

# COMPLIANCE BULLETIN

## New York HERO Act Workplace COVID-19 Rules Updated, Delayed

New York State's [Health and Essential Rights Act](#) (NY HERO Act) was passed to prevent occupational exposure to airborne infectious diseases. The NY HERO Act covers all private employers in the state. The Act was signed into law on May 5, 2021, and was amended on June 11, 2021. The [amendments](#), among other things, have extended the compliance deadline for key portions of the Act from June 4, 2021, to **July 5, 2021**.

The NY HERO Act created Section 218-b of the New York Labor Law, which requires employers to establish an airborne infectious disease exposure prevention plan. Employers must post the plan in their workplace and meet other requirements for making their plans available to employees.

The Commissioner of Health created a model airborne infectious disease [standard](#) and [plan](#). Employers can adopt this model standard or establish an alternative plan that meets or exceeds its requirements. This section of the Act takes effect on **July 5, 2021**.

The Act also created Section 27-d of the law, which permits employees to establish and administer joint labor-management workplace safety committees. This section of the Act takes effect on **Nov. 1, 2021**.

Amendments to the original NY HERO Act are indicated below in bold.

### Action Steps

Employers subject to the NY Hero Act should watch for the release of the model standard, which provides New York's minimum requirements for preventing exposure to airborne infectious diseases in the workplace.

Employers should review the standard to determine how it affects their current workplace protections. Employers should determine whether to adopt the model standard or an alternative standard, or update their current standard to meet the necessary requirements.

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### Employer Resources

Industry-specific model plans:

- [Agriculture](#)
- [Construction](#)
- [Delivery services](#)
- [Domestic workers](#)
- [Emergency response](#)
- [Food services](#)
- [Manufacturing and industry](#)
- [Personal services](#)
- [Private education](#)
- [Private transportation](#)
- [Retail](#)

### Important Dates

#### **June 11, 2021**

Amendments to the HERO Act signed into law by Governor Andrew Cuomo

#### **July 5, 2021**

Employer airborne infectious disease prevention exposure prevention plan effective date

#### **Nov. 1, 2021**

Joint labor-management workplace safety committee effective date





## Prevention of Occupational Exposure to an Airborne Infectious Disease

Section 218-b of the New York Labor Law was created to prevent exposure to airborne infectious diseases in the workplace. Under this section, employers must establish an airborne infectious disease exposure prevention plan. To assist employers, the Commissioner, in consultation with the New York Department of Health (NYDOH), must create and publish (in both English and Spanish) a model airborne infectious disease exposure prevention standard for all worksites. Employers must either adopt the model standard relevant to their industry or establish an alternative plan that meets the minimum standards provided by the model standard **within 30 days from the publication of a model general standard**.

If the employer adopts an alternative plan, the plan must be developed pursuant to an agreement with the collective bargaining representative (if any). If there is no collective bargaining representative, the employer must have meaningful participation from employees in developing the plan. The plan must be tailored and specific to hazards in the industry and worksites of the employer.

### Model Standard Requirements

The model standard must establish minimum requirements for preventing exposure to airborne infectious diseases in the workplace to protect the public and the workforce. The model standard must be differentiated by industry and must consider the types of risks present at the worksite, including the presence of third parties.

The model standard must explicitly specify and distinguish the extent to which the provisions are applicable for different airborne infectious disease exposure levels. There must also be distinctions in the policies based on circumstances where a state of emergency has been declared due to an airborne infectious disease.

The Commissioner may use their discretion to determine which languages to publish the standard in, in addition to English and Spanish. This determination may be based on the number of individuals in the state that speak each language, the prevalence of certain languages in particular industries and any other factor that the Commissioner deems relevant.

