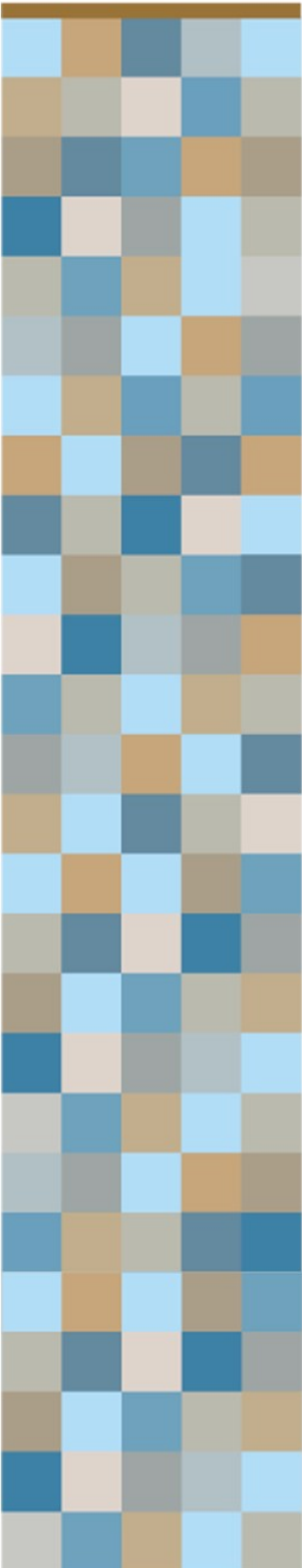


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July 2021



HERO Act Imposes New Requirements on New York Employers

By: Jonathan Trafimow & Jennifer Calamia

As explained more fully below, the New York Health and Essential Rights Act¹ (“HERO Act” or the “Act”) requires private employers to create a written plan (the “Plan”) to minimize or eliminate occupational exposure to airborne infectious diseases² in the workplace by **August 5, 2021**. The second part of the Act requires employers with at least 10 employees to permit the creation of a joint employer-employee workplace health and safety committee, by **November 1, 2021**.

On May 5, 2021, New York Governor Andrew Cuomo signed the HERO Act into law, adding two new sections to the New York Labor Law: (1) Section 218-b, regarding airborne infectious disease prevention plans and standards; and (2) Section 27-D, regarding joint management workplace safety committees.

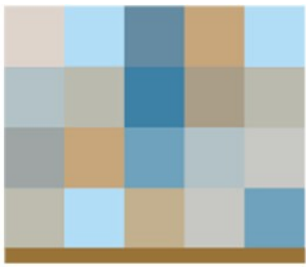
To help employers develop a Plan, the Act directed the New York Department of Labor (“DOL”) to issue several model documents, which it did on July 6, 2021. The DOL published: (1) the Airborne Infectious Disease Exposure Prevention Standard (the “Standard”); (2) a Model Airborne Infectious Disease Exposure Prevention Plan (the “Model Plan”); and (3) additional industry specific model plans (the “Industry Specific Plans”) in the following industries: agriculture, construction, delivery services, domestic work, emergency response work, food services, manufacturing and industry, personal services, private education, private transportation and retail.

Key Takeaways

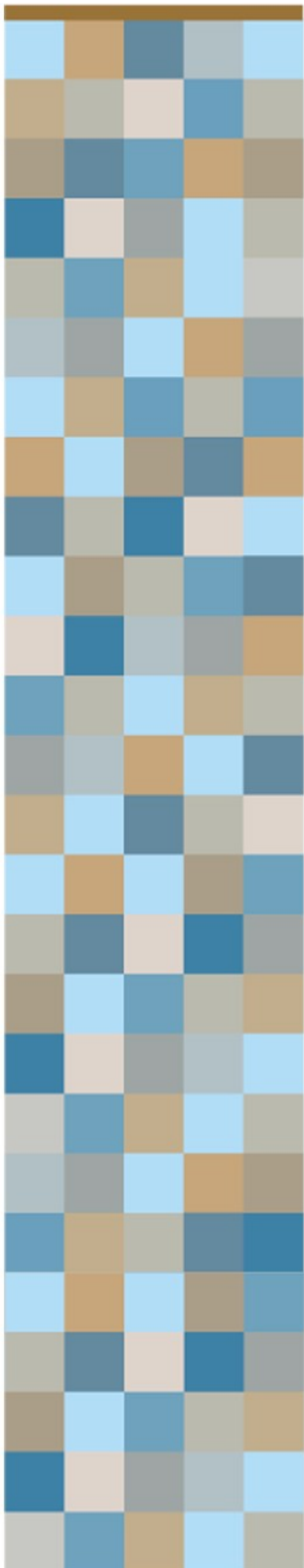
- Employers must tailor and adopt the Model Plan or develop their own Plan by August 5, 2021.
- Employers must provide employees with a copy of the Plan:
 - Within 60 days after the NYSDOL publishes the Model Plan, or September 4, 2021;
 - Within 30 days after adoption of the Plan;

