

May 11, 2021

New York Passes 'HERO' Act Mandating Workplace Safety Plan for Airborne Infectious Diseases

On May 5 Governor Cuomo signed the New York Health and Essential Rights Act (the HERO Act) requiring all New York employers to adopt mandatory workplace standards to protect employees from airborne infectious diseases. The HERO Act amends the New York Labor Law by adding two new sections. Section 1 requires all employers to implement model safety plans and prohibits discrimination and/or retaliation against employees who exercise their rights under the Act. Section 2 requires employers with 10 employees or more to establish a joint labor-management workplace safety committee.

Section 1 – Model Safety Plans

Section 1 applies to all employers, except state or governmental agency employers, and covers any employee providing services to such an employer, regardless of immigration status, including, but not limited to, part-time workers, independent contractors, and domestic workers. Section 1 becomes effective on June 4.

Adoption of the Model or Individualized Plan

Section 1 requires that the Commissioner of the Department of Labor, in consultation with the NY Department of Health, create a model airborne infectious disease prevention plan for all worksites, differentiated by industry, and to establish minimum requirements for preventing exposure to airborne infectious diseases in the workplace. The plan must address the following:

- employee health screenings;
- face coverings;
- personal protective equipment (PPE) applicable to each industry at the employer's expense;
- workplace hand hygiene stations, including ensuring employees receive adequate break time to wash their hands as needed;
- regular cleaning and disinfecting of shared equipment and frequently touched surfaces;
- effective social distancing for employees and third parties;
- compliance with mandatory and precautionary orders of isolation and/or quarantine protocols;
- compliance with applicable engineering controls relating to airflow, exhaust, etc.;
- designation of management employees to enforce the exposure plan;
- compliance with any applicable laws, regulations, standards, and other guidance;
- verbal review of the plan/standard and other applicable employer policies; and
- anti-retaliation provisions.

Every employer must either adopt the model plan or develop its own plan that meets or exceeds the requirements of the HERO Act and the model plan. If an employer develops its own plan, it must do so pursuant to an agreement with its employees' union representative, or in the case of a non-union workforce, "meaningful participation" from non-management employees for all aspects of the plan. Such plan must also be tailored to the employer's specific industry and worksites.

Employee Notice

Employers must provide a copy of their plan to all employees in English and each employee's identified primary language (to the extent the model document is available in the employee's primary language) upon reopening of their business as a result of closure from an airborne infectious disease, or upon the effective date of the HERO Act, the date of hire for new employees, or upon request by employees. Employers must also post a copy of the plan in a visible place at each worksite and include the plan in any employee handbook.

Anti-Retaliation Provisions

The HERO Act prohibits employers from retaliating against employees who: (1) exercise their rights under the HERO Act or the plan; (2) report violations of the HERO Act and/or plan or any concerns related to the plan to any government authority; or (3) refuse to work when they reasonably believe, in good faith, that the work exposes them to an unreasonable risk of an airborne infectious disease because the working conditions are inconsistent with the HERO Act.

Penalties

The Commissioner may assess a penalty of \$50 per day for employers that do not have a plan and may fine employers no less than \$1,000 and not in excess of \$10,000 for not following a plan, with enhanced penalties for repeated violations. The HERO Act also permits employees to seek injunctive relief and allows courts to award costs, attorneys' fees, and liquidated damages up to \$20,000.

Section 2 – Workplace Safety Committee

Section 2, which becomes effective November 1, requires employers with 10 or more employees to establish a joint labor-management workplace safety committee. The workplace safety committee must be composed of employee and employer designees, and must be comprised of at least two-thirds non-supervisory personnel. The committee must be co-chaired by an employer representative and a non-supervisory employee. Where there is a collective bargaining agreement in force, the union representative is responsible for selecting the non-supervisory employees to serve on the committee. If there are geographically distinct worksites, multiple committees may need to be formed. Employers must not interfere with the selection of employee representatives.

Responsibilities of the Committee

The HERO Act authorizes the following non-exhaustive tasks of the committee: (1) raise health and safety concerns to which the employer *must* respond; (2) review the health and safety plan for compliance with the HERO Act; (3) review the adoption of any policy responsive to the passage of any federal, state, or local law regarding health and safety concerns; (4) participate in any site visit by any government agency responsible for enforcing health and safety standards consistent with the HERO Act; (5) review reports filed by the employer related to health and safety in the workplace; and (6) schedule meetings at least once per quarter during work hours.

Employers must also permit committee members to attend trainings—without any loss of pay—on the function of worker safety committees, any rights under the HERO Act, or an introduction to occupational safety and health. Finally, Section 2 also prohibits retaliation against any committee members for their participation. Any violation of this section will be subject to the penalties set forth in Section 1.

Start Preparing Now

Upon signing this bill into law, Governor Cuomo issued a memorandum stating that he had "secured agreement with the Legislature to make technical changes to the bill, including giving the department of labor 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." Although the Commissioner is currently tasked with developing the model plan, employers should review their current return-to-work and health and safety policies **now**, and consider other measures they will need to implement to comply with this new law.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our [COVID-19 Resource Center](#).

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

Authors



Daniel L. Schwartz

Partner

Stamford, CT | (203) 977-7536

New York, NY | (212) 297-5800

dlschwartz@daypitney.com



Francine Esposito

Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com



Glenn W. Dowd

Partner

Hartford, CT | (860) 275-0570

gwdowd@daypitney.com



Heather Weine Brochin

Partner

Parsippany, NJ | (973) 966-8199

New York, NY | (212)-297-5800

hbrochin@daypitney.com



Rachel A. Gonzalez

Partner

Parsippany, NJ | (973) 966-8201

New York, NY | (212) 297-5800

rgonzalez@daypitney.com



Theresa A. Kelly

Partner

Parsippany, NJ | (973) 966-8168

tkelly@daypitney.com