

The New York Hero Act, Effective this Week, Mandates Permanent New Health and Safety Measures for Private Employers

by Krista Bolles and Laura M. Lestrade

The New York Health and Essential Rights Act (“Hero Act” or “Act”), which requires every private employer, regardless of size, to establish an infectious disease safety plan, goes into effect today, June 4, 2021. The Hero Act amends the New York Labor Law by establishing new health and safety protections to reduce the risk of airborne infectious diseases, including COVID-19, in the workplace. The Act requires the New York State Department of Labor (“NY DOL”), in consultation with the New York Department of Health, to develop industry-specific model safety standards which employers may adopt in lieu of creating their own plans. It also requires employers with 10 or more employees to permit their employees to establish and administer joint labor-management workplace safety committees to help ensure worker safety.

Who Is Covered

The Hero Act applies to private employers. It defines the term “employer” broadly to include “any person, entity, business, corporation, partnership, limited liability company, or association employing, hiring, or paying for the labor of any individual in any occupation, industry, trade, business, or service,” regardless of size. It does not include state and governmental agency employers.

The term “employee” is likewise broadly defined to include those individuals “providing labor or services for remuneration for a private entity or business within the state,” including, among others, part-time workers, independent contractors, domestic workers, home health and personal care workers, and temporary and seasonal workers, without regard to their immigration status. State and other governmental agency employees are excluded.

Model Safety Standards

The Hero Act requires that by June 4, 2021, the NY DOL develop industry-specific model airborne infectious disease exposure minimum standards for businesses to adopt. Private employers of all sizes are required to either implement the model standard

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applicable to their industry and workforce, or to establish their own alternative airborne infectious disease exposure plans that meet or exceed the requirements of the applicable NY DOL standard. If an employer chooses to develop its own plan, that plan must be tailored to the industry-specific hazards and worksites of the employer, and must be developed with meaningful employee participation, or pursuant to an agreement with collective bargaining representatives for unionized workforces.

The NY DOL's industry-specific model plans must set minimum requirements for: (i) employee health screenings; (ii) face coverings; (iii) employer-provided PPE; (iv) hand hygiene; (v) cleaning and disinfecting shared equipment and high-touch surfaces; (vi) social distancing; (vii) compliance with mandatory or precautionary orders of isolation or quarantine; (viii) engineering controls for ventilation and air flow; (iv) designation of supervisory employees responsible for enforcement of these protocols; (v) notice requirements to employees and relevant state and local agencies of potential exposure to airborne infectious disease at a worksite; and (vi) review of standards, policies and employee rights.

Notice Requirements

Employers must distribute the plan to their employees in writing both in English and in an employee's primary language if other than English (provided there is a model plan developed in that specific language) on June 4, 2021 if the employer is permitted to operate as of that date, or upon reopening after a period of closure due to an airborne infectious disease, and thereafter to new employees upon hire. Employers must post their plan at the worksite and incorporate it into employee handbooks if an employer maintains a handbook. Additionally, employers must make the plan available for review upon request by employees, independent contractors, collective bargaining representatives, the labor commissioner and the commissioner of public health.

Anti-Discrimination and Retaliation

The Hero Act contains anti-discrimination and retaliation provisions. An employer may not "discriminate, threaten, retaliate against, or take adverse action against any employee" for: (i) exercising their rights under the Act or the employer's plan; (ii) reporting violations of the Act or the employer's plan to the government; (iii) reporting airborne infectious disease exposure concerns to the government and seeking assistance or intervention; and (iv) refusing to work when an employee reasonably believes that his workplace poses an unreasonable risk of exposure to an airborne infectious disease due to working conditions that are inconsistent with existing laws and regulations, including the NY DOL's model safety standards, with certain exceptions.

Private Right of Action and Civil Penalties

The Hero Act authorizes the NY DOL to assess penalties against non-compliant employers of \$50 per day for failing to adopt an appropriate plan and a fine of \$1,000-10,000 for failing to comply with an adopted plan. If the state determines that an employer previously violated the Act in the previous six years, such penalties may

increase to \$200 per day for failure to implement an appropriate plan or between \$1,000-\$20,000 for failure to abide by an adopted plan.

Additionally, the Act provides employees with the right to bring a lawsuit seeking injunctive relief against an employer for non-compliance in certain instances. Plaintiffs may recover attorneys' fees and costs, as well as liquidated damages of up to \$20,000 unless the employer can demonstrate good faith attempts at compliance.

Workplace Safety Committees

As of November 1, 2021, employers with at least 10 employees must permit employees to establish and administer a joint employer-employee workplace safety committee. At least two-thirds of a workplace safety committee must be comprised of non-supervisory employees. Committees must be co-chaired by a representative of the employer and non-supervisory employees. 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. Employers are prohibited from interfering with the selection of employees for such committees or with employees' performance of committee activities.

Workplace safety committees are authorized to: (i) raise health and safety concerns and violations to the employer, to which the employer must respond; (ii) review and provide feedback on workplace health and safety policies; (iii) participate in any site visit by a governmental entity responsible for enforcing health and safety standards; (iv) review reports filed by the employer pertaining to the health and safety of the workplace; and (v) regularly conduct meetings during work hours at least once per quarter.

Proposed Amendments

Although the Hero Act has not yet gone into effect, the New York State Assembly and Senate have already introduced proposed amendments to it. If enacted, the proposed amendments would modify and clarify several aspects of the Act. Of immediate concern, the proposed amendments would provide employers with more time to adopt the NY DOL's model plan or establish an alternative plan. As currently drafted, the Act appears to require employers to either adopt the NY DOL's model plan or an alternative plan by June 4, 2021; but the NY DOL is not, however, required to publish its model plan until June 4, 2021. The proposed amendment would provide employers with an additional thirty days from the date the NY DOL publishes its model plan to comply, as well as additional time to distribute plans to employees. The November 1, 2021 effective date for workplace safety committees would remain unchanged. Additionally, the proposed amendments would place certain limitations on the jurisdiction of workplace safety committees and the ability of employees to commence civil litigation against their employers and their potential monetary recovery.

Conclusion

While the NY DOL has yet to provide industry-specific minimum standards, employers

can begin preparing for the new law by reviewing their existing safety protocols, including those contained in the employee handbook, and considering which supervisory employees should be appointed to monitor compliance.