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BULLETIN

To: Membership of Allied Building Metal Industries, Inc.

From: Steven N. Davi

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Re: New York Health and Essential Rights Act (“HERO Act”)

On July 6, 2021, the New York State Department of Labor (“NYDOL”) published model documents related to the implementation of the New York HERO Act, a new piece of legislation requiring all private employers in New York to adopt a prevention plan to protect against the spread of airborne infectious diseases in the workplace. Set forth below is a detailed primer intended to assist your compliance efforts under the Act.

Background

On April 20, 2021, the New York State legislature passed the [New York Health and Essential Rights Act](#) (“HERO Act” or the “Act”). The HERO Act amends the New York Labor Law (“NYLL”) by adding two new sections.

Section 1 of the HERO Act amends the NYLL by adding a new Section 218-b, which requires employers to prepare a model safety plan for prevention of airborne infectious diseases and prohibits retaliation against employees who exercise their rights under the Act. Section 2 of the HERO Act amends the NYLL by adding a new section 27-d, which requires certain employers to establish a joint workplace safety committee with their employees. Governor Andrew Cuomo signed the HERO Act into law on May 5, 2021.¹

In June, 2021, New York State passed chapter amendments to the HERO Act that, among other things, (i) provide additional compliance guidance under the Act; (ii) set certain limitations on an employee’s right to sue for non-compliance under the Act, and thus, curtail the potential liability lurking in the original iteration of the Act, and (iii) clarified that employers would not be required to adopt their own airborne infectious disease prevention plans until the NYDOL, in consultation with the New York State Department of Health (“NYDOH”), published their model plan.

Accordingly, on July 6, the NYDOL [published](#) a series of template documents under the Act, including (1) an Airborne Infectious Disease Exposure Prevention Standard (“[Standard](#)”); (2) a Model Airborne Infectious Disease Exposure Prevention Plan (“[Model Plan](#)”); and (3) [eleven industry-specific template plans](#) for the prevention of airborne infectious disease in the workplace.

¹ The obligations under NYLL §§ 218-b and 27-D may be waived by collective bargaining agreement so long as such waiver explicitly references NYLL §§ 218-b and 27-D.

As set forth below, New York employers have until August 5, 2021, to adopt the NYDOL's Model Plan, one of the NYDOL's industry-specific plans, or their own plan ("Alternate Plan") that, at minimum, satisfies the requirements of the NYDOL templates. In all cases, New York employers must post and distribute their plan to their employees by September 4, 2021.

While the clock is ticking for New York employers to **adopt** a NYDOL template plan or their own plan that satisfies the requirements of the NYDOL templates, the time for New York employers to **activate or implement** any such plan has not yet begun to run, at least not yet. This is because the NYDOL has made clear that any such plans shall not become effective until the New York State Commissioner of Health ("Commissioner") designates an airborne infectious agent or disease as a highly contagious communicable disease that presents a serious risk of harm to the public health. To date, the Commissioner has made no such designation. As a result, while employers have until August 5, 2021, to adopt a prevention plan, such plans are not yet required to be activated or implemented.

Discussion

Who is Covered?

The HERO Act's employer and employee coverage is very broad.

The Act covers all private employers in the state, regardless of size, and covers all work site locations, including locations "where work is performed over which [the] employer has the ability to exercise control."²

The Act defines "employees" broadly to include, without limitation, individuals "providing labor or services for remuneration," part-time workers, independent contractors, domestic workers, home health and personal care workers, seasonal workers, and contractors or subcontractors working on behalf of the employer at any individual work site, as well as any individual delivering goods or transporting people at, to or from the work site 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 under the NYLL.

The Standard: General Provisions

The Standard summarizes the requirements of the HERO Act and makes clear that employers must establish a written exposure prevention plan by adopting the NYDOL's Model Plan, an industry-specific plan promulgated by NYDOL, or an Alternate Plan.

