

# New York Health and Essential Rights Act *NY HERO Act*

Signed into law-May 5, 2021

Governor Cuomo signed the New York Health and Essential Rights Act (NY HERO Act) into law on May 5, 2021.

This new Act changes NYS labor laws and it will impose substantial responsibilities on all private employers to provide and maintain safe workplaces for the ongoing COVID-19 pandemic, and for all airborne infectious disease outbreaks in the future.

## ► Part 1: Airborne Infectious Disease Exposure Prevention Plan

- ❖ Effective Date: July 6, 2021
- ❖ Plans must be adopted by August 5, 2021 (30 days)
- ❖ Plans must be in place: September 6, 2021 (30 days)
  - distribute a copy to the work force
  - incorporate into new hire communication
  - include in handbook, if applicable
- ❖ DOL model notices have been released (11 industry specific models available)

### Amendment!

- ❖ The deadline for employers to adopt their airborne infectious disease exposure prevention plans is 30 days and another 30 days to distribute the plan to employees.



# Prevention Work Plan

- Covers **private sector employers**, along with their workers
  - Not just employees, includes temporary workers, contractors, independent contractors.
  - Excludes worksites not under the employer's control

## Amendment!

The worksites for which DOL must publish model plan(s), and for which employers must adopt plan(s), are now explicitly limited to those “over which an employer has the ability to exercise control.”

The amendments also clarify that covered worksites do not include telecommuting or telework sites over which the employer lacks the ability to exercise control or vehicles.

- The plan must be industry specific
  - I.e.; there will be model plans created by the NYS DOL for each industry such as manufacturing, hospitality, etc.

# Prevention Work Plan

- The plans must include mandates for health screenings, face coverings, PPE, hygiene stations, regular cleaning/disinfecting, social distancing, engineering controls, etc.
- Employers can either: (1) adopt one of the model standard exposure prevention plans applicable to their industry, or (2) develop and establish an alternative prevention plan that meets or exceeds the minimum standards.
- If developing your own plan,
  - Employer plans must entail meaningful participation of employees in the course of development or union agreement.
- Your plan will need to be customized to include the who, what, and how specific to your organization.

# Prevention Work Plan

- Training on the plan is required

## **Amendment!**

- Employers will also be required to distribute their adopted plans to newly hired employees at the time of hire and to all employees within 15 days after reopening after a period of closure due to airborne infectious disease.
- The plan must be posted and included in the Employee Handbook
  - Posting must be at all sites (excluding vehicles)
- Only supervisors can be tasked with responsibility for compliance with the plan
  - All supervisory personnel are considered the “employer”.
- Anti-discrimination/retaliation protections for employees who refuse to work based on “**reasonable**” and “**good faith**” belief working conditions are unsafe.

# Prevention Work Plan

- Employees must give employer written notice of the alleged violation
  - DOL will provide a model complaint form-forthcoming
- Employees cannot sue until 30 days thereafter unless there is a demonstration for refusal to cure.
  - The plan should include a process to address safety issues on a timely basis.
  - No action can be taken by employee, if the problem is corrected.
  - An employee has six months to bring action (statute of limitations).

## **Amendment!**

- **The amendments also require employees to provide their employer with 30 days' notice and an opportunity to cure the violation before filing a civil action under Section 218-b, unless the "employee alleges with particularity that the employer has demonstrated an unwillingness to cure a violation in bad faith."** Employees must file such a civil action within six months of the date the employee had knowledge of the violation. Employees who file civil actions that are found by the court to be frivolous may be ordered to pay the costs and reasonable attorney's fees incurred by the employer in the defense of the action.

# Penalties for Non-Compliance

- ▶ Penalties for not complying with this law are real. They start at minimally \$50 per day for each day an employer does not adopt a required plan, and minimally \$100 per day for not following the plan. From there, penalties for reported and founded violations increase with the frequency of violations and time.

