

**New York State Department of Labor Releases
NY HERO Act Model Safety Plans:
Employers Have 30 Days to Adopt Conforming Plans**

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The clock is now running: New York employers have until August 5, 2021, to adopt workplace safety plans, in accordance with the NY HERO Act (“Act”). As we previously [reported](#), Governor Andrew Cuomo signed the Act into law on May 5, 2021, and approved [clarifying amendments](#) (“Amendments”) on June 14, 2021. The Act and its Amendments impose significant workplace health and safety obligations on New York employers, as we explained [here](#), including mandating that New York employers adopt airborne infectious disease exposure prevention plans (“safety plans”). Enacted in response to the COVID-19 pandemic, the purpose of the Act is to promote workplace readiness in advance of any future public health emergency.

The Amendments stipulated that, once the New York State Department of Labor (“NYSDOL”) released model standards, employers would have 30 days to adopt the model safety plan applicable to their industry, or an alternative safety plan. Late in the evening on July 6, 2021, NYSDOL published (i) the [NY HERO Act Airborne Infectious Disease Exposure Prevention Standard](#) (“NY Standard”); (ii) the [model airborne infectious disease exposure prevention plan](#) (“model safety plan”), which is applicable to all employers; and (iii) 11 industry-specific model safety plans contemplated by the Act, for the following industries:

- [Agriculture](#)
- [Construction](#)
- [Delivery Services](#)
- [Domestic Workers](#)
- [Emergency Response](#)
- [Food Services](#)
- [Manufacturing and Industrial](#)
- [Personal Services](#)
- [Private Education](#)
- [Private Transportation](#)
- [Retail](#)

By *August 5, 2021*, all New York employers **MUST** either (i) adopt the applicable model safety plan(s)¹ relating to their business or (ii) develop and adopt an alternative safety plan (or plans) that meet or exceed the model safety plans' requirements. Employers must also provide their safety plan to employees within 30 days of adoption of their plan(s), but no later than by September 4, 2021 (assuming the employer's plan is adopted on August 5), and post the same in a visible and prominent location within each worksite.

While New York employers must *adopt* a safety plan, there is no requirement at the present time to actually *implement* the safety plan. These safety plans will only go into effect if (and when) an airborne infectious disease is designated by the New York State Commissioner of Health ("Commissioner") as "a highly contagious communicable disease that presents a serious risk of harm to the public health." Currently, no such designation has been made, but employers need to adopt a safety plan in order to be prepared in case of a new public health emergency.

NYSDOL's Airborne Infectious Disease Exposure Prevention Standard

The NY Standard applies to all private employers with worksites in New York State, with an exception carved out for any employees covered by a temporary or permanent standard adopted by the U.S. Occupational Safety and Health Administration (such as health care workers protected under the Emergency Temporary Standard, as explained [here](#)). The NY Standard applies only to an airborne, infectious agent or disease that is designated by the Commissioner as highly contagious, communicable, and a serious risk of harm to the public health, and requires all employers to establish, obtain, and/or maintain the following:

- **Exposure Prevention Plans:** Also referred to as safety plans, these are written plans that must be adopted by every New York employer and reviewed verbally with employees. If the Commissioner designates a highly contagious communicable disease as a serious public health risk, such safety plans must be (i) reviewed and implemented promptly, (ii) monitored and maintained, and (iii) updated in accordance with guidance from the New York State Department of Health ("DOH") and/or the federal Centers for Disease Control and Prevention ("CDC").
- **Exposure Controls:** Any worksite where occupational exposure exists must provide appropriate exposure controls.
- **Prohibition on Retaliation:** Employers may not retaliate against employees for (i) their good faith complaints about the safety plan(s) or (ii) their refusal to work due to good faith, reasonable beliefs that such work would expose employees to "an unreasonable risk of exposure to an airborne infectious disease due to the

¹ For example, if an employer maintains a business office and several retail stores, it would need to utilize both the retail plan and likely the standard plan for its business office.

existence of working conditions that are inconsistent” with the minimum standards, provided the employer had notice and an opportunity to cure same.

NYSDOL’s Model Safety Plans

NYSDOL has published 12 model safety plans, including those for the above-referenced industries and a more [general version](#) applicable to workplaces not encompassed by the industry-specific models. While employers are not required to adopt one or more of the model plans, any alternative plan(s) adopted must meet or exceed the level of detail and precautions outlined by NYSDOL. Further, and importantly, any alternative plan(s) must be developed cooperatively with collective bargaining unit representatives, if applicable, or with “meaningful participation” of employees if there is no collective bargaining representative.² Each of the model plans follows a general pattern, with some industry-specific details regarding requisite exposure controls during an outbreak added to the industry-specific plans. Each model safety plan includes a preliminary statement, or preamble, and a table of contents listing the following seven covered topics:

1. RESPONSIBILITIES: Designation of Applicable Worksites and Supervisors

Every version of the model safety plans first prompts employers to specify which of the employer’s worksites and employees are covered. Thus, although the Act and Amendments are silent on this issue, and as noted above, it appears that employers may adopt different plans for different types of worksites and/or employees. This is particularly relevant for employers within those industries with industry-specific model plans, since some details contained in them may not be relevant to all worksites (e.g., a retail industry employer with various New York facilities would use different plans for customer-facing store operations as compared to warehouse/distribution centers or office-only corporate facilities).

Additionally, the model safety plan requires employers to select supervisory employees to enforce compliance with the safety plan and act as “designated contacts.”

