
Status Update: NY COVID-19 Restrictions and the NY HERO Act

New York has taken significant steps to return to normal now that COVID-19 cases in the state are at an all-time low, and the percentage of vaccinated adults continues to rise. On June 15, 2021, New York State Governor Andrew M. Cuomo announced that 70% of adult New Yorkers received their first COVID-19 vaccine dose and that the State was lifting COVID-19 restrictions and New York Forward Industry Guidance across multiple commercial settings.ⁱ Governor Cuomo explained that, with few exceptions, the State's guidelines (which cover limits on social gatherings, capacity restrictions, social distancing, cleaning and disinfection, health screenings, and contact tracing) are now optional.ⁱⁱ New York has also adopted the Centers for Disease Control and Prevention's (CDC) guidance concerning unvaccinated individuals, who must continue wearing masks and being socially distant in most settings in accordance with applicable guidance.ⁱⁱⁱ Businesses may continue to require masks and social distancing regardless of vaccination status, as long as the requirement complies with applicable federal and state laws and regulations (e.g., federal, state, and local discrimination statutes).

While New York has lifted COVID-19 restrictions, for the most part, the State has also passed legislation to ensure that its population is better prepared to handle another public health crisis in the future. On May 5, 2021, Governor Cuomo signed the New York Health and Essential Rights Act, or the NY HERO Act, into law, which solidified New York's effort to prevent occupational exposure to airborne diseases. On June 14, 2021, Governor Cuomo signed a second bill amending the NY HERO Act.^{iv} While more specific guidance and regulations concerning the NY HERO Act are expected, employers should begin to prepare for more permanent health and safety-related changes on the horizon. Below is a short summary of the NY HERO Act and a more detailed Q&A regarding its key provisions, in order to help employers understand their obligations under the new law.

I. Short Summary:

A. The NY HERO Act imposes two significant changes:

- i. First, the NY HERO Act requires that the New York Department of Labor (NYSDOL) establish specific model standards to prevent occupational exposure to airborne infectious diseases. Once the NYSDOL publishes the model standards, employers will have 30 days to establish airborne infectious disease exposure prevention plans (the "safety plans") either adopting the NYSDOL's standards or creating their own plans that meet or exceed the NYSDOL's standards. The NY HERO Act also prohibits discrimination and retaliation against

employees. These provisions, referred to in this alert as the “Health and Safety Provisions,” are effective 60 days after the NY HERO Act’s date of enactment (i.e., on July 5, 2021).^v

1. However, employers are not required to take any specific steps until the NYSDOL publishes its model standards. Employers will have 30 days from the release of the model standards to adopt a safety plan and another 30 days thereafter to distribute the plan to their employees.

ii. Second, the NY HERO Act amends the New York Labor Law by requiring that employers allow employees to establish workplace safety committees. These provisions, referred to in this alert as the “Committee Provisions,” become effective 180 days after the NY HERO Act’s date of enactment (i.e., on November 1, 2021).^{vi}

B. The Health and Safety Provisions and the Committee Provisions are discussed in more detail in Sections II and III below.

II. Health and Safety Provisions

A. *What type of standards must the NYSDOL create and publish?*

- i. The NYSDOL will establish model standards for particular industries requiring specific guidance and a general model standard for all other covered worksites that are not addressed by a specific industry standard.
- ii. The NY HERO Act instructs the NYSDOL to create standards in English and Spanish, and other languages at its discretion.

B. *What is the purpose of the standards?*

- i. The standards will establish requirements regarding the following categories: (1) employee health screenings; (2) face coverings; (3) required personal protective equipment (PPE) applicable to each industry; (4) hand hygiene and accessible workplace hand hygiene stations; (5) consistent cleaning and disinfection of shared equipment and frequently touched surfaces; (6) effective social distancing for employees, customers, and consumers as may be warranted by the illness and corresponding level of risk; (7) compliance with

mandatory/precautionary orders of isolation/quarantine; (8) compliance with specific engineering requirements, such as proper air flow or exhaust ventilation; (9) designation of a supervisory employee (or more than one if necessary) to enforce the safety plans and applicable federal, state, or local guidance regarding an airborne infectious disease; (10) compliance with applicable laws, rules, regulations, standards, or guidance concerning an airborne infectious disease; and (11) verbal review of a specific industry standard, if applicable, the employer's safety plan and policies, and employees' rights.

C. *When do employers need to have their safety plans completed?*

- i. Employers must establish their safety plans within 30 days after the NYS DOL publishes the model general standard and model standards for specific industries.

D. *Must employers distribute their safety plans to employees? If so, how do employers distribute their safety plans properly?*

- i. Yes – employers must distribute their safety plans to each employee in writing in English and the employee's primary language.

