LABOR AND EMPLOYMENT

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NY HERO Act: Employers Need to Act by August 5th

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Overview

On May 5, 2021, Governor Andrew Cuomo signed into law the first-of-its-kind Covid-19 workplace safety law known as the New York Health and Essential Rights Act (S.1034-A/A.2681-B) ("HERO Act"). The HERO Act amends New York's Labor Law (Section 218-b), requiring employers to implement a workplace safety and health plan to prevent exposure to airborne infectious diseases. The law underwent a number of amendments, effective June 11, 2021, including requiring the New York State Department of Labor ("NYSDOL") and Department of Health to issue a model airborne infectious disease exposure prevention plan and standards for employers, which was published on July 6, 2021.

By **August 5, 2021**, all employers with a worksite in New York State are required to adopt an airborne infectious disease exposure prevention plan to eliminate or minimize employee exposure to airborne infectious agents in the event of an outbreak of an airborne infectious disease ("Plan")—either by adopting the model plan[1] promulgated by the NYSDOL or creating an alternative plan that meets or exceeds the model plan's requirements.

By **September 4, 2021** (*i.e.*, within 30 days of the adoption of the Plan and within fifteen days after reopening after a period of closure due to airborne infectious diseases), all employers must distribute their plans to employees in English and in an employee's primary language (if the language for that model plan is available from the NYSDOL).

Employers must also provide new hires with a copy of the Plan upon hire, post the Plan in a visible and prominent location within each worksite, include the Plan in their employee handbook, and conduct a verbal review with employees of the employer policies regarding the Plan, employee rights under the Standard promulgated by the NYSDOL and New York Labor Law Section 218-b, and the employer's exposure prevention Plan.

How the Law Works

The HERO Act has two main components.

Part 1: The first part of the law—which took effect June 4, 2021—applies to all New York employers regardless of size and covers not only full-time and part-time employees, but also independent contractors, temporary and seasonal workers, and employees of staffing agencies. It requires covered employers to implement health/safety protocols for Covid-19 testing and other infectious diseases, to provide face masks and personal protective equipment (already required in New York), and implement social distancing and other protocols.

[1] On July 6, 2021, the NYSDOL published the Model Airborne Infectious Disease Exposure Prevention Standard (the "Standard") and a Model Airborne Infectious Disease Exposure Prevention Plan (the "Model Plan"), and eleven (11) industry-specific model safety plans 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. The Model Plan covers topics including, but not limited to, health screening, stay-at-home policies, face coverings, physical distancing, hand hygiene, personal protective equipment, and engineering controls such as ventilation.

Part 2: **The second part of the law—which takes effect November 1, 2021—** applies only to employers with 10 or more employees working in New York State and requires them to permit the formation of joint labor-employer workplace safety committees to devise safety plans and monitor them. The committee must be comprised of at least two-thirds non-supervisory employees, the members must be selected by non-supervisory employees and the committee must be co-chaired by both an employer representative and non-supervisory employees. Members of such committees are entitled to schedule safety committee meetings to be held on a quarterly basis for no longer than two hours and safety committee designees may "attend a training of no longer than four hours, without suffering a loss of pay . . ." The committee and its designees will have the authority to:

1. Raise health and safety concerns, hazards, complaints and violations to the employer, to which the employer must respond.
2. Review any workplace policy relating to occupational safety and health and provide feedback to such policy in a manner consistent with any provision of law.
3. Review the adoption of any workplace policy in response to any health or safety law, ordinance, rule, regulation, executive order, or other related directive.
4. Participate in any site visit by any governmental entity responsible for enforcing safety and health standards unless otherwise prohibited by law.
5. Review any report filed by the employer related to workplace health and safety in a manner consistent with any provision of law.

The joint labor-management workplace safety committee is limited to one per worksite—and if an employer already has a committee that is otherwise consistent with the requirements of the HERO Act, it is exempted from creating an additional committee. Note that a "worksite" does not include a telecommuting/telework site unless the employer has the ability to exercise control of such site.

