

E-Alert:

New York State Enacts Workplace Health and Safety Protections

On May 5, 2021, Governor Andrew Cuomo signed the New York Health and Essential Rights Act (“HERO Act” or “Act”) into law. The HERO Act is intended to prevent the spread of airborne infectious diseases in the workplace. The Act includes two distinct sections that apply to all New York private employers with at least one employee. Each section of the law has a distinct effective date.

Section 1 of the HERO Act amends New York Labor Law Section 218-b requiring all private employers establish an airborne infectious disease exposure prevention plan by June 4, 2021. However, the governor and legislature agreed to make various amendments to the law including the effective date. Employers will not be required to develop a prevention plan until the New York Department of Labor issues its standards. Employers will have an opportunity to immediately cure violations.

Section 2 of the HERO Act amends New York Labor law Section 27-d requiring all private employers with at least 10 employees allow their employees to create a joint employer and employee committee to address workplace health and safety issues. **Section 2 of the HERO Act is effective November 1, 2021.**

Airborne Infectious Disease Safety Standard

Section 1 of the HERO Act requires the New York State Department of Labor in consultation with the New York State Department of Health create an airborne infectious disease safety standard which will differ between industries and establish minimum requirements for a range of areas. An employer can adopt the model standard for their industry or establish a plan that equals or exceeds the New York Department of Labor standards.

The model safety standards will address the following: (1) employee health screenings, (2) face coverings, (3) required personal protective equipment, (4) workplace hand hygiene stations, (5) regular cleaning of shared equipment and frequently touched surfaces such as workstations, touchscreens, phones, handrails, doorknobs, restrooms, breakrooms, locker rooms, company vehicles, (6) effective social distancing for employees and customers, consumers, and clients, (7) compliance with mandatory or precautionary isolation or quarantine orders, (8) compliance with applicable engineering controls such as proper air flow or exhaust ventilation, (9) designation of one or more supervisory employees to enforce compliance with the company’s infectious disease

exposure plan, (10) compliance with applicable laws, standards, or guidance on notification to employees and state and local agencies of potential exposure to airborne infectious disease in the workplace, (11) verbal review with employees of infectious disease standards, employer policies, and employee rights under the HERO Act

The New York Department of Labor is expected to publish a model airborne infectious disease prevention plan by industry by June 4th, but this deadline is expected to be extended as agreed by the governor and legislature. It is unclear when the New York State Department of Labor will develop and post the model standards.

Employers must adopt the NY Department of Labor airborne infectious disease prevention plan or create their own written plan that meets or exceeds the State's model plan. Employers must provide the written safety plan to all current employees including full-time employees, part-time employees, independent contractors, workers hired through a staffing agency, and domestic workers on June 4th. New hires must receive the written safety plan as well. The safety plan must be provided to employees in English and their primary language. Additionally, the safety plan must be provided to all employees if there is a workplace closure due to an outbreak. Employers must post a copy of the safety plan in a visible and prominent location in the worksite. Employers must add the relevant safety plan to an existing employee handbook.

The Act includes guidance for unionized employers. A collective bargaining agreement can waive the safety plan rule if it explicitly references the Act.

Fines for Non-Compliance With the Airborne Infectious Disease Prevention Plan

The New York State Department of Labor can fine an employer \$50 per day for each day a plan is not developed. Employers that fail to comply with the airborne infectious disease exposure prevention plan could be fined \$1,000 to \$10,000 for non-compliance. Additionally, if the employer has a previous violation of the HERO Act within the past six years, the employer may be assessed a civil penalty of not less than \$200 a day up to \$20,000 for failure to comply with its plan.

Employees can bring a civil action against their employer for injunctive relief, liquidated damages and attorneys' fees, unless the employer can demonstrate a good faith basis to believe the established safety standards were in compliance with the safety plan.

Anti-Retaliation Provision

The Act prohibits employers from discriminating, threatening, retaliating or taking adverse action against an employee exercising their rights under the Act, reporting alleged violation of the Act, refusing to work when the employee reasonably believes their work environment exposes the person to an unreasonable risk of exposure to an airborne disease.

Workplace Safety Committees

The HERO Act requires private employers with 10 or more employees to allow their employees to establish and administer a joint labor-management workplace safety committee. The law is not clear if out-of-state employees are included in the employee count. **The effective date of the Act for the workplace safety committee is November 1, 2021.**

The Act states at least two-thirds of the committee members must be non-supervisory employees and the committee must be co-chaired by one employer representative and one employee representative. If there is a collective bargaining agreement in effect, the collective bargaining

representative is responsible for selecting employees to serve as members of the safety committee.

Workplace Safety Committees' Duties

The Act defines the duties of the safety committee include:

- Raise health and safety concerns or violations of the plan or the Act;
- Review workplace policy put in place required by the HERO Act or any workplace safety requirement;
- Participate in site visit by any governmental entity responsible for enforcing safety and health standards;
- Review any report filed by the employer related to the health and safety of the workplace; and
- Scheduling meetings during working hours at least once a quarter.

The law is unclear if the scope of the workplace safety committee is limited to review of the policies and standards of the HERO Act.

Next Steps for New York Employers

While we await the New York State Department of Labor model standards, employers should begin to create a process to comply with the new legal requirements. Employers can review their current plan developed under NY Forward to determine if their current standards align with the established guidance.

Employers should prepare to add the safety plan to an existing handbook and check the New York Department of Labor website for model safety plans by industry.

Please feel free to contact us with any questions.

[Cindy Nichtberger, Esq.](#)

Human Resources Services Specialist

Marshall & Sterling Insurance

845-226-3083, ext. 2482

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