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BULLETIN

To: Membership of Allied Building Metal Industries, Inc.

From: Steven N. Davi

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Re: NYS HERO Act Update

As we advised on July 26 and September 7, the New York State HERO Act requires all employers in New York to implement certain safety standards and adopt a prevention plan to protect against the spread of airborne infectious diseases in the workplace. As set forth below, the NYDOL has now issued updated prevention plans and updated FAQs under the Act.

Background

On July 6, the NYDOL [published](#) a series of template documents under the Act, including a Model Airborne Infectious Disease Exposure Prevention Plan (“[Model Plan](#)”) and [eleven industry-specific template plans](#) for the prevention of airborne infectious disease in the workplace, including one for [Construction](#).

Following the [announcement](#) by Governor Hochul on September 6 that the Commissioner of Health had designated Covid-19 as a “highly contagious communicable disease that presents a serious risk of harm to the public health” under the law, (a designation that was subsequently [extended](#) on September 30), employers across the state were required to “promptly” take certain steps pursuant to the Airborne Infectious Disease Exposure Prevention [Standard](#) published by the New York State Department of Labor (NYDOL), to activate and distribute their plans and otherwise ensure compliance with the Act.

Updated and Reissued Prevention Plans

On September 23, the state issued [updated model airborne infectious disease exposure prevention plans](#) for employer use pursuant to the Act. These updated and reissued plans contain material changes in two sections—face coverings and social distancing.

Face coverings. The model plans now provide that, in workplaces where all individuals on premises are fully vaccinated, face coverings are “recommended, but not required.” For all other workplaces, the model plans now state that “[e]mployees will wear appropriate face coverings in accordance with guidance from State Department of Health (NYDOH) or the Centers for Disease Control and Prevention (CDC), as applicable.” Previously, the model plans stated that “employees will wear face coverings throughout the workday to the greatest extent possible” and “[f]ace coverings and physical distancing should be used together whenever possible.”

Social distancing. The revised model plans remove prior references to “avoiding unnecessary gatherings” and “using a face covering when physical distance cannot be maintained.” Now the relevant section states only that “[p]hysical distancing will be used to the extent feasible, as advised by guidance from NYDOH or CDC, as applicable.” The revised plans still require the employer to articulate the health and safety controls it will implement in circumstances where distancing cannot be maintained.

Updated FAQs

On September 30, the NYDOL released an updated set of [frequently asked questions](#) on the HERO Act. The updated FAQs, which replace the FAQs issued on September 9, contain some notable changes, as follows.

Verbal Review Requirement. The HERO Act requires employers to provide a verbal review of its prevention plans, employer policies, and employee rights. The updated FAQs clarify that employers need only conduct a verbal review of the plan “when the Commissioner of Health designates a disease as an airborne infectious disease that presents a serious risk of harm to the public health.” Because a designation is currently in effect for Covid-19, employers must conduct this verbal review with employees.

Modifications to the Model Plan. If an employer adopts a plan other than one of the model plans provided by the state, the HERO Act requires that the employer “develop such plan pursuant to an agreement with the collective bargaining representative, if any, or with meaningful participation of employees where there is no collective bargaining representative.” Regarding the extent to which an employer may alter one of the model plans before it becomes an “alternative plan,” the September 9 FAQs had stated that “amendments to such templates that go beyond the open fields of such template likely do constitute an ‘alternative plan’ requiring employee review and/or participation.” The updated FAQs remove this language and now state that “[s]hould an employer develop its own plan, then the employer must review the plan with employees. However, employees do not need to approve the plan for it to be adopted.”

Workplace Safety Committees. Section 2 of the HERO Act provides that employers with at least 10 employees “shall permit employees to establish and administer a join labor-management workplace safety committee” on or after November 1. The updated FAQs state “that if an employer modifies its HERO Act plan after November 1, and it is also an employer covered by Section 2 of the HERO Act, it will need to review the new or modified plan with a workplace safety committee allowed by Section 2 of the HERO Act.” The NYDOL will provide guidance on Section 2 of the HERO Act prior to its November 1 effective date.

OSHA ETS. Pursuant to the NYDOL [Standard](#), the HERO Act does not apply to any “employee within the coverage of a temporary or permanent standard adopted by [OSHA] setting forth applicable standards regarding COVID-19 and/or airborne infectious agents and diseases.” On September 9, President Biden released a comprehensive new Covid-19 action plan called [Path Out of the Pandemic](#). As we advised on September 13, the Biden plan directs the USDOL’s Occupational Safety and Health Administration (OSHA) to develop an Emergency Temporary Standard (ETS) that will require all private sector employers with 100 or more employees (i) to ensure their workforce is fully vaccinated or (ii) to require their unvaccinated workers to provide a negative COVID-19 test result at least once per week before coming to work. The ETS will also require covered employers to provide employees paid time off to get vaccinated and recover from side effects associated with the Covid-19 vaccine. NYDOL will provide additional information

regarding whether employers subject to the forthcoming OSHA ETS will be exempt from complying with the HERO Act once the OSHA ETS comes out.

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.