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New York State Passes Significant Amendments to the HERO Act

Law and the Workplace Blog on **June 8, 2021**

On June 7, 2021, the New York State legislature amended certain provisions of the HERO Act which, as we previously reported, requires all employers in New York to adopt a prevention plan to protect against further spread of COVID-19 and other airborne infectious diseases in the workplace. A detailed summary of the amendments is below.

Effective Date

The amendments 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 (permitting the creation of a workplace safety committee) will still take effect on November 1, 2021.

Model Airborne Infectious Disease Exposure Prevention Standards

The amendments direct the commissioner of the NYS Department of Labor (the "Commissioner"), in consultation with the NYS Department of Health (NYS DOH), to create and publish a model airborne infectious disease exposure prevention standard for industries representing a significant portion of the workforce and those with unique characteristics requiring distinct standards. The Commissioner will also create "a general model airborne infectious disease exposure prevention standard" applicable to all other worksites.

Deadlines to Establish and Provide Airborne Infectious Disease Exposure Prevention Plan

Within 30 days after the Commissioner publishes the model general standard and the model industry standards, the amendments require employers to adopt an airborne infectious disease exposure plan – either by adopting the applicable model standard or by establishing an alternative plan that meets or exceeds the minimum requirements provided by the model standard. Employers must provide the plan to employees within 30 days of the adoption date and thereafter within 15 days after reopening after a period of closure due to airborne infectious disease. The plan must also be provided to newly hired employees upon hire. For those employers permitted to operate as of July 5, 2021, the prevention plan must be provided to all employees no later than 60 days after the Commissioner publishes the model general standard and applicable industry standard.

Definition of Employee and Worksite

The amendments update the definition of a covered employee to include "individuals working for digital applications or platforms." In addition, the definition of worksite is updated as follows: "any physical space, including a vehicle (though an employer's prevention plan need not be posted in a vehicle), that has been designated as the location where work is performed over which an employer has the ability to exercise control." The updated definition notes that this term does not include a telecommuting or telework site unless the employer has the ability to exercise control of such site.

Liability Limitations

Before commencing a civil action based on an alleged violation of the Act, the amendments require an employee to give the employer notice of the alleged violation. Specifically, an employee is prohibited from bringing a civil action until 30 days *after* giving the employer notice of the alleged violation, except where an employee alleges with particularity that the employer has demonstrated an unwillingness to cure a violation in bad faith. An employee also may not bring a civil action if the employer remedies the alleged violation. In addition, any civil action alleging a violation of the Act must be brought within six months from the date the employee has knowledge of the alleged violation.

The amendments eliminate a prior provision that authorized courts to order payment of liquidated damages of no greater than $20,000 unless the employer proved a good faith basis to believe that the established health and safety measures were in compliance with the applicable airborne infectious disease standard. The amendments also permit employers to seek attorneys' fees and costs if an employee brings an action found to be frivolous. The previous iteration of the law permitted parties to seek sanctions if an action, defense, counterclaim or crossclaim was found to be completely without merit in law and undertaken primarily to harass or maliciously injure another.

Workplace Safety Committees

With respect to workplace safety committees, the amendments clarify that if an employer already has a workplace safety committee "that is otherwise consistent with the requirements" of the Act, the employer is exempt from creating an additional safety committee. In addition, employers are not required to permit more than one committee per worksite.

The amendments further clarify that workplace safety committees are authorized to raise issues relating to any policy put in place pursuant to the provisions of the Act relating to occupational safety and health, but eliminates language that also would have authorized the committee to review policies relating to "any provision of the workers' compensation law." Committees are still authorized to schedule a committee meeting during work hours at least once each quarter, though the amendments specify that such meetings "shall last no longer than two hours." The amendments also specify that the training that safety committee designees are permitted to attend without loss of pay may not exceed four hours.

Takeaways

Governor Cuomo is widely expected to sign the amendments into law (and if he fails to timely act, the amendments will automatically become law). Until the state issues its model, however, employers in New York are not required to adopt any new health and safety measures. Nevertheless, employers may want to consider reviewing any COVID-19-related prevention plans they have in place and be prepared to make changes in accordance with the state's safety standard. In that regard, while employers must also comply with existing NYS and NYC reopening guidelines, Governor Cuomo has announced that such guidelines will become optional for most employers once 70% of adults 18+ in New York have at least one COVID-19 vaccine dose. Cuomo would not predict when the state will meet the 70% mark, though the state's vaccine tracker indicates that as of June 8, 2021, 66.4% of the adult population has received at least one dose of the vaccine.

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