New York Enacts Major Expansion of Workplace Health and Safety Standards to Create COVID-Related Protections

Insights
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Following an eleventh-hour agreement to make "technical changes" to the version of the bill passed by the New York State legislature, Governor Cuomo signed into law the New York Health and Essential Rights Act – also known as the NY HERO Act – to create additional pandemic-related workplace protections. Drafted in response to the COVID-19 pandemic, the Act amends state law to mandate the development and implementation of health and safety standards targeting the spread of all airborne infectious diseases in the workplace. The majority of obligations will kick in on June 4 – 30 days from the May 5 finalization date – although one section does not take effect until November 1 (180 days later). Here is what New York employers need to know about this new law – especially given that your compliance obligations will be here before you know it.

[Ed. Note: By amendment, the state legislature pushed the effective date for the most pertinent parts of the Act back 30 days to July 4.]

What Does the Act Do? 5 Key Developments

The NY HERO Act changes state law in five distinct and significant ways. As noted above, the first four of these changes take effect on June 4.

1. Mandates Development of Industry-specific Model Workplace Health and Safety Standards for Airborne Infectious Disease

The Commissioner of the New York Department of Labor, with input from the Department of Health, has 30 days to establish model, industry-specific standards to prevent exposure to all airborne infectious diseases in the workplace. The model standards must establish minimum requirements on procedures and methods for:

- Employee health screenings;
- Face coverings;
- Required personal protective equipment (PPE) applicable to each industry. The PPE must be provided, used, and maintained in sanitary and reliable condition at expense of the employer;
- Accessible workplace hand hygiene stations and breaktimes to use handwashing facilities, as needed;

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needed;

- Regular cleaning and disinfecting of shared equipment and frequently touched services;
- Effective social distancing for employees and consumers or customers as the risk of illness may warrant;
- Compliance with mandatory or precautionary orders of isolation or quarantine including provision of separate and appropriate accommodations for employees that reside in employer-provided housing;
- Compliance with engineering controls such as proper air flow and exhaust ventilation;
- The designation of one or more supervisory employee to enforce compliance with the airborne infectious disease exposure prevention plan and other federal, state, or local guidance; and
- Verbal review of the infectious disease standard, employer policies, and employee rights under the Act.

The model standards must take into consideration the types of risks present at the worksite, including the presence of third parties, and declarations of a state of emergency due to airborne infectious disease. The standards must explicitly specify the extent to which the standards are applicable based on different levels of airborne infectious disease exposure.

[Ed. Note: This section of the law is effective July 4. Pursuant to amendments by the state legislature, the Commissioner is tasked with creating: (1) industry-specific model standards for industries "representing a significant portion of the workforce" and (2) a general model standard for employers not covered by an industry specific model.

Employers in the healthcare industry, with certain exceptions, will also have to abide by the emergency temporary standards issued by the Occupational Safety and Health Administration (OSHA) on June 10. OSHA also issued nonbinding guidance for workplaces outside of the healthcare industry on June 10. You should be mindful of, but not necessarily rely on, OSHA's nonbinding guidance as it may fall well below the standards New York's Department of Labor will mandate for employers.]

2. Requires All Employers Have an Airborne Infectious Disease Exposure Prevention Plan

Every employer must have an airborne infectious disease exposure prevention plan. Employers may either adopt the model standard applicable to their industry or create an alternative plan that "equals or exceeds" the minimum standards in the model standard. Where an employer chooses to create their own Prevention Plan, it must be developed in consultation with any collective bargaining representative or with the "meaningful participation" of employees where there is no collective bargaining agreement. Prevention Plans must be specifically tailored to the hazards of the respective industry and worksite.

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Employers must provide the Prevention Plan to all employees upon reopening or, if an employer is already open, on the effective date of the Act and upon hiring. The Prevention Plan must be posted in a "visible and prominent location" within the worksite, be included in the employee handbook (if handbooks are provided to employees), and be available for review upon request.

According to the approval memo Governor Cuomo attached to the bill, the legislature will amend the Act to provide more specific instructions, including a "clear timeline," to assist the Department of Labor and employers in developing and implementing these new workplace standards.

[Ed. Note: Amendments to the Act pushed back the effective date to July 4 and clarified that an employer has 30 days *after* the Commissioner publishes the model standards to either adopt the model standard relevant to its industry or develop its own Prevention Plan. An employer must provide its employees with a copy of its Prevention Plan, in writing, within 30 days of adopting the plan, 15 days after reopening after closure due to airborne infectious disease, and to newly hired employees upon hiring.

Employers open as of the effective date of this Act have 60 days after the Commissioner publishes the model standard relevant to its industry to provide its Prevent Plan to all employees. Only supervisory employees can oversee compliance with the requirements of the Prevention Plan.]

3. Levies Penalties

After an investigation, the Commissioner may levy financial penalties or enjoin a party for violations of the Act. Employers who fail to adopt a Prevention Plan may be assessed a civil penalty of not less than $50 a day. The Commissioner may also assess a penalty of not less than $1,000 or more than $10,000 for an employer's failure to abide by its Prevention Plan. Civil penalties are increased for violation of the Act more than once in a six-year period.

