

EMPLOYERS MUST PROMPTLY IMPLEMENT THEIR WORKPLACE SAFETY PLANS UNDER THE NEW YORK HERO ACT, KD Law Alert, Sept. 15, 2021

New York Governor Kathy Hochul recently announced that New York's Commissioner of Health has designated COVID-19 as a "highly contagious communicable disease that presents a serious risk of harm to the public health." As a result of this designation, employers must now implement the workplace safety plan (the "Plan") that they adopted under the New York HERO Act.

As indicated in a prior KD Alert, the HERO Act required employers to adopt a workplace safety plan to protect employees from all possible airborne infectious diseases. To assist employers in the development of their Plan, the New York State Department of Labor ("NYSDOL") developed a "Model Plan" Airborne Infectious Disease Exposure Prevention, as well as various industry-specific models plans, which can be accessed on the NYSDOL's website. Although employers were also required to distribute their Plan to all employees (and post it in a prominent location and include it any employee handbook) on or before September 4, 2021, until now employers were not officially required to enact the Plan because the Commissioner of Health had not designated COVID-19 as a "highly contagious communicable disease that presents a serious risk of harm to the public health."

Employers Must Now Take Prompt Action To Implement Their Plans

Pursuant to the Airborne Infectious Disease Exposure Standard (the "Standard") that was promulgated by the NYSDOL, employers must take the following actions to ensure compliance with the HERO Act:

- Immediately review and update their Plan (if necessary) to ensure that it incorporates current information, guidance and governmental mandates related to COVID-19;
- Finalize and promptly activate the Plan;

Please note that the "Model Plan" developed by the NYSDOL sets forth "Minimum Controls" that employers must implement in the workplace. Specifically, among other things, the "Minimum Controls" require employers to conduct health screenings prior to each shift, impose physical distancing requirements, and provides that employees will "wear face coverings throughout the workday to the greatest extent possible." As of the date of this KD alert, the state has not issued any specific guidance addressing whether vaccinated employees are subject to the "Minimum Controls" set forth in the Model Plan.

Please also note that neither the HERO Act nor any guidance issued by the NYSDOL sets forth a specific deadline in which the Plan must be implemented. Nevertheless, given that the Standard expressly requires the Plan to be "immediately reviewed" and "promptly activated", it is best practice for employers to implement their Plans as soon as practicable and that they consult with counsel when doing so.

- Provide employees with a verbal review of the Plan and their rights under the New York HERO Act; and
- Provide employees with a copy of the Plan (in their primary language) and post a copy of the Plan in a visible and prominent location. Employers must ensure that the Plan is accessible to all employees during all work shifts.

Actions That Must Be Taken While the Commissioner of Health's Designation Remains in Effect

The Standard further provides that employers must ensure that the Plan is being followed by:

- Assigning enforcement responsibilities to one or more supervisory employees and ensuring that adequate enforcement of the Plan takes place;
- Monitoring and maintaining exposure controls; and

- Regularly checking for updated information and guidance promulgated by the State Department of Health and the Centers for Disease Control and Prevention concerning COVID-19.

KD IS HERE TO HELP

The NYSDOL's website currently states that it will be sharing more information regarding the HERO Act in the near future. As such, the attorneys at Kaufman Dolowich & Voluck are closely monitoring any updates issued by the NYSDOL, as well as any mandates or guidance promulgated by federal, state or local governments in response to the COVID-19 pandemic. If you have any questions, or need assistance implementing the requisite Plan, please contact Keith Gutstein (KGutstein@kaufmandolowich.com), Jennifer E. Sherven (JSherven@kaufmandolowich.com), or Edward H. Grimmett (EGrimmett@kaufmandolowich.com) by email.