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New York's HERO Act requires new COVID-related workplace protections

On May 5, Governor Andrew Cuomo signed the New York Health and Essential Rights (HERO) Act into law. Effective June 4, the HERO Act will require New York employers to implement safety standards and a prevention plan to curb the spread of COVID-19 and other airborne infectious diseases in the workplace. In addition, it will require most businesses to permit the creation of joint employer-employee workplace safety committees.

Background

New York employers are already required to comply with a series of executive orders issued by Governor Cuomo and the [New York Forward](#) industry-specific guidance and reopening guidelines to prevent the spread of COVID-19. Even as both New York and the Centers for Disease Control and Prevention (CDC) appear to be easing COVID-19 restrictions generally, state efforts to ramp up workplace protections are continuing.

On May 5, New York enacted the New York Health and Essential Rights (HERO) Act ([S.1034B/A.2681B](#)) imposing new workplace health and safety obligations on private employers not just for COVID-19, but for all airborne infectious diseases (such as COVID-19, the flu, and other bacterial, viral, and fungal diseases). It does not, however, cover the state, any political subdivision of the state, a public authority, any other governmental agency or instrumentality or their employees.

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COVID-19 Compliance check-in

Buck's latest version of the [COVID-19 Compliance check-in](#) is updated to reflect the retirement, health, labor and employment issues facing employers now. Review the checklist to help your team manage priorities and determine next steps.

HERO Act

The HERO Act amends the New York Labor Law by adding two sections aimed at protecting employees from COVID-related and other potential health hazards in the workplace. Section one of the bill requires employers to implement certain health and safety standards and to adopt a plan to prevent the workplace spread of COVID-19 and other airborne infectious diseases, effective June 4, 2021. Section two requires employers with 10 or more employees to allow the creation of joint employer-employee workplace safety committees to evaluate workplace health and safety protocols, effective November 1, 2021.

According to Governor Cuomo’s approval memo, the state legislature has agreed to make technical changes to the bill including giving the NY Department of Labor (NYDOL) and employers “more specific instructions in developing and implementing the workplace standards, including a clear timeline and providing for an immediate requirement for employers to cure violations in order to better protect the safety of workers and limit lengthy court litigation to those private rights of action, in limited circumstances where employers are acting in bad faith and failing to cure deficiencies.”

Coverage

The HERO Act covers all private entities or businesses in New York that employ, hire, or pay for the labor of any individual without regard to their immigration status. Coverage extends, among others, to employees, part-time workers, independent contractors, temporary and seasonal workers, as well as to individuals working for staffing agencies, contractors or subcontractors on behalf of an employer at a work site. The Act applies to any physical space, including vehicles, used as a location where work is performed as well as employer-provided housing and transportation.

Airborne infectious disease safety standard

The HERO Act requires the NYDOL, in consultation with the state Department of Health, to create and publish, in both English and Spanish, a model airborne infectious disease safety standard. For these purposes, the Act defines airborne infectious disease 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 Health Commissioner as a highly contagious communicable disease that presents a serious risk of harm to the public health.

Among other things, the safety standard will establish minimum requirements for preventing workplace exposure to airborne infectious diseases. Requirements will vary among industries for employee health screenings, face coverings and other PPE, hand hygiene, cleaning and disinfecting, social distancing, and engineering controls.

Required prevention plan

The HERO Act also requires covered employers to establish an airborne infectious disease exposure prevention plan — either by adopting the model standard relevant to their industry or implementing their own plan that meets or exceeds state standards. Employers will also be required to comply with

certain notice and posting requirements. For example, employers that are permitted to operate on June 4 must provide the prevention plan to all employees by that date. They must also provide the plan to all employees on reopening after closing due to airborne infectious disease and at hire.

Workplace safety committees

Covered employers must also permit employees to establish and administer a joint labor-management workplace safety committee co-chaired by employee and employer representatives. Each workplace safety committee and workplace safety designee will be authorized to:

- Raise health and safety concerns, hazards, complaints and violations
- Review any workplace policy required by the HERO Act or the workers' compensation law
- Review the adoption of any workplace policy in response to any health or safety law, regulation, executive order, or other directive
- Participate in any site visit by a governmental entity enforcing safety and health standards
- Review any employer report related to workplace health and safety
- Regularly meet at least once a quarter during work hours
- Attend training related to workplace safety and health without a loss of pay

Employers are prohibited from discriminating or retaliating against any employee who participates in the activities or establishment of a workplace safety committee, reports violations of the Act or concerns about exposure to airborne infectious disease or refuses to work due to a good faith belief that work exposes them or others to an unreasonable risk of such exposure.

Penalties for noncompliance

Penalties for noncompliance may include:

- A fine of not less than \$50 per day for failure to implement a prevention plan and a fine of up to \$10,000 for failure to comply with an adopted plan
- For repeat violations within six years, a fine of not less than \$200 per day for failure to implement a prevention plan and a fine of up to \$20,000 for failure to comply with an adopted plan

In addition, employees may bring a civil action for injunctive relief, costs, attorneys' fees and liquidated damages, unless the employer proves a good faith basis to believe that its health and safety measures were in compliance.

In closing

New York employers should review their current return-to-work policies and any existing COVID-19 safety protocols and prevention plans and begin to consider what measures they may need to take to comply with the HERO Act when it takes effect on June 4.

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