Regardless of which plan employers adopt, the Act requires covered employers to satisfy numerous continuing obligations. In particular, employers must:

- periodically review and update the exposure prevention plan;
- make the exposure prevention plan available, upon request, to all employees, employee representatives, collective bargaining representatives, independent contractors, the NYDOL, and the NYDOH;
- during an airborne infectious disease outbreak, conduct a verbal review with their employee populations of their exposure prevention plans and of employee rights under

² State and other governmental agency employees and independent contractors of the state are excluded from the Act's protections and state and governmental agency employers are exempt from the Act.

- the Act, in a manner most suitable for the prevention of an airborne infectious disease, whether in person in a well-ventilated environment with appropriate face masks or personal protective equipment, or via audio or video conference technology;
- ensure that the safety plan can be activated in the event of a highly contagious communicable disease (seasonal flus are specifically excluded);
 - in the event of an airborne infectious disease outbreak, implement the plan;
 - ensure that the worksite’s exposure prevention plan is effectively followed by:
 - Assigning enforcement responsibilities in accordance with the Act, and ensuring that adequate enforcement of the worksite’s exposure prevention plan takes place;
 - Monitoring and maintaining exposure controls; and
 - Regularly checking for updated information and guidance provided by State Department of Health and the Centers for Disease Control and Prevention (“CDC”) and updating the exposure prevention plan, when necessary, so that the plan reflects current NYDOH or CDC-recommended control measures; and
 - designate one or more supervisory employees to enforce compliance with the exposure prevention plan and any other applicable federal, state, or local guidance related to preventing the spread of the airborne infectious disease.³

The Standard: Exposure Controls

The Standard requires employers to select and obtain appropriate exposure controls based on the types and level of exposure risks employees have during activities performed at the worksite. Specifically, employers must include the following controls in their exposure prevention plan:

1. **Health Screenings:** Employers must conduct health screenings for the disease at the beginning of each workday in accordance with guidance issued by the NYDOH or CDC.
2. **Face Coverings:** Employers must select, provide at no cost, and require that employees wear appropriate face coverings whenever social distancing cannot be maintained as per NYDOH or CDC guidance. In addition, employers must also provide and require that employees use personal protective equipment (“PPE”) as recommended by NYDOH.
3. **Physical Distancing:** Employers must implement physical distancing to keep employees at least six feet apart from others or as recommended by the NYDOH or CDC.
4. **Hand Hygiene Facilities:** Employers must provide handwashing facilities; and when doing so is not practical and feasible, the employer must provide hand sanitizer with at least 60% alcohol that is effective against the infectious disease.
5. **Cleaning and Disinfection:** Employers must implement an appropriate plan for cleaning and disinfection based on recommendations by the NYDOH or CDC.

The Standard: Anti-Retaliation

The HERO Act prohibits employers from discriminating or retaliating against employees for exercising their rights under the Act, reporting an airborne infectious disease concern, or reporting violations of the law or the employer’s plan to federal, state or local agencies or officials, if they reasonably believe, in good faith, that a violation exists.

³ Notably, the Standard does not apply to “[a]ny employee within the coverage of a temporary or permanent standard adopted by the Occupational Safety and Health Administration setting forth applicable standards regarding COVID-19 and/or airborne infectious agents and disease.” The Standard also is not applicable to “[a]ny seasonal or endemic infectious agent or disease, such as the seasonal flu, that has not been designated by the Commissioner of Health as a highly contagious communicable disease that presents a serious risk of harm to the public health.”

The Act also prohibits retaliation against employees for refusing to work if they reasonably believe, in good faith, that such work exposes them, other workers, or the public, to an unreasonable risk of exposure to an airborne infectious disease due to the existence of working conditions that are inconsistent with laws, rules, policies, or orders of any governmental entity.

Finally, an employer must maintain records that exist between the employer and employee regarding a potential risk of exposure for two years after the Commissioner has determined the place of employment is no longer at high risk of disease.

Airborne Infectious Disease Exposure Prevention Plans

As set forth above, to comply with the Act's written plan requirement, employers may adopt the Model Plan, establish an Alternate Plan that meets or exceeds the minimum requirements provided by the NYDOL templates, or adopt one or more of the following eleven industry-specific safety plan issued by the NYDOL in this context: [Agriculture](#); [Construction](#); [Delivery Services](#); [Domestic Workers](#); [Emergency Response](#); [Food Services](#); [Manufacturing and Industry](#); [Personal Services](#); [Private Education](#); [Private Transportation](#); [Retail](#).

