

# Alert

## What Employers Need to Know About the NY HERO Act

May 11, 2021

On May 5, 2021, Governor Cuomo signed into law the New York Health and Essential Rights Act (“HERO Act”) to combat the spread of COVID-19. The HERO Act adds two sections to the New York Labor Law: (1) the prevention of occupational exposure to an airborne infectious disease and (2) workplace safety committees. The HERO Act's first provision is effective on June 4, 2021, and its second provision is effective on Nov. 1, 2021.

### Section 1: Prevention of Occupational Exposure to Airborne Infectious Diseases

#### *Coverage and Effective Date*

Effective June 4, 2021, the New York State Department of Labor (“NYSDOL”) is directed, in consultation with the New York State Department of Health, to create and publish a model airborne infectious disease exposure prevention standard, differentiated by industry, for all work sites. All employers in New York will be required to adopt and provide to all of their employees an airborne infectious disease exposure prevention plan to protect employees from exposure to COVID-19 and other infectious diseases in the workplace as described below. Notably, “employee” is defined to include independent contractors, part-time workers, domestic workers, home care workers, temporary and seasonal workers, and individuals working for staffing agencies, contractors and subcontractors working on behalf of an employer at a work site. “Work site” is defined to mean “any physical space, including a vehicle, that has been designated as the location where work is performed.” “Employer” is defined to cover almost any entity or person that pays individuals for labor, regardless of size or number of employees.

#### *The Model Prevention Plan*

This NYSDOL model standard will establish minimum requirements for preventing exposure to airborne infectious diseases in the workplace. These standards will include requirements for employers on procedures and methods for:

- Employee health screenings;
- Face coverings;
- Required personal protective equipment applicable to each industry;
- Accessible workplace hand hygiene stations and maintaining healthy hand hygiene;
- Regular cleaning and disinfecting of shared equipment and frequently touched surfaces;
- Effective social distancing for employees and consumers/customers;
- Compliance with mandatory or precautionary orders of isolation or quarantine;

- Compliance with applicable engineering controls such as proper air flow and exhaust ventilation;
- Designation of one or more supervisory employees to enforce compliance with airborne infectious disease exposure plans and laws, rules, regulations or guidance;
- Verbal review of infectious diseases standard, employer policies and employee rights under this section; and
- Anti-retaliation requirements.

### *Employers' Obligations*

Employers are required to establish an airborne infectious disease exposure prevention plan either by adopting the model standard relevant to their industry or by establishing an alternative plan that equals or exceeds the minimum standards set forth by the model standard.<sup>1</sup> Employers must provide their prevention plans to all their employees (broadly defined above) in writing in English and in the language identified by each employee as his or her primary language upon reopening after a period of closure due to airborne infectious disease, at the time of hiring, and upon the effective date of the HERO Act if the employer is permitted to operate at that time. Employers must also make their prevention plans available, upon request, to employees, collective bargaining representatives, if any, and the Commissioner of Labor and the Commissioner of Public Health. In addition, employers must post their prevention plans in a visible and prominent location within their work sites and include the prevention plan in their employee handbooks.

### *Anti-Discrimination and Retaliation*

Employers are prohibited from discriminating, retaliating or taking adverse action against any employee for exercising their rights under this section (such as by requesting a copy of their employer's prevention plan or bringing a civil action against their employer) or under the applicable prevention plan, for reporting violations of the applicable prevention plan, or for refusing to work when such employee reasonably believes, in good faith, that such work exposes workers or the public to an unreasonable risk of exposure to an airborne infectious disease due to the existence of working conditions that are inconsistent with law, including the model prevention standards, provided that the employer was notified of, or had or should have had reason to know about, these inconsistent conditions and the employer failed to cure such conditions.

### *Penalties*

The NYSDOL may, following an investigation, assess a civil penalty upon an employer or person found to have violated any provision of this section. This civil penalty may not be less than \$50 per day for failure to adopt an airborne infectious disease exposure prevention plan, and may not be less than \$1,000 or more than \$10,000 for failure to abide by an adopted prevention plan. These penalties may increase if the NYSDOL finds that the employer had violated this section in the preceding six years. The NYSDOL also may seek a court order to enjoin or restrain the commission or continuation of unlawful acts.

