

Need an Infectious Disease Prevention Plan? In New York, You Soon Will under the HERO Act

On May 5, 2021, Governor Cuomo of New York signed the New York Health and Essential Rights Act (HERO Act) into law. The HERO Act creates occupational safety and health standards in the private sector for all airborne infectious diseases including but not limited to COVID-19. While the HERO Act places obligations on New York employers that appear responsive to general concerns surrounding return-to-work during the COVID-19 pandemic, employers will need to further comply with significant additional obligations such as developing an airborne infectious disease exposure prevention plan and creating a joint employer-employee workplace health and safety committee.

Of note, the HERO Act defines “employee” broadly to include individuals providing services for remuneration, and specifically includes part-time workers, independent contractors, domestic workers, home care and personal care workers, day laborers, farmworkers, and other temporary and seasonal workers.

Pursuant to the HERO Act, the New York State Commissioner of Labor is required to create and publish (in English and Spanish) a model airborne infectious disease prevention plan and to establish minimum standards for preventing exposure to airborne infectious disease in areas including: employee health screenings; face coverings; personal protective equipment; hygiene; cleaning and disinfecting of shared equipment; social distancing; and mandatory and precautionary isolation or quarantine orders, among others. These model prevention plans will be industry specific and this section takes effect on June 4, 2021.

New York employers will be required to adopt the model prevention plan or develop their own plan that exceeds or equals the minimum standards of the model plan. Employers must post the applicable prevention plan and include it in an employee handbook, if there is one. In addition, employers are required to distribute the prevention plan in English and in the language of the employee upon hiring the employee and upon reopening after a period of closure due to an airborne infectious disease.

As referenced above, the HERO Act also requires employers to establish a joint workplace safety committee with their employees who must have “meaningful” participation. These committees must be composed of employee and employer designees, with at least two-thirds being non-supervisory employees. If there is a collective bargaining agreement in place, the collective bargaining representative will be responsible for selecting employees to serve as members of the committee. Committees are to schedule meetings at least once a quarter. This section of the law takes effect on November 1, 2021.

In the case of noncompliance, the HERO Act provides for civil penalties, including up to \$20,000 for failure to abide by an adopted airborne infectious disease exposure prevention plan. The HERO Act also creates a private right of action for employees that permits employees to seek injunctive relief, attorney’s fees, and liquidated damages for violations.

Finally, the HERO Act contains significant anti-retaliation provisions that prohibit retaliation against employees for exercising their rights under the law; reporting violations of airborne infectious disease exposure to government entities; reporting an airborne infectious disease exposure to their employers or government entities; and refusing to work when an employee reasonably believes that doing so poses an unreasonable risk of exposure to an airborne infectious disease under certain circumstances.

Business advocate and/or similar industry trade associations should consider legal challenges to whether the HERO Act, in whole or in part, should be preempted under OSHA particularly since



John S. Ho

**Co-Chair,
OSHA-
Workplace
Safety Practice**

jho@cozen.com
Phone: (212) 883-4927
Fax: (212) 509-9492



James J. Sullivan, Jr.

**Co-Chair,
OSHA-
Workplace
Safety Practice**

jjsullivan@cozen.com
Phone: (202) 912-4841
Fax: (267) 507-1571

Related Practice Areas

- Labor & Employment

there is a private right of action that does not exist under OSHA. Although OSHA currently does not have an infectious disease standard, OSHA is expected to publish a COVID-19 temporary emergency standard (ETS) later this month. It is widely expected such an ETS would address many of the topics covered under the HERO Act. Furthermore, OSHA already has standards addressing personal protective equipment and a respirator standard.

However, until such a legal challenge is successful, New York employers should immediately review and revise their current safety and health practices and begin to take steps to comply with these significant burdens including monitoring the New York State Department of Labor for publication of the model policy discussed above.