## Amendment!

- ▶ **The remedies which employees can recover in a civil action under Section 218-b have been limited.** Specifically, while employees may still seek injunctive relief, costs, and reasonable attorneys' fees for an employer's violation of the airborne infectious disease exposure plan that could result in physical harm to the employee, the amendments removed a provision that would have allowed employees to recover liquidated damages of up to \$20,000 for such a violation.

# Part 2: Labor-Management Safety Committee

## ▶ **Effective Date: November 1, 2021**

- The Safety Committee component covers private sector employers with 10 or more employees (no full or part-time distinction).
- Private Sector employers are required to permit workplace safety committees at each worksite if requested by an employee. *(Means that an employee is allowed to create a workplace safety committee)*

## **Amendment!**

- ▶ **The purview of workplace safety committees has been narrowed to more closely target issues related to workplace safety.** Specifically, the HERO Act originally allowed workplace safety committees to, among other identified tasks, “[r]eview any policy put into place in the workplace required by any provision of this chapter,” which could have been read to extend to any policy required by the New York Labor Law. That provision has now been modified to include only policies “put into place in the workplace required by any provision of this chapter relating to occupational safety and health.” The other tasks that workplace safety committees are entitled to undertake remain largely unchanged. The amendments do, however, clarify that employers are only required to permit one committee per worksite and do not need to allow another committee where one already exists.

# Labor-Management Safety Committee

- The committee will have enumerated powers, including raising health and safety concerns, reviewing workplace safety policies, and participating in governmental site visits, where permitted by law.
- Committee must be chaired by management and employee representatives.
- **Two-thirds of the committee must be non-supervisory employees.**
- Committees must be allowed to meet at least quarterly during working hours (for no more than 2 hours)
- The employer must permit committee members to attend 4 hours of paid training.
  - The guidance does not say when or how often the committee members can attend.
- Employees are protected against retaliation for their participation.

## **Amendment!**

**The duration of workplace safety committee meetings and trainings has been limited.** Specifically, the amendments specify that the regularly scheduled quarterly meetings of the committee “shall last no longer than two hours.” These meetings still must occur during work hours. In addition, the training that safety committee members are entitled to attend, without loss of pay, has been limited to a duration of no more than four hours.

# Frequently Asked Questions

- **What if I already have a workplace Safety Committee?**
  - *If your organization already has a workplace safety committee, there is no need to create a separate workplace safety committee.*
  - *Existing plans may need amendments to comply with new law including an anti discrimination/anti retaliation statement.*
  - *Remember, the need to create the committee is only relevant if an employee asks to create the committee.*
  - *In addition, if an employee brings up the request, you need to ensure that the committee meets the requirements of the HERO act.*

# Frequently Asked Questions

- **I'm clear on the Work plan but does every employer need a Safety Committee?**
  - *No. Employees must ask to form a safety committee if one doesn't exist. A request to form a safety committee cannot be ignored.*
- **How do employers decide which rank-file employees will serve on the Safety Committee?**
  - *The employer does not decide. The employer does not have any input.*
  - *Employees get to decide who is on the 2/3rds of the workplace safety committee.*
  - *If you have a union, the union decides.*
- **What if I have multiple worksites?**
  - *The legislation states that each worksite is permitted to have a safety committee.*

# Frequently Asked Questions

- **Is the plan active at all times or just during emergencies/pandemics?**
  - *The plan is active at all times, but certain parts of the plan will only be active during emergencies/pandemics.*
- **What is the minimum number of people in the Safety Committee?**
  - *Four*
- **Who determines when the plan needs to be invoked?**
  - *The DOH or the State by Executive Order.*
- **Does this law only apply to the COVID-19 pandemic?**
  - *No. All infectious diseases now and in the future.*

# What to Do and Who to Call?

- ▶ **Use your Pinnacle HR Consultant to help:**
  - Develop a plan or amend a current plan
  - Customize model notices
  - Create policies and processes
  - Train managers on the plan
  - Verbally communicate the plan to employees
  - Form the safety committee
  
- ▶ **Call Your Insurance Agency to:**
  - Review your current limits on EPL insurance
  - Purchase EPL insurance



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Thank you!