



New York Extends Designation of COVID-19 as an Airborne Infectious Disease Under the HERO Act: A 7-Step Action Plan

Insights

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New York employers must continue to implement their airborne infectious disease exposure prevention plans through at least October 31, **[Ed. Note. The Commissioner of New York's Department of Health extended the designation to March 17, 2022.]** thanks to the Commissioner of Health's recent under-the-radar designation that COVID-19 remains "a highly contagious communicable disease that presents a serious risk of harm to the public health" under the state's HERO Act. While the New York HERO Act was designed to bring transparency to the workplace to combat the spread of airborne infectious diseases, its implementation has been rather opaque. On September 30, without any announcement on the State's Department of Health or HERO Act webpage – in contravention to earlier communication that such designations would be "prominently displayed" – the Commissioner of Health extended his earlier designation. Given the breadth of the Act, and confusion it has created, here is a list of the seven things employers need to do now to comply with the HERO Act given this most recent development.

The Basics

For those unfamiliar, New York lawmakers enacted the HERO Act this past spring to create additional pandemic-related workplace protections. Drafted in response to the COVID-19 pandemic, it 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.

From day one, employers have been in a mad dash to comply with the Act. New York State's Department of Labor has been, too, with steady updates to the HERO Act webpage and its publications (the Department of Labor again updated their FAQ on September 30). With each new development, and associated compliance obligation, it can be difficult for employers to keep up.

Developing and Sharing the Airborne Infectious Disease Exposure Prevention Plan

Employers who have not shared their Prevention Plan with employees should do so as soon as possible. Model plans can be found on the state Department of Labor's HERO Act webpage. Employers can either use the applicable published template or adapt the format of said applicable template. A previous version of the Department's FAQ said modifications to the "Controls or Advance Controls sections of the [Prevention Plan templates] do not necessarily constitute an 'alternative plan' for the purposes of the HERO Act and likely do not require additional employee participation."

This language has since been deleted from the updated version of the FAQ to state more affirmatively that employers “can use the ‘Advanced Controls’ section in the model plan to add controls that are applicable to their specific business.”

Accordingly, apart from in the Advanced Controls section, employers should be careful not to make significant alterations to the template. Employers who make significant changes to the template or create their own must comply with the model standard and develop their Prevention Plan with meaningful participation of their employees or a collective bargaining representative (when applicable).

7-Step Compliance Plan for Employers

1. **Review and update the plan.** When there is a designation by the Commissioner of Health that an airborne infectious disease is a highly contagious communicable disease that presents a serious risk of harm to the public health, employers must *immediately* review and update their plan to make sure it “incorporates current information, guidance, and mandatory requirements issued by federal, state, or local governments related to the infectious agent of concern.”

NOTE: The state Department of Labor recently amended the template Prevention Plan to address the use of face coverings given that a majority of adult New Yorkers are vaccinated. In workplaces where all individuals on the premises (not just employees) are fully vaccinated, the Department recommends, but does not require, that employees wear face coverings in accordance with guidance from the state’s Department of Health or the CDC. Most worksites, however, will not reach this high bar. In all other worksites, employees are required to wear face coverings in accordance with guidance from the state’s Department of Health or the CDC.

Employers should update their Prevention Plan to reflect this amendment of the template Prevention Plan. [Ed. Note. The Department of Labor amended the Prevention Plan again on February 10, 2022, to *recommend* employee face covering use in indoor areas if the area does not have a mask or vaccine requirement as a condition of entry.]

2. **Finalize and activate the Prevention Plan.** Neither the statute, nor the model standard or template Prevention Plan, specifically state how long an employer has to finalize its Prevention Plan after a designation by the Commissioner of Health. While the model standard says the Prevention Plan should be activated “promptly,” the term provides employers with a significant amount of leeway. However, given the possibility of fines or legal action from employees, employers should not unnecessarily delay the activation of their Prevention Plan.
3. **Inform your employees.** Make sure the Prevention Plan is posted in a prominent location in the worksite, included in the employee handbook (if provided) and given to new hires.
4. **Implement training.** Employers must conduct a verbal review of the Prevention Plan with their employees and new hires.

- Determine when, where, and how it will occur. The review or training can be conducted in person or through audio or video conference. If conducted in person, the review should take place in a well-ventilated room with appropriate face masks.
 - As stated in the Department of Labor's template Prevention Plan, review should address the following: the infectious agent and the disease(s) it can cause, the signs and symptoms of the disease, how the disease can be spread, the activities and locations at the worksite that may involve exposure to the infectious agent, and the use and limitations of exposure controls. The review must also provide an explanation of the model standard, the Prevention Plan, employees' rights under the HERO act, and associated employer policies. Since the infectious agent at issue is COVID-19, the training should be specific to the disease.
5. **Assign enforcement responsibilities and ensure compliance.** Make sure each worksite is implementing the minimum controls selected in the employer's Prevention Plan, such as the stay-at-home policies in case of infection, health screenings, face coverings (employers must provide them), physical distancing, hand and hygiene facilities, and cleaning and disinfection.

Only supervisory employees can be responsible for enforcing compliance with the Prevention Plan.

6. **Consider elevation to advanced controls.** Employers are given discretion to determine when advanced controls will be implemented. Employers, however, should not leave this decision to the last minute. Employers should brainstorm and decide when health and safety conditions will necessitate elevation to the use of the advanced controls they identified in their Prevention Plan. If the selected advanced controls requires the use of PPE, employees should be provided with training on their use of the equipment.
7. **Evaluate and revise Prevention Plan as needed.** Employers should regularly check for updated information and guidance provided by the state's Department of Health and the CDC. The Prevention Plan should also be "reviewed and updated whenever necessary to reflect new or modified tasks and procedures which affect occupational exposure and to reflect new or modified employee assignments."

What happens next?

You must keep your Prevention Plan in effect until the designation is lifted. Accordingly, you should continue to monitor state and CDC guidance concerning COVID-19 and, when necessary, update your Prevention Plan. You should also prepare for the implementation of the second part of the HERO Act (effective November 1), which permits the formation of joint labor-management workplace safety committees. Committee members will have the authority to raise health and safety concerns, review your health and safety policies, and participate in health and safety site checks.

Notably, the FAQ published by the state's Department of Labor states that "employers who employ at least 10 employees are required to establish a workplace safety committee." The statute, however, does not have this language. Rather, employees are permitted to establish and administer a

committee while employers are prohibited from interfering. This significant discrepancy will hopefully be addressed in future regulations. In the meantime, you should [read the statute](#) to prepare for the creation of these committees and organize all health and safety policies, guidance, and rules so that they are easily found and accessible for potential review.

We will monitor developments related to the HERO Act, 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, the authors of this Insight, or any attorney in [our New York City office](#).

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