The standard must include, but need not be limited to, establishing requirements on procedures and methods for:

- Performing employee health screenings in the workplace.
- The use of face coverings in the workplace.
- Required personal protective equipment (PPE) applicable to each industry for eyes, face, head and extremities. This includes protective clothing, respiratory devices and protective shields and barriers, which must be provided, used and maintained in a sanitary and reliable condition at the expense of the employer. The standard must provide for a list of PPE that satisfies the requirements, based on hazard assessments for each industry.
- Accessible workplace hand hygiene stations, maintaining healthy hand hygiene and providing adequate break times for workers to use handwashing facilities as needed.
- Regular cleaning and disinfecting of shared equipment and frequently touched surfaces (e.g., workstations, touchscreens, telephones, handrails and doorknobs) and all surfaces and washable items in other high-risk areas (e.g., restrooms, dining areas, break rooms, locker rooms, vehicles and sleeping quarters).
- Effective social distancing for employees, consumers or customers as the risk of illness may warrant, including options for social distancing such as sign postage or markers; increasing physical space between workers at the worksite; limiting customer capacity; delivering services remotely or through curbside pick-up; reconfiguring spaces where workers congregate; and flexible meeting, travel or work hours.



- ☑ Compliance with mandatory or precautionary orders of isolation or quarantine that have been issued to employees, including the identification and provision of separate and appropriate accommodations for employees who reside in employer-provided housing in a manner consistent with mandatory or precautionary orders of isolation and quarantine that have been issued to employers and employees.
- ☑ Compliance with applicable engineering controls, such as proper airflow, exhaust ventilation or other special design requirements.
- ☑ Designation of one or more supervisory employees to enforce compliance with the airborne infectious disease exposure prevention plan and any other federal, state or local guidance related to avoiding spreading an airborne infectious disease as applicable to employees, customers, contractors and members of the public within the workplace. Nonsupervisory line employees must not bear the responsibility for overseeing compliance with the requirements of the model policy.
- ☑ Compliance with any applicable legal requirements or guidance on notification to employees and relevant state and local agencies of potential exposure to airborne infectious disease at the worksite.
- ☑ Verbal review of the infectious disease standard, employer policies and employee rights. The review does not need to be provided to any individuals working for staffing agencies, contractors or subcontractors on behalf of the employer at any individual worksite. It also does not need to be provided to any individual delivering goods or transporting people at, to or from the worksite on behalf of the employer, particularly where delivery or transport is conducted by an individual or entity that would otherwise be deemed an employer.
- ☑ Anti-retaliation requirements.

## Employer Notice and Posting Requirements

Employers are required to provide the airborne infectious disease exposure prevention plan to their employees **within 30 days after adoption of the plan and within 15 days after** reopening following a period of closure due to airborne infectious disease and upon hiring. Businesses **permitted to operate as of the effective date of this section must provide such a plan to all employees within 60 days after the publication of the model standard relevant to their industry.**

The plan must be provided to employees in writing, English and the language identified by each employee as their primary language. When an employee's primary language is a language for which a model document is not available, the employer may provide that employee with an English-language notice.

The plan must be posted in a visible and prominent location within each worksite. If the employer provides an employee handbook to its employees, the plan must also be included in the employee handbook. The plan must also be available, upon request, to all employees and independent contractors, employee representatives and collective bargaining representatives, and the Commissioner of Health.

## Anti-retaliation Requirements

The model standard must include anti-retaliation requirements in accordance with the anti-retaliation provisions of the NY HERO Act. Under those rules, employers and business entities may not discriminate, threaten, retaliate or take adverse action against any employee for engaging in certain protected actions.

Specifically, employees are protected from retaliation when:

- Exercising their rights under Section 218-b or under the applicable airborne infectious disease exposure prevention plan.