E. *What is the deadline for employers to distribute their safety plans?*

- i. Employers are required to distribute their safety plans within 30 days after adoption of the plan, but no later than within 60 days after the NYS DOL publishes the model standard relevant to the employer's particular industry.

1. **Note:** The Health and Safety Provisions also require that employers distribute their safety plans within 15 days after reopening after closure due to an airborne infectious disease notice and upon hire, but these requirements are not likely to be meaningful at this time.

F. *What must/should an employer's safety plan contain?*

- i. Employers are required to either adopt the model standard relevant to their particular industry as their safety plan or to establish an

alternative plan that meets or exceeds the minimum requirements provided by the applicable model standard.

1. **Note:**

- a. If an employer opts to implement an alternative plan, the employer must (1) develop the plan pursuant to an agreement with the collective bargaining representative, if any, or (2) develop the plan with meaningful participation of employees (which is not defined or further explained in the Health and Safety Provisions).
- b. The employer must also tailor the plan to the specific hazards within the particular industry and worksites of the employer.

G. *Are employers required to post the safety plan?*

- i. Yes – employers must post their safety plan in a visible and prominent location within each worksite (but not vehicles).

H. *Are employers required to include the safety plan in their handbooks?*

- i. If an employer has a handbook, then that employer must include the safety plan in its handbook ***in addition to*** posting the safety plan in a visible and prominent location within each worksite.

I. *Do employees have any specific rights under the Health and Safety Provisions?*

- i. Yes – employers may not discriminate or retaliate against any employee for (1) exercising their rights under the Health and Safety Provisions or the employer’s safety plan; (2) reporting violations under the Health and Safety Provisions to any local, state, or federal government agency, public officer, or elected official; (3) reporting a concern regarding exposure to an airborne infectious disease to, or seeking assistance or intervention regarding said concern from, any local, state, or federal government agency, public officer, or elected official; or (4) refusing to work (as explained below).

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1. Note that an employee may refuse to work in very limited circumstances:
 - a. The employee must have a good-faith belief that such work exposes them, other workers, or the public to an unreasonable risk of exposure due to the employer's working conditions being inconsistent with any governmental entity's laws, rules, policies, and orders, including the commissioner's relevant model standards; and
 - b. The employer must either (1) be notified (either by the particular employee, another employee or an employee representative) of the fact that the working conditions are inconsistent with requirements and also failed to cure said conditions; or (2) the employer had known or should have had reason to know, of the inconsistent working conditions and maintained them without correction.

J. *How are the Health and Safety Provisions enforced?*

- i. First, the NYSDOL may investigate alleged violations, and when found, may assess the following penalties:
 1. A civil penalty of \$50 per day for failing to adopt a safety plan;
 2. A civil penalty of \$1,000 to \$10,000 for failing to abide by the safety plan.
- ii. If the NYSDOL finds that the employer has violated the Health and Safety Provisions in the preceding six years, the NYSDOL may assess the following penalties:
 1. A civil penalty of \$200 per day for failing to adopt a safety plan;
 2. A civil penalty of \$1,000 to \$20,000 for failing to abide by the safety plan.
- iii. The NYSDOL may also order other relief as necessary.

K. *Can an employee sue an employer for violating its safety plan?*

i. Yes, but with some caveats:

1. The employee must provide the employer with notice of the alleged violation.
2. The employee must bring suit at least 30 days after providing notice to the employer of the violation (unless they allege with particularity that the employer is unwilling to cure the violation in bad faith). The suit must be filed within six months of the date the employee became aware of the violation.
 - a. **Note:** The employee may not bring a civil action if the employer corrects the alleged violation.
3. Employees may sue for injunctive relief only.
4. The Health and Safety Provisions seem to require that the violation be serious, as the employer must be alleged to have violated the safety plan “in a manner that creates a substantial probability that death or serious physical harm could result to the employees”
5. It seems that even if such a violation is actionable, the employer would not be liable if the employer did not know about the violation and could not have known about the violation even when exercising due diligence.

ii. If the employee is successful in their suit, the court may enjoin the employer’s conduct and award the employee costs and reasonable attorneys’ fees.

iii. **However**, if the court finds that the employee’s suit is frivolous, the court may award costs and reasonable attorneys’ fees against the employee, their attorney, or both, depending on the circumstances of the case.

L. *Can an employee sue an employer for violating the anti-discrimination and retaliation provisions of the Health and Safety Provisions?*

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- i. Yes. Specific penalty provisions of NYLL § 215 apply to violations of the anti-discrimination and retaliation provisions of the Health and Safety Provisions.
 - ii. **However**, if the court finds that the employee's suit is frivolous, the court may award costs and reasonable attorneys' fees against the employee, their attorney, or both, depending on the circumstances of the case.

