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New York's HERO Act Requires Employers to Take Measures to Prevent Occupational Exposure to Airborne Infectious Diseases

What is the HERO Act?

On May 5, 2021, Governor Cuomo signed the New York Health and Essential Rights Act (“HERO Act”) (S. 1034B) into law. It is the first legislation in the country mandating permanent health and safety standards to reduce workplace transmission and community spread of airborne infectious diseases. While the law was written as a direct result of the COVID pandemic, it is not limited to exposure from COVID and is intended to be a permanent change to the labor laws. In this regard, the HERO Act defines “airborne infectious diseases” as “any infectious viral, bacterial or fungal disease that is transmissible through the air in the form of aerosol particles or droplets and is designated a highly contagious communicable disease by the Commissioner of Health that presents a serious risk of harm to the public health.”

The HERO Act has two main provisions. The first (N.Y. Lab. Law § 218-b) requires all employers to adopt a health and safety plan, in a form to be provided by the New York State Department of Labor (“NYSDOL”) or that meets or exceeds the NYSDOL’s minimum standards. The plan must be tailored and specific to the hazards in the employer’s industry and worksite and developed in agreement with employees. The second provision (N.Y. Lab. Law § 27-d), requires employers with 10 or more employees to permit the creation of joint employer-employee workplace health and safety committees.

Both provisions prohibit employers from retaliating or discriminating against employees for: (1) exercising their rights under the HERO Act or the employer’s plan; (2) reporting violations or concerns about the HERO Act or the employer’s plan to their employer or the government; or (3) refusing to work if the employee has a reasonable good faith belief that working will expose him or her or others to an unreasonable risk of exposure to an airborne infectious disease under certain circumstances, which includes employer notification and failure to cure.

What are the specific provisions of N.Y. Lab. Law § 218-b?

This section of the Act, effective June 4, 2021, requires all employers to adopt a health and safety plan to prevent occupational exposure to airborne infectious diseases and to provide said plan to all employees.

The NYSDOL’s model standard will be differentiated by industry, taking into account the types of risks present at the particular work sites, and will specify and distinguish the extent to which the provisions are applicable for different level of airborne infectious disease exposure, and will take into consideration whether a state of emergency has been declared due to an airborne infectious disease.

The minimum standards which must be addressed include:

- a. Employee health screenings
- b. Face coverings
- c. Required personal protective equipment applicable to each industry for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, to be provided at the employer's expense
- d. Accessible workplace hand hygiene stations and adequate break time for handwashing hygiene
- e. Regular cleaning and disinfecting of shared equipment and frequently touched surfaces and all surfaces and washable items in high-risk areas
- f. Effective social distancing for employees and customers, including sign postage or markers; increasing physical space between workers; limiting capacity of customers; delivering services remotely or through curbside pick-up; reconfiguring spaces where workers congregate; and flexible meeting and travel options, worksites, or work hours
- g. Compliance with mandatory or precautionary orders of quarantine or isolation
- h. Compliance with applicable engineering controls, such as proper air flow, exhaust ventilation, or other special design requirements
- i. Designation of one or more supervisory employees to enforce the airborne infectious disease exposure prevention 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 within the workplace
- j. Compliance with any other applicable laws, rules, regulations, standards, or guidance on notifying employees and government agencies regarding potential exposure to airborne infectious disease at work
- k. Verbal review of the infectious disease standard, employer policies, and employee rights under this section of the HERO Act, with certain exceptions

If, after investigation, the Commissioner finds there has been a violation of Section 218-b, the Commissioner can, in addition to ordering other appropriate relief, assess a civil penalty of not less than \$50 per day for failure to adopt the required plan, or not less than \$1000 nor more than \$10,000 for failure to abide by a plan. However, if the Commissioner finds that the employer has violated this section in the preceding 6 years, he may assess a penalty of not less than \$200 per day for failure to adopt a plan, or not less than \$1000 nor more than \$20,000 for failure to abide by a plan.

In addition, employees are permitted to bring civil actions seeking injunctive relief against an employer allegedly violating its plan in a manner that creates a substantial probability of death or serious physical harm unless the employer did not, and could not, with the exercise of reasonable diligence, know of the violation. The Court can restrain such violations and order all appropriate relief, including costs, reasonable attorneys' fees and liquidated damages of no more than \$20,000 unless the employer proves it had a good faith basis to believe its health and safety measures were in compliance with the applicable plan. However, where an action brought by an employee, or a defense, counterclaim or crossclaim by an employer, is found to be completely without merit in law and undertaken primarily to harass or maliciously injure another, the court may impose sanctions against the responsible attorney or party.

What are the specific provisions of N.Y. Lab. Law § 27-d?

This section of the Act, effective November 1, 2021, requires employers with 10 or more employees to permit the creation of joint employer-employee workplace health and safety committees.

The committees and committee designees are authorized to:

- a. Raise health and safety concerns, hazards, complaints, and violations, to which the employer must respond
- b. Review and provide feedback on any workplace policy required by the labor code or workers' compensation laws.
- c. Review any policy adopted in response to a health or safety law, ordinance, rule, regulation, executive order, or other directive.
- d. Participate in any site visit by government agencies responsible for enforcing safety and health standards.
- e. Review any report the employer files regarding workplace health and safety.
- f. Schedule a meeting during work hours at least once a quarter.
- g. Attend training on committee functions and occupational safety and health without losing pay
- h. Participate in workplace safety committee activities without retaliation.

What happens now?

In Governor Cuomo's signing statement, he declared that the legislature had agreed to make technical changes to the bill, including giving the NYSDOL and employers more specific instructions with respect to the development of workplace standards, including a clear timeline, and providing an opportunity for employers to cure violations so that litigation is limited to those circumstances where employers act in bad faith and fail to cure deficiencies. Accordingly, employers are awaiting these amendments as well as the Commissioner of Health's direction as to what diseases are considered "highly contagious" and "communicable" and provision of the NYSDOL's model Safety Plan broken down by industry.

In the meantime, employers should begin preparing their plans, including the minimum standards listed above, and any required training to implement same. Employers can look to previous reopening requirements from New York State, the Department of Health, the CDC and OSHA in order to anticipate what those requirements may look like. In addition, employers can begin taking steps to determine how their safety committee will be organized and run.

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