



The HERO Act - What Employers Need to Know

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Agenda

- The HERO Act
 - Labor Law Section 218-b
 - Airborne infectious disease exposure prevention plan
 - Labor Law Section 27-d
 - Labor-management workplace safety committees
- What to do next



The HERO Act

- On May 5, 2021 Governor Cuomo signed the New York Health and Essential Rights Act (“HERO Act”) into law.
- The legislation imposes workplace safety obligations on **private sector** employers in New York State.
 - The HERO Act does not apply to municipalities or governmental entities.
- The HERO Act created two new provisions of the New York State Labor Law: (1) Section 218-b; and (2) Section 27-d.
 - Section 218-b: involves the airborne infectious disease exposure prevention plan
 - Section 27-d, which involves labor-management workplace safety committees



Why Now?

- Applies to more than just COVID-19
 - Airborne infectious disease means “any infectious viral, bacterial or fungal disease that is transmissible through the air in the form of aerosol particles or droplets and is designated by the commissioner of health a highly contagious communicable disease that presents a serious risk of harm to the public health.”
- Attempt to better prepare employers in case of future issues concerning airborne infectious diseases



Labor Law Section 218-b

- Requires **all private sector employers** to adopt an airborne infectious disease exposure prevention plan.
- Requires the Commissioner of the New York State Department of Labor (“NYS DOL”) to create and publish a model airborne infectious disease exposure prevention standard and a model plans for industries that represent a significant portion of the workforce or those that require distinct standards.



Labor Law Section 218-b

- Broad applicability
- Applies to all employees.
 - Defined as “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 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 digital applications or platforms, 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.”



Labor Law Section 218-b

- Although private sector employers must adopt an airborne infectious disease exposure prevention plan, such plans only take effect if the Commissioner of Health designates an airborne infectious disease “as a highly contagious communicable disease that presents of a serious risk of harm to the public health.”
 - No such designation by the Commissioner of Health is in effect.



Contents of Plan

- An airborne infectious disease exposure prevention plan must address the following:
 - Employee health screenings;
 - Face coverings;
 - Required personal protective equipment applicable to each industry which must be provided at the employer’s expense;
 - Accessible workplace hand hygiene stations and maintaining healthy hand hygiene;
 - Regular cleaning and disinfecting of shared equipment;
 - Effective social distancing; and



Contents of Plan

- Compliance with mandatory or precautionary orders of isolation or quarantine;
- Compliance with applicable engineering controls (for example, proper air flow or exhaust ventilation);
- Designation of at least one supervisory employee to enforce compliance with the airborne infectious disease exposure prevention plan;
- Compliance with any other applicable laws, rules, regulations, or standards on notification to employees of potential exposure to an airborne infectious disease at the workplace; and
- Verbal review of the infectious disease standard and employee rights.



Contents of Plan

- An airborne infectious disease exposure prevention plan must also include anti-retaliation provisions for employees who:
 - (1) exercise their rights under Section 218-b of the Labor Law;
 - (2) report violations of Section 218-b of the Labor Law or the applicable airborne infectious disease exposure prevention plan;
 - (3) report an airborne infectious disease concern to their employer, a government entity, a public officer, or an elected official; and



Contents of Plan

(4) refuse to work where employees, in good faith, reasonably believe that such work exposes them to an airborne infectious disease as a result of working conditions that fail to meet laws, rules, policies, or orders of any governmental entity, including the minimum standards provided by the model airborne infectious disease exposure prevention standard.

- To receive protection for a refusal to work an employee must have notified the employer of the "inconsistent working conditions" and the employer refused to cure the conditions, or the employer knew, or should have known, about the inadequate working conditions and failed to correct them.



Model Plans and Standard Issued by NYSDOL

- On July 6, 2021, the NYSDOL issued its model airborne infectious disease exposure prevention plan, along with an airborne infectious disease exposure standard.
 - Available on NYSDOL website at: <https://dol.ny.gov/ny-hero-act>
- The NYSDOL also industry specific sample airborne infectious disease plans covering the agriculture, construction, delivery services, domestic worker, emergency response, food service, manufacturing and industrial, personal service, private education, private transportation and retail industries.



Timing Requirements

- Employers have 30 days from the time that the NYSDOL issues its model plans to adopt their own plans.
 - August 5, 2021
- An employer must provide its plan to all employees within 30 days of adopting its own airborne infectious disease exposure prevention plan.
 - September 4, 2021
- An employer also must provide its plan within 15 days of reopening after closure because of airborne infectious disease.



Notice and Posting Requirements

- An employer must provide its airborne infectious disease exposure prevention plan to new employees at time of hiring.
- An employer must provide its airborne infectious disease exposure prevention plan to employees in English and in the language identified by each employee as the primary language of such employee upon hiring.
- An employer must also include its airborne infectious disease exposure prevention plan in employee handbook.



Notice and Posting Requirements

- An employer must its airborne infectious disease exposure prevention plan in a "visible and prominent place."
 - Breakroom, near time clocks, etc.
- The airborne infectious disease exposure plan must be posted at each "work site."
- Work site is defined as "any physical space, including a vehicle, that has been designated as the location where work is performed over which an employer has the ability to exercise control."
 - Includes employer-provided housing and transportation
 - Does not include a telecommuting or telework site unless the employer has the ability to exercise control of such site.



