

Employment & Labor Law Alert

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NY HERO Act: New York Enacts First Workplace Law to Prevent Airborne Infectious Diseases

New York has enacted the first legislation of its kind in the nation that requires employers to create an enforceable plan to prevent airborne infectious diseases in the workplace. Effective June 4, the New York Health and Essential Rights Act, otherwise known as the NY HERO Act (Senate Bill 1034-A/Assembly Bill 2681-B), requires the development of model airborne infectious disease prevention standards, directs private-sector employers to adopt these standards or develop their own comprehensive airborne infectious disease exposure prevention plan, gives employees a voice in the development process, and establishes penalties for violations.

Key Takeaways

- The New York State Department of Labor (NYSDOL), together with the New York State Department of Health, must develop industry-specific model workplace standards with minimum requirements for preventing exposure to airborne infectious diseases no later than June 4.
- Private-sector employers must either adopt the appropriate NYSDOL model standards or develop their own standards that meet or exceed the model standards.
- Businesses permitted to operate as of June 4 (the effective date of the act) must provide their airborne infectious disease exposure prevention plan immediately. Employers must also give employees a copy of their plan upon reopening after an airborne infectious disease closure, must provide the plan to new employees upon hiring, must post the plan in a prominent location and must include it in the employee handbook, if the employer has one.



- Employers with at least 10 employees must permit the creation of a joint employer-employee workplace health and safety committee meeting specific requirements for composition, control and authority, as of Nov. 1.
- Employers that fail to comply with the NY HERO Act may be assessed fines by the state. Employees also have a private right of action under the act.
- Employers with unionized work sites have added requirements under the act. They may also negotiate a waiver of the act prevention plan requirements, but only through a provision in the collective bargaining agreement (CBA) that expressly references the NY HERO Act.

Model Standard Safety Measures

The NY HERO Act requires NYSDOL to develop industry-specific model workplace standards detailing, in both English and Spanish, the “minimum requirements for preventing exposure to airborne infectious diseases in the workplace” no later than June 4. In developing the standards, the NYSDOL must consider the risks presented by the work site, which is broadly defined to include employer-provided housing and transportation;

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specify the application of the standards for different levels of disease exposure; and consider scenarios in which a state of emergency may or may not be in effect.

The model standards must establish specific requirements for:

- Employee health screenings.
- Face coverings.
- Industry-applicable personal protective equipment (PPE).
- Accessible workplace hand hygiene stations and adequate break times to use hand-washing facilities as needed.
- Regular cleaning and disinfecting of shared equipment and frequently touched surfaces such as workstations, touchscreens, telephones, handrails and doorknobs, and surfaces in high-risk areas such as restrooms, breakrooms and vehicles.
- Effective social distancing policies for employees and customers, which may include posting signs, increasing physical space between workers, limiting customer capacity, implementing flexible work hours and establishing curbside pickup.
- Compliance with mandatory or precautionary quarantine orders issued to employees.
- Compliance with applicable requirements for proper air flow, exhaust ventilation, or other special design needs.
- Designation of one or more supervisors to enforce compliance with the airborne infectious disease exposure prevention plan and related federal, state or local guidance.
- Notice of the anti-retaliation provisions of the NY HERO Act.

Employer-Developed Standards

Employers can establish an airborne infectious disease exposure prevention plan either by adopting the NYSDOL model standard for their industry or by establishing an alternative plan that equals or exceeds the model plan's minimum standards and is appropriately tailored to the industry and work site hazards for the employer.

An employer with a workforce governed by one or more collective bargaining agreements must develop its standards under an agreement with its collective bargaining representative. Where no collective bargaining agreement governs, the employer must develop its plan

with "meaningful participation" of its employees, although what that means is not defined by the statute.

Employer-Employee Workplace Health and Safety Committee

Effective Nov. 1, the NY HERO Act also requires employers with at least 10 employees to permit the creation of a joint employer-employee workplace health and safety committee.

At least two-thirds of each workplace safety committee must be nonsupervisory employees, and the committee co-chairs must be a supervisory and a nonsupervisory employee. Where a collective bargaining agreement is in place, the collective bargaining representative will be responsible for selecting employees to serve as members of the committee.

Workplace safety committees and their members are authorized to:

- Raise health and safety concerns, hazards, complaints, and violations to the employer, to which the employer must respond.
- Review any policy put in place in the workplace required by any provision of the new law or any provision of the workers' compensation law, and provide feedback on these policies.
- Review the adoption of any workplace policy in response to any health or safety law, ordinance, rule, regulation, executive order or other related directive.
- Participate in any site visit by any governmental entity responsible for enforcing safety and health standards.
- No employee who participates in the workplace safety committee can be subjected to discrimination or retaliation for any committee activities.

Notice Requirements

Every employer must provide their airborne infectious disease exposure prevention plan to employees upon reopening the workplace after having closed it due to an airborne infectious disease. The plan must also be given to new employees upon hiring.

Businesses permitted to operate as of June 4 must provide their airborne infectious disease exposure prevention plan immediately. The plan also must be posted in a prominent location at the workplace and in the employee handbook, if the employer has one.

The employer must also make the airborne infectious disease exposure prevention plan available upon request to all employees, independent contractors, employee representatives, collective bargaining representatives, and state labor and public health officials.

Anti-Retaliation Provisions

Employers may not discriminate, threaten, retaliate against or take an adverse action against any employee for:

- Exercising their rights under the law or under their employer's airborne infectious disease exposure prevention plan.
- Reporting violations of the law or their employer's plan to any state, local or federal government entity, public officer or elected official.
- Refusing to work where the employee reasonably believes the employee or others will be exposed to an unreasonable risk of exposure to an airborne infectious disease due to working conditions that are inconsistent with the law, policies and orders of a government entity, including the model airborne infectious disease exposure prevention standard.

Unionized Work Sites

In addition to the added requirements relating to the formation of employer-developed standards and the health and safety committee, the NY HERO Act provides that where an employer's workforce is governed by a collective bargaining agreement, the parties may agree to waive the mandated plan in the CBA through a provision that expressly references the act.

Penalties Imposed

Employers that fail to adopt an airborne infectious disease exposure prevention plan will be fined a civil penalty of at least \$50 per day. Those that fail to abide by an adopted airborne infectious disease exposure prevention plan could draw a fine of at least \$1,000 and up to \$10,000.

If the state determines that an employer previously violated the NY HERO Act in the preceding six years, it may levy a fine of \$200 per day for failure to implement an airborne infectious disease exposure prevention plan, or a fine of at least \$1,000 and up to \$20,000 for failure to abide by an adopted plan. The state may also impose injunctive relief.

Private Right of Action

The NY HERO Act also gives employees a private right of action to seek injunctive relief against an employer alleged to have violated the airborne infectious disease exposure prevention plan, unless the employer did not know, or could not know even with the exercise of due diligence, of the presence of the violation.

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