

Employee Benefit ■ Plan Review

New York's HERO Act: What Employers Need to Know and Do Right Now

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New York recently amended its Health and Essential Rights Act (“HERO Act”) and published its “Model Airborne Infectious Disease Exposure Prevention Plan.” While the Model Plan specifies that there is currently no airborne infectious disease outbreak, that has changed since the HERO Act was amended. The HERO Act requires New York employers to take steps now to comply with the statute.

“Airborne infectious disease” is defined as any infectious, viral, bacterial, or fungal disease that is transmissible through the air in the form of aerosol particles or droplets and is designated by the Commissioner of Health as a highly communicable disease that presents a serious risk of harm to the public health. While not originally designated as such, COVID-19 was recently designated a highly communicable disease that presents a serious risk of harm to the public health. Employers need to take steps now to comply with the HERO Act.

WHAT EMPLOYERS NEED TO KNOW

The HERO Act has broad definitions of “employer,” “employee,” and “work site.” “Employer” includes any person, entity, business, corporation, partnership, limited liability company, or association employing, hiring, or paying for the labor of any individual. “Employee” means any person providing labor

or services for remuneration within the state and without regard to immigration status. The definition includes independent contractors. A “work site” means any physical space, including vehicles, where work is performed and the employer has the ability to exercise control. A work site includes employer-provided housing and transportation. Thankfully, employees’ own homes and vehicles are not covered.

The HERO Act prohibits employers from retaliating or taking adverse action against any employee who exercises rights under the statute; reports violations of the statute; reports airborne infectious disease exposure; or refuses to work where the employee reasonably believes, in good faith, that such work exposes employees to an airborne infectious disease due to working conditions inconsistent with the law. The law, however, requires the employee to first notify the employer of the problem and then give the employer an opportunity to cure it.

Finally, employers must designate one or more supervisory employees to ensure compliance with the HERO Act as well as other health and safety statutes. It also permits employees to initiate and administer a joint labor-management workplace safety committee and requires employers to pay them for up to two hours of meetings per quarter and for training of up to four hours. This is limited to

one such committee per work site and will include any pre-established committees. Two-thirds of the committee should be non-supervisory employees and selected by non-supervisory employees. The committee can raise health and safety concerns, review policies established to comply with the HERO Act, review any occupational safety and health policies, participate in site visits by the government agencies enforcing safety and health standards, and review any reports filed by the employer related to safety and health.

WHAT EMPLOYERS NEED TO DO NOW

Unless you are a state agency or are covered by an Occupational Safety and Health Administration standard setting forth applicable standards regarding COVID-19 and/or airborne infectious agents and diseases, you should keep reading. The HERO Act required employers to establish an Airborne Infectious Disease Prevention Plan by adopting the model plan relevant to its industry or by establishing an alternative plan that equals or exceeds the minimum standards set forth in the model plan by August 5, 2021.¹ If an employer adopts an alternative plan, it must negotiate it with any collective bargaining agent of its employees or with meaningful participation of the employees if they are not represented. In other words, it may be best to adopt the model plan.

Within 30 days of the plan being established, it must be provided (and be available upon request) to employees in their primary language (if the commissioner's model plan is not provided in the employee's primary language, then an English version is acceptable). If the workplace is closed, the plan must be provided within 15

days of reopening and provided to new employees upon hire. The plan must also be posted prominently at each work site other than vehicles and must be incorporated into Employee Handbooks. Finally, employers should review the plan with employees through meetings, either live, with appropriate safeguards in place, or virtually.

Employers should document all efforts to comply with the HERO Act as follows:

1. Establish/adopt the Model Plan unless not required to do so.
2. Publish it to employees and obtain acknowledgment of receipt either in writing or electronically.
3. Post it prominently at each work site and add it to the Employee Handbook.
4. Review the plan with employees and maintain an attendance log.
5. Incorporate the plan review into new employee orientation.
6. Ensure all independent contractors are included in these efforts.
7. Establish a safety committee.
8. Ensure employees have a clear understanding as to whom any violations are to be reported and emphasize the anti-retaliation provisions of the plan.
9. Designate someone in the organization to maintain compliance with the HERO Act moving forward.

EMPLOYERS ALSO NEED TO TAKE STEPS GIVEN THE RECENT DESIGNATION OF COVID-19 AS SERIOUS RISK

While at the time this article was written, COVID-19 was not designated as a "highly communicable disease that presents a serious risk of harm to the public health," it was so designated on September 6, 2021,

as this article was set for publication. As a result, the New York State Department of Labor's guidance states: [w]hen there is a designation that a highly contagious communicable disease presents a serious risk of harm to the public health, each employer must:

- Immediately review the worksite's exposure prevention plan and update the plan, if necessary, to ensure that it incorporates current information, guidance, and mandatory requirements issued by federal, state, or local governments related to the infectious agent of concern;
- Finalize and promptly activate the worksite exposure prevention plan;
- Provide a verbal review of the plan with their employees;
- Provide each employee with a copy of the exposure prevention plan in English or in the language identified as the primary language of such employees, if available. The plan must also be posted at the worksite and be accessible to employees during all work shifts.²

Thus, employers must take immediate steps to comply with the HERO Act given this designation. 🌟

NOTES

1. The industry-specific model plans can be found here: <https://dol.ny.gov/system/files/documents/2021/07/model-airborne-infectious-disease-exposure-prevention-plan-p765.pdf>.
2. See THE NY HERO ACT Information & FAQs, available at <https://dol.ny.gov/system/files/documents/2021/09/heroact-factsheet-9-9-21.pdf>.

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