

Publications

New York Employers Must Adopt Airborne Infectious Disease Prevention Plans by August 5, 2021

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In May 2021, New York enacted its Health and Essential Rights Act (HERO Act). The law mandates extensive workplace health and safety protections in response to the current pandemic and to protect against future airborne infectious disease outbreaks. The HERO Act requires employers to adopt an airborne infectious disease prevention plan and to permit their employees to create a joint labor-management workplace safety committee. Contact your Vorys lawyer if you have questions about the Act's requirement, including assistance with adopting your workplace plan.

Airborne Infectious Disease Exposure Prevention Plan

Under the HERO Act, the New York State Department of Labor developed a new Airborne Infectious Disease Exposure Prevention Standard, a Model Airborne Infectious Disease Exposure Prevention Plan, and 11 industry-specific model plans (including plans for manufacturing and retail industries) for the prevention of airborne infectious diseases. Employers can adopt the applicable model plan or establish an alternative plan that meets or exceeds the standard's minimum requirements. If an employer adopts its own plan, the plan must be developed in consultation with any applicable collective bargaining representative or with "meaningful" employee participation if non-unionized. The plan also must be "tailored and specific to hazards in the specific industry and work sites" of the employer.

Important Dates

An employer's plan goes into effect when ordered by the New York State Commissioner of Health. While employers must *adopt* their health and safety plan by **August 5, 2021**, the plan does not yet have to be implemented.

Employers have until **September 4, 2021**, or 30 days after their plan is adopted, to communicate the standard to employees.

Plan Requirements

The model plans include procedures relating to: employee health screenings; face coverings; physical distancing; hand hygiene; cleaning and disinfection; personal protective equipment; engineering controls (proper airflow and ventilation); administrative controls (policies and work rules to prevent exposure); quarantine, isolation, and return-to-work procedures; employee training requirements; and continued review and revisions to the plan as needed to ensure it is up-to-date with new requirements. Employers will be familiar with most of these as they mirror existing COVID-19-related procedures.

Notice Requirements

The HERO Act imposes numerous notice requirements on employers:

- The plan is provided to every employee, in writing in English and in the primary language of the employee if not English by September 4, 2021.
- The plan is provided to every new employee upon hiring.
- The plan is provided to every employee within 15 days of reopening after the employer is closed due to an airborne infectious disease.
- The plan is posted in a “prominent and visible” location at each worksite.
- The plan is included in any employee handbook the employer provides to employees.
- Employers must make their plan available, upon request, to all employees, employee representatives, collective bargaining representatives, independent contractors, the NYDOL and NY Department of Health.

Employers also must “conduct a verbal review” of employer policies, employee rights under the HERO Act and its regulations, and the employer’s exposure prevention plan. The verbal review must be provided in a manner most suitable for the prevention of an airborne infectious disease (either in person in a well-ventilated environment with appropriate face masks or PPE, or via audio or video conference technology).

Anti-Retaliation

The HERO Act prohibits employers from discriminating, retaliating or taking adverse action against any employee for exercising their rights under the Act or the employer’s plan; for reporting violations of the Act or the employer’s plan; and for refusing to work where an employee reasonably believes in good faith that such work exposes the employee, other workers, or the public to an unreasonable risk of exposure (with some exceptions).

Penalties for Non-Compliance

The New York Labor Commissioner may assess a penalty of not less than \$50/day on employers failing to adopt a plan, and from \$1,000 to \$10,000 for failing to comply with a plan once adopted. Employees may seek injunctive relief, and the court may award costs, reasonable attorneys' fees, and liquidated damages up to \$20,000.

Joint Labor-Management Workplace Safety Committee

The HERO Act requires employers with 10 or more employees to permit employees to create a joint labor-management workplace safety committee. This requirement becomes effective **November 1, 2021**.

The committee must be comprised of employer and employee designees, and at least two-thirds non-supervisory employees. An employer representative and employee representative co-chair the committee. Employers are prohibited from interfering with the selection of employees who serve on the committee.

The committee is authorized to: (1) raise health and safety concerns, complaints, and violations to which the employer must respond; (2) review and provide feedback on any workplace health and safety policy required under the HERO Act or the workers' compensation law; (3) review any workplace policy adopted in response to any health or safety law, ordinance, rule, regulation, executive order, or other related directive; (4) participate in any site visit by any governmental entity responsible for enforcing safety and health standards unless prohibited by law; (5) review any report filed by the employer related to the health and safety of the workplace in a manner consistent with any provision of law; and (6) schedule a meeting during work hours at least once per quarter. Employers must permit committee members to attend paid training (up to 4 hours) on the function of the committee, rights under the HERO Act, and an introduction to occupational safety and health.

Employers may not retaliate against any employee who participates in the activities or establishment of a committee.