¹ All references to the HERO Act include the June 11, 2021 amendments to the Act.

² This includes any airborne infectious agent or disease designated by the Commissioner of Health as a highly contagious communicable disease that presents a serious risk of harm to the public health. COVID-19 has not received this designation at the time of this Client Alert.



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- Within 15 days after reopening after a period of closure due to airborne infectious disease; and
- Upon hire to newly hired employees.
- Employers with more than 10 employees must prepare to respond to the November 1, 2021 deadline regarding workplace health and safety committees.

The Model Plan and Industry Specific Plans

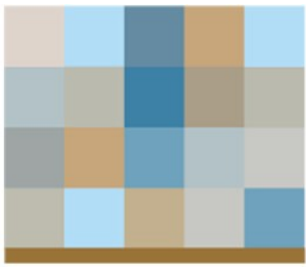
Both the Model Plan and the Industry Specific Plans establish the minimum requirements New York employers must adopt for written procedures and protocols in the following categories:

- Employee health screenings.
- Face coverings.
- Required personal protective equipment (“PPE”) that must be maintained.
- Accessible hand hygiene stations and maintaining healthy hand hygiene (including providing adequate break times for employees to wash their hands).
- Regular cleaning and disinfecting of shared equipment and frequently touched surfaces.
- Effective social distancing for employees, consumers and customers.
- Compliance with mandatory or precautionary orders of isolation or quarantine.
- Compliance with applicable engineering controls such as proper air flow and exhaust ventilation.
- Designation of one or more supervisory employees to enforce compliance with the plan and any other federal, state or local guidance related to avoidance of spreading an airborne infectious disease.
- Compliance with any applicable laws, rules, regulations, standards or guidance on notification to employees and relevant state and local agencies of potential exposure to airborne infectious disease at the worksite.
- Verbal review of infectious disease standard, employer policies and employee rights under this section of the Act.

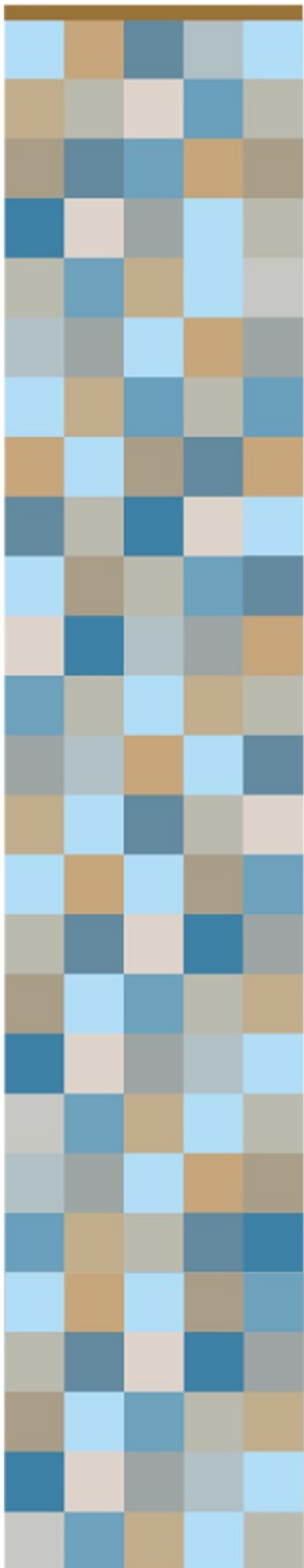
Employer Responsibilities

Employers have until August 5, 2021 to complete and adopt either the Model Plan or Industry Specific Plan that applies to them or to develop and establish an alternative Plan that meets or exceeds the minimum standard as set forth by the DOL.³ Employers adopting the Model Plan must still tailor the plan to meet the specific needs of their individual workplace. On the other hand, Employers who choose to develop their own

