

# Preparing Employers for the NY HERO Act

*First Look at Major Workplace Safety Developments*

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# Health and Essential Rights (HERO) Act

- ▶ Signed by Gov. Cuomo on May 5, 2021
- ▶ Gov. signed subject to Legislature agreeing to make “technical” amendments
- ▶ Adds two new sections to the NY Labor Law
- ▶ Applies to private businesses (profit and not-for-profit)

# Airborne Infectious Disease Exposure Prevention

- ▶ NY Labor Law § 218-b
- ▶ Every employer must adopt an airborne infectious disease exposure prevention plan
- ▶ NYS DOL will create industry-specific minimum standards and model plans
- ▶ Expected by this summer

# Covered Employees

- ▶ Broader than normal definitions of “employee”
- ▶ Includes independent contractors
- ▶ Also includes individuals working for staffing agencies, contractors, subcontractors, and delivery personnel present on employer’s worksite

# Required Standards

- ▶ Employee health screenings
- ▶ Face coverings
- ▶ Personal protective equipment (PPE) for eyes, face, head, and extremities
- ▶ Protective clothing
- ▶ Respiratory devices
- ▶ Protective shields and barriers
- ▶ Accessible workplace hand hygiene stations



# Required Standards (cont.)

- ▶ Regular cleaning and disinfecting of shared equipment and frequently touched surfaces and all surfaces and washable items in other high-risk areas
- ▶ Social distancing for employees, consumers, and customers
- ▶ Compliance isolation and quarantine orders
- ▶ Engineering controls, such as airflow and exhaust ventilation

# Required Standards (cont.)

- ▶ Designation of a supervisory employee to enforce compliance
- ▶ Compliance with applicable laws or guidance on notification of potential exposure to airborne infectious disease at the worksite
- ▶ Verbal review of the infectious disease standard, employer policies, and employee rights under the HERO Act with employees
- ▶ Anti-retaliation protections

# Plan Options

- ▶ Adopt model plan
- ▶ Agree with union on alternative plan
- ▶ If non-union, implement alternative plan  
“with meaningful participation of employees”
- ▶ Any alternative plan must be “tailored and specific to hazards in the specific industry and work sites of the employer”



# Timing

- ▶ No obligation until DOL standards are available
- ▶ Pending amendment gives employers 30 days after model standards published to adopt plan
- ▶ Once plan adopted, employer must provide in writing to all existing employees within 30 days
- ▶ Thereafter, must give to all new employees upon hire

# Employee Protections

Employers may not take adverse action against employees for:

- ▶ Exercising their rights under § 218-b or the applicable infectious disease exposure prevention plan;
- ▶ Reporting violations of § 218-b or the plan;
- ▶ Reporting an airborne infectious disease exposure concern; or
- ▶ Refusing to work based on a good faith belief of an unreasonable risk of exposure to an airborne infectious disease due to the existence of working conditions that are inconsistent with laws or other government orders, despite notice to the employer of the inconstant working conditions that the employer failed to address.

# Penalties

- ▶ \$50+ per day for not having plan in place
- ▶ \$1,000-\$10,000 for violating plan
- ▶ Higher fines for repeat violations
- ▶ Employees can sue for alleged violations of plan that creates “a substantial probability that death or serious physical harm could result”
- ▶ Amendment proposes that employee must first give 30 days’ notice to employer to provide opportunity to correct the violation
- ▶ Compensatory and liquidated damages, among other relief, available in cases of discrimination/retaliation



# Workplace Safety Committees

- ▶ NY Labor Law § 27-d
- ▶ Applies to private employers with at least 10 employees in New York
- ▶ Covered employers must “permit” employees “to establish and administer a joint labor-management workplace safety committee”
- ▶ Effective November 1, 2021

# Committee Composition

- ▶ No specific number, but at least 2/3 of committee must be non-supervisory employees
- ▶ Each committee must be co-chaired by one representative each of the employer and the non-supervisory employees
- ▶ Not required to have more than one WSC per worksite

*“No employer shall interfere with the selection of employees who shall serve on such committee or who serve as the workplace safety designee or with such employees’ performance of the duties authorized under [§ 27-d].”*

# Committee Activities

- ▶ Raise health and safety concerns, hazards, complaints, and violations to which the employer must respond
- ▶ Review any policy put in place in the workplace required by the NY Labor Law ~~or the workers' compensation law~~ relating to occupational safety and health and provide feedback to such policy in a manner consistent with any provision of law
- ▶ Review the adoption of any policy in the workplace in response to any health or safety law, ordinance, rule, regulation, executive order, or other related directive
- ▶ 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
- ▶ Regularly schedule a meeting during work hours at least once a quarter that shall last no longer than two hours

# Paid Training

“Employers shall permit safety committee designees to attend a training **of no longer than four hours**, 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.”



# Retaliation

- ▶ “Any employee who participates in the activities or establishment of a workplace safety committee shall not be subject to retaliation for any actions taken pursuant to their participation.”
- ▶ Compensatory and liquidated damages available, along with other remedies

# Collective Bargaining

- ▶ Union can waive the employees' rights under § 27-d
- ▶ Absent express waiver, the law can't be read to limit an employee's rights under a collective bargaining agreement



# Guidance and Regulations

- ▶ NYS DOL likely to issue more than just model standards
- ▶ Regulations required for application of workplace safety committee provisions
- ▶ Timing and format unknown

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# Questions?



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