Adopting an Alternative Plan

- If an employer adopts an alternative airborne infectious disease exposure prevention plan, it must do so through "meaningful participation" of employees, if employees do not have a collective bargaining representative.
- If employees are represented by a union and an employer adopts an alternative airborne infectious disease exposure prevention plan, it must do so through an agreement with the employees' collective bargaining representative.
- An alternative plan must be "tailored and specific to hazards in the specific industry and work sites of the employer."
- Must meet or exceeds requirements



Ensuring Compliance

- Only a supervisory employee can have responsibility for ensuring compliance with an employer's airborne infectious disease exposure prevention plan
- Upon request, employer must provide its airborne infectious disease exposure prevention plan to employees, collective bargaining representatives, employee representatives and the Commissioner of Health.



Plan During an Outbreak

- If the Commissioner of Health designates a highly contagious communicable disease as presenting a serious risk of harm to the public health, employers must:
 - Immediately review the employer'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 disease;
 - Finalize and promptly activate the worksite airborne infectious disease exposure prevention plan;
 - Provide a verbal review of the plan; and
 - Provide each employee with a copy of the plan in English or in the language identified as the primary language of such employees, if available, and (1) 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 (2) ensure that a copy of the exposure prevention plan is accessible to employees during all work shifts.



Remedies

- An employee may seek remedies against an employer if it violates its airborne infectious disease exposure prevention plan.
- An employee may file a lawsuit against an employer and seek injunctive relief, costs and attorneys' fees, but amendments to the HERO Act do not permit recovery of liquidated damages.
- However, an employee may not file an action against an employer for violating its airborne infectious disease standard without first putting the employer on notice and allowing 30 days to cure the alleged problem, unless the employer has demonstrated an unwillingness to cure the violation.



Remedies

- If a lawsuit filed by an employee against an employer for a violation of its airborne infectious disease exposure prevention plan is determined frivolous by the court, the court may award the employer costs and reasonable attorneys' fees against the employee or against the attorney for the employee, or against both.
- An employee must bring a civil action within six months from the date the employee had knowledge of the alleged violation.



Remedies

- Section 218-b of the Labor Law also permits the NYSDOL to conduct an investigation if an employer is alleged to have violated its airborne infectious disease exposure prevention plan.
- The NYSDOL may issue a civil penalty of not less than \$50 per day for failure to adopt an airborne infectious disease exposure prevention plan, or between \$1,000 - \$10,000 for an employer's failure to abide by its own airborne infectious disease exposure prevention plan.
 - If an employer has committed a violation within the past six years, the civil penalties may be increased to up to \$20,000.



Labor Law Section 27-d

- Takes effect on November 1, 2021
- Requires private sector employers with **ten or more** employees to allow employees to establish workplace safety committees **if requested**
- Limitation of one workplace safety committee per work site



Labor Law Section 27-d

- Each workplace safety committee must: (1) include both employer and employee designees; (2) be comprised of at least two-thirds non-supervisory employees; and (3) be co-chaired by an employer representative and a non-supervisory employee.
- Employers cannot interfere with the selection of employees who will serve on the workplace safety committee, who serve as a workplace safety designee or employees' duties that are authorized by Labor Law Section 27-d.



Labor Law Section 27-d

- In the non-union setting, members of the workplace safety committee must be selected by non-supervisory employees.
- If, however, 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 workplace safety committee.



Powers of Workplace Safety Committee

- An employer must permit workplace safety committees to perform, at a minimum, the below functions:
 - Raise health and safety concerns, hazards, violations, complaints and violations to the employer, to which the employer must respond;
 - Review policies established in the workplace that are required by the HERO Act related to occupational safety and health and provide input on the policies;
 - Review the adoption of “any policy in the workplace in response to any health or safety law, ordinance, rule, regulation, executive order” or similar directives;



Powers of Workplace Safety Committee

- Participate in any on-site visit by a governmental entity responsible for enforcing compliance with safety and health standards, unless otherwise prohibited by law;
- Review any report filed by the employer related to safety and health in the workplace; and
- Regularly schedule a meeting, during work hours, at least once per quarter, **which shall not last longer than two hours.**



Paid Training

- Employers must permit members of a workplace safety committee to attend training on the function of workplace safety committees, rights members of a workplace safety committee possess under Labor Law Section 27-d and introduction to occupational safety and health.
- The training is limited up to **four** hours and members of a workplace safety committee cannot suffer a loss of pay for attending the training
 - Unclear whether this is a quarterly, yearly, one-time, etc. limitation



Anti-Retaliation Protections

- Any employee who participates in the establishment of a workplace safety committee or participates in activities of a workplace safety committee cannot be subject to retaliation for either forming the committee or participating in the activities of a workplace safety committee.



Remedies

- An employee may file a lawsuit against an employer seeking injunctive relief, costs and attorneys' fees for an alleged violation of Labor Law Section 27-d.
- An employer who violates Labor Law Section 27-d can be subject to civil penalties between \$1,000 - \$10,000, but if an employer has committed a violation within the past six years, the civil penalties may be increased to up to \$20,000.



Considerations for Employers

- Review guidance issued by the NYS DOL
- Develop airborne infectious disease exposure prevention plan that meets or exceeds the requirements of the HERO Act by August 5, 2021
- Communicate plan to employees by September 4, 2021
- Update handbooks to include airborne infectious disease exposure prevention plan
- Post airborne infectious disease exposure prevention plan
- Be prepared for employee requests to form workplace safety committee



The HERO Act

Questions?



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