³ While employers must adopt a Plan by August 5, 2021, such Plan shall only be effective “when a highly contagious communicable disease is designated by the Commissioner of Health as presenting a serious risk of harm to the public health.” See, Department of Labor Airborne Infectious Disease Exposure Prevention Standard, P764 (7/21). As of the writing of this Client Alert, the Commissioner of Health has made no such designation.



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Plan must develop the Plan pursuant to a collective bargaining agreement (if applicable), or with “meaningful participation of employees.”

Employers must provide employees with copies of the Plan at the following times:

- Within 60 days after the NYSDOL publishes the Model Plan relevant to the employer’s industry if the business/employer is in operation as of the effective date of this section, or **September 4, 2021**;
- Within 30 days after adoption of the Plan;
- Within 15 days after reopening after a period of closure due to airborne infectious disease; and
- Upon hire to newly hired employees.

Employers must provide a written copy of the Plan in English as well as in the employee’s identified primary language. The DOL will publish the Model Plan in English, Spanish and selected other languages.

Employers must also post the Plan in a “visible and prominent location within each work site.” If an employer issues an employee handbook, a copy of the Plan must also be included in the employee handbook.

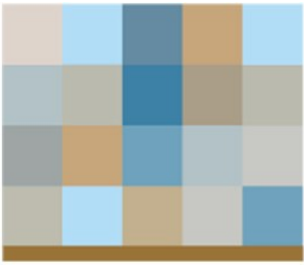
Non-Retaliation Provision

Employers may not retaliate against an employee for reporting violations or concerns, reporting an airborne exposure concern, and/or refusing to work when the employee in good faith believes that the worksite exposes them to safety risks which are inconsistent with laws, rules, policies, or orders of governmental agencies, including the Standard.

Workplace Committees

Section 27-D requires employers with 10 or more employees to permit employees to establish and administer a joint labor-management workplace safety committee by **November 1, 2021**. It further directs that each workplace safety committee shall be composed of employee and employer designees, at least two-thirds of whom must be non-supervisory employees. Members of the committees shall be chosen by non-supervisory employees.

This provision of the Act does not diminish any rights under a collective bargaining agreement. In fact, parties to a collective bargaining agreement can waive the obligations under Section 27-D, so long as the waiver explicitly references the Act.



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A. Jonathan Trafimow is a Partner of the firm where he Co-Chairs its Employment Law Practice Group. Mr. Trafimow represents employers in all areas of discrimination, retaliation, harassments and civil rights claims, and class actions. He also routinely advises employers on compliance employment laws and regulations.

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Compliance and Penalties

The DOL may investigate violations of Section 218-b and impose penalties of \$50 or more per day for failure to adopt a Plan, as well as \$1,000- \$10,000 for failure to abide by an adopted Plan. Section 218-b also creates a limited private right of action.⁴

Implications for Employers

Employers must act quickly to adopt a Plan to comply with the **August 5, 2021** deadline and other applicable requirements. Employers should also begin planning for how to respond to the **November 1, 2021** deadline. We note the possibility that the Act could be challenged under various legal theories, including a claim that it is preempted in part by the National Labor Relations Act.

If you have any questions regarding the matter raised in this Alert, please feel free to contact [Jonathan Trafimow](mailto:jtrafimow@moritthock.com) at (516) 880-7283 or jtrafimow@moritthock.com and [Jennifer Calamia](mailto:jcalamia@moritthock.com) at (516) 265-1136 or jcalamia@moritthock.com



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⁴ Before commencing a civil action based on an alleged violation of the Act, the employee must give the employer notice of the violation and the employer must have 30 days to remedy the violation. If the employer corrects the violation during that time, the employee may not bring an action. Also, the employee must bring the civil suit within six months of the employee's discovery of the violation. The employee may seek injunctive relief.

