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# New York State Enacts HERO Act: What Employers Need to Know

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***UPDATE:** On May 26, 2021, the New York State Senate passed a bill including several proposed amendments to the HERO Act. Among other things, the proposed amendments would provide that section 1 of the Act will take effect on the 60th day after enactment (i.e., July 5, 2021) rather than on June 4, 2021. Section 2 would still take effect on November 1, 2021. If passed, the proposed amendments would require employers to establish an airborne infectious disease exposure plan within 30 days after the state commissioner publishes the model general standard and the model standard relevant to the industry. The bill now heads to the state Assembly; a more detailed summary of the proposed amendments will follow.***

Effective June 4, 2021, section 1 of the HERO Act requires all employers in New York to implement certain safety standards and adopt a prevention plan to protect against further spread of COVID-19 and other airborne infectious diseases in the workplace. In addition, effective November 1, 2021, section 2 of the Act requires employers with at least 10 employees to permit the creation of a joint employer-employee workplace health and safety committee. Below is a summary of these requirements.

## Airborne Infectious Disease Safety Standard

The Act requires the state Department of Labor, in consultation with the state Department of Health, to create an airborne infectious disease safety standard, which ultimately will differ between industries and establish minimum requirements on procedures and methods for the following:

- Employee health screenings;
- Face coverings;
- Required PPE that must be maintained in a sanitary and reliable condition at the employer's expense;
- Accessible workplace hand hygiene stations and maintaining healthy hand hygiene (including providing adequate break times for employees to wash their hands);

- Regular cleaning and disinfecting of shared equipment and frequently touched surfaces;
- Effective social distancing for employee, consumers and customers;
- Compliance with mandatory or precautionary orders of isolation or quarantine that have been issued to employees;
- Compliance with applicable engineering controls such as proper air flow, exhaust ventilation or other special design requirements;
- Designation of one or more supervisory employees to enforce compliance with the plan and any other federal, state or local guidance related to avoidance of spreading an airborne infectious disease as applicable to employees and third parties (*e.g.*, customers, contractors and members of the public within the workplace);
- Compliance with any applicable laws, rules, regulations, standards or guidance on notification to employees and relevant state and local agencies of potential exposure to airborne infectious disease at the worksite; and
- Verbal review of infectious disease standard, employer policies and employee rights.

**Airborne Infectious Disease Exposure Prevention Plan**

The Act requires the state Department of Labor, in consultation with the state Department of Health, to create a model airborne infectious disease exposure prevention plan ("Prevention Plan"). Employers are required to either adopt the state model Prevention Plan or implement their own written Prevention Plan that meets or exceeds the standards set forth in the state model.

Employers must also comply with the following notice requirements:

- The Prevention Plan must be provided to all employees upon reopening after a period of closure due to airborne infectious disease and upon hire. If an employer is permitted to operate as of the Act's effective date *(i.e.,* June 4, 2021), the employer must provide the Prevention Plan to all employees by June 4.
- The Prevention Plan must be provided in English and in the language identified by each employee as their primary language. If an employee identifies as their primary language a language for which a model document is not available from the state, the employer will be permitted to provide an English-language notice.
- The Prevention Plan must be posted in a "visible and prominent location" within the worksite.

- If an employer maintains an employee handbook, a copy of the Prevention Plan must be included in the employee handbook.
- Employers are required to make the Prevention Plan available, upon request, to all employees, independent contractors, employee representatives, collective bargaining representatives, and the state commissioner and commissioner of public health.

These requirements may be waived by a collective bargaining agreement, provided that for such waiver to be valid, it must explicitly reference the relevant section of the Act.

**Anti-Discrimination and Anti-Retaliation Provisions**

The Act prohibits discrimination and retaliation if employees:

- Report violations of the Act or an employer's Prevention Plan to any state, local, or federal government entity, public officer or elected official;
- Report airborne infectious disease exposure concerns; and/or
- Refuse to work if the employee reasonably believes, in good faith, that such work exposes the employee or other employees or the public to an unreasonable risk of exposure to an airborne infectious disease, provided that the employee notified the employer of their concerns regarding the employer's failure to comply with the Act and the employer failed to cure or otherwise address those concerns.

