

> Client Alert

The HERO Act Requires New Workplace Safety Measures for Airborne Infectious Diseases to be Implemented by June 4, 2021

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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 requires the New York State Department of Labor (NYDOL), in conjunction with the New York State Department of Health (NYDOH), to establish industry-specific minimum requirements for preventing employee exposure to airborne infectious diseases in the workplace. This is particularly notable because New York State rarely imposes such robust occupational safety standards on the private sector.

This alert provides an overview of the HERO Act, which includes civil penalties and a private right of action for noncompliance, as well as anti-discrimination and anti-retaliation provisions for employees.

Applicability and Required Actions for Employers

The HERO Act applies to private sector employers in New York, regardless of size. Specifically, the law covers any individual “providing labor or services for remuneration” in the private sector. This includes 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.

The HERO Act requires New York employers to either:

Adopt the NYDOL’s model airborne infectious disease safety plan, or create a model safety plan that meets or exceeds the standards established by the NYDOL. Where an employer’s workforce is unionized, such plans must be created in consultation with the union’s collective bargaining representatives. Meanwhile, safety plans for non-unionized workforces must be created with “meaningful participation of employees” and be customized to meet industry standards and worksite specifications.

While the NYDOL has not yet released a model plan, it is anticipated that the model plan will feature safety standards and procedures concerning a variety of issues, including:

- Health screenings for employees;
- Face coverings and other PPE that must be maintained at the employer’s expense;
- Cleaning and disinfecting of surfaces;
- Complying with quarantine protocols and mandatory isolation orders;

- Ensuring proper engineering controls, such as air flow and exhaust ventilation;
- Complying with applicable federal, state and local laws, rules, regulations, and guidance on preventing exposure to airborne infectious diseases;
- Designating supervisory employees to enforce compliance with an established safety plan; and
- Reviewing and posting safety plans.

The HERO Act also requires employers with at least 10 employees to create a “joint labor-management workplace safety committee” comprised of at least two-thirds non-supervisory employees and selected by non-supervisory employees. If the workplace is unionized, then the collective bargaining representative will choose delegates for this purpose. The law also allows for the creation of committees representing geographically distinct worksites.

Joint labor-management workplace safety committees will be authorized to:

- Schedule quarterly meetings to convene during work hours;
- Raise health and safety issues to management;
- Review and comment on the adoption of any health and safety policy, including those enacted by the employer in response to new regulations, laws, and executive orders;
- Review and comment on any workplace policies required by the HERO Act or New York Workers’ Compensation Law;
- Participate in government worksite visits; and
- Review any workplace health and safety reports filed by the employer.

Employers must also permit committee members to attend “a training, without suffering a loss of pay, on the function of worker safety committees, rights established under this section, and an introduction to occupational safety and health.”

Issuing Required Notices Under the HERO Act

All employers permitted to operate a business in New York as of June 4, 2021, must provide the safety plan to all employees on or before June 4, 2021, and upon hiring any new employees. Plans distributed to employees must be in English or in each employee’s stated primary language.

Employers are further required to post the newly adopted safety plan in a “visible and prominent” place in the workplace, make copies of the safety plan available upon request, and include the safety plan in the employee handbook, if any.

New Discrimination and Retaliation Prohibitions

The HERO Act prohibits discrimination and retaliation against employees for:

- Exercising their rights under the Act or the employer’s plan;
- Reporting violations of the Act or the employer’s plan;
- Reporting violation and/or exposure concerns, and seeking assistance or intervention related to those concerns; and
- Refusing to work under the good faith belief that working in conditions inconsistent with DOL standards or the employer’s plan would constitute an unreasonable risk of exposure, provided that the employee notified the employer of said conditions and the employer failed to address them.

Civil Penalties for Noncompliance

Employers that fail to adopt a safety plan would be subject to a penalty of at least \$50 per day until a plan is implemented, and employers that fail to comply with an adopted plan could be subject to fines ranging from a minimum of \$1,000 to a maximum of \$10,000.

The HERO Act also creates a private right of action for employees, which includes the right to seek injunctive relief in court, along with attorney's fees and liquidated damages up to \$20,000.

The Takeaway: Preparation is Key

It may take some time for the DOL to publish the industry-specific safety plans required under the HERO Act, but employers should use this time to prepare reopening guidelines applicable to their worksites and start considering additional needs for implementing an appropriate safety plan. Employers should also begin updating the required language for any employee handbooks and begin speaking with their employees and/or their collective bargaining representatives about the creation of safety committees.

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The Morrison Cohen LLP Labor & Employment Team is available to provide legal advice concerning the HERO Act or any other employment law questions that should arise from time to time and as needed.