

New York HERO Act Establishes Additional COVID-19 Workplace Safety Requirements

Update

The Act has been amended to extend the deadlines described below. The NYDOL now has until July 5, 2021 to issue industry-specific airborne infectious disease prevention standards. Once these standards are issued, employers will have 30 days to adopt a disease prevention plan in accordance with such standards and 60 days to provide a copy of their safety plan to employees.

The Bottom Line

- New York's recently enacted HERO Act imposes significant COVID-19 safety obligations on all private employers.
- Covered employers should be on alert for additional guidance from the NYDOL and be prepared to make changes to any COVID-19 safety plans that are already in place (including those intended to comply with the existing New York reopening guidelines) to bring them into compliance with the industry-specific standard(s) and model plan that will eventually be issued by the NYDOL.

Governor Cuomo signed the HERO Act (the Act) into law on May 5, 2021. The Act requires all private New York employers to put certain COVID-19 safety standards into place and prepare a plan aimed at preventing the transmission of COVID-19 and other airborne infectious diseases at work. Most provisions of the Act go into effect on **June 4, 2021**. However, the provision of the Act that permits employees to form a joint labor-management health and safety committee does not become effective until **November 1, 2021**, and applies only to private employers with 10 or more employees.

Airborne Infectious Disease Prevention Standard

Section 218-b of the Act requires the New York State Department of Labor (NYDOL) to establish an airborne infectious disease prevention standard covering all private employers, regardless of size. This standard will vary by industry but it must set minimum requirements for the following:

- Employee health screenings;
- Face coverings;
- Required personal protective equipment applicable to each industry (which must be provided and maintained at the employer's expense);
- Accessible workplace hand hygiene stations and hand hygiene practices;
- Regular cleaning and disinfecting of shared equipment and high-touch surfaces;

- Social distancing for employees and consumers;
- Compliance with mandatory or precautionary orders of isolation or quarantine that have been issued to employees;
- Compliance with applicable engineering controls (e.g., air flow, ventilation, etc.);
- Designation of one or more supervisory employees to enforce compliance with the employer's airborne infectious disease prevention plan and any other applicable federal, state or local guidance aimed at preventing transmission of airborne infection diseases among employees and third parties in the workplace;
- Compliance with any applicable laws, regulations or guidance on notifying employees and relevant government agencies of potential exposure to airborne infectious disease at the worksite; and
- Verbal review of the airborne infectious disease prevention standard and any related employer policies and employee rights.

Written Airborne Infectious Disease Prevention Plan

The NYDOL will also be required to issue a model airborne infectious disease prevention plan for each industry that complies with the above-described standard.

For the prevention plan, employers must either:

- Adopt the model plan for their particular industry; or
- Create their own written plan that meets or exceeds the requirements of the model plan. (If an employer chooses to develop its own written plan, it must do so pursuant to its agreement with a collective bargaining representative (if any) or with "meaningful participation" by its employees.)

For the prevention plan, employers must also:

- Provide it to employees in English and in the language identified by employees as their primary language;
- Post it in a visible and prominent location on the worksite;
- Include it in any employee handbook provided to employees; and
- Make it available upon request to all employees, independent contractors, employee and collective bargaining representatives, and the state commissioner and commissioner of public health.

When to share the prevention plan:

- For employers that are open and operating on the effective date of the Act, the plan must be provided to employees on the effective date.
- For employers that are reopening after being closed during the pandemic, the plan must be provided to employees when reopening.
- New employees must receive a copy of the plan upon hire.

Although a significant portion of the Act goes into effect on June 4, the additional guidance that will be issued by the NYDOL for various industries may set forth more precise timelines for implementation of the

written prevention plan discussed above. The NYDOL's guidance may also include recommendations relating to vaccinated and unvaccinated employees in the workplace.

Obligation to Allow Employees to Establish a Joint Labor-Management Workplace Safety Committee

Private employers with at least 10 employees are required to allow employees to establish and administer a "joint labor-management workplace safety committee," as discussed in Section 27-d of the Act. This committee must be composed of employee and employer designees and at least two-thirds of the committee must consist of non-supervisory employees. The committee must be co-chaired by a representative of the employer and a representative of the non-supervisor employees, and is authorized to:

- Raise health and safety concerns, hazards, complaints and violations to the employer (to which the employer must respond);
- Review and provide feedback on any workplace policy put into place to comply with the Act or the New York workers' compensation law;
- Review the adoption of any workplace policy in response to any health or safety law, response to any health or safety law, ordinance, rule, regulation, executive order, or other related directive;
- Participate in any site visit by any government entity responsible for enforcing safety and health standards;
- Review any report filed by the employer related to the health and safety of the workplace; and
- Regularly schedule a meeting during work hours at least once a quarter.

On its face, Section 27-d does not appear to require covered employers to affirmatively form a joint labor-management safety committee; however, this point will likely be clarified in additional NYDOL guidance.

Enforcement and Non-Retaliation Provisions

The Act prohibits discrimination and retaliation against employees who:

1. Exercise their rights under the Act or the employer's prevention plan;
2. Report violations of the Act or an employer's prevention plan to any state, local or federal government entity, public officer, or elected official;
3. Report airborne infectious disease exposure concerns to the employer or a government entity, officer or official; and/or
4. Refuse to work if the employee has a reasonable, good faith belief that such work exposes the employee, other employees or the public to an unreasonable risk of exposure to an airborne infectious disease, provided that the employer has been notified of and/or knows or has reason to know about such concerns and the employer has failed to address them.

Violations of the Act may result in monetary penalties, some of which are significant. An employer's failure to adopt a prevention plan is punishable by a penalty of \$50 for each day the plan is not in place (\$200 per day if the employer has violated the Act in the last six years), while the employer's failure to adhere to the standards outlined in its own prevention plan can result in a fine of \$1,000 to \$10,000 (the cap increases to \$20,000 if the employer has violated the Act in the last six years).

Employees also have a private right of action under the Act and may seek an injunction against an employer for violation of the Act and/or the employer's prevention plan. An employee who prevails in such an action may receive injunctive relief, attorneys' fees and costs, and liquidated damages of up to \$20,000 dollars – unless the employer can show a good faith basis for its belief that the health and safety measures in place were in compliance with the applicable airborne infectious disease standard established by the Act.

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