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NY HERO Act update: Workplace exposure prevention plans must remain in effect through October 31

New York's Health and Essential Rights (HERO) Act required private employers to adopt workplace exposure prevention plans to curb the workplace spread of COVID-19 and other airborne infectious diseases. The New York State Health Commissioner recently extended designation of COVID-19 as a serious public health risk, obligating employers to maintain activated plans through October.

Background

Earlier this year, New York enacted the Health and Essential Rights (HERO) Act imposing new workplace health and safety obligations on private employers. Among other things, the HERO Act required New York employers to adopt a prevention plan to curb the workplace spread of COVID-19 and other airborne infectious diseases by August 5 and to distribute the plan to workers by September 4. However, plans did not have to be put in effect unless and until an airborne infectious disease was officially designated as a serious public health risk. (See our [May 18, 2021 FYI](#).)

In July, the New York State Department of Labor (NYSDOL) released its general Airborne Infectious Disease Exposure Prevention [Standard](#) and published on its website both a Model Airborne Infectious Disease Exposure Prevention [Plan](#) and industry-specific templates for: agriculture, construction, delivery services, domestic services, emergency response, food services, manufacturing and industry, personal services, private education, private transportation, and retail. Employers had the option to adopt either the NYSDOL model plan or their own prevention plan for New York worksites, provided it was at least as comprehensive as the model plan.

Workplace exposure prevention plans

On September 6, the New York State Health Commissioner [designated](#) COVID-19 as a serious public health risk in the state, based on the "substantial" or "high" level of transmission identified by the

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Authors

Nancy Vary, JD
Abe Dubin, JD

Centers for Disease Control and Prevention (CDC). Initially slated to remain in effect until September 30, the designation has been continued by the Health Commissioner through October 31 requiring workplace prevention plans to remain in effect. The Commissioner will determine whether to continue the designation at the end of this month.

Employer obligations

The airborne infectious disease designation triggered employer obligations to activate compliant workplace exposure prevention plans and to implement safety controls required by the HERO Act, including the following:

- Exposure controls (such as employee health screening, face covering, and physical distancing)
- Engineering controls, such as increased mechanical and natural ventilation
- Administrative controls (such as employee training, hand hygiene, cleaning and disinfecting)
- Required use of personal protective equipment (PPE)

While the designation remains in effect, the General Standard requires employers to ensure that their exposure prevention plan is followed by:

- Assigning enforcement responsibilities to one or more supervisory employees and ensuring that adequate enforcement of the worksite's exposure prevention plan takes place
- Monitoring and maintaining exposure controls
- Regularly checking for updated information and guidance provided by State Department of Health and the CDC concerning the airborne infectious disease and updating the exposure prevention plan, when necessary, to reflect their recommended control measures

Penalties for noncompliance

Employers that have not yet adopted and distributed a prevention plan should do so quickly to avoid potential enforcement actions and penalties. Employers face civil penalties of \$50 per day for failure to adopt or implement an appropriate prevention plan and up to \$10,000 for failure to comply with an adopted and implemented plan. Employees may also bring a private right of action against employers for alleged violations of their prevention plan or retaliation for raising workplace safety issues.

In closing

The New York Health Commissioner's continued designation of COVID-19 as a serious public health risk requires employers to keep their HERO Act workplace exposure prevention plans activated until at least October 31, 2021. Employers should review their plans and safety protocols and take any necessary steps to ensure compliance.

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