

CLIENT ALERT

The New York State HERO Act Imposes Airborne Infectious Disease Exposure Standards on Employers

May.12.2021

On May 5, 2021, New York Governor Andrew Cuomo [signed S1034](#), the New York State Health and Essential Rights Act (HERO Act), into law. The HERO Act, described by the Governor's Office as a "first-in-the-nation" law, requires the New York State Commissioner of Labor (NYDOL), in consultation with the New York State Commissioner of Health (NYDOH), to issue airborne infectious disease exposure standards for all work sites, in English and in Spanish. These standards, covering not only employees but also independent contractors, must be differentiated by industries and must address several subject areas, including employee health screenings, face coverings, personal protective equipment (PPE), effective social distancing, and cleaning and disinfecting protocols. All employers are required to either implement the standard that is relevant to their industry and workforce, or to establish their own airborne infectious disease exposure prevention plans (Plans) that meet or exceed the requirements of the applicable NYDOL standard. Effective November 1, 2021, the HERO Act requires employers with at least ten employees to permit their employees to create and participate in joint labor-management workplace safety committees meeting certain specified criteria. The statute, otherwise effective June 4, 2021, establishes a private right of action for employees and imposes civil fines on employers who fail to comply. Retaliation against covered employees for exercising rights under the HERO Act or the employer's Plan, reporting violations, participating in workplace safety committees, and/or refusing to work based on their reasonable, good-faith belief that the working conditions create an unreasonable risk of exposure to airborne infectious diseases inconsistent with applicable law is strictly prohibited.

Who is Covered? The HERO Act defines the term "employer" to include "any person, entity, business, corporation, partnership, limited liability company, or association employing, hiring, or paying for the labor of any individual in any occupation, industry, trade, business, or service," regardless of size, but does not "include the state, any political subdivision of the state, a public authority, or any other governmental agency or instrumentality." The term "employees" is broadly defined to include those individuals "providing labor or services for remuneration" including, among others, part-time workers, independent contractors, domestic workers, home health and personal care workers, and seasonal workers, without regard to their immigration status.

Development and Implementation of Plans. Once the NYDOL issues industry-specific standards, New York State employers of all sizes must either adopt the standards applicable to their industry as their Plans or must develop and implement their own Plans that comply with or exceed those standards. If an employer chooses to establish its own airborne infectious disease exposure prevention standards, it must do so pursuant to an agreement with any collective bargaining representatives or, in a non-unionized workforce with meaningful employee participation, and be tailored and specific to industry-specific hazards and work site considerations.

The Plan must be distributed to covered employees in both English and in the employee's primary language if available from the NYDOL as a model, upon hire and upon reopening after business closure due to an airborne infectious disease. Employers must also post the Plan in a visible and prominent location within the work site and include the Plan into their employee handbooks

where employers maintain them. In addition, employers must make the Plan available for review upon request by covered employees, employee representatives, collective bargaining representatives, the NYDOL and the NYDOH.

Joint Labor-Management Workplace Safety Committees. An employer must permit its employees to establish and administer a “joint labor-management workplace safety committee,” comprised of employee and employer designees. At least two-thirds of the membership of any committee must consist of non-supervisory employees, and the committee must be co-chaired by a representative of the employer and non-supervisory employees. Employers may not interfere with the selection of employees for such committees or with their performance of their duties under the statute. The HERO Act authorizes the committee to: (i) raise health and safety concerns, to which the employer must respond; (ii) review and provide feedback on all employer policies required by the HERO Act or the New York State Workers’ Compensation Law; (iii) review and provide feedback on all workplace policies promulgated in response to any health or safety law; (iv) participate in any work site visit by a government entity responsible for enforcing health and safety standards; (v) review any employer health and safety report; and (vi) regularly schedule a meeting during work hours at least quarterly. Employers must also permit safety committee designees to attend, without loss of pay, a training on the function of worker safety committees, rights under this portion of the HERO Act, and an introduction to employee safety and health.

