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New York State adopts new employer requirements regarding workplace safety policies and committees

By David A. Tauster

New York State has taken yet another step to substantially increase the burdens and responsibilities upon employers to protect their workforce from COVID-19 and other airborne infectious diseases. On May 5, 2021, Governor Cuomo signed into law the self-described "HERO Act" (the "Act"). The Act has two primary requirements. First, the Act requires all employers (other than governmental entities and instrumentalities) to establish an infectious disease exposure prevention plan. Second, the Act requires employers with at least 10 employees to permit their employees to establish and administer a joint labor-management workplace safety committee. We discuss those requirements in turn below.

Infectious disease exposure prevention plans

Employers may establish the required infectious disease exposure prevention plan either by adopting a model plan developed by the New York Department of Labor that is "relevant to their industry" or by establishing an alternative plan that "equals or exceeds the minimum standards" promulgated by the Department of Labor. Consistent with this requirement, the Act also requires the Department of Labor, in conjunction with the Department of Health, to establish infectious disease exposure prevention standards that are applicable to all "work sites" and differentiated by industry. The concept of a "work site" is defined broadly under the Act, as including "any physical space, including a vehicle, that has been designated as the location where work is performed," including employer-provided housing and transportation. Beyond being industry and work site specific, the model plans must also specify and distinguish between "different levels of airborne infectious disease exposure," as well as whether a state of emergency has or has not been declared due to any such infectious disease.

The Act specifically requires the model plans to include requirements on procedures and methods relating to a number of items, including, but not limited to:

- employee health screenings;
- face coverings;
- required personal protective equipment, which must be "provided, used, and maintained in a sanitary and reliable condition at the expense of the employer";

- regular cleaning and disinfecting of shared equipment and "frequently touched surfaces" such as workstations, as well as "all surfaces and washable items in other high-risk areas" including restrooms and dining areas;
- effective social distancing for employees and consumers or customers based upon the risk of illness; and
- compliance with applicable engineering controls such as proper air flow or other special design requirements.

Beyond the requirement that it promulgate model plans, the Act also directs the Department of Labor, in consultation with the Department of Health, to adopt and amend rules and regulations to effectuate the law's requirements.

As noted above, employers may either adopt the model plan applicable to their industry or develop their own plan that meets or exceeds the applicable standards established in the model plan. If an employer is electing to develop its own plan, it must also do so either pursuant to an agreement with the applicable collective bargaining representative or with "meaningful participation of employees" where there is no such representative. This participation or agreement must extend to "all aspects of the plan."

Once an employer has adopted a plan, the Act requires the employer to provide the plan to all employees. The plan must also be posted in a visible and prominent location within the work site, and included in any employee handbook. The plan must also be made available upon request to employees, independent contractors, collective bargaining representatives, and to the Department of Labor and the Department of Health. The plan must be provided to employees in English and in their primary language; however, if the Department of Labor does not promulgate a model plan in the employee's primary language, then the employee need only be provided the plan in English.

The Act also explicitly requires that the plan include anti-retaliation requirements. Notably, one of the anti-retaliation provisions in the Act prohibits an employer from taking adverse action against an employee who refuses to work where the employee "reasonably believes, in good faith" that their work exposes them to an unreasonable risk of exposure to an airborne infectious disease due to the existence of working conditions that are inconsistent with applicable law and regulations, including the model plans promulgated by the Department of Labor. The Act also permits the Department of Labor to assess civil penalties of not less than $50 per day for failing to adopt a plan, or between $1,000 and $10,000 for failing to comply with a plan, which are multiplied substantially if the employer had a similar violation within the preceding six years.

Beyond permitting the Department of Labor to take administrative action against employers, the Act also permits employees to bring civil actions seeking injunctive relief where an employer is alleged to have violated the plan in a manner that creates a substantial probability of death or serious physical injury. The court adjudicating such an action has the power to not only enjoin the violation, but may also award the employee costs and reasonable attorneys' fees and liquidated damages up to $20,000.

The Act provides the Department of Labor with 60 days to develop the standards, or by July 4, 2021. From there, employers will have 30 days to either adopt the Department of Labor's standard or to develop its own plan, and then an additional 30 days to communicate the applicable plan to employees.

Labor-management workplace safety committees

Workplace safety committees established under the Act are composed of employer and employee designees, but at least two-thirds of the members of any such committee must be non-supervisory employees, and "selected by, and from among" the employer's non-supervisory employees. Employers are explicitly prohibited from interfering with the selection of employees to serve on the committee and from retaliating against employees for any action relating to their participation in the committee.

Once established, the committees are empowered to perform a number of tasks including: raising health and safety concerns to which the employer "must respond"; reviewing policies that were adopted in response to health and safety laws, rules, and executive orders; participating in site visits by government agencies responsible for enforcing safety and health standards; and regularly scheduling meetings during working hours. Employers must also permit committee members to attend a training, without loss of pay, on the function of the committee, the rights established under the law, and an introduction to occupational safety and health. The section of the Act allowing for the creation of these committees will take effect on November 1, 2021.

Conclusion

According to the Legislature's Sponsor Memo, the Act is designed to "protect New Yorkers from exposure to airborne infectious diseases by reducing workplace transmission and community spread through enforceable health and safety standards." While it is unclear if the Act will live up to this lofty purpose, it is clear that the Act imposes substantial burdens upon employers in the immediate future. Employers should remain in regular contact with employment counsel over the course of the coming months, as the model standards and other necessary rules and regulations are adopted by the Department of Labor, to ensure that they are not subject to the law's monetary penalties or potential litigation.

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