

## > Client Alert

# New York State Has Released its Exposure Prevention Plan and Templates with Employer Action Now Required

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As discussed in our previous alert and follow-up alert, on May 5, 2021, Governor Andrew Cuomo signed into law the New York Health and Essential Rights Act, otherwise known as the “HERO Act.” The Hero Act was enacted to protect employees, as well as independent contractors, part-time and seasonal workers, domestic staff, and home health and personal service workers (collectively referred to as “workers” for purposes in this alert).

The New York State Department of Labor (NYSDOL), in consultation with the New York State Department of Health (NYSDOH), has now developed a new Airborne Infectious Disease Exposure Prevention Standard (the “Standard Plan”), a Model Airborne Infectious Disease Exposure Prevention Plan (the “Model Plan”), and various industry-specific model plans for the prevention of airborne infectious disease (“Industry-Specific Plans”), which can be found here: <https://dol.ny.gov/ny-hero-act>. The Plans are currently available in English, with translated templates expected in the coming days, according to the NYSDOL.

Employers have 30 days after the NYSDOL’s publication – or **until August 5, 2021** – to either: (1) adopt the Model or Industry-Specific Plan; or (2) develop and establish an alternative exposure prevention plan that meets or exceeds the minimum standards as required by the NYSDOL. Within 30 days of adopting a plan, employers must then provide the plan to all workers in writing. This alert provides employers with an overview of how to begin creating an exposure prevention plan.

Although employers must act quickly to prepare and distribute an exposure prevention plan for potential future use, they only need to implement their plans “**when an airborne infectious disease is designated by the New York State Commissioner of Health as a highly contagious communicable disease that presents a serious risk of harm to the public health.**” At this time, the Commissioner of Health has not made any such designation.

### General Provisions of the Exposure Prevention Plan

According to the NYSDOL’s Standard Plan, once the Commissioner designates an airborne infectious disease as presenting a serious risk of harm to the public health, employers must:

- Immediately review the worksite’s exposure prevention plan and update the plan, if necessary, to ensure that it incorporates current information, guidance, and mandatory requirements issued by federal, state, or local governments related to the infectious agent of concern;
- Finalize and promptly activate the worksite exposure prevention plan;
- Provide a verbal review of their safety policies; workers’ rights under the HERO Act, and the written exposure prevention plan (which can be conducted via audio or video conference technology); and
- Provide each worker with a copy of the exposure prevention plan in English or in the language identified as the primary language of such workers, if available; post a copy of the exposure prevention plan in a visible and prominent location at the worksite (except when the worksite is a vehicle); and ensure that a copy of the exposure prevention plan is accessible to workers during all work shifts.

While the NYSDOL’s designation remains in effect, employers must take certain steps to ensure that the exposure prevention plan is followed, including by: (1) assigning one or more supervisory workers to ensure adequate enforcement of the exposure prevention plan and other federal, state, or local guidance related to preventing the spread of the airborne infectious disease; (2) monitoring and maintaining exposure controls (as discussed further below); (3) monitoring for updated information and guidance from the Centers for Disease Control and Prevention (“CDC”) and NYSDOH; and (4) updating the exposure prevention plan as necessary to comply with any new guidance.

### “Minimum” Exposure Controls to Include in the Exposure Prevention Plan

The Standard Plan outlines the “exposure controls” that employers must implement in their exposure prevention plans in the event of an outbreak of an airborne infectious disease (as designed by the Commissioner of Health). Many of the Standard Plan’s “minimum” control measures will be familiar to employers as NYSDOL has carried over many of the “New York FORWARD” reopening guidelines required by the State from May 2020 through June 2021:

1. **Health Screenings:** Health screening for the disease shall be performed at the beginning of the workday, in accordance with guidance issued by the NYSDOH or CDC, as applicable. Employers must limit the exposure of other individuals to workers who demonstrate any symptoms of an airborne infectious disease. Employers shall also follow the NYSDOH or CDC protocols regarding testing, isolation, and quarantine before allowing workers to return to the worksite and inform workers of the same.
2. **Face Coverings:** Employers must select, provide at no cost, and require that workers wear appropriate face coverings whenever social distancing cannot be maintained in accordance with the NYSDOH or CDC guidance.
3. **Physical Distancing:** Employers must implement physical distancing to keep workers at least six feet apart from others or as recommended by the NYSDOH or CDC, as applicable during a disease outbreak.

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4. **Hand Hygiene Facilities:** Employers must, to the extent practicable and feasible, provide handwashing facilities with an adequate supply of tepid or warm potable water, and single-use towels or air-drying machines. When not practical and feasible, the employer must provide hand sanitizer with at least 60% alcohol that is effective against the infectious disease or as determined to be appropriate by the NYSDOH or CDC for the disease outbreak, as applicable.
5. **Cleaning and Disinfection:** Employers must implement an appropriate plan for cleaning and disinfection based on recommendations by the NYSDOH or CDC, including cleaning and disinfecting surfaces known or believed to be contaminated; disinfecting frequently touched surfaces throughout the workday; providing for the cleaning and disinfection of shared tools, equipment and workstations; and arranging for the cleaning and disinfection of common areas (such as bathrooms and break rooms) at least daily or as recommended by the NYSDOH or CDC.
6. **Personal Protective Equipment (“PPE”):** Employers are required to provide workers with, and ensure its use of, PPE deemed necessary or recommended by the NYSDOH or CDC. Employers must also provide training and information to workers regarding PPE and ensure that the PPE is maintained in a sanitary condition and functioning properly.

