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NY Designates COVID-19 a Highly Contagious Communicable Disease, Triggering HERO Act Workplace Safety Plans

As we previously reported, here, here and here, New York enacted the Health and Essential Rights Act (HERO Act) this spring in response to the COVID-19 pandemic. The HERO Act establishes mandatory workplace safety standards and requires employers to adopt a written plan to protect against airborne infectious diseases. New York passed the HERO Act on May 5, amended it on June 11 and issued the Airborne Infectious Disease Exposure Prevention Standard and Model Airborne Infectious Disease Exposure Prevention plans on July 6. The New York Commissioner of Health on September 6 designated COVID-19 a highly contagious communicable disease that presents a serious risk of harm to the public health under the HERO Act.

No later than August 5, New York employers were required to adopt an airborne infectious disease exposure prevention plan. The plan must address a number of safety measures, including employee health screenings, face coverings, social distancing, workplace hygiene, workplace cleaning protocols, quarantine protocols and building airflow technology. Employers were also required to post the plan in each worksite and provide copies to all employees within 30 days of adopting the plan, and they must provide copies to all new employees upon hire. The New York Department of Labor's (NY DOL) model plans can be found here. Beginning November 1, New York employers with 10 or more employees must allow workers to establish and administer a joint labor-management workplace safety committee if the workers choose to do so. The NY DOL recently stated that it will issue regulations regarding such workplace safety committee requirements.

This past week, the NY DOL published FAQs addressing a number of questions that have arisen since the HERO Act's enactment. The FAQs explain that the HERO Act applies to all nongovernmental industries across New York except for those that are covered by a temporary or permanent OSHA standard on COVID-19 or airborne infectious diseases generally. As of now, only healthcare is covered by such an OSHA standard. The HERO Act does not apply to telework or any worksite that the employer does not have the authority to control.

The designation of COVID-19 as a highly contagious communicable disease requires all New York employers with at least one employee to implement their workplace safety plan immediately. New York employers must take the following steps: immediately review the worksite's exposure prevention plan and update it, if necessary, to ensure that it incorporates current information, guidance and any requirements issued by federal, state or local governments; finalize and promptly activate the plan; conduct a verbal review of the plan with employees; provide each employee with a copy of the plan in English or the employee's primary language; and post the plan at the worksite so it is accessible to employees during all work shifts.

According to the NY DOL's FAQs, the verbal review of the exposure prevention plan that employers are required to conduct with their employees need not be in person. Employers should conduct the verbal review in a manner most suitable for the prevention of an airborne infectious disease, including via audio or videoconference technology when applicable.

While the NY DOL's FAQs do not address face coverings explicitly, the designation of COVID-19 as a highly contagious communicable disease generally requires New York employees to wear face coverings in the workplace. The NY DOL's model plans, which employers now must implement, state that employees should wear face coverings in the workplace when they cannot maintain at least six feet of physical distance from others. The model plan provides no exceptions for employees who have been vaccinated, and the NY DOL did not address vaccination in its FAQs.

In the FAQs, the NY DOL clarified that employers are required to have an airborne infectious disease plan in place for all work locations over which they have the ability to exercise control, including a worksite with independent contractors.

Employers are required to distribute the written plan to independent contractors, individuals working for staffing agencies and others within the HERO Act's broad definition of "employees" who would not traditionally be defined as employees. Employers also are required to add the exposure prevention plan to their employee handbook, if they have one.

The NY DOL published template plans for various industries, including agriculture, construction, manufacturing and retail. In the FAQs, the NY DOL stated that, rather than any of the industry-specific templates, the general Model Airborne Infectious Disease Exposure Prevention Plan is best suited to an office environment, but it advised that employers should ensure that controls and other aspects of the plan address the unique circumstances and conditions of particular worksites. If an employer develops an alternative plan for its worksite, the alternative plan does not need to be approved by the NY DOL before it is adopted. However, employers must ensure that their alternative plan equals or exceeds the minimum standards provided by the NY DOL's model standard.

Employers that fail to adopt an airborne infectious disease exposure prevention plan can incur civil penalties of at least $50 per day. Employers that fail to abide by plans that they have adopted can incur civil penalties of between $1,000 and $10,000. Penalties may increase for repeat violations. In addition, the HERO Act permits employees to bring civil actions against employers that violate their safety plans. Such employees may obtain injunctive relief, liquidated damages of no greater than $20,000, and attorneys' fees and costs.

New York employers should immediately review their airborne infectious disease exposure prevention plan and update it, if necessary, conduct a verbal review of the plan with employees, ensure that each employee has been provided a copy of the plan, and ensure that the plan has been posted at each worksite. Employers also should ensure that they comply with the plan going forward, including by designating a supervisory employee who will be responsible for compliance. Any employer that has not already adopted a workplace safety plan should do so as soon as possible.

Any questions or concerns regarding an employer's obligations under the HERO Act should be addressed with legal counsel.

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.

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