

There have been several recent updates to the HERO Act. These updates apply to section 1 of the HERO Act. This section requires covered employers to have in place their Airborne Infectious Disease Exposure Prevention Plan. Section 2 of the HERO Act that addresses the Workplace Safety Committee has not changed. As of this date the NYS DOL has not issued any further guidance regarding the Workplace Safety Committees.

### Updates to Section 1 of the HERO Act - Airborne Infectious Disease Exposure Prevention Plan

- 1. NY State Commissioner of Health Extends Designation:** The NY State Commissioner of Health has extended the designation of COVID-19 as a “highly contagious communicable disease that presents a serious risk of harm to the public health” through December 15, 2021. The previous designation was through October 31, 2021. **NY covered employers must now keep their HERO Act workplace exposure prevention plans activated until at least December 15, 2021.**
- 2. Change to Model Plan Template on Face Coverings:** The NY State Department of Labor recently amended the template prevention plan to address the use of face coverings. This change explains that in workplaces where all individuals on the premises (not just employees) are fully vaccinated, the Department recommends, but does not require, that employees wear face coverings in accordance with guidance from the NY State Department of Health or the CDC.

However, most workplaces will not be able to say that everyone on site is fully vaccinated. Thus, in such workplaces, The NYS DOL has stated employees are to follow guidance from the NY State’s Department of Health or the CDC. Note, as has been previously communicated, **OSHA, the CDC, the NYS DOL and the NY State DOH all recommend the use of proper face coverings indoors – whether individuals are vaccinated or not.**

Employers should update their Prevention Plan as necessary to reflect this amendment of the template Prevention Plan.

**\*NOTE** – OSHA’s recently issued Emergency Temporary Standard (ETS) on COVID-19 (29 CFR 1910.501) will require employers covered by the OSHA ETS to require non-vaccinated employees to undergo weekly testing for COVID-19, as well as wear proper face coverings. Thus, once in place, the OSHA ETS may supersede some portions of the HERO Act plans. We will be providing additional information on the OSHA ETS in a subsequent guide.

### No new changes to section 2 of the HERO Act - Workplace Safety Committee

The NYS DOL indicated they would provide additional guidance regarding Section 2 of the HERO Act prior to November 1, 2021. No such information has been published. We will provide updates as they become available. At this time it is recommended that covered employers permit their employees to create these committees as required by the HERO Act.

### Actions Employers Should Take

#### Section 1 of the HERO Act - Airborne Infectious Disease Exposure Prevention Plans

If not already done so, covered NY employers need to activate their plans and institute a number of workplace COVID-19 prevention measures similar to those that were previously required under the New York Forward guidance from May 2020 through June 2021. These minimum measures include, but are not limited to:

- ✓ Stay at home policies for employees who test positive or who have symptoms
- ✓ Daily health screenings of employees
- ✓ Per the NYS DOL – employees should wear face coverings per the guidance from the NY State’s Department of Health or the CDC (see memorandum below). However, as noted, the NYS DOL updated its prevention plan template to indicate that where all individuals at a workplace are fully vaccinated, appropriate face coverings are recommended, but not required. Also, OSHA, the CDC, the NYS DOL and the NY State DOH all *recommend* the use of proper face coverings indoors – whether individuals are vaccinated or not.
- ✓ Physical distancing where feasible
- ✓ Engineering controls, such as ensuring effective ventilation
- ✓ Administrative controls, such as employee training, limiting the sharing of workstations, and capacity constraints
- ✓ The use of personal protective equipment (where applicable)
- ✓ Cleaning and disinfection practices
- ✓ Verbal Training and Review (the verbal training can be conducted electronically). Employers must provide a verbal training of the employer’s prevention plan and employee rights under the HERO Act. Personnel must be trained on the following topics:
  - a) COVID-19 and the disease(s) it can cause
  - b) The signs and symptoms of COVID-19
  - c) How COVID-19 can spread
  - d) A review of the employer’s prevention plan
  - e) Activities and locations at the employer’s worksite that may involve exposure to COVID-19
  - f) The use and limitations of exposure controls
  - g) Review the NY Standard released by the NYS DOL, including employee rights and anti-retaliation protections provided under the HERO Act.

**Department  
of Health**

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**Commissioner's Determination on Indoor Masking Pursuant to 10 NYCRR 2.60****August 27, 2021**

Pursuant to 10 NYCRR 2.60, I hereby issue the following determination, which includes findings of necessity, to support the face masking/covering requirements set forth below:

**Findings of necessity:**

The Centers for Disease Control and Prevention (CDC) has identified a concerning national trend of increasing circulation of the Delta COVID-19 variant, which is approximately twice as transmissible as the SARS-CoV-2 strain. Since early July, cases have risen 10-fold, and 95 percent of sequenced recent positives in New York State were the Delta variant.

Certain settings and areas (e.g., healthcare, schools, and public places located in CDC-identified areas of substantial or high community transmission) pose increased challenges and urgency for controlling the spread of this disease because of the vulnerable populations served, the disproportionate percentage of individuals (e.g., children) who are not yet eligible for the COVID-19 vaccination, and/or the substantial to high levels of community transmission.

