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# New York State Issues Updated Guidance On HERO Act

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On September 30, 2021, the New York State Department of Labor ("NYSDOL") released an updated set of frequently asked questions on 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.

The updated FAQs, which replace a set of FAQs previously issued on September 9, primarily re-iterate information from the HERO Act statute, standard, and model plans, but also include some notable changes:

- **Verbal Review Requirement**: The HERO Act requires that employer provide a verbal review of its prevention plan, employer policies, and employee rights. While the September 9th FAQs included language suggesting that the verbal review must be provided even absent a designation of a covered infectious disease, the updated FAQs clarify that employers need only conduct a verbal review of the plan "when the Commissioner of Health designates a disease as an airborne infectious disease that presents a serious risk of harm to the public health." Because a designation is currently in effect for COVID-19, employers must conduct this verbal review with employees.
- **Employers Based Outside of New York State**: The FAQs clarify that an employer based outside of New York with employees based in the state is covered by the HERO Act "unless the employee within New York State is telecommuting or teleworking and the employer cannot exercise control of the work site."
- **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." Regarding the extent to which an employer may alter one of the model plans before it becomes an "alternative plan," the September 9th FAQs had stated that "[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." The recently updated September 30th FAQs remove this language. Instead, the FAQs currently state that "if an employer adopts one of NYS DOL's model plans, the employer doesn't need to seek employee feedback. Should an employer develop its own plan, then the employer must review the plan with employees. However, employees do not need to approve the plan for it to be adopted."

- **Workplace Safety Committees**: The HERO Act states that employers with at least 10 employees "shall permit employees to establish and administer a join labor-management workplace safety committee." While the September 30th FAQs do not address the workplace safety committee provisions in detail, the FAQs state "that if an employer modifies its HERO Act plan after November 1, 2021, and it is also an employer covered by Section 2 of the HERO Act, it will need to review the new or modified plan with a workplace safety committee allowed by Section 2 of the HERO Act." According to the FAQs, the NYSDOL will provide guidance on Section 2 of the HERO Act prior to its effective date (*i.e.*, November 1, 2021).
- **Impact of Forthcoming OSHA Emergency Temporary Standard**: According to the HERO Act standard, the law does not apply to any "employee within the coverage of a temporary or permanent standard adopted by [OSHA] setting forth applicable standards regarding COVID-19 and/or airborne infectious agents and diseases." On September 9, 2021, the Biden Administration announced that OSHA is developing a standard that will require large employers to ensure their workforce is fully vaccinated or provide a negative COVID-19 test result at least once per week. The NYSDOL has indicated that it will provide additional information regarding whether employers subject to the forthcoming OSHA standard are relieved from complying with the HERO Act once that standard is issued. According to the updated FAQs, "[c]urrently, OSHA does not have such a standard, but NYS DOL will update information if and when OSHA does create a standard that applies to any additional employees."

We will continue to monitor for developments from the State, including for the forthcoming guidance regarding Section 2 of the Act, and will provide updates as they become available.

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