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New York State Issues Updated Model Workplace Safety Plans and FAQ Guidance Under the HERO Act

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On September 23, 2021, New York State issued updated model airborne infectious disease exposure prevention plans for employer use pursuant to the HERO Act.

As we previously reported, the HERO Act requires all employers in New York to implement certain safety standards and adopt a prevention plan to protect against the spread of airborne infectious diseases in the workplace. Following the September 6, 2021 designation of COVID-19 as a covered infectious disease under the law, employers across the state must now "promptly" take certain steps to activate and distribute their plans and otherwise ensure compliance with the Act.

While a general model plan appropriate for office workplaces and separate plans for certain specific industries were previously issued by the New York State Department of Labor (NYDOL), these have now been updated and reissued with substantive changes to two sections – face coverings and social distancing.

- **With regard to face coverings**, the model plans now provide that, in workplaces where all individuals on premises, including but not limited to employees, are fully vaccinated, face coverings are "recommended, but not required." For all other workplaces, the model plan now states: "Employees will wear appropriate face coverings in accordance with guidance from State Department of Health or the Centers for Disease Control and Prevention, as applicable." Previously, the model plans stated that "employees will wear face coverings throughout the workday to the greatest extent possible" and "[f]ace coverings and physical distancing should be used together whenever possible."
- **With regard to social distancing**, the revised model plans remove prior references to "avoiding unnecessary gatherings" and "using a face covering when physical distance cannot be maintained." Now, the section states only: "Physical distancing will be used to the extent feasible, as advised by guidance from State Department of Health or the Centers for Disease Control and Prevention, as applicable." The revised plans still, however, require the employer to list the health and safety controls it will implement in circumstances where distancing cannot be

maintained.

The NYDOL also recently issued a set of frequently asked questions on the HERO Act. The FAQs primarily re-iterate information from the HERO Act statute as well as the standard and model plans. However, some notable provisions from the FAQs include:

- **Modifications to the Model Plan**: If an employer adopts a plan other than one of the models provided by the state, the HERO Act requires that the employer "develop such plan pursuant to an agreement with the collective bargaining representative, if any, or with meaningful participation of employees where there is no collective bargaining representative." To what extent an employer may alter one of the model plans before it becomes an "alternative plan" remains open to some interpretation, but according to the FAQs "[m]odifications by the employer in the Controls or Advance Controls sections of the Department of Labor's General Industry Template do not necessarily constitute an 'alternative plan' for the purposes of the HERO Act and likely do not require additional employee participation. However, amendments to such templates that go beyond the open fields of such template likely do constitute an 'alternative plan' requiring employee review and/or participation."
- **Workplace Safety Committees**: The HERO Act also states that employers with at least 10 employees "*shall permit employees to establish and administer* a join labor-management workplace safety committee." On this provision of the Act, the FAQs state that "[t]he law *requires employers with 10 or more employees to establish and administer* a joint labor-management workplace safety committee." Employers should continue to watch for additional clarification and guidance (discussed further below) regarding the workplace safety committee provisions of the Act and any next steps that may be needed in this regard.
- **HERO Act Regulations**: The FAQs state that the NYDOL will be promulgating regulations regarding the HERO Act, including the provisions governing workplace safety committees, in the future. While the FAQs do not provide a timeframe for the publication of these regulations, they may resolve some of the open questions remaining under the Act.

We will continue to monitor for developments from the State and will provide updates as they become available.

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