



New York State Passes the HERO Act Imposing New Health and Safety Standards in the Workplace

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Responding to calls for more stringent safety protocols revealed by the COVID-19 pandemic, on May 5, 2021 Governor Cuomo signed the New York State Health and Essential Rights (HERO) Act (the “Act”), which establishes mandatory standards for COVID-19 as well as all airborne infectious diseases. The Act adds two sections to the Labor Law: The first section directs the Commissioner of Labor to promulgate model airborne infectious disease exposure prevention plans for all work sites, differentiated by industry, and requires employers to adopt a plan to protect their workplaces from further spread of COVID-19 and other airborne infectious diseases. The second section establishes workplace health safety committees between employees and employers with more than 10 employees.

Covered “Employees”

The Act defines “employees” broadly as “any person providing labor or services for remuneration for a private entity or business within the state.” This definition includes, without regard for immigration status, part-time workers, independent contractors, domestic workers, and home care and personal care workers, among others. The state, municipalities, and public agencies are excluded from the Act’s definition of “employer” and employees of the state, municipalities, and public agencies are excluded from the Act’s definition of “employee.”

Section 1: Workplace Airborne Infectious Disease Exposure Prevention Standards

The Act directs the Commissioner of Labor, in consultation with the New York State Department of Health, to publish a “model airborne infectious disease exposure prevention standard for all work sites, differentiated by industry, to establish minimum requirements for preventing exposure to airborne infectious diseases in the workplace.” The model safety standard will establish minimum requirements for, among other things:

- Employee health screenings;
- Face coverings;
- Required personal protective equipment (“PPE”) applicable to each industry which is to be maintained at the employer’s expense;
- Accessible workplace hand hygiene stations;
- Regular cleaning and disinfecting of shared equipment and frequently touched surfaces;

- Effective social distancing for employees, consumers, and customers.

Employers must either adopt the model standard for their industry or establish their own “alternative plan that equals or exceeds the minimum standards provided by the model standard.” Employers must post their airborne infectious disease exposure prevention plan in a visible place, include the plan in their employee handbook, and provide the plan upon request. The plan must also be distributed to current employees as of the effective date of Section 1, to new employees upon hiring, and “upon reopening after a period of closure due to airborne infectious disease.”

The Act contains anti-retaliation provisions expressly prohibiting retaliation against employees for: exercising their rights under the Act, reporting violations of the Act, reporting concerns about airborne infectious disease exposure, or refusing to work – provided that the employee reasonably believes they would be put at an unreasonable risk of exposure to an airborne infectious disease.

Civil Penalties for Violation of The Act

The Act also establishes penalties for violations. After an investigation and finding that a person or employer has violated provisions of the Act, the Commissioner is empowered to assess the following civil penalties:

- At least \$50 per day for failure to adopt a compliant plan;
- Between \$1,000 and \$10,000 for failure to abide by an adopted plan;

If the Commissioner finds that the employer or person has violated the provisions of the Act within the preceding six years, then the Commissioner may assess the following civil penalties:

- At least \$200 per day for failure to adopt a plan;
- Between \$1,000 and \$20,000 for failure to abide by an adopted plan.

The Commissioner is empowered to order other appropriate relief, including enjoining the conduct of any person or employer.

In addition to the Commissioner’s power to impose civil penalties and injunctions, employees have a private right of action and may seek, among other things, injunctive relief, costs, attorneys’ fees and liquidated damages. If, however, a court finds that such action “is completely without merit in law and undertaken primarily to harass or maliciously injure another” the employer may seek “sanctions against the attorney or party who brought such action.”

Although Governor Cuomo signed the Act, he did so only after reaching an agreement with the state legislature that would amend this portion of the law, limiting employees’ private rights of action to circumstances where employers are acting in bad faith and failing to cure deficiencies. The exact language of the amendment has not yet been released.

Section 2: Workplace Safety Committees

Section 2 of the Act requires employers with at least 10 employees, excluding the state, municipalities, and public agencies, to allow employees to “establish and administer a joint labor-management workplace safety committee” that is authorized to raise health and safety issues and review workplace health and safety policies and procedures. A committee should be “composed of employee and employer designees, provided that at least two-thirds are non-supervisory employees” chosen by other non-supervisory employees, unless a collective bargaining agreement is in place, in which case the collective bargaining representative will select non-supervisory employees for a committee. Employers cannot interfere in the selection of non-supervisory employees to sit on a committee. A non-supervisory employee and a representative of the employer will co-chair a committee.

Committees are provided broad powers, including but not limited to: the ability to raise health and safety concerns to the employer, review any safety policy required by the Act or the Workers’ Compensation Law, review the adoption of any health or safety policy in the workplace or any report filed by an employer related to health and safety in the workplace, and participate in visits to the workplace conducted by government health and safety regulators. Committee members must be permitted to attend a training, without loss of pay, on the function of worker safety committees, rights established under the law, and an introduction to occupational safety and health. They must also be permitted to regularly schedule a meeting during work hours at least once a quarter.

Section 2 also contains an anti-retaliation provision. Remedies for Section 2 violations may include fines, liquidated damages, injunctions, lost compensation awards, reinstatement, and reasonable attorneys’ fees.

Conclusion

The provisions of the Act directing the Commissioner to promulgate model standards and mandating that employers adopt airborne infectious disease exposure prevention plans are scheduled to take effect on June 4, 2021. The workplace safety committee portion of the law is scheduled to take effect on November 1, 2021. These effective dates may change, however, as Governor Cuomo signed the HERO Act only after securing an agreement with the state legislature that includes giving the state Department of Labor and employers more specific instructions in developing and implementing the workplace standard, including a clear timeline, and providing for an immediate requirement for employers to cure violations. The exact language of the amendment implementing these changes is not yet publicly available.

In addition, OSHA has reportedly submitted a proposed Emergency Temporary Standard on COVID-19 to the White House’s Office of Management and Budget that could include many of the same provisions as the HERO Act, including implementing a written plan, supplying masks, enforcing social distancing, cleaning and disinfection in the workplace, and training workers on appropriate prevention procedures. The final version of the Emergency Temporary Standard on COVID-19 could preempt state laws like the HERO Act.

Employers should review their current COVID-19 plans, other health and safety policies and practices, existing NYS and NYC reopening guidelines, and, in consultation with counsel, consider whether revisions are necessary to comply with new state regulations.

If you have questions regarding the NY HERO Act and its potential effect on your business, please contact James G. Ryan at (516) 357-3750 or via email at JRyan@cullenllp.com, Thomas B. Wassel at (516) 357-3868 or via email at TWassel@cullenllp.com, Hayley B. Dryer at (516) 357-3745 or via email at HDryer@cullenllp.com, or Daniel J. Becker at (516) 357-3788 or via email at DBecker@cullenllp.com.

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Practices

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