**Penalties for Non-Compliance**

Penalties for non-compliance with the above-mentioned requirements may include the following:

- A fine of $50 per day for failure to implement a compliant Prevention Plan or between $1,000 and $10,000 for failure to abide by an adopted Prevention Plan.
- If it is determined by the State that an employer previously violated the Act in the preceding six (6) years, a fine of $200 per day for failure to implement a compliant Prevention Plan or between $1,000 and $20,000 for failure to abide by an adopted Prevention Plan.
- Employees may bring a civil action against an employer and seek injunctive relief, costs, attorneys' fees and liquidated damages, unless the employer proves a good faith basis to believe that the established health and safety measures were in compliance with the applicable airborne infectious disease standard.
- Note that if an action is brought by an employee and a court finds that such action is "completely without merit in law and undertaken primarily to harass or

maliciously injure another," the employer may seek sanctions against the party who brought such action.

**Workplace Safety Committees**

Effective **November 1, 2021**, the Act requires employers with at least 10 employees to permit employees to establish and administer a joint labor-management workplace safety committee.

- Each committee must be composed of employee and employer designees, provided at least two-thirds are non-supervisory employees. Committees must be co-chaired by a representative of the employer and non-supervisory employees.
    - For purposes of the Act, a supervisory employee is defined as "a person who has the authority to direct and control the work performance of other employees, or who has the managerial authority to take corrective action regarding the violation of the law, rules or regulations." This definition does not include any employee who is a member of a collective bargaining unit that primarily represents employees not otherwise deemed to be a supervisor or supervisory employee as defined by the Act.
    - Where there is a collective bargaining agreement in place, the collective bargaining representative is responsible for selecting employees to serve as members of the committee.
    - Committees representing geographically distinct worksites may also be formed as necessary.

- Committees and workplace safety designees are authorized to, among other things:
    - Raise health and safety concerns;
    - Review any policy put in place in the workplace required by this law and provide feedback;
    - Review the adoption of any policy in the workplace in response to any health or safety law, ordinance, rule, regulation, executive order, or other related directive;
    - Participate in any site visit by any governmental entity responsible for enforcing safety and health standards in a manner consistent with any provision of law;
    - 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.

- Employers are prohibited from interfering with the selection of employees who serve on the committee or who serve as the workplace safety designee, or with such employees' performance of the duties authorized by the Act. Employers are also prohibited from retaliating against any employee who participates in the activities or establishment of a workplace safety committee.
- Employers must permit safety committee designees to attend a training, without loss of pay, on the function of worker safety committees, rights established under the Act, and an introduction to occupational safety and health.

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We are closely monitoring for the release of the state's Airborne Infectious Disease Safety Standard and model Prevention Plan.  Notably, according to Governor Cuomo's approval memo, the Governor secured an agreement with the state legislature to make technical changes to the bill "including giving the department of labor and employers more specific instructions in developing and implementing the workplace standards, including a clear timeline, and providing for an immediate requirement for employers to cure violations in order to better protect the safety of workers, and limit lengthy court litigation to those private rights of action, in limited circumstances where employers are acting in bad faith and failing to cure deficiencies." The amendment's language is not yet publicly available, but we will be closely monitoring its release.

In the meantime, employers in New York should review their existing health and safety plans (which are required by existing NYS and NYC reopening guidelines) to ensure those plans are up to date and, at a minimum, address the topics noted above. The extent to which the existing NYS and NYC reopening guidelines may overlap with the forthcoming Airborne Infectious Disease Safety Standard remains to be seen though it's likely there will be similarities such that employers need not completely overhaul their existing plans. As always, we are available to answer any questions you may have and to assist with your efforts to comply with these new requirements.

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