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<sup>1</sup> Any alternative plan must be developed in tandem with the employees' collective bargaining representative, if any, or with meaningful participation of employees where there is no such representative. This plan must be tailored and specific to the hazards in the specific industry and work sites of the employer.

Additionally, any employee is authorized to bring a civil action seeking injunctive relief against an employer alleged to have violated an applicable prevention plan in a manner that creates a substantial probability that death or serious physical harm could result, unless the employer did not, and could not with the exercise of reasonable diligence, know the presence of the violation. Courts are authorized to grant injunctive relief, reasonable attorneys' fees and costs and liquidated damages to successful claimants. However, an employer will not be liable for this relief where the employer proves it had a good faith basis to believe that its established health and safety measures were in compliance with the applicable prevention standard(s). Note that if an action brought by an employee (or a defense, counterclaim, or cross claim is brought by an employer in response) is found by a court to be "completely without merit in law and undertaken primarily to harass or maliciously injure," the court may award sanctions.

## **Section 2: Workplace Safety Committees**

### *Coverage and Effective Date*

This section covers all employers that employ at least 10 employees and is effective on Nov. 1, 2021.

### *Safety Committees' Makeup*

Employers must allow their employees to establish and administer joint labor-management workplace safety committees. Each safety committee shall be composed of employee and employer designees, provided two-thirds of the committee are non-supervisory employees (selected by non-supervisory employees). Where a collective bargaining agreement is in place, the collective bargaining representative is responsible for selecting employees to serve on the committee. Committees shall be co-chaired by a representative of the employer and of non-supervisory employees.

### *Safety Committees' Powers*

Each safety committee and workplace safety designee will be authorized to perform the following actions, among others:

- Raise health and safety concerns, hazards, complaints and violations to the employer to which the employer must respond;
- Review any policy put in place in the workplace required by any provision of the Labor Law or any provision of the Workers' Compensation Law;
- Review the adoption of any policy in the workplace in response to any health or safety law, regulation or executive order;
- Participate in any site visit by any governmental entity responsible for enforcing safety and health standards;
- Review any report filed by the employer related to the health and safety of the workplace; and
- Schedule a meeting during work hours at least once a quarter.

### *Anti-Retaliation and Penalties*

Employers are prohibited from retaliating against any employee who participates in the activities or establishment of a safety committee for any actions taken pursuant to their participation. Violations of

this section will be subject to civil penalties and injunctive relief ordered by the NYSDOL, and civil actions from affected employees for injunctive relief, reasonable attorneys' fees and costs and liquidated damages of up to \$20,000.

### **Next Steps**

In signing the HERO Act, Governor Cuomo and the New York State Legislature agreed to a still-not-public amendment to make certain technical changes to the bill, including giving the NYSDOL and employers more specific instructions in developing and implementing the workplace standards, including a clear timeline, and providing for an immediate requirement for employers to cure violations in order to better protect the safety of workers, and limit lengthy court litigation to those private rights of action where employers are acting in bad faith and failing to cure deficiencies. This amendment is forthcoming.

Employers should be prepared to adopt the NYSDOL's airborne infectious disease safety standards and model prevention plans when those are released. In the meantime, employers should continue to review their existing return-to-work guidelines and health and safety plans and protocols for compliance with existing federal, state and local health and safety requirements or guidance. Employers with employees represented by unions may seek to waive either or both sections of the HERO Act in their collective bargaining agreements, provided that such agreements explicitly reference the section(s) of the HERO Act being waived. The joint labor-management committees may have implications under federal labor law, and may be subject to legal challenge.

As always, if you have any specific questions about the HERO Act or how it impacts your organization, you should contact your SRZ attorney.

*Authored by [Mark E. Brossman](#), [Ronald E. Richman](#), [Scott A. Gold](#), [Donna K. Lazarus](#) and [Abdulrahman Alwattar](#).*

Schulte Roth & Zabel  
New York | Washington DC | London  
[www.srz.com](http://www.srz.com)

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