All other sectors for which no industry-specific plan is available, including office-based workplaces, should refer to the Model Plan.

Notably, employers that adopt their own plan, rather than the Model Plan or an industry-specific plan, must adopt such plan pursuant to an agreement with their collective bargaining counterpart, and if there is no such representative, with the meaningful participation of employees. Any such Alternate Plan must also be tailored and specific to the hazards in the specific industry and worksites of the employer.

Penalties; Limits of Liability

The NYDOL may investigate violations of Section 218-b. If the investigation reveals a violation, the NYDOL may assess civil penalties of \$50 (or more) per day for failure to adopt an airborne infectious disease exposure prevention plan, or between \$1,000 and \$10,000 for failure to abide by an adopted plan. Civil penalties for subsequent violations that occur within a preceding six-year period carry greater penalties. The NYDOL is also authorized to order injunctive relief.

Section 218-b also creates a limited private right of action. Employees may seek injunctive relief in court against an employer alleged to have violated the airborne infectious disease exposure prevention plan/standards in limited situations. In order to commence such a lawsuit however, an employee is required to give notice to the employer of the alleged violation. The employer then has thirty days to remedy the alleged violation. If the employer corrects the violation, the employee is barred from bringing suit. An employee must bring their lawsuit within six months from the date the employee had knowledge of the alleged violation. A successful plaintiff may be entitled to injunctive relief, costs and reasonable attorneys' fees.

This is arguably one of the most notable features of the HERO Act as it essentially creates a new protected activity under state law, and thus, a measure of job protection, which is similar, from a retaliation standpoint, to complaints an employee may lodge alleging bias or harassment.

Workplace Safety Committees

Effective November 1, 2021, the Act requires employers with at least ten employees to allow employees to establish and administer a joint labor-management workplace safety committee. Committees are authorized to, among other things, raise health and safety concerns, review safety policies, and regularly schedule meetings during work hours. The committee must be composed of employee and employer designees, with at least two-thirds being non-supervisory personnel. If a collective bargaining agreement is in place, the union is responsible for selection of employee members. The committee must be co-chaired by a representative of the employer and a representative of the non-supervisory employees.

The Act, as amended, makes clear that an employer need not create a second committee if one that meets the Act's requirements is already in existence. Moreover, a committee's role can be limited to reviewing and/or raising occupational health and safety concerns implicated by the Act's provisions, not the entire reach of the NYLL.

The Act directs the NYDOH to adopt rules and regulations related to the implementation of workplace safety committees, which have not yet been issued. We will continue to monitor.

Takeaway for Employers

All private employers with workplaces in New York State should take the following steps now:

1. **Adopt a Plan.** All employers must adopt a Model Plan or industry-specific plan, or establish an Alternate Plan that meets or exceeds the minimum requirements provided by the Standard, by August 5, 2021.

Please note: Any employer opting to avoid the NYDOL Model Plan or industry-specific plans and establish its own Alternate Plan, should consider the numerous administrative hurdles this path will entail, including having to consult with the employees' collective bargaining representatives or, in a nonunion setting, the employees directly. An Alternate Plan must also be customized to incorporate industry-specific hazards and worksite considerations.

2. **Provide the Plan to Employees.** Employers must provide their plan to employees within 30 days of its adoption, within 15 days after reopening after a period of closure due to airborne infectious disease, and to new employees upon hire. The plan must be provided to employees in English and in the language identified by each employee as their primary language if a model standard is available in that language.
3. **Post the Plan.** The plan must be posted in a visible and prominent location in **each** worksite, with the exception of vehicles.
4. **Update Your Employee Handbook, if any.** For employers that provide employee handbooks, the prevention plan must be included.

We will continue to monitor and report on any further developments where these matters are concerned. As always, if you have any questions or wish to discuss any of the above, please do not hesitate to contact me directly.