

**Insights**

## **NY HERO ACT: NYS DEPARTMENT OF LABOR ISSUES EXPOSURE PREVENTION STANDARD AND SAFETY PLANS – IMMEDIATE ACTION REQUIRED BY EMPLOYERS!**

Jul 22, 2021

### SUMMARY

The New York Health and Essential Rights Act (the “HERO Act”) requires immediate action by New York employers to adopt an airborne infectious diseases prevention plan by August 5, 2021.

The HERO Act requires the New York State Department of Labor (“NYSDOL”) to create and publish a model airborne infectious disease exposure standard for all worksites in the state and, where appropriate, issue industry-specific model plans to prevent exposure to airborne infectious diseases at the workplace.

On July 6, 2021, NYSDOL published (i) the Airborne Infectious Disease Exposure Prevention Standard (the “[Prevention Standard](#)”); (ii) a Model Airborne Infectious Disease Exposure Prevention Plan (the “[Model Prevention Plan](#)”); and (iii) eleven industry-specific model prevention plans (agriculture, construction, delivery services, domestic workers, emergency response, food services, manufacturing and industrial, personal services, private education, private transportation and retail). (The 11 industry-specific model prevention plans can be found [here](#).)

The Prevention Standard applies to all private employers and their employees in New York State, except (i) where industry-specific model prevention plans applies; or (ii) for employees covered by temporary or permanent standards adopted by the Occupational Safety and Health Administration (“OSHA”) setting forth standards for COVID-19 and/or other airborne infectious diseases (e.g. health care workers covered by OSHA’s COVID-19 emergency temporary standard). Employers have until August 5, 2021 to either: (1) adopt one of the model prevention plans applicable to their industry, or (2) develop an alternative prevention plan that meets or exceeds the minimum standards.

While employers must adopt a prevention plan and inform their employees, such plans are only activated “when an airborne infectious disease is designated by the New York State Commissioner of Health as a highly contagious communicable disease that presents a serious risk of harm to the

public health.” **As of July 6, 2021 (when the NYSDOL published its plans), no designation had been made regarding COVID-19.**

A summary of the Prevention Standard and the Model Prevention Plan follows.

*Prevention Standard: During an Outbreak*

When an airborne infectious disease is designated by the Commissioner of Health as presenting a serious risk of harm to the public health, employers must:

1. Immediately review and update the Prevention Plan (as necessary) to reflect new or modified tasks and procedures, and incorporate current federal, state or local government information, guidance and requirements;
2. Finalize and promptly activate the Prevention Plan;
3. Conduct a “verbal review” of employer policies, employee rights under the HERO Act, and the employer’s prevention plan in a manner consistent with preventing transmission of an airborne infectious disease (i.e. either in-person in a well-ventilated environment or via audio or video conference technology);
4. Provide each employee with a copy of the Prevention Plan and post a copy of the plan in a visible and prominent location within the worksite, accessible to all employees during all work shifts;
5. Designate of one or more supervisory employees to enforce compliance;
6. Monitor and maintain exposure controls (see below); and
7. Regularly check for updated information, guidance and regulations provided by federal, state or local governments concerning the airborne infectious disease and updating the Prevention Plan, when necessary, so that the plan reflects current information, guidance and regulations.

*Prevention Standard: Exposure Controls*

The Prevention Standard requires employers to select and obtain appropriate exposure control based on the types and level of exposure risks employees have during all activities performed at the worksite. Employers must include:

1. Employee health screening;
2. Face coverings;
3. Physical or social distancing—including options for social distancing such as increasing physical space between workers at the worksite, limiting capacity of customers or consumers, delivering

services remotely or through curbside pick-up, or implementing flexible work hours such as staggered shifts;

4. Accessible workplace hand hygiene stations;
5. Regular cleaning and disinfecting of shared equipment and frequently touched surfaces; and
6. Require Personal Protective Equipment (PPE) that shall be provided, used, and maintained in a sanitary and reliable condition at the expense of the employer.

#### Prevention Standard: Anti-Retaliation Provisions

The Prevention Standard also outlines anti-retaliation requirements. Specifically, employers cannot retaliate against employees for:

1. Exercising their rights under the HERO Act;
2. Reporting violations of the HERO Act, the NYSDOL Model Prevention Plan or an employer developed prevention plan;
3. Reporting, or seeking assistance or intervention regarding, an airborne infectious disease exposure concern to their employer, or a state, local, or federal government entity, public officer or elected official; and
4. Refusing to work where such employee reasonably believes, in good faith, that such work exposes him or her, or other workers or the public, to an unreasonable risk of exposure to an airborne infectious disease because of the existence of working conditions that are inconsistent with the HERO Act or other laws, rules, policies or orders; provided that the employee, another employee, or employee representative notified the employer of the unsafe working conditions and the employer failed to cure the conditions, or the employer had or should have had reason to know about the unsafe working conditions and continued to maintain the unsafe working conditions.

#### NYSDOL's Model Prevention Plan

The NYSDOL has issued eleven industry-specific prevention plans. Where there is no industry specific plan, an employer should follow the Model Prevention Plan (e.g. office-based employers) or develop its own. An employer who develops its own prevention plan must include either a collective bargaining representative (if any) or meaningful employee participation in the plan adoption process. The alternative plan must be tailored and specific to the hazards in the specific industry and worksites of the employer.

In addition to the policies required in the Prevention Standard, the Model Prevention Plan and industry specific plans address tele-work policies, respiratory etiquette, and special

accommodations for individuals with added risk factors. Employers are also required to determine if additional exposure controls (e.g. proper airflow, exhaust ventilation, disinfectant, cleanable physical barriers, training, signage, or additional PPE) are needed for the protection of its employees.

### *Immediate Action Needed*

Now that the Model Prevention Plan has been released, all NY private employers must:

1. Adopt the Model Prevention Plan (or applicable industry plan) or develop and adopt their own plan;
2. Post a copy of the plan in a visible and prominent location within the worksite;
3. Distribute a copy of the plan to employees upon: 1) hiring, 2) reopening after a period of closure due to airborne infectious disease, and 3) 30 days after adopting a plan (but no later than September 4, 2021), in English and in the language identified by each employee as the primary language of such employee (except if there is no NYSDOL model policy in that language); and
4. Update the employee handbook (if there is one) to include the plan.

Employers should also note that the HERO Act directs the New York State Department of Health to adopt regulations regarding the implementation of the Act's joint labor-management workplace safety committee requirements, which take effect November 1, 2021. The Department of Health has not yet published its regulations. We will provide an update once the regulations are issued.

*Bryan Cave Leighton Paisner LLP has a team of knowledgeable lawyers and other professionals prepared to help employers review their handbooks and implement their prevention plan. If you or your organization would like more information on this or any other employment issue, please contact an attorney in the Employment and Labor practice group.*

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## MEET THE TEAM



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