July 8, 2021

New York Issues HERO Act Airborne Infectious Disease Exposure Prevention Standard and Model Plan

As we previously reported, here and here, Governor Cuomo signed the New York Health and Essential Rights Act (the HERO Act) on May 5, in response to the COVID-19 pandemic. The HERO Act establishes mandatory workplace safety standards, and requires employers to implement a written plan to protect against airborne infectious diseases. On July 6, the New York State Department of Labor, in consultation with New York State Department of Health (NYSDOH), issued the Airborne Infectious Disease Exposure Prevention Standard (the Standard) and Model Airborne Infectious Disease Exposure Prevention Plans (the Model Plans). Employers have until **August 5** to either adopt the general Model Plan or one of the industry-specific Model Plans, or establish their own plan which meets or exceeds the requirements of the Model Plan. Once implemented, the plan must be followed if and when the NYSDOH designates an airborne infectious disease as a highly contagious communicable disease that presents a serious risk of harm to the public health, which it has not done as of the date of this article. As an additional reminder, the HERO Act requires that employers with 10 or more employees establish workplace safety committees by **November 1**.

The Airborne Infectious Disease Exposure Prevention Standard

The Standard outlines the HERO Act's requirements. It sets forth (1) generally to whom the HERO Act applies; (2) requirements for a written plan; (3) types of exposure controls employers should consider; and (4) a reaffirmation of the HERO Act's anti-retaliation provisions. Notably, the Standard states that if the NYSDOH announces the outbreak of a highly contagious communicable disease, an employer should conduct a "verbal review" of its policies, the plan it implements, and employees' rights under the HERO Act. The Standard also requires that during the outbreak of a highly contagious communicable disease, employers must (1) assign enforcement responsibilities to ensure the plan adopted by the employer is enforced; (2) monitor and maintain exposure controls; and (3) regularly check for updated guidance from the NYSDOH.

The Model Plan

The Model Plan mirrors many of the HERO Act's requirements and breaks them down into seven sections: (1) Responsibilities; (2) Exposure Controls During a Designated Outbreak; (3) Housekeeping During a Designated Outbreak; (4) Infection Response During a Designated Outbreak; (5) Training and Information During a Designated Outbreak; (6) Plan Evaluations During a Designated Outbreak; and (7) Retaliation Protections and Reporting of Any Violations.

The Model Plan requires that employers add certain information to the template. For example, employers must identify (1) the worksites to which the Model Plan applies; (2) the supervisory employees responsible for enforcement of the Model Plan; (3) the engineering and administrative controls utilized and their location; (4) any PPE required; and (5) the individual responsible for training and verbally informing employees of the existence and location of the Model Plan. In addition, the Model Plan includes a section that requires employers to review and revise the plan periodically, upon activation, and "as often as needed" to keep up with changing requirements. The Model Plan also has a section where employers must identify, each time the Model Plan is reviewed and revised, the date, the participants, the revisions, and the individuals who approved the revisions.

As anticipated, the NYSDOH has also issued "industry-specific" Model Plans that can be used in lieu of the general Model Plan. These Model Plans closely resemble the general Model Plan, with some differing guidelines for exposure controls depending on the industry. The NYSDOH has issued industry-specific plans in the following sectors:

- Agriculture
- Construction
- Delivery Services
- Domestic Workers
- Emergency Response
- Food Services
- Manufacturing and Industry
- Personal Services
- Private Education
- Private Transportation
- Retail

These plans are located here.

Next Steps

Now that the NYSDOH has issued the Model Plan and industry-specific Model Plans, employers have 30 days (until August 5) to adopt one of these options, or to create an alternative plan that meets or exceeds the HERO Act's requirements and the standards set forth in the Model Plan. Employers must also distribute the plan they implement to all employees by September 5 in English and in each employee's identified primary language (the NYSDOH currently offers no translations of the Model Plan, but we expect that to be updated in the near future). Employers who are unsure of whether to adopt the general Model Plan, adopt an industry-specific Model Plan, or develop their own plan should consider adopting the Model Plan as a preliminary step and, if necessary, revising and implementing a new plan as needed.

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



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