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HERO Act update: New York employers must adopt an airborne infectious disease exposure prevention plan by August 5, 2021

By **Conor Tallet, Stephanie Caffera, David Tauster**

New York recently enacted amendments clarifying employer obligations under the HERO Act. As [previously discussed](#), the HERO Act and its clarifying amendments require all private employers to adopt an infectious disease exposure prevention plan consistent with the New York Department of Labor (“DOL”) model standard within 30 days after the model standard is published.

On July 6, 2021, the DOL published its airborne infectious disease exposure prevention standard and model plans. Accordingly, employers have until August 5, 2021 to adopt an infectious disease exposure prevention plan.

The DOL’s standard generally discusses the HERO Act’s requirements and the basics for the required written exposure prevention plan designed to eliminate or minimize employee exposure to airborne infectious disease. The DOL’s standard identifies a number of exposure prevention controls based on the types and level of exposure risks employees have during all activities performed at the employer’s worksite. The types of exposure prevention controls employers must adopt include such things as health screenings, face coverings, physical distancing, and various hygiene and housekeeping procedures.

The DOL’s standard also discusses when and how an employer will be required to implement the plan. Significantly, while the DOL’s standard requires all employers to adopt a written plan and publish it to their workforce, such plans do not need to be implemented unless and until “a highly contagious communicable disease is designated by the Commissioner of Health as presenting a serious risk of harm to the public health[.]” The DOL notes on its website that “as of the date of this writing no designation has been made and plans are not required to be in effect.”

In the event the Commissioner of Health designates an airborne infectious disease as presenting a serious risk of harm to the public health, the DOL’s standard requires employers to:

- Immediately review their plan and update, if necessary, to ensure it incorporates any current information, guidance, or mandatory requirements issued by federal, state, or local governments.

- Finalize and promptly activate the exposure prevention plan.
- Conduct a “verbal review” of the plan with employees and provide each employee a copy of the exposure prevention plan in English or in the language identified as the primary language of such employee.
- Ensure that the exposure prevention plan is effectively followed while the Commissioner of Health’s designation remains in effect, including by continuously monitoring and maintaining exposure controls and checking for updated information and guidance.
- Designate one or more supervisory employees to enforce compliance with the exposure prevention plan, the DOL standard, and any other federal, state, or local guidance.
- Retain any records of communications between an employer and an employee regarding a potential risk of exposure. Records must be retained for two years following the conclusion of a designation by the Commissioner of Health.

The DOL’s standard ostensibly was drafted to take into account the possibility of preemption by any similar standards adopted by the federal Occupational Safety and Health Administration (“OSHA”). The DOL’s standard does not apply to any employee who is covered by a temporary or permanent standard adopted by OSHA setting forth applicable standards regarding COVID-19 and/or airborne infectious agents and diseases, including OSHA’s current Emergency Temporary Standard: COVID-19 Healthcare effective June 21, 2021, which applies to certain health care services employers.

Consistent with the HERO Act’s requirement and the DOL’s standard, the DOL also published a generally applicable model plan for all employers, as well as model plans specific to the following industries:

- Agriculture,
- Construction,
- Delivery Services,
- Domestic Workers,
- Emergency Response,
- Food services,
- Manufacturing and industry,
- Personal services,
- Private education,
- Private transportation, and
- Retail.

The model plans require employers to identify items, such as the exposure prevention controls, which the employer will be implementing and the types of personal protective equipment which will be available in the event that the plan is implemented. The model plans also require employers to designate responsible supervisors, and include expansive language prohibiting retaliation.

As noted in our prior alerts, employers are not required to adopt the model plan for their industry. However, any alternate plan an employer adopts must meet or exceed the DOL’s standard, and must be adopted pursuant to an agreement with any collective bargaining representative or with the “meaningful participation” of unrepresented employees for *all* aspects of the plan. The HERO

Act does not require employers to submit their adopted plans for approval to the DOL or to any other entity.

Action items for employers

Private employers in New York now must comply with several key deadlines following the DOL's published standard and model plans, including:

- By August 5, 2021 employers either must adopt the DOL's model plan for their industry or adopt an alternative plan that meets or exceeds the DOL's minimum standard.
- By September 4, 2021 employers must provide their adopted plan to their employees, as well as include the plan in their employee handbook (if any) and post the plan in a prominent location within the workplace.

Additionally, as [previously discussed](#), beginning November 1, 2021 employers must permit the creation of a workplace safety committee as required under the HERO Act. The DOL has yet to publish any guidance regarding this requirement.

Conclusion

While employers do not need to implement their adopted disease exposure prevention plan at this time, employers must take initial steps now to comply with the HERO Act's requirement to adopt a plan and to publish it to their workforce. Employers should remain in contact with counsel over the next month to ensure their adopted plan complies with the HERO Act and the DOL's model standard.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- Conor Tallet, 585-263-1378, ctallet@nixonpeabody.com
 - Stephanie M. Caffera, 585-263-1066, scaffera@nixonpeabody.com
 - David A. Tauster, 516-832-7559, dtauster@nixonpeabody.com
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