

> Client Alert

New York State Passes Amendments to the HERO Act

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Authors and Key Contacts

If you require any additional information regarding the HERO Act or health and safety in the workplace issues, or any other labor and employment matter, please contact any of the attorneys listed below.

Jeffrey P. Englander

Partner & Co-Chair

P (212) 735-8720

jenglander@morrisoncohen.com



Keith A. Markel

Partner & Co-Chair

P (212) 735-8736

kmarkel@morrisoncohen.com



John B. Fulfree

Senior Counsel

P (212) 735-8850

jfulfree@morrisoncohen.com



Theresa D'Andrea

Associate

P (212) 735-8751

tdandrea@morrisoncohen.com



Christopher W. Pendleton

Associate

P (212) 735-8783

cpendleton@morrisoncohen.com



Cassandra N. Branch

Associate

P (212) 735-8838

cbranch@morrisoncohen.com



As discussed in our previous [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 law codifies COVID-19-related health and safety protocols for all private sector employers in the State. The Hero Act protects employees, as well as independent contractors, part-time and seasonal workers, domestic staff, and home health and personal service workers. Government employers and employees are not covered by the law.

It appears, however, that the Governor’s Office recognized there were ambiguities in the Hero Act when Governor Cuomo signed it into law, including the Act’s timeline for employers to implement airborne infectious disease prevention plans, as well as the details surrounding workplace safety committees and employees’ rights to pursue a private right of action under the law. As such, on May 14, 2021, bills were introduced into the State legislature to address those concerns and amend the HERO Act (the “Amendments”). A summary of the HERO Act, as amended, is provided below.

Airborne Infectious Disease Exposure Prevention Plan

In its original format, the HERO Act called for the New York State Department of Labor (NYSDOL), in conjunction with the New York State Department of Health (NYSDOH), to establish industry-specific minimum requirements for preventing employee exposure to airborne infectious diseases in the workplace by June 4, 2021. The Amendments, however, have set a new deadline of July 5, 2021 for the NYSDOL to issue these model standards to the public. The Amendments also require the NYSDOL to publish a general model airborne infectious disease exposure prevention standard applicable to all worksites.

The HERO Act did not initially provide a deadline by which employers must implement their airborne infectious disease exposure prevention plans. The Amendments clarify that employers must adopt the applicable model standard, or an alternative plan that meets or exceeds the minimum requirements provided by the model standard, within 30 days of the NYSDOL’s issuance of such standards, and within 15 days of reopening after a period of closure due to airborne infectious disease exposure. In addition, the Amendments provide that the employer plans must be provided to employees within 60 days following the issuance of the model standards. Finally, a worksite’s compliance with the airborne infectious disease exposure prevention plan must be overseen by a supervisory employee of the employer.

Definitions of “Employee” and “Worksite”

The Amendments update the definition of a covered “employee” to include “individuals working for digital applications or platforms.” The definition of “worksite” was also updated to refer to “any physical space, including a vehicle [though an employer’s prevention plan need not be posted in a vehicle], that has been designated as the location where work is performed over which an employer has the ability to exercise control.” Notably, these updated definitions exclude telecommuting and telework sites unless the employer exercises control over such sites.

Workplace Safety Committees

The HERO Act requires employers to establish workplace safety committees to (i) raise health and safety concerns; (ii) review workplace policies; (iii) participate in site visits from any governmental entity responsible for enforcing health and safety standards; (iv) review reports filed by the employer related to health and safety in the workplace; and (v) meet once a quarter to discuss workplace safety issues. The Amendments further clarify the role that workplace safety committees play and provide further operational guidelines. The Amendments make clear that an employer need only have one safety committee per worksite. If a workplace safety committee already exists at a particular worksite, the employer need not create an additional one. Review by the employer’s workplace safety committee is limited to workplace policies that concern occupational safety and health, rather than all policies related to any provision of the New York Labor Law. Quarterly workplace safety committee meetings may last no longer than two hours, and trainings for an employer’s workplace safety committee members may last no longer than four hours.

Limitations on Private Causes of Action

The HERO Act prohibits employees from pursuing a private cause of action unless and until such time as they have provided the employer with at least 30 days’ notice of an alleged violation of the law. An exception to this 30-day requirement exists where an employee specifically alleges that the employer demonstrated a bad faith unwillingness to cure the violation. However, an employee may not pursue a private cause of action for a violation that has been subsequently remedied by the employer. Furthermore, an employee must bring a civil action for a violation of the HERO Act within six months from the date that the employee knew of the purported violation.

The Amendments also provide that an employer may recoup its costs and reasonable attorneys’ fees where a court deems the employee’s action in commencing an action frivolous. Such costs and fees may be assessed either against the employee or against the attorney for the employee, or against both, as determined by the court. The Amendments therefore provide an appropriate check and balance to safeguard the health and safety of the workplace and avoid unnecessary or burdensome litigation.

Insights

Employers need not adopt any new health and safety measures until the NYSDOL issues its model standards. However, once the standards are issued by the State, employers will be time pressed to adopt their own plans (30 days from issuance) and distribute those plans to their employees (60 days from issuance). Given that Governor Cuomo is widely expected to sign the Amendments into law, employers should plan ahead by reviewing their existing COVID-19-related prevention plans and be prepared to modify their plans in accordance with the forthcoming State safety standards.

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The Morrison Cohen LLP Labor & Employment 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.