

Alert

New York State Employers Must Activate Exposure Prevention Plans Under the NY HERO Act

September 13, 2021

On Monday, Sept. 6, 2021, Governor Kathy Hochul announced that the New York State Commissioner of Health had designated COVID-19 as a highly contagious communicable disease that presents a serious risk of harm to the public health under the New York Health and Essential Rights Act of 2021 (“HERO Act”). This designation requires all employers in New York State to implement and enforce their airborne infectious disease exposure prevention plans.

SRZ has issued several client alerts on the HERO Act, which you can find [here](#), [here](#) and [here](#). The HERO Act required all employers to adopt an airborne infectious disease exposure prevention plan by Aug. 5, 2021. Employers, however, were not required to comply with, or enforce the terms of, their prevention plans until an airborne infectious disease was designated by the New York State Commissioner of Health as a highly contagious communicable disease. Until Sept. 6, 2021, no disease was designated.

What Employers Need to Do Now

Employers must “activate” their prevention plans and immediately begin compliance with their plans. To comply, employers should — if they have not already done so — distribute their prevention plans to each of their employees,¹ post their prevention plans in visible and prominent locations in their workplaces and conduct verbal trainings for their employees. Further, to implement their prevention plans, employers are required to enforce the prevention standards set forth in their plans, including, but not limited to, conducting regular cleanings, adhering to applicable guidance from the New York State Department of Health and the U.S. Centers for Disease Control and Prevention, and designating one or more employees to enforce compliance with their prevention plans. With respect to masks and social distancing, the HERO Act does not provide explicit requirements. Instead, the HERO Act states that employers’ prevention plans must set forth standards for masking and social distancing. The New York State Department of Labor (“DOL”) further explained that, at minimum, employers’ prevention plans must require physical distancing “be used, when possible, to keep employees at least six feet apart from other individuals,” and require employees to wear face masks “when physical distancing cannot be maintained.” The DOL’s model airborne infectious disease exposure prevention plan, which many employers adopted, provides that “face coverings and physical distancing should be used together whenever possible,” and “employees will wear face coverings throughout the workday to the greatest extent possible.” Therefore, the exact requirements for masks and physical distancing in the workplace depend on the terms of each employer’s prevention plan, but, at minimum, masks must be worn by all individuals in the workplace when physical distancing cannot be maintained, regardless of vaccination

¹ Employers must provide each employee with a copy of their exposure prevention plan in English or in the language identified as the primary language of such employee, if available. Currently, the New York State Department of Labor’s model plan is available in English and Spanish.

status. For more information on the HERO Act's requirements, see SRZ's previous client alerts (linked above) and the DOL's [prevention standards](#), the applicable industry [model prevention plans](#), and the HERO Act's [Frequently Asked Questions](#).

Employers should also be aware of the HERO Act's multi-layered enforcement mechanism by the DOL, the New York State Attorney General and an employer's own employees. The Commissioner of the DOL is entitled to investigate employers for alleged violations of the HERO Act. The Commissioner may assess a civil penalty of not less than \$1,000 nor more than \$10,000 for failure to abide by an adopted airborne infectious disease exposure prevention plan. There is a six-year statute of limitation for the DOL to assess this penalty. In addition, where a violation of this section is alleged to have occurred, the Commissioner or the New York State Attorney General may apply, on behalf of New York State, for an order enjoining or restraining the commission or continuance of the alleged unlawful acts.

Employees are entitled to report violations of the HERO Act or their employer's prevention plan to any state, local or federal government entity, public officer or elected official; report airborne infectious disease exposure concerns to any of the foregoing authorities or to the employer; and refuse to work where the employee "reasonably believes, in good faith, that such work exposes him or her, or other 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 applicable laws or policies, including the prevention plan, provided the employer is notified "of the inconsistent working conditions and the employer failed to cure the conditions or the employer had or should have had reason to know about the inconsistent working conditions and maintained the inconsistent working conditions." Employees are also entitled to bring a civil action for injunctive relief against their employer for violations of the prevention plan that created a substantial probability of serious physical harm or death. Pursuant to such civil action, courts are empowered to restrain violations of the prevention plan and to order all appropriate relief, including enjoining the conduct of the employer and awarding costs and reasonable attorneys' fees to the employee. Before bringing such a civil action, employees must give their employer notice of the alleged violation and provide the employer with 30 days to cure the alleged violation, except where an employee alleges with particularity that the employer has demonstrated an unwillingness to cure a violation in bad faith. Employees have six months from the date they have knowledge of the alleged violation to bring such civil action.

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

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