New York Employers Must Act Immediately to Comply with NY HERO Act

Insights
7.20.21

New York employers must take immediate steps to comply with statutory requirements aimed at preventing the spread of infectious disease in the workplace. As previously reported, in May New York State passed the NY HERO Act, which requires employers to implement an airborne infectious disease exposure plan. The legislation directed the State to prepare a model plan and requires employers to either adopt the model plan or create an alternative plan that meets or exceeds the standards in the state model.

Earlier this month, the Department of Labor (in consultation with the New York State Department of Health) published the state's Airborne Infectious Disease Exposure Prevention Standard ("Model Standard") and model and industry-specific Airborne Infectious Disease Exposure Prevention Plans ("Prevention Plan"). The Department of Labor states on its website that employer Prevention Plans do not currently (as of the date of this publication) have to be in effect. Rather, employers must adopt their Prevention Plan now so it can be put into effect should the state designate an airborne infectious disease as a highly contagious communicable disease that presents a serious risk of harm to the public health. Here's what employers need to know to comply with this new law.

What is the Model Standard?

See our previous publication for a more in-depth review of the NY HERO Act. The Model Standard consists of the minimum requirements employers must meet in order to comply with the law. If an employer chooses to create its own Prevention Plan or "alternative plan," it will need to pay particular attention to the Model Standard. Alternative plans must meet or exceed the minimum standards in the Model Standard. The Department of Labor encourages employers to review the model or relevant industry-specific Prevention Plan for guidance when crafting an alternative plan.

An employer choosing to adopt one of the Prevention Plans published on the Department of Labor's website should review the Model Standard in order to have a strong understanding of its purpose and application, but will primarily concentrate on implementing the Prevention Plan.

What is a Prevention Plan?

The Prevention Plan provides employers and employees with step-by-step guidelines and procedures should there be a designated airborne infectious disease outbreak – similar to the

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

procedures should there be a designated airborne infectious disease outbreak—similar to the industry specific guidance the state put into place for businesses during much of the COVID-19 pandemic. Now that the Department of Labor has published a model and industry-specific Prevention Plans, employers must decide if they want to adopt the model Prevention Plan applicable to their industry or develop their own plan. Employers have until **August 5** (30 days after publication of the model and industry-specific standards) to adopt their Prevention Plan.

The Prevention Plans published by the Department of Labor are comprehensive, consisting of several parts such as:

- Identification of the supervisory employee(s) who will be responsible for enforcing compliance with the Prevention Plan and any other applicable local, state, and federal guidance.
- Exposure controls consisting of:
  - Minimum controls such as stay-at-home policies in case of infection, health screenings, face coverings, social distancing, and cleaning and disinfection.
  - Advanced controls when the minimum controls do not provide sufficient protection. Employers may implement additional controls such as engineering or policy changes**. Note:** Employers are given the authority to determine when advanced controls are necessary. Accordingly, employers should decide under what circumstances they may elevate their exposure controls.
- Housekeeping matters such as disinfection methods and schedules.
- Employer responses to an infection.
- Verbal training during a designated airborne infectious disease outbreak.

In addition, employers are expected to evaluate and revise their Prevention Plan when there is a designated airborne infectious disease outbreak. Both the Model Standard and the Prevention Plans denote employee protections against discrimination, retaliation, or any adverse action for exercising any rights granted by the Act or the employer's Prevention Plan.

Industry-Specific Plans

The model and industry-specific Prevention Plans are substantially similar apart from slight variations, tailored to each industry, in the engineering controls, administrative controls, and personal protective equipment sections. The Department of Labor published Prevention Plans for the following industries: agriculture, construction, delivery services, domestic workers, emergency response, food services, manufacturing and industry, personal services, private education, private transportation, and retail.

Sharing the Prevention Plan with Employees

Employers must provide their employees with a written copy of their Prevention Plan within thirty days after adoption of the plan, and no later than **September 4, 2021**. The Prevention Plan must also

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

days after adoption of the plan, and no later than **September 4, 2021**. The Prevention Plan must also be posted in a visible and prominent location within the worksite, included in the employee handbook (if one is provided), and provided to new hires.

Language Considerations

The Model Standard and Preventions Plans have been published in English on the Department of Labor's website and Spanish translations are noted to be forthcoming. Pursuant to the Act, however, employers must disseminate their Prevention Plan "in the language identified by each employee as the primary language of such employees."

Penalties

Employers may be fined at least $50 a day for failing to adopt or create a Prevention Plan. Employers who fail to abide by their Prevention Plan can be fined anywhere from $1,000 to $10,000. Multiple violations within a six-year period will lead to a substantial increase in fines.

When Must the Prevention Plan Be Implemented?

As of the date of this publication, employers do not have to have their plan activated. As stated by the Department of Labor, an employer's Prevention Plan:

> [Goes] into effect when an airborne infectious disease is designated by the New York State Commissioner of Health as a highly contagious communicable disease that presents a serious risk of harm to the public health.

While the Department of Labor acknowledges that we are still in the midst of a pandemic, it explains that no designation has been made at this time—New York lifted most COVID-19 restrictions on June 15, 2021 after 70 percent of New Yorkers aged 18 or older received at least one dose of the COVID-19 vaccine. Employers are directed to "check the websites of Departments of Health and Labor for up-to-date information on whether a designation has been put into effect, as any such designation will be prominently displayed."

When there *is* a designated airborne infectious disease outbreak, employers must provide employees with a verbal review of the Model Standard, their Prevention Plan, employees' rights under the NY HERO Act, and any associated employer policies. Employees must also receive training on additional topics concerning the infectious agent, activities at the work site that may lead to exposure, and the use and limitation of exposure controls.

What Should New York Employers Do Now?

While your Prevention Plan does not currently need to be activated, New York employers must act quickly to adopt a Prevention Plan and take a number of steps to ensure compliance with the Act. You must:

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

- **By August 5**:
  - Either adopt the model Prevention Plan applicable to your industry or create your own Prevention Plan.
  - Designate the supervisory employee(s) responsible for implementing and enforcing your Prevention Plan.
- **By September 4**:
  - Share your Prevention Plan with your employees. You must also post the plan in a visible and prominent location at each work site, attach it to any handbook materials, and ensure that staff responsible for hiring distribute the Prevention Plan to new hires.
- Make any necessary changes and procurements to ensure you will be compliant with your adopted Prevention Plan, should the state designate an airborne infectious disease, and develop processes to make sure any acquired materials are maintained in a sanitary and reliable condition.
- Develop training materials and designate the supervisory individual(s) who will provide employees with training on the Model Standard, Prevention Plan, and employees' rights under the NY HERO Act when there is a designated airborne infectious disease outbreak.
- Update training policies and procedures and handbooks.

Conclusion

The Department of Labor will continue to post guidance and details about the law as it is further implemented. We will monitor developments related to the NY HERO Act, so make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information sent directly to your inbox. If you have questions about the NY 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.

Related People

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

Amanda M. Blair
Associate
212.899.9989
Email

Melissa (Osipoff) Camire
Partner
212.899.9965
Email

Service Focus

Workplace Safety and Catastrophe Management

Related Offices

New York

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.