III. Committee Provisions

A. *Must employers establish workplace safety committees? If so, how many?*

- i. Employers must *allow* employees to establish and administer one joint labor-management workplace safety committee per worksite unless the employer has already established such a committee that is consistent with the requirements of the Committee Provisions. Based on the most current version of the NY HERO Act, it seems that workplace safety committees must be permitted, but are not mandatory. However, the State may release clarifying guidance concerning workplace safety committees in the following months.
- ii. The Committee Provisions allow employers to create committees representing geographically distinct worksites.

Assuming workplace safety committees are established:

B. *How must employers compose workplace safety committees?*

- i. Each committee must have employer and employee designees, and at least two-thirds (2/3s) of the members must be non-supervisory employees.
- ii. Workplace safety committees must be co-chaired by a representative of the employer and a non-supervisory employee.

C. *Must members of workplace safety committees be elected? If so, how?*

- i. Yes – employee members of the committee must be selected by and from among non-supervisory employees.

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- ii. Note that where there is a collective bargaining agreement, the collective bargaining representative is responsible for the selection of employee committee representatives.
 - iii. Additionally, employers are prohibited from interfering with the selection of employee committee members.

D. *What do workplace safety committee members do?*

- i. Each workplace safety committee designee is authorized to perform the following tasks: (1) raising health and safety concerns, hazards, complaints, and violations to which the employer must respond; (2) reviewing certain workplace policies relating to occupational safety and health, and providing feedback consistent with any provision of law; (3) reviewing the adoption of any workplace policy in response to any health or safety law, ordinance, rule, regulation, executive order, or other related directives; (4) participating in any site visit by any governmental entity responsible for enforcing safety and health standards, unless otherwise prohibited by law; (5) reviewing any report filed by the employer related to workplace health and safety consistent with any provision of law; and (6) scheduling regular meetings during work hours at least once a quarter and lasting no longer than two hours.

E. *Will workplace safety committee members receive training?*

- i. Employers are required to allow committee designees to receive up to four hours of training, without losing pay, on the following topics: (1) the function of worker safety committees; (2) the rights established under the Committee Provisions; and (3) an introduction to occupational health and safety.

F. *Do the Committee Provisions provide any protections for workplace safety committee members?*

- i. Employers may not retaliate against any employee who participates in the establishment of the workplace safety committee or its activities. Certain penalty provisions of NYLL § 215 apply to violations of the anti-retaliation provisions of the Committee Provisions.

IV. Final Thoughts

Given the new obligations imposed by the NY HERO Act, early preparation is key. Thus, employers should review and evaluate their existing COVID-19 safety plans and return-to-work guidelines to determine which areas will likely need to be revised. The Health and Safety Provisions provide a list of the categories the safety plans will have to cover. Employers who have discovered or expect hurdles regarding any of those categories should begin brainstorming possible solutions. Employers should also prepare for the additional expenses and other resources that may be required to comply with the provisions of the NY HERO Act, including the purchase of and availability of PPE, regular cleanings, engineering protocols, and the establishment of workplace safety committees.

Employers should regularly check the State's NY HERO Act webpage for the most current information.

The NY HERO Act webpage may be accessed here: <https://dol.ny.gov/ny-hero-act>.

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ⁱ Governor Cuomo's June 15, 2021 announcement may be accessed here: <https://www.governor.ny.gov/news/governor-cuomo-announces-covid-19-restrictions-lifted-70-adult-new-yorkers-have-received-first>.

ⁱⁱ In fact, the State has revised its New York Forward Industry Guidance webpage to reflect active guidance for the following industries: (1) fairs and festivals; (2) large-scale performing arts and entertainment; (3) pre-K to Grade 12 schools; (4) professional sports with fans; and (5) public transportation. Guidance for all other industries has been archived and is available for "reference and resource only." New York's webpage may be accessed here: <https://forward.ny.gov>.

ⁱⁱⁱ New York's guidance concerning fully vaccinated individuals may be accessed here: https://www.governor.ny.gov/sites/default/files/2021-05/NYS_CDCGuidance_Summary.pdf.

^{iv} The amended NY HERO Act may be accessed here: <https://legislation.nysenate.gov/pdf/bills/2021/S6768>.

^v The Health and Safety Provisions provide definitions for the terms "employee," "worksite," "supervisor" or "supervisory employee," "employer," and "airborne infectious disease" that are not covered in this client alert. You may access these definitions on pages 1 and 2 of the amended NY HERO Act, which may be accessed here: <https://legislation.nysenate.gov/pdf/bills/2021/S6768>.

^{vi} The Committee Provisions provide definitions for the terms "employee" and "employer" that are not covered in this client alert. You may access these definitions on page 7 of the amended NY HERO Act, which may be accessed here: <https://legislation.nysenate.gov/pdf/bills/2021/S6768>.