4. Grants Employees a Cause of Action

As currently written, the law protects employees from discrimination, retaliation, or any adverse action for:

- Exercising rights granted by the Act or Prevention Plan;
- Reporting violations of the Act or Prevention Plan to any state, local, or federal government entity, public officer or elected official;
- Reporting, seeking assistance with, or intervening in an airborne infectious disease exposure concern; and
- Refusing to work where the employee "reasonably believes in good faith," that such work exposes the employee, other workers, or the public to unreasonable risk of exposure to an airborne infectious disease due to working conditions that are inconsistent with the law.

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including the minimum standards provided by the model standard. The employee, another employee, or an employee representative must have notified the employer of the inconsistent working condition and the employer must have either (i) failed to fix the inconsistent working condition or (ii) should have had reason to know of the condition and maintained the inconsistent working condition.

Employees can bring a civil action in court seeking injunctive relief against the employer alleged to have violated the Prevention Plan "unless the employer did not and could not, with the exercise of reasonable diligence, have known of the violation."

The court also has jurisdiction to restrain violations and order relief. The court may (1) enjoin the conduct of employer, (2) award costs and reasonable attorneys' fees to the employee, or (3) order payment of liquidated damages of no more $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."

The legislation allows for sanction by the court of employees who bring an action and employers who submit a defense, counterclaim, crossclaim that is ruled without merit and found to be "undertaken primarily to harass or maliciously injure another."

Expected changes to the original version of the bill will provide employers with a period to cure violations before facing a lawsuit to, according to Governor Cuomo, "limit lengthy court litigation to those private rights of action, in limited circumstances where employers are acting in bad faith and failing to cure deficiencies."

[Ed. Note: Amendments provide employers with a cure period before an employee can file a civil action. Specifically, before bringing a civil action, an employee must give the employer 30 days' notice of the violation, unless the employee alleges the employer demonstrated unwillingness to cure the alleged violation in bad faith. An employee cannot file a lawsuit if the employer corrects the alleged violation. Additionally, the amendments clarify that a court can award costs and fees against an employee, the employee's attorney, or both for civil actions brought under this Act found to be frivolous. Finally, the amendments impose a six-month statute of limitations period from the date the employee learns of the alleged violation to bring a civil action.]

5. Permits Workplace Safety Committees

This final section of the law does not take effect until November 1. Employers (employing 10 or more employees) must permit their employees to establish a joint labor-management workplace safety committee. The committee is to be composed of employees and employer designees, with at least two-thirds of the employees holding non-supervisory positions. Employers are prohibited from interfering with the selection of employees onto the committee.

The workplace safety committee and workplace safety designee are authorized to:

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- Raise health and safety concerns, hazards, complaints and violations to which the employer and employer must respond;
- Review any policy put in place because of the requirements of the Act or the worker's compensation law and provide feedback on said policy; **[Ed. Note: reference to the workers' compensation law was deleted and changed to "any policy put in place as required by the Act relating to occupational safety and health"]**
- Review the adoption of any policy put in place 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 the Act;
- Review any report filed by the employer related to health and safety of workplace in a manner consistent with any provision of the Act; and
- Regularly schedule a meeting during work hours at least once a quarter.

Committee designees must be permitted to attend trainings on the function of worker safety committees, rights established the Act, and an introduction to occupational safety and health without loss of pay. Employees are protected from retaliation for establishing the workplace safety committee or participating in committee activities.

[Ed. Note: This section of the Act comes into effect 180 days after July 4 (December 31). Employers are exempted from creating a workplace safety committee if they already have a safety committee that is compliant with the Act in place.]

Next Steps for New York Employers

There remains great uncertainty around what the impact of this consequential piece of legislation will be on employers. What we know now, however, is that you should not waste any time to assess whether you must (and how you will) comply with obligations already outlined by the Act. After the Department of Labor releases the new workplace and safety standards for airborne infectious diseases, you face fines if you do not enact a Prevention Plan or are found non-compliant with your industry-specific model standard.

The legislation also significantly increases the risk of litigation from employees who believe their workplace to be inconsistent with the mandated minimum standards. While lawmakers have promised future amendments to reduce this risk (such as a cure period to limit litigation), the fact remains that employees have greater legitimacy to sue if they feel their workplace is unsafe. To defend against such action, you must show a court that you made a good faith effort to comply with the obligations of the model standard. Accordingly, you should immediately begin to assess and review measures implemented in response to the COVID-19 pandemic to determine where you may be deficient. You should also start thinking about any updates that need to be made to handbooks, materials, and training provided to current and newly hired employees.

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Finally, because the provisions of these amendments to can be waived by a collective bargaining agreement, you should work with your labor counsel to determine whether you can negotiate with any affected union on these issues.

Conclusion

As the contours for this legislation changes, you can expect more updates from us. We will continue to monitor developments impacting New York employers, so make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information directly to your inbox. If you have questions about the HERO Act and whether your policies comply with workplace and other applicable laws, contact your Fisher Phillips attorney or any attorney in our New York City office.

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