

## Is This Really The “Hero” We Were Waiting For? An Employer’s Guide To The NY HERO Act

Even as COVID-19 pandemic restrictions on the public lift, New York is imposing new permanent obligations on employers mandating extensive workplace safety and health protections. Signed into law by Gov. Andrew M. Cuomo on May 6, 2021 (with amendments signed into law on June 14, 2021), the NY Hero Act is a first-in-the-nation *permanent requirement for employers to adopt and implement an “airborne infectious disease exposure prevention plan”*. The NY Hero Act became effective on July 6, 2021, pursuant to the amendments recently made to the Act.

*The NY HERO Act imposes heavy penalties against employers who fail to comply, and even creates a private right for employees to sue employers for alleged violations. New York employers should therefore take steps to comply with this new law.*

### Employers May Adopt The Model Plan Created By The NYSDOL Or Create An Alternative Plan

Section 1 of the NY HERO Act requires all New York employers to implement a plan to protect employees from *all possible airborne infections – including not only COVID-19, but also the flu, the common cold and other airborne infectious diseases*. Under this requirement, *within 30 days after the July 6, 2021 effective date of the NY Hero Act – August 5, 2021 – employers must adopt a compliant plan.*

*Section 1 of the NY HERO Act applies to all private employers, and applies to all full-time employees, part time employees, independent contractors, individuals working for staffing agencies, and individuals making deliveries to a work-site. The NY HERO Act defines a “work site” to include any physical space, including a vehicle, and employer-provided housing, subject to certain exclusions. Generally speaking, telecommuting/remote work is not considered within a “worksites” for purposes of the NY HERO Act, unless “the employer has the ability to exercise control of such site”.*

*Under Section 1 of the NY HERO Act, the NYS Department of Labor (“NYSDOL”) was charged with developing model plans for employers in each industry representing a significant portion of the workforce or with unique characteristics requiring distinct standards (as determined by the Commissioner of Labor in consultation with the Commissioner of Health). Such model plans must incorporate protocols for, inter alia, daily health screenings, PPE, hygiene stations, cleaning/disinfection of equipment, social distancing, compliance with orders of isolation with respect to exposed employees, and compliance with other orders issued by the NYS Department of Health and local authorities.*

*The NYSDOL model plan was issued on July 6, 2021. Within thirty (30) days after such date – by August 5, 2021 – employers must either adopt the plan, or, alternatively, develop and implement a plan tailored specifically to their workplace. However, any alternative plan must be as stringent or more stringent than the NYSDOL model plan.*

*Significantly, any alternative plan must be developed by the employer in cooperation with the union representative or, in non-unionized workplaces, with “meaningful participation of employees.” No guidance is given on what “meaningful participation” of employees constitutes.*

### Employers Must Provide The Plan To Employees And Post The Plan Conspicuously In The Workplace

Employers must provide the plan to employees within sixty (60) days of the NYSDOL’s July 6, 2021 promulgation of the model plan. Employers must also provide the plan to all new hires. Further, employers must post the plan in a visible and prominent location at each “worksites” and include the plan in any employee handbook.

### Employers Must Allow Employees to Establish “Workplace Safety Committees”

Under Section 2 of the NY HERO Act, no later than November 1, 2021, employers must permit the creation of “joint labor-management workplace safety committees” by employees. These committees must comprise of no less than 2/3 non-supervisory employees and are empowered to take action to ensure the employer’s compliance with the NY HERO Act.

The amendments significantly clarify the role to be played by the “joint labor-management workplace safety committees”. Specifically, whereas under the original NY HERO Act such committees were charged with reviewing the employer’s compliance with “any provision of the worker’s compensation law,” the amendments restrict the purview of the committees to “occupational safety and health”-related provisions of the Labor Law.

#### Retaliation is Prohibited

Under the anti-retaliation provisions of the NY HERO Act, employers are prohibited from discriminating, threatening, retaliating against, or taking adverse action against employees for exercising any right created by the NY HERO Act or under the employer’s plan or reporting violations to the appropriate authorities. The anti-retaliation provisions go even further, stating that employers are forbidden from acting against employees that refuse to work, where the employee reasonably believes workplace conditions create an unreasonable risk of exposure to airborne disease, and notifies the employer of such conditions.

#### Violations Can Lead to Stiff Civil Penalties, Enforcement Actions, and Private Lawsuits

The NY HERO Act provides for onerous penalties against non-compliant employers. The NYSDOL may assess civil penalties against employers that fail to adopt an “airborne infectious disease exposure prevention plan”.

If the NYSDOL finds that an employer failed to adopt a compliant plan, the employer can be fined up to \$50 per day. For subsequent violations of the NY HERO Act, the daily penalty increases to \$2,000. As well, employers found by the NYSDOL to have failed to abide by their plans are also subject to civil penalties of up to \$10,000 for an initial violation and up to \$20,000 for each subsequent violation within six (6) years of the first violation.

Employees are also provided a private right of action under the NY HERO Act against any employer alleged to violate their plan “in a manner that creates a substantial probability that death or serious physical harm could result to the employee,” unless the employer did not know, and could not have known about the violation with reasonable diligence.

Any action under the NY HERO act must be commenced within six (6) months of the date the employee obtained knowledge of the violation alleged. To commence an action, the employee must give the employer thirty (30) days’ notice. However, the pre-suit notice requirement does not apply if the employee can allege with particularity that the employer acted with bad faith in failing to cure the complained-of condition. No action under the NY HERO Act may be brought if the employer corrects the complained-of violation.

Remedies available to employees include injunctive relief against the employer, up to \$20,000.00 in liquidated damages, and reasonable attorney’s fees. If the court finds the action to be frivolous, the employer may be awarded costs and reasonable attorney’s fees.

In view of the severe potential consequences for employers that violate the NY HERO Act, New York employers should promptly seek advice on how to achieve compliance.

The attorneys at Kaufman Dolowich & Voluck will continue to keep employers informed about legislation impacting employers during this unprecedented time. In the meantime, if you have any questions, or wish to discuss the contents of this alert further, please contact Keith Gutstein (KGutstein@kaufmandolowich.com), Jennifer E. Sherven (JSherven@kaufmandolowich.com), Aaron N. Solomon (ASolomon@kaufmandolowich.com) or Taimur Alamgir (TAlamgir@kaufmandolowich.com) by email.