

New York Imposes New Workplace Safety Measures with Passage of the HERO Act

On May 5, 2021, New York enacted the New York Health and Essential Rights Act, or NY HERO Act (“the Act”), which amends the New York Labor Law, adding two sections aimed at curbing the spread of airborne infectious diseases (such as COVID-19, the flu, and other bacterial, viral, and fungal diseases) in the workplace. Section One of the bill requires employers to implement plans to combat the spread of infectious diseases, or to adopt a model plan promulgated by the New York State Commissioner of Labor (in consultation with the New York State Department of Health). Section Two requires most employers to create workplace safety committees with their employees. Most of the provisions of the Act take effect June 4, 2021 (Section Two is effective November 1, 2021), although it will likely take some time for the Commissioner of Labor to develop and promulgate model airborne infectious disease exposure prevention plans for specific industries.

Scope of the Act

The Act defines “employer” broadly to include “any person, entity, business, corporation, partnership, limited liability company, or association employing, hiring, or paying for the labor of any individual in any occupation, industry, trade, business, or service.” The Act does not apply to “the state [of New York], any political subdivision of the state, a public authority, or any other governmental agency or instrumentality.” For purposes of Section Two, “employer” is limited to employers with at least ten employees.

The Act also defines “employee” broadly to include “any person providing labor or services for remuneration for a private entity or business within the state, without regard to an individual’s immigration status, and shall include, but not be limited to, part-time workers, independent contractors, domestic workers, home care and personal care workers, day laborers, farmworkers, and other temporary and seasonal workers. The term shall also include individuals working for staffing agencies, contractors or subcontractors on behalf of the employer at any individual work site, as well as any individual delivering goods or transporting people at, to or from the work site on behalf of the employer, regardless of whether delivery or transport is conducted by an individual or entity that would otherwise be deemed an employer under this chapter.”

Section One: Airborne Infectious Disease Exposure Prevention Plan

Every employer must adopt an “airborne infectious disease exposure prevention plan.” The employer may either adopt an industry-specific model plan to be developed by the Commissioner of Labor or develop its own plan, so long as it equals or exceeds the requirements set forth in the applicable model plan.

At a minimum, the plan must address the following topics: employee health screenings, face coverings, required personal protective equipment (“PPE”), hand hygiene, regular cleaning/disinfecting of shared equipment and surfaces (i.e., touchscreens, telephones, handrails, and doorknobs, as well as surfaces and washable items in high-risk areas such as restrooms, dining areas/breakrooms, locker rooms, etc.), social distancing protocols, compliance with isolation and quarantine orders, engineering controls (such as air circulation), designation of a supervisory employee to be responsible for compliance with the plan and other government protocols, and verbal review of the plan with employees.

If an employer elects to develop its own plan, it must do so with the participation of employees. If the employer is party to a collective bargaining agreement, it must develop its plan in consultation with the collective bargaining representative.

Employers must provide a copy of the plan to employees upon reopening their workspace after closure due to an airborne infectious disease and upon the hiring of a new employee. Employers must also display the plan in a visible and prominent location within the worksite and include it in the employee handbook, if one exists.

Section Two: Workplace Safety Committees

Employers must permit employees to establish and administer a joint labor-management workplace safety committee. Members of the committee are to be chosen by employees and the employer. Employee designees must be selected by, and from among, non-supervisory employees, and at least two thirds of the membership of the committee must be non-supervisory employees. The committee is to be co-chaired by one employer designee and one employee designee.

The committee is authorized to perform a number of safety-related functions, including: raising health and safety concerns to the employer, reviewing and providing feedback on any workplace policy relating to workplace safety, participating in any worksite visit by a governmental entity responsible for safety/health standards, reviewing any report filed by the employer related to health/safety, and scheduling meetings during working hours at least once a quarter. Employers must permit committee members to attend relevant training without suffering loss of pay or other adverse action.

Anti-Retaliation

The Act prohibits employers from discriminating or retaliating against employees for exercising their rights under the Act or the employer's airborne infectious disease exposure prevention plan. This covers employees who report violations to their employer or to government officials or who refuse to work based on a good-faith belief that there is a danger of exposure to airborne infectious diseases.

Enforcement

The Commission may impose civil penalties up to \$50 per day for an employer's failure to adopt an airborne infectious disease exposure prevention plan, as well as a penalty of between \$1,000-\$10,000 for an employer's failure to follow its plan. An employee may also bring a lawsuit to enjoin practices contrary to the Act and may also obtain attorneys' fees and liquidated damages up to \$20,000.

Steps Employers Should Take

Employers can anticipate that once the Department of Labor issues model plans, they may need to plan for possible modifications of their physical workspaces to comply with PPE, hygiene, engineering, and social distancing requirements that will likely be included in the plans. Employers also must be prepared for greater employee involvement in health/safety matters through the Workplace Safety Committee. Finally, employers will need to modify their employee handbooks to reflect changes required under the Act. In the meantime, the New York Forward reopening guidance still requires all businesses to maintain a written safety plan when they reopen. Employers can look to the state-issued template (https://www.governor.ny.gov/sites/default/files/atoms/files/NYS_BusinessReopeningSafetyPlanTemplate.pdf) when preparing such plans.

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<u>Lisa E. Cleary</u>	212.336.2159	<u>lecleary@pbwt.com</u>
<u>Catherine A. Williams</u>	212.336.2207	<u>cawilliams@pbwt.com</u>
<u>Jacqueline L. Bonneau</u>	212.336.2564	<u>jbonneau@pbwt.com</u>
<u>George B. Fleming</u>	212.336.2841	<u>gflaming@pbwt.com</u>

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