CBA Waiver Provision. The HERO Act contains a collective bargaining agreement (“CBA”) waiver provision, which permits employers and unions to explicitly agree to waive the requirements of the HERO Act as long as the waiver “explicitly reference[s]” the statute. Such employers may be obligated to adopt Plans for their non-bargaining unit employees, notwithstanding the waiver as to its bargaining unit employees. Finally, the HERO Act expressly provides that nothing therein “shall be deemed to diminish the rights, privileges, or remedies of any employee under any” CBA.

Penalties. Penalties for non-compliance with the requirements of the HERO Act may include a fine of \$50 per day for failure to implement a compliant Plan, or between \$1,000 and \$10,000 for failure to abide by an adopted Plan. If New York State determines that an employer previously violated the HERO Act in the preceding six years, such penalties may increase to \$200 per day for failure to implement a compliant Plan or between \$1,000 and \$20,000 for failure to abide by an adopted Plan.

Private Right of Action. In addition to fines, the HERO Act creates a private right of action for covered employees. Covered employees may assert a claim for injunctive relief against their employer alleging violation of its Plan in a manner that creates a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, by the employer at the work site, unless the employer did not and could not, with the exercise of reasonable diligence, know of the presence of the violation. The HERO Act allows courts adjudicating such claims to award up to \$20,000 in liquidated damages and attorneys’ fees to a prevailing employee, unless the employer demonstrates a good faith basis for its belief that its health and safety measures complied with the applicable NYDOL standard. If, however, an action is brought by an employee and a court finds that such action is “completely without merit in law and undertaken primarily to harass or maliciously injure another,” the employer may seek sanctions against the party who commenced it.

Anti-Retaliation Provision. The HERO Act prohibits employers from retaliating against covered workers who: (i) exercise their rights under or report a violation of the statute or the Plan; (ii) participate in joint labor-management workplace safety committees; and/or (iii) refuse to work due to their reasonable belief that the work site exposes them or others to unreasonable health and safety risks that are inconsistent with the laws, rules, policies, or orders of any governmental entity, including the

standards issued pursuant to the HERO Act. Employees may not pursue a retaliation claim based on this last principle unless the employer was informed of the work site risk or condition, which allows the employer the opportunity to cure it, unless the employer “had or should have had reason to know about the inconsistent working conditions and maintained the inconsistent working conditions.”

Effective Dates. The NYDOL must issue the industry-specific standards by June 4, 2021, thirty days from the HERO Act’s enactment. The non-retaliation provisions take effect on June 4, 2021 and the workplace safety committee provisions are effective November 1, 2021, 180 days after enactment. The Governor’s signing message accompanying the bill reports that the New York State Legislature has agreed to technical changes to the HERO Act instructing the NYDOL to include a clear timeline in developing and implementing the workplace standards.

Preparation for Compliance. The HERO Act imposes significant new obligations on covered employers as they prepare for more employees to return to the workplace. Employers should evaluate their return-to-the-workplace guidelines and facilities to identify areas that may need to be addressed to comply with the applicable safety mandates. Employers should also prepare to implement and distribute Plans, and provide supervisors with both policy compliance and anti-retaliation training. Employers should also consider the potential budgetary implications raised by additional expenditures needed to comply with the HERO Act. Employers can also begin preparing to incorporate these new provisions into their employee handbooks, and devise a plan for dealing with greater employee involvement in health and safety policies. Complying with current guidelines, including but not limited to, the [Governor’s Office-Based Work Guidelines](#), is recommended. It is also important to consider the potential impacts of the numerous other federal, state and local law and orders that have been issued in response to the COVID-19 pandemic and requirements regarding family leave, sick pay, and other issues.

Crowell & Moring LLP continues to monitor relevant developments and counsel its clients accordingly. The Firm will be holding a three-part webinar, [Returning to the Workplace and Getting Back to Normal During the Pandemic](#), two sessions of which have already been scheduled, regarding pertinent legal issues involving rules and guidelines impacting employers when implementing health and safety measures in the workplace. Laws impacting return to the workplace such as the HERO Act will be covered during the webinar. For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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