



## *New York HERO Act Requires Employers to Adopt an Airborne Infectious Disease Prevention Plan and Allow Employees to Form Workplace Safety Committees*

On May 5, 2021, New York Governor Andrew Cuomo signed the New York Health and Essential Rights Act, or HERO Act, into law. The law adds two new sections to the New York Labor Law (NYLL): (1) Section 218-b, which requires all private employers to adopt an airborne infectious disease prevention plan; and (2) Section 27-d, which requires all private employers with at least 10 employees to allow their employees to form workplace safety committees. These changes will impose significant new obligations on employers to maintain permanent workplace protections against airborne infectious diseases and grant employees unprecedented powers in overseeing and enforcing workplace safety. Employers should become familiar with the law's requirements so that they are ready to comply with it when it takes effect.

### **AIRBORNE INFECTIOUS DISEASE PREVENTION PLAN**

Section 218-b of the NYLL requires all private employers to establish an airborne infectious disease prevention plan either by adopting the model standards for their industry to be issued by the New York State Department of Labor (DOL) or by establishing an alternative plan that equals or exceeds the standards set by the DOL plan for their industry. A unionized employer that adopts an alternative plan must do so pursuant to an agreement with the union, and a non-unionized employer that adopts an alternative plan must do so with the participation of its employees.

The standards to be issued by the DOL will address, among other things:

- Employee health screenings;
- Face coverings;
- Required personal protective equipment;

- Workplace hand hygiene stations;
- Regular cleaning and disinfecting of equipment and frequently touched surfaces;
- Social distancing;
- Compliance with orders of isolation or quarantine issued to employees;
- Compliance with applicable engineering controls;
- Designation of supervisory employees to enforce compliance with the employer's plan;
- Compliance with any applicable laws, rules and other governmental requirements regarding exposure to airborne infectious diseases at the worksite; and
- Verbal review with the employer's own employees of its prevention plan, policies and employee rights under the law.

### **SCOPE OF COVERAGE OF AN EMPLOYER'S PREVENTION PLAN**

Under the law, an employer's prevention plan covers not only an employer's employees, but also an employer's independent contractors, individuals working for staffing agencies, contractors and subcontractors on behalf of an employer at any worksite, and persons delivering goods or transporting people at, to or from a worksite on behalf of the employer, regardless of whether delivery or transport is conducted by an individual or entity that would otherwise be deemed an employer.

### **DISTRIBUTION OF AN EMPLOYER'S PREVENTION PLAN**

An employer's prevention plan must be posted in the worksite, included in an employer's employee handbook, distributed to current employees and given to new employees



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upon hire. The prevention plan must be provided in writing to employees in English and their primary language. The DOL's model plans will be written in English and Spanish and other languages as determined by the DOL. Employers must also provide their plans to all employees, independent contractors and employee and union representatives, as well as the State, upon request.

### WORKPLACE PROTECTIONS UNDER THE HERO ACT

The HERO Act protects all persons covered by an employer's plan from discrimination and retaliation for engaging in any of the following conduct:

- Exercising their rights under the law or applicable prevention plan;
- Reporting a violation of the law or a prevention plan to a governmental entity or public official;
- Reporting an airborne infectious disease exposure concern to, or seeking assistance or intervention regarding such a concern from, their employer, a governmental entity or public official; and
- Refusing to work, if they reasonably believe in good faith that working exposes them, other employees or the public to an unreasonable risk of exposure to an airborne infectious disease, and provided that the employer is aware of the condition and fails to correct it.

### PENALTIES

The HERO Act empowers the DOL to assess a civil penalty of not less than \$50 per day for failure to adopt a prevention plan, and a penalty between \$1,000 and \$10,000 for failure to abide by an adopted prevention plan. An employer who has multiple violations within a six-year period is subject to increased penalties.

### PRIVATE RIGHT OF ACTION

The law gives all persons covered by an employer's plan the right to sue the employer in court for violating the law. Upon finding a violation, the court can restrain the

employer from continuing to violate the law and award the individual his or her attorney's fees and costs, as well as liquidated damages up to \$20,000, unless the employer proves a good faith basis to believe that its prevention plan was in compliance with the applicable standards.

### WORKPLACE SAFETY COMMITTEES

The provision of the HERO Act enacting a new § 27-d of the NYLL requires employers with at least 10 employees to permit their employees to establish and administer a joint labor-management workplace safety committee comprised of employee and employer representatives, two-thirds of whose members must be non-supervisory employees. Employee members of the committee must be selected from non-supervisory employees, and an employer cannot interfere with the selection of employees who will serve on the committee. Where a union exists, the union is responsible for selecting the employees to serve on the committee. Committees must be co-chaired by a representative of the employer and its non-supervisory employees. Committees representing distinct geographic worksites may be formed as necessary.

Workplace safety committees and their members are authorized to perform the following tasks:

- Raise health and safety concerns to which the employer must respond;
- Review the adoption of any policy in the workplace regarding employee safety required by law;
- Participate in any safety-related site visit by any governmental entity;
- Review any report filed by an employer related to the health and safety of the workplace;
- Regularly schedule a meeting during work hours at least once a quarter; and
- Attend training—without loss of pay—on the function of workplace safety committees, the rights established under the law and an introduction to occupational safety and health.



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Employers are also prohibited from discriminating or retaliating against employees who participate in a workplace safety committee for any conduct related to their participation.

### COLLECTIVE BARGAINING WAIVER

Both the airborne infectious disease prevention plan and workplace safety committee requirements of the HERO Act can be waived by a collective bargaining agreement that explicitly references in each case the applicable section of the law.

### EFFECTIVE DATES

NYLL § 218-b, regarding the adoption of airborne infectious disease prevention plans, takes effect on June 4, 2021. However, it is expected that the DOL will have until July 4, 2021, to develop industry-specific standards, and that employers will have until 30 days thereafter (August 3, 2021) to adopt a plan, and then 30 days after doing so (September 2, 2021) to communicate their plans to employees.

NYLL § 27-d, requiring employers to allow the creation of workplace safety committees, goes into effect on November 1, 2021.

### NEXT STEPS FOR EMPLOYERS

Employers should consult with their labor and employment counsel to prepare to adopt and implement an airborne infectious disease prevention plan, and communicate it to employees as required by the law. Employers should also consult with their counsel on how to respond to employee requests to establish a workplace safety committee and interact with them to comply with their obligations under the law.

### Additional Assistance

*For further assistance, please contact any of the attorneys on our [Labor & Employment Practice Team](#) or the [Phillips Lytle attorney](#) with whom you have a relationship. ■*



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