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New York enacts amendments clarifying employer obligations under the HERO Act

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As previously discussed here, on May 5, 2021 New York adopted a first-of-its-kind law imposing new burdens on employers to protect employees from COVID-19 and other airborne infectious diseases in the workplace. The Health and Essential Rights Act (the "HERO Act" or the "Act") has two primary requirements:

- First, the Act requires all private employers to establish an infectious disease exposure prevention plan consistent with standards issued by the Department of Labor.
- 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.

Upon signing the HERO Act into law, Governor Cuomo announced an "agreement" with the New York Legislature to make "technical changes" to the bill to, among other things, provide employers with a clear timeline for adopting an infectious disease exposure prevention plan.

On June 11, 2021, Governor Cuomo signed legislation amending the HERO Act (the "Amendments"). As discussed below, the Amendments:

- Provide a specific timeline for employers to implement an infectious disease exposure prevention plan after the Department of Labor publishes its model standards,
- Impose new limitations on employees' right to sue their employer relating to the infectious disease exposure prevention plans, and
- Narrow the powers of the workplace safety committees permitted by the HERO Act.

Although the Amendments have made the HERO Act a bit more employer-friendly, there are still a number of obligations and pitfalls that employers must be aware of in connection with the Act.

Timeline for employers to implement infectious disease exposure prevention plans

The Amendments provide a clear timeline for employers to implement an infectious disease exposure prevention plan. As originally passed, the HERO Act required all private employers to adopt such plans by June 4, 2021, and required that those plans meet or exceed the minimum standards required by the Department of Labor. However, the HERO Act did not set a deadline for the Department of Labor (in conjunction with the Department of Health) to create and publish its model standards. Those standards were not published before June 4, which essentially made it impossible for employers to comply with their obligation.

The Amendments now impose a July 5, 2021 deadline for the Department of Labor to create and publish model infectious disease exposure prevention standards for specific industries, as well as a "general model airborne infectious disease exposure prevention standard" for industries not subject to a specific standard. Once the Department of Labor's model standards are published, employers will have 30 days under the Amendments to either adopt the Department of Labor's model standards applicable to the employer's industry, or to adopt an alternative plan that meets or exceeds the minimum standards of the model standards. Employers then must provide their adopted plan to their employees within 60 days of the Department of Labor's publication of the model standards. Employers also must post the adopted plan in the workplace, and include the plan in their employee handbook (if any). Accordingly, while the Amendments now provide for a more definitive timeframe for promulgation of the model standards and their adoption by employers, it is still imperative for employers to remain in contact with counsel to ensure that they are aware when the model standards are released, that they adopt the correct standard for their industry, and that they provide the required information to their employees.

Limitations on employers' potential civil liability for infectious disease exposure prevention plans

The Amendments also place new obstacles on employees' ability to bring a civil action against their employers relating to infectious disease exposure prevention plans. First, the Amendments require an employee to provide notice to the employer of an alleged violation of the HERO Act and wait 30 days before commencing a civil action in court. This 30-day notice period gives the employer an opportunity to "cure" the alleged violation. If the employer corrects the problem, the employee is barred from suing.

Second, the Amendments impose a six-month window for an employee to bring a civil action against the employer from the date the employee had knowledge of an alleged violation. Notably, the Amendments also authorize a court to award reasonable attorneys' fees and costs to the employer if the court finds the employee's lawsuit to be frivolous. The Amendments also deleted language from the Act that would have permitted a court to award sanctions in the event that a defense or counterclaim in response to an employee's suit was found to be without any legal merit and undertaken primarily to harass or maliciously injure another.

Third, the Amendments further limit an employer's potential civil liability for a violation of the Act. The Amendments removed language that would have required an award to the employee of up to $20,000 in liquidated damages following an adverse judgment against an employer unless the employer provided a good faith defense. The Amendments did not alter the court's ability under the Act to award reasonable attorneys' fees and costs to an employee who brings a successful claim. Removing the opportunity for direct money damages, combined with the other restrictions on civil

actions discussed above, should limit the litigation risks faced by employers in complying with the Act.

Scope and powers of the workplace safety committees

As originally drafted, the HERO Act empowered workplace safety committees formed by employees to review and provide feedback on any policy put in place by an employer regarding "any provision" of the New York Labor Law or the Workers' Compensation Law—regardless of whether the policy pertained to health and safety in the workplace. The Amendments now limit the workplace safety committees' power to review and provide feedback to only those workplace policies "relating to occupational safety and health[.]"

Additionally, the Amendments clarify that employers must permit no more than one workplace safety committee per worksite, and that employers need not permit the creation of a new workplace safety committee under the HERO Act where the employer already has an equivalent committee that is otherwise consistent with the requirements of the Act. The Amendments also clarify that the workplace safety committee's regular quarterly meetings during working hours (which are required by the HERO Act) must not exceed two hours in length, and that the paid training that committee members must be permitted to attend may not exceed four hours in length.

The Amendments do not change the effective date for the workplace safety committee requirements. Those provisions of the Act take effect on November 1, 2021.

Conclusion

The Amendments provide much needed clarification for employers regarding their responsibilities and liabilities under the HERO Act. While the specific timeline for the infectious disease exposure plans, limitations on an employee's ability to sue the employer (and their ability to recover money damages in such an action), and narrowing of the workplace safety committees' powers are positive news for employers, employers still have many compliance obligations under the HERO Act to avoid liability in an action brought by employees or by the Department of Labor. Accordingly, as the summer progresses and the Department of Labor releases the applicable standards, employers should be prepared to consult with counsel to ensure that they implement a safety plan by the required deadline and are otherwise able to comply with the provisions of the HERO Act.

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