2. EXPOSURE CONTROLS: Minimum and Advanced

As stated in the model safety plan’s preamble, its purpose “is to protect employees against exposure and disease during an airborne infectious disease outbreak.” To achieve this, the model safety plan establishes “Minimum Controls” to be used in all areas of the worksite during an airborne infectious disease outbreak, including a “Stay at Home Policy,” health screenings, face covering guidance, physical distancing protocols, and other health and hygiene measures.

The model safety plan also establishes “Advanced Controls” for activities where the Minimum Controls alone will not provide sufficient protection for employees. The Advanced Controls include temporary suspension or elimination of “risky activities,”

² See [NYSDOL NY HERO ACT: The Airborne Infectious Disease Exposure Prevention Standard](#) at p. 1, ¶ B.1.

engineering controls such as ventilation systems, installation of automatic disinfection systems and partitions, or changing the layout of the worksite to avoid points or areas where employees may congregate (e.g., installation of additional time clocks).

The Advanced Controls also include “Administrative Controls,” such as increasing space between workers, slowing production speed, identifying and prioritizing job functions that are essential for continuous operations, and establishing pods or cohorts working on the same shift.

In addition, each of the industry-specific plans sets forth additional appropriate advanced engineering and/or administrative controls, and eliminates certain controls from the general model safety plan that may not be applicable (e.g., the Agriculture model safety plan eliminates certain examples relating to general ventilation and adds additional examples relating to natural ventilation).

Further, the model safety plan calls for the employer to acquire selected exposure controls and to properly store and maintain them so that they are readily available for immediate use when needed.

3. HOUSEKEEPING

The model safety plan identifies sanitation procedures that must be followed during an outbreak, such as increased cleaning and disinfecting.

4. INFECTION RESPONSE

The model safety plan specifies actions to be taken in the event an actual or suspected infectious disease case occurs at work. These actions include instructing the sick individual to wear a face covering, leave the worksite, and follow DOH and/or CDC guidance.

5. TRAINING AND INFORMATION

The model safety plan mandates certain training requirements, including designation of an individual responsible for communicating to employees about the plan. Employers must verbally inform all employees of the existence and location of the safety plan, the circumstances under which it can be activated, the infectious disease standard, employer policies, and employee rights under the Act.³

When the safety plan is activated, all personnel must receive training that will cover all elements of the safety plan as well as the following topics:

1. The infectious agent and the disease(s) it can cause;

³ Employers do not need to train the following individuals: any individuals working for “staffing agencies, contractors or subcontractors at any individual work site, as well as any individual delivering goods or transporting people at, to or from the work site on behalf of the employer, where delivery or transport is conducted by an individual or entity that would otherwise be deemed an employer under this chapter.”

2. The signs and symptoms of the disease;
3. How the disease can be spread;
4. An explanation of the safety plan;
5. The activities and locations at the employer's worksite that may involve exposure to the infectious agent;
6. The use and limitations of exposure controls; and
7. A review of the NY Standard, including employee rights provided under [Labor Law, Section 218-B](#).

The training must be provided at no cost to employees during working hours. If training during normal work hours is not possible, employees must be compensated for the training time with pay or time off. The training must be verbally provided in person or through telephonic, electronic, or other means.

6. PLAN EVALUATIONS

The model safety plan provides for the employer to periodically review and revise its safety plan upon activation and as needed to keep it up to date with current guidance and circumstances.

7. RETALIATION PROTECTIONS

Finally, the model safety plan expresses that employers may not discriminate, threaten, retaliate against, or take adverse action against any employee for exercising rights under the safety plan, including reporting conduct the employee reasonably believes in good faith violates the safety plan. The retaliation protections also apply to employees refusing to work where they reasonably believe in good faith that such work exposes employees or the public to an unreasonable risk of exposure, if the employer had been notified of the inconsistent working conditions, or if the employer knew or should have known of the consistent working conditions, and the employer failed to cure the risk.

To the extent that communications between the employer and employee regarding a potential risk of exposure are in writing, they must be maintained for two years after the conclusion of the designation of a high-risk disease from the Commissioner, or two years after the conclusion of the governor's emergency declaration of a high-risk disease. Employers should include contact information to report violations of the safety plan and retaliation during regular business hours and for weekends/other non-regular business hours when employees may be working.

Workplace Safety Committees

Please note that the new NYSDOL guidance does not address the portion of the Act allowing employees to form a joint labor-management workplace safety committee ("workplace safety committee"). While the Act mandates all employers to adopt safety

plans, the workplace safety committees are permissive, not required. Additionally, the effective date of the workplace safety committee portion of the Act is November 1, 2021. We will provide further updates regarding HERO Act workplace safety committees as they become available.

What New York Employers Should Do Now

- Carefully review the components of the model safety plan and any applicable industry-specific model safety plan, and consider whether it is appropriate for your company, or determine if your company has the need and/or resources to develop an alternative safety plan by the August 5, 2021, deadline.
- If an alternative plan is preferable, ensure that employees or collective bargaining representatives, where applicable, are meaningfully engaged in the development process.
- Prepare to adopt a safety plan no later than August 5, 2021, or face a minimum penalty of \$50 per day for each day a safety plan is not adopted.
- Prepare to conspicuously post the safety plan and distribute it to employees within 30 days of adopting the plan (by September 4, 2021, if adoption of the plan is on August 5). Thereafter, provide the plan to any newly hired employees, upon hiring.
- Prepare to include the safety plan within your employee handbook, if you provide one.
- Have the plan available for all employees, independent contractors, employee representatives, collective bargaining representatives, and the Commissioner, upon request.
- In the event of any period of closure due to an airborne infectious disease, distribute the plan to all employees within 15 days after reopening.

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