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- Reporting violations of Section 218-b or the applicable airborne infectious disease exposure prevention plan to any state, local, or federal government entity, public officer or elected official.
- Reporting an airborne infectious disease exposure concern to, or seeking assistance or intervention with respect to airborne infectious disease exposure concerns from, their employer or a state, local, or federal government entity, public officer or elected official.
- Refusing to work when the employee reasonably believes, in good faith, that the work exposes him or her, or other workers or the public, to an unreasonable risk of exposure to an airborne infectious disease due to the existence of working conditions that are inconsistent with any legal requirement, including the model airborne infectious disease exposure prevention standard, as long as the employer was notified of the inconsistent working conditions and failed to cure the conditions, or the employer had or should have had reason to know about the inconsistent working conditions and maintained the inconsistent working conditions.

## Penalties

Employers that violate any provision of Section 218-b may be subject to civil penalties. The amounts of such penalties are:

- Not less than \$50 per day for failure to adopt an airborne infectious disease exposure prevention plan; or
- Not less than \$1,000, but no more than \$10,000 for failure to abide by an adopted airborne infectious disease exposure plan.

If the Commissioner finds that the employer has violated the provisions of Section 218-b in the preceding six years, the Commissioner may assess a civil penalty of:

- Not less than \$200 per day for failure to adopt the exposure plan; or
- Not less than \$1,000 or more than \$20,000 for failure to abide by the adopted plan.

The Commissioner may also order other appropriate relief, which can include enjoining the conduct of the person or employer.

Employees can bring a civil action to seek injunctive relief against an employer alleged to have violated the airborne infectious disease exposure prevention plan in a manner that is likely to cause death or serious physical harm to the employee, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. **In order to bring a civil action against the employer, employees must first give the employer notice of the alleged violation and then wait 30 days after the notice to allow the employer time to correct the violation.**

## Workplace Safety Committees

Under Section 27-d of the New York Labor Law, employers must permit employees to establish and administer a joint labor-management workplace safety committee. **There must not be more than one committee per worksite. Employers that already have a workplace safety committee are not required to create a new committee, as long as their existing committee is otherwise consistent with the HERO Act.** Each workplace safety committee must be composed of employee and employer designees, provided at least two-thirds of participants are nonsupervisory employees. Committees must be co-chaired by a representative of the employer and nonsupervisory employees.

If there is a collective bargaining agreement in place, the collective bargaining representative will be responsible for selecting employees to serve as members of the committee. Committees representing geographically distinct worksites may also be formed if necessary.

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Employers must not interfere with the selection of employees who will serve on the committee or who will serve as the workplace safety designee, or with an employee's performance of the duties authorized under the Act. Each workplace safety committee and workplace safety designee must be authorized to perform the following tasks, which include but are not limited to:

- Raise health and safety concerns, hazards, complaints and violations to the employer, to which the employer must respond.
- Review the policies put in place that are required by the NY HERO Act **or relating to occupational safety and health standards**, and provide feedback on the policies in a manner consistent with the law.
- Review the adoption of any policy in the workplace in response to any health or safety law, ordinance, rule, regulation, executive order or other related directives.
- Participate in any site visit by any governmental entity responsible for enforcing safety and health standards **unless otherwise prohibited by law**.
- Review any report filed by the employer related to the health and safety of the workplace in a manner consistent with any provision of law.
- Regularly schedule a meeting during work hours at least once a quarter **that must not last longer than two hours**.

## Training

Employers must permit safety committee designees to, without suffering any loss of pay, attend a training **of no longer than four hours** on the function of worker safety committees, rights established under Section 27-d and an introduction to occupational safety and health.

## Retaliation

Any employees who participate in the activities or establishment of a workplace safety committee may not be subject to retaliation for any actions taken pursuant to their participation. Violations of Section 27-d will be considered a violation of [Section 215](#) of the New York Labor Law, and the civil penalties and remedies of that section will apply.

## Collective Bargaining Agreements

The NY HERO Act does not diminish any employee's rights, privileges, or remedies under any collective bargaining agreement. The Act's requirements regarding the airborne infectious disease standard may be waived by a collective bargaining agreement. However, for such a waiver to be valid, the agreement must explicitly reference Subsection Nine of the Act.