The NYSDOL makes clear that, while employers must adopt plans as required by the law, there is no current requirement to activate such plans. However, once a highly contagious communicable disease is designated by NYS's Commissioner of Health, the law requires employers to:

- 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 the Plan, employee policies and employee rights under the law to employees (additional information regarding the verbal review is in the Model Plan and in the industry-specific model plans); and
- Provide each employee with a copy of the exposure prevention plan in English and in the language identified as the primary language of such employees, if available, and
    - 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 employees during all work shifts.

Employers must also take certain steps to ensure that the Plan is enforced.

Impact on Unionized Workforces

Nothing in the law diminishes any rights under a collective bargaining agreement. Where there is a collective bargaining agreement in place, the collective bargaining representative must be responsible for the selection of employees to serve as members of the committee. In any circumstance where an employer develops an alternative airborne infectious disease exposure prevention plan that

differs from the Model Plan, the employer must develop such plan pursuant to an agreement with the collective bargaining representative. A collective bargaining agreement may waive the provisions of this law if it so explicitly references this law.

Impact on Nonprofit Organizations

Nonprofits, which tend to use independent contractors to a greater extent than for-profit organizations, and may have volunteers on-site, need to consider how they will ensure implementation of protocols extending to such persons, and how they will communicate the protocols to such individuals who are not their employees.

Interplay between OSHA and the HERO Act

The Standards explicitly state that they do not apply to "any employee within the coverage of a temporary or permanent standard adopted by the Occupational Safety and Health Administration setting forth applicable standards regarding COVID-19 and/or airborne infectious agents and diseases." Therefore, employers and employees covered under the OSHA Emergency Temporary Standard (ETS) should follow OSHA guidance.

No Retaliation; Cure Period and Penalties for Non-compliance

The law prohibits employers from discriminating, threatening, retaliating against, or taking adverse action against any employee for exercising their rights under the law, including for any action taken pursuant to their participation in the joint labor-management committee.

The HERO Act provides employees with a private right of action to seek injunctive relief against an employer for non-compliance in instances "that create [] a substantial probability that death or serious physical harm could result to the employee . . ." Notably, an employee must provide the employer with at least 30 days-notice of an alleged violation before filing a civil action, except in instances where an employee alleges with particularity that the employer has demonstrated an unwillingness to cure a violation in bad faith. An employee may not pursue a civil action if the employer corrects the alleged violation. The time frame to commence an action is within six months from the date that the employee has knowledge of the violation. Employees who prevail in their action may recover attorneys' fees and costs in certain instances and the court may award costs and attorneys' fees against an employee and/or his/her attorney for pursuing a frivolous action.

Additionally, the NYSDOL may assess penalties against non-compliant employers of $50 per day for failing to adopt an appropriate plan and a fine of $1,000 to $10,000 for failing to comply with an adopted plan. If an employer violated the law in the previous six years, penalties may increase to $200 per day for failure to implement an appropriate plan and $1,000 to $20,000 for failure to abide by an adopted plan.

What Should Employers Do Now

The HERO Act presents a sea change for workplace safety in New York and imposes new burdens on businesses and nonprofit organizations, including monetary penalties for non-compliance. At the same time, employers should welcome the opportunity for employees to participate in the safety planning process as a way to increase employee engagement and a sense of empowerment in their workplace community while also potentially minimizing the risk of legal claims and unionization.

Employers would be well-advised to carefully review the NYSDOL's Standard and Model Plan, adopt the model or establish their own Plan by August 5th with review by their legal counsel, and update their employee handbooks quickly to incorporate or refer to the HERO Act's requirements. Employers should also distribute their Plans to all employees and independent contractors, notify employees of their rights under the HERO Act and train managers on their legal obligations, especially those responsible for ensuring that employees are free from retaliation for raising safety or health concerns and exercising their rights under the HERO Act. Additionally, in anticipation of the November 1st deadline for implementation of a joint labor-management committee, employers with 10 or more employees should consider now how that committee will be implemented.

This Alert is based on information available at the time of publishing. It is subject to change. Business leaders should consult with counsel and refer to government websites and publications for the most up-to-date information.

For more detailed analysis on a wide range of legal issues, please see Schnader's Covid-19 Resource Center at www.schnader.com/blog/covid-19-coronavirus-resource-center. ◆

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