

THE HERO ACT BECOMES LAW IN NEW YORK: EMPLOYERS MUST NOW ADOPT AIRBORNE INFECTIOUS DISEASE PREVENTION PLANS AND ALLOW EMPLOYEES TO FORM JOINT LABOR- MANAGEMENT WORKPLACE SAFETY COMMITTEES

Hodgson Russ Labor and Employment Alert
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On May 5, 2021, Governor Cuomo signed into law the New York Health and Essential Rights Act (“HERO Act”), which adds two new sections to the New York Labor Law:

- Section 218-b, which addresses the “Prevention of Occupational Exposure to an Airborne Infectious Disease” and becomes effective June 4, 2021; and
- Section 27-d, which addresses “Workplace Safety Committees” and becomes effective November 1, 2021.

These new requirements do not apply to the state, any political subdivision of the state, any public authority, or any other governmental agency or instrumentality.

Section 218-b: Prevention of Occupational Exposure to an Airborne Infectious Disease

The HERO Act requires the Department of Labor (“DOL”), in consultation with the Department of Health, to create and publish model airborne infectious disease exposure prevention standards for all worksites, differentiated by industry. Notably, these standards will be targeted towards preventing any airborne infectious disease and are not strictly limited to COVID-19.

In preparing the model standards, DOL must “explicitly specify and distinguish the extent to which the provisions are applicable for different levels of airborne infectious disease exposure, and...take into account whether a state of emergency has been declared.” At a minimum, DOL’s model plan must establish procedures and methods for the following:

- Employee health screenings

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- Face coverings
- Required personal protective equipment
- Accessible workplace hand hygiene stations
- Regular cleaning and disinfecting of shared equipment
- Effective social distancing measures
- Compliance with mandatory or precautionary orders of isolation or quarantine
- Designation of one or more supervisory employees to enforce compliance with the plan
- Compliance with any applicable laws, rules, regulations, standards, or guidance
- Verbal review of infectious disease standard, employer policies, and employee rights

All private sector employers must establish an airborne infectious disease exposure prevention plan, either by adopting the model plan published by DOL for their industry or by establishing an alternative plan that equals or exceeds the minimum standards provided by the model plan standard. Additionally, if an employer chooses not to adopt the model plan, it must develop its plan pursuant to an agreement with the relevant union or, if there is no relevant union, with “**meaningful participation of employees...for all aspects of the plan**”.

Once adopted, each employer must post its plan in a visible and prominent location within the worksite **and** include the plan within any handbook it provides to employees. Employers must also distribute a written copy of the plan to each employee, in English as well as the employee’s primary language if other than English. This must initially be done by the effective date of the requirement (June 4, 2021) or, for employees hired after that date, at the time of hire. The plan must also be distributed when the employer reopens after a period of closure due to an airborne infectious disease.

It is not clear what employers should do if DOL does not issue the model plans by June 4. When Governor Cuomo signed the HERO Act, he indicated that he had secured an agreement with the Legislature to amend the Act to, among other things, provide DOL and employers with “a specific timeline and instructions for implementing the changes.” No amendment has been proposed in the Legislature as of the date of this writing, however, and it is not known whether or when the Act will be amended. So until the Act is amended by the Legislature, employers should work toward coming into compliance as of the Act’s current deadlines.

Section 218-b also prohibits employers from taking adverse action against any employee for:

- Exercising their rights under, or reporting violations of, Section 218-b or the applicable airborne infectious disease exposure prevention plan;
- Reporting an airborne infectious disease exposure concern to any state, local, or federal government entity, public officer, or elected official; or
- Refusing to work where such employee reasonably believes, in good faith, that the work exposes him or her to an unreasonable risk of exposure to an airborne infectious disease due to the working conditions that are inconsistent with

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Section 218-b or the applicable airborne infectious disease exposure prevention plan, provided that the employer knew or should have known of such working conditions and failed to cure the issue.

DOL may assess penalties on any employer that violates the Act: (a) at least \$50 per day for failing to adopt a compliant plan; and (b) a fine of \$1,000 to \$10,000 for failing to comply with the plan. Employees may also bring a civil action against their employer for violations of Section 218-b. In addition to an order requiring an employer to comply with Section 218-b, a prevailing employee claim may recover his or her reasonable attorney's fees as well as liquidated damages of up to \$20,000.

Notably, Section 218-b defines the term "employee" to include independent contractors. This means that independent contractors must also receive a copy of the employer's airborne infectious disease exposure prevention plan, and are protected by the law's anti-retaliation rules and enforcement remedies.

Section 27-d: Workplace Safety Committees

The HERO Act requires that private employers with 10 or more employees allow employees to form joint labor-management workplace safety committees. These committees must be composed of both employees and employer designees, though at least two-thirds must be non-supervisory employees. The non-supervisory members must be selected by the relevant union or, if there is no union, by the employer's non-supervisory employees. Employers are prohibited from "interfering with the selection of employees [to] serve on such committees."

Where established, the committee must be authorized to perform certain tasks, including the following:

- Raise health and safety concerns, hazards, complaints and violations to the employer;
- Review any policy put in place required by the HERO Act;
- Review the adoption of any policy in the workplace in response to any health or safety law;
- Participate in any site visit by any governmental entity responsible for enforcing safety and health standards;
- Review any report filed by the employer related to the health and safety of the workplace;
- Regularly schedule a meeting during work hours at least once a quarter.

Employers are prohibited from retaliating against any employee for participating in a workplace safety committee. Employers must also provide paid leave for workplace safety committee members to attend training on the function of safety committees, rights established under the HERO Act, as well as "an introduction to occupational safety and health."

If you have questions or would like assistance in developing your airborne infectious disease exposure prevention plan, please contact [John Godwin](#) (716.848.1357), [Lura Bechtel](#) (416.595.2693), [Kinsey O'Brien](#) (716.848.1287), or any member of Hodgson Russ's [Labor and Employment Practice](#).