

Governor Andrew Cuomo Signs into Law the HERO Act

The HERO Act Requires Employers to Implement Enhanced Health and Safety Standards for the Workplace by June 4, 2021

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On May 5, 2021, Governor Andrew Cuomo signed into law the New York Health and Essential Rights Act (the “HERO Act”) ([S. 1034B](#)) to minimize the spread of COVID-19 and other airborne infectious diseases in the workplace given the anticipated return of many employees to work. The expansive law directs the New York Department of Labor (the “NYDOL”) to create standards to prevent the spread of airborne infectious diseases by June 4, 2021. By that date, employers must either adopt those model standards or implement an alternative that meets or exceeds the minimum standards established by the NYDOL.

Minimum Infectious Disease Exposure Prevention Standards

The HERO Act amends the New York Labor Law (“NYLL”) by adding Section 218-b, which directs the NYDOL to create a model standard to assist with the prevention of occupational exposure to airborne infectious diseases, which shall include establishing requirements on procedures and methods for:

- Employee health screenings;
- Face coverings;
- Personal protective equipment (“PPE”) to be provided to employees at the employer’s expense;
- Accessible workplace hand hygiene stations and adequate break times for workers to use handwashing facilities as needed;
- Regular cleaning and disinfecting of shared equipment and frequently touched surfaces;
- Effective social distancing for employees and customers;
- Compliance with mandatory or precautionary orders of isolation or quarantine that have been issued to employees;
- Compliance with applicable engineering controls such as proper air flow, exhaust ventilation, or other special design requirements;
- Designation of one or more supervisory employees to enforce compliance with the airborne infectious disease exposure prevention plan and any other federal, state, or local guidance;
- Compliance with any applicable laws, rules, regulations, standards, or guidance on notification to employees and relevant state and local agencies of potential exposure to airborne infectious disease at the work site; and
- Verbal review of infectious disease standards, employer policies, and employee rights under the HERO Act.

NYLL § 218-b(2).

By June 4, 2021, employers must adopt the NYDOL standards or implement an alternative airborne infectious disease prevention plan that meets or exceeds those standards in agreement with a collective bargaining representative or with meaningful employee participation (if there is no collective bargaining representative). Id. § 218-b(4). The prevention plan must be provided to employees, must be posted in a visible and prominent location at the workplace, and must be included in the employee handbook if one is provided to employees. Id. § 218-b(5)-(6).

Anti-Retaliation and Anti-Discrimination

The HERO Act contains an anti-retaliation and anti-discrimination provision that prohibits employers from retaliating or discriminating against employees for exercising their rights under the HERO Act or prevention plan or reporting violations or concerns to their employer or any governmental entity. In addition, employers may not retaliate or discriminate against any employee who refuses to work if the employee has a reasonable good faith belief that working exposes the employee or others to an unreasonable risk of exposure to an airborne infectious disease due to the existence of working conditions that fail to meet the prevention plan's minimum standards if:

- the employee or another employee or representative notified the employer of the inconsistent working conditions and the employer failed to cure it; or
- the employer had or should have had reason to know about the inconsistent working conditions and maintained the inconsistent working conditions.

Id. § 218-b(8).

Penalties and Remedies

Employers that fail to adopt a prevention plan may be subject to penalties of not less than either \$50 per day or \$200 per day for repeat violations within six years. Employers that adopt but fail to abide by their prevention plan may be subject to penalties between \$1,000 and \$10,000 (and up to \$20,000 for repeat offenses), but will be given an opportunity to cure those violations. Id. § 218-b(10)(a).

Employees have a private right of action under the HERO Act if an employer is not abiding by the prevention plan and may seek injunctive relief, attorneys' fees, costs, and liquidated damages (of no more than \$20,000) unless the employer proves a good faith basis to believe that the established health and safety measures were in compliance with the applicable airborne infectious disease standard. If the employee's action, or the employer's defense, counterclaim, or crossclaim is found to be completely without merit and undertaken primarily to harass or maliciously injure another, the court may impose sanctions against the offending attorney or party. Id. § 218-b(10)(b).

Creation of Workplace Safety Committees

Effective November 1, 2021, employers with ten or more employees shall permit the employees to establish and administer joint employer-employee workplace safety committees 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 Labor Law or Workers' Compensation Law and provide feedback to such policy in a manner consistent with any provision of law;
- Review the adoption of any policy in the workplace 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 in a manner consistent with any provision of law;
- Review any report filed by the employer related to the health and safety of the workplace in a manner consistent with any provision of law; and
- Regularly schedule a meeting during work hours at least once a quarter.

Id. § 27-d(4).

In addition, employers must allow members of the safety committees to attend training on the function of workplace safety committees, rights established under this section, and an introduction to occupational safety and health without suffering a loss of pay. Id. § 27-d(5). Employers are also prohibited from retaliating against an employee for actions taken pursuant to his or her participating in a workplace safety committee. Id. § 27-d(6).

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If you have any questions concerning the HERO Act, or any other federal or state employment laws, please feel free to contact [Jennine DiSomma](#) or [Vincent C. Cirilli](#) of Saiber LLC's Employment and Labor Law practice.