#### **Anti-Retaliation & Recordkeeping Provisions Included in the Exposure Prevention Plan**

Specifically, the Standard Plan prohibits employers from taking any adverse action against a worker for: (1) exercising their rights under the HERO Act or under the employer’s exposure prevention plan; (2) reporting violations of the Act or an employer’s exposure prevention plan when the worker reasonably believes, in good faith, that a violation occurred; (3) reporting an airborne infectious disease concern to their employer or a governmental entity, officer, or official; or (4) refusing to work when the worker reasonably believes, in good faith, that such work exposes workers to unreasonable risk from an airborne infectious disease due to working conditions that are inconsistent with the Standard Plan, exposure prevention plan, or others laws, rules, policies, or order; *provided, however*, that the worker, another worker, or a worker representative notified the employer of the unsafe working condition and the employer failed to cure the conditions, or the employer had or should have had reason to know about the unsafe working conditions.

To the extent that records exist between the employer and worker regarding a potential risk of exposure, such records must be maintained by the employer for at least two years after the conclusion of the designation of a high risk disease from the Commissioner.

#### **Model and Industry-Specific Plans Require Additional Controls**

To comply with the HERO Act’s written plan requirement, employers may either adopt the model exposure prevention plan applicable to their industry, as released by the NYSDOL, or establish an alternative plan that meets or exceeds the minimum requirements provided by the Standard Plan. As of the date of this publication, the State has issued eleven industry-specific templates for the following industries: agriculture, construction, delivery services, domestic workers, emergency response, food services, manufacturing and industry, personal services, private education, private transportation, and retail. All other sectors for which no industry-specific plan is available – including office-based workplaces – should refer to the Model Plan.

In addition to providing additional detail about the “minimum” controls addressed in the Standard Plan (see above), the Model and Industry-Specific Plans also address “stay at home” policies, “respiratory etiquette” (such as covering one’s nose and mouth when sneezing, coughing or yawning), and providing special accommodations for individuals with added risk factors (as some workers, “due to age, underlying health condition, or other factors, may be at increased risk of severe illness if infected”).

There is also a section entitled “Advanced Controls during an Outbreak” for activities where the “minimum” controls alone will not provide sufficient protection for workers and therefore “additional controls from the following

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hierarchy may be necessary.” These controls include: (1) the temporary suspension or elimination of risky activities where adequate controls would not provide sufficient protection; (2) engineering controls (*e.g.*, ventilation, automatic disinfection systems, installing cleanable physical barriers, and changing layouts to avoid points or areas where workers may congregate); (3) administrative controls (*e.g.*, increasing space between workers; slowing production speed to accommodate fewer workers at a time; providing worker trainings; identifying and prioritizing job functions essential for continuous operations; cross-training workers to ensure critical operations can continue during worker absence; posting signs; rearranging traffic flow; etc.); and (4) ascertaining additional PPE for workers.

Again, the Model and Industry-Specific Plans remind both employers and workers of the anti-retaliation provisions discussed above.

### **Employer's Next Steps**

Now that the State has issued the Standard, Model, and Industry-Specific Plans, all employers with worksites in New York State should take the following steps:

1. Develop and implement an exposure prevention plan that complies with or exceeds the NYSOOL standards **by August 5, 2021**;
2. Distribute the exposure prevention plan to all workers **within 30 days** of the adoption of the plan, within 15 days after reopening after a period of closure due to airborne infectious disease, and to new employees upon hire. The exposure prevention plan must be provided to workers in English and in the language identified by each worker as their primary language if a model standard is available in that language (and implemented by the employer);
3. Post the exposure prevention plan in a visible and prominent location in each worksite, with the exception of vehicles.; and
4. Update employee handbooks accordingly.

Employers must also begin to plan ahead, as effective November 1, 2021, employers with at least ten employees are required to allow employees to form a joint labor-management workplace safety committee. Committees are authorized to, among other things, raise health and safety concerns, review safety policies, participate in certain site visits, and regularly schedule meetings during work hours. The HERO Act states that at least 2/3 of the membership of any committee must consist of non-supervisory employees and must be co-chaired by both an employer representative and a non-supervisory employee. Members of such committees will be allotted two paid hours quarterly for meetings and four paid hours quarterly for committee trainings, all of which can take place during working hours. The HERO Act directs the NYSOOL to adopt rules and regulations related to the implementation of workplace safety committees, which have not yet been issued to date. We will continue to monitor for these rules and regulations.

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The Morrison Cohen LLP Labor & Employment Law Team is available to provide legal advice concerning health and safety regulations in the workplace, or other employment law questions that may arise from time to time and as needed.