

New York HERO Act Amendments Signed Into Law

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On June 14, 2021, New York Governor Andrew Cuomo signed into law [amendments](#) (“Amendments”) to the recently enacted HERO Act (“Act”). The Act imposed significant workplace health and safety obligations on New York employers, as we previously described [here](#). The Amendments, as we [explained](#) last week, allow the New York State Department of Labor (“NYSDOL”) more time to create the model safety standards for the airborne infectious disease exposure prevention plan (“safety plan”) portion of the Act and, importantly, grant employers more time to comply. However, the November 1, 2021, effective date regarding the workplace safety committee portion of the Act remains unchanged. The Amendments also clarify certain portions of the Act, particularly those concerning the workplace safety committees that most employers will be obligated to permit.

Highlights of the Amendments to the HERO Act

Airborne Infectious Disease Exposure Prevention Plans

- The Amendments give the NYSDOL an additional month, until **July 5, 2021**, to publish the model standards.
- In addition to industry-specific model standards, the Amendments call for publication of a **general model standard** applicable to all work sites¹ not included in the industry-specific model standards. The industry-specific model standards will cover what have been referred to as industries representing a significant portion of the workforce, or those with unique characteristics requiring

¹ The Amendments define a “work site” as “any physical space, including a vehicle, that has been designated as the location where work is performed over which an employer has the ability to exercise control. The term shall include employer-provided housing and employer-provided transportation at, to or from the work site but shall not include the residence of the employer or employee unless such residence has been provided by the employer and is used as the primary place of work The term shall not include a telecommuting or telework site unless the employer has the ability to exercise control of such site.” Given this definition, it is likely that many employers’ places of business will include multiple work sites.

distinct standards. These specific industries, for which industry-specific standards will be issued, have not yet been identified by the State.

- Employers will be required to establish a safety plan **within 30 days** after NYSDOL publishes the model standards—no later than August 5, 2021 (**possibly sooner**, if the model standards are released before July 5).
- Employers must provide their safety plan to their employees **within 60 days** of NYSDOL’s publication of the model standards.

Workplace Safety Committees

- The Amendments clarify that there need be **no more than one workplace safety committee per work site**. However, given the broad definition of “work site,” it will be critical for each employer to determine how many separate work sites its operations encompass. Importantly, employers do not need to affirmatively establish such committees, and must only permit employees to establish and administer the committees.
- In addition, if an employer already has a workplace safety committee that satisfies the requirements of the Act, the creation of an additional safety committee for the applicable work site **is not required**.
- The Amendments also resolve ambiguity regarding the scope of the workplace safety committees’ policy review authority, providing that such committees may only review workplace policies specifically related to **occupational safety and health**.

Private Causes of Action

- The Amendments limit the Act’s original provisions permitting employees to bring private lawsuits or causes of action concerning employer compliance. The Amendments now provide that an employee may not commence a private cause of action for an alleged violation of the Act prior to **giving the employer notice** of the alleged violation, and not for 30 days after such notice has been given, unless the employee is able to plead facts showing that their employer both acted in bad faith and has demonstrated an unwillingness to cure the alleged violation.
- The Amendments provide that an employee may not bring a civil action if the employer **corrects the alleged violation**.
- The Amendments establish a **six-month statute of limitations** from the date an employee has notice of an alleged violation, within which a claim must be brought.
- **Liquidated damages** are no longer recoverable for violation of the Act.

- In addition, the Amendments strengthen protections for employers against **frivolous actions**, providing that a court may award an employer costs and reasonable attorneys' fees, which may be assessed against the employee, the employee's attorney, or both, if the court determines that a lawsuit was frivolously brought.

What New York Employers Should Do Now

It is anticipated that the NYSDOL model standards will be released sometime between now and July 5, 2021, and employers should be on the lookout for the model standards, including any applicable industry-specific guidance, in the coming weeks. In the meantime, employers can further prepare by:

- assessing any current workplace policies with respect to the safety plan, and anticipating the need to adjust such policies in accordance with the forthcoming NYSDOL model standards;
- preparing to implement the model standards, or developing their own plan that meets or exceeds the applicable model standards requirements, within 30 days of the release of the model standards;
- preparing to provide the safety plan to employees within 60 days of the release of the model standards;
- evaluating the workplace safety committee mandates, including whether any existing joint labor-management committees are—or could be—deemed to constitute compliance with Act's requirements;
- designating managers and/or employees with supervisory authority to oversee compliance with the Act, including designating an employee or employees with supervisory authority to ensure that employees comply with the employer's safety plans, once developed;
- deciding whether to adopt the model standards or create an alternative plan, with unionized employers taking into consideration the Act's mandate to develop such a plan pursuant to an agreement with the collective bargaining representative as well as whether to attempt to negotiate a waiver with the unions representing the employers' employees; and
- anticipating revisions to employee handbooks, as the safety plan must be included in an employee handbook if an employer maintains one.

We will provide further updates when NYSDOL releases any related information, including the model standards.

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