The above findings demonstrate the necessity for the implementation of layered prevention strategies, which includes face coverings/masks. COVID-19 spreads through respiratory droplets, and several studies have shown that appropriate face coverings/masks reduce the spray of droplets when worn correctly, fully covering one's nose and mouth. Additionally, [as noted by the CDC](#), multiple real-world studies have shown a substantial decrease in SARS-CoV-2 transmission, including:

- Mask use during an outbreak aboard the USS Theodore Roosevelt, a close, congregate environment, was associated with 70% decrease in risk of infection.
- A study from Thailand documented that those who reported mask use during high-risk exposures experienced a more than 70% reduced risk of acquiring the disease compared to those who did not report such mask use during high-risk exposures.
- A study in China demonstrated that mask use by both the index patient and family contacts before symptom onset reduced secondary transmission within households by 79%.

Further, as also reported by the CDC, research supports that there are no significant health effects or changes in oxygen or carbon dioxide levels from mask wear.

Accordingly, based on the foregoing findings of necessity, I hereby issue the following masking requirements:

**Face Covering/Masking Requirements<sup>1</sup>**

1. Healthcare settings:
  - a. *Personnel:* After careful review and consideration of [CDC recommendations](#) for face masks in healthcare settings regulated by the Department, I hereby adopt such recommendations, imposing them as requirements, where applicable. Accordingly, all personnel, regardless of vaccination status, in a healthcare setting (i.e., facilities or entities regulated under Articles 28, 36 and 40 of the Public Health Law) shall wear an appropriate face mask in accordance with applicable CDC exceptions, until this determination is modified or rescinded.
  - b. *Visitors to Healthcare Facilities:* After careful review and consideration of [CDC recommendations](#), all visitors over age two and able to medically tolerate a face covering/mask shall be required to wear a face covering/mask in health care facilities, regardless of vaccination status, subject to applicable CDC exceptions, and until this determination is modified or rescinded.
2. Adult care facilities (ACFs) regulated by the Department:
  - a. *Personnel:* After careful review and consideration of the core principles for infection control to protect the health and safety of both fully vaccinated and unvaccinated residents, all ACF personnel, regardless of vaccination status, shall wear an appropriate face mask if providing direct medical care and at a minimum, a cloth face covering by other staff in such settings, in accordance with any applicable CDC exceptions, until this determination is modified or rescinded.
  - b. *Visitors:* After careful review and consideration of [CDC recommendations](#), unvaccinated visitors, who are over age two and able to medically tolerate a face covering/mask shall be required to wear a face covering/mask in such setting, subject to CDC exceptions, and until this determination is modified or rescinded.
3. P-12 school settings:
  - a. After careful review and consideration of [CDC recommendations](#) for face coverings/masks in school settings, I hereby adopt such recommendations, imposing them as requirements, where applicable, until this determination is modified or rescinded<sup>2</sup>. Accordingly, universal masking of teachers, staff, students, and visitors to P-12 schools over age two and able to medically tolerate a face covering/mask and regardless of vaccination status, is required until this determination is modified or rescinded. Such requirement is subject to applicable CDC-recommended exceptions.
4. Correctional facilities and detention centers:
  - a. *Incarcerated/Detained Persons and Staff:* After careful review and consideration of [CDC recommendations](#) for face coverings/masks, all incarcerated/detained Persons and staff shall wear an appropriate face covering/mask when social distancing cannot be maintained, and in accordance with applicable CDC exceptions (e.g., eating and sleeping), until this determination is modified or rescinded.
  - b. *Visitors:* After careful review and consideration of [CDC recommendations](#) for face coverings/masks in correctional facilities and detention centers, all visitors over age two and able to medically tolerate a face covering/mask shall wear an appropriate face covering/mask in accordance with applicable CDC exceptions, until this determination is modified or rescinded. Correctional facilities and detention centers may impose their own policies for private visitation.
5. Homeless Shelters (including overnight emergency shelters, day shelters, and meal service providers):
  - a. After careful review and consideration of [CDC recommendations](#), all clients, visitors, staff, and volunteers over age two and able to medically tolerate a face covering/mask shall wear an appropriate face mask/covering regardless of vaccination status, when social distancing cannot be maintained and in accordance with applicable CDC exceptions (e.g., eating and sleeping), until this determination is modified or rescinded.

6. Public Transportation Conveyances and at Transportation Hubs
- a. After careful review and consideration of [CDC recommendations](#) for face coverings/masks on public transportation conveyances and at transportation hubs, all persons, over age two and able to medically tolerate a face covering/mask, regardless of vaccination status, shall wear an appropriate face covering/mask while in indoor areas of conveyances or while indoors at transportation hubs, in accordance with applicable CDC exceptions, until this determination is modified or rescinded.

Updates to the above referenced CDC recommendations will not necessarily require issuance of a revised or modified determination. However, such CDC recommendations will be continuously monitored by the Department, and updated determinations issued, as appropriate.

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<sup>1</sup> Nothing in this determination shall be interpreted as inconsistent with the Americans with Disabilities Act (ADA), workplace safety guidelines, or applicable federal regulations.

<sup>2</sup> Guidance from [American Academy of Pediatrics](#) was also reviewed when making face covering/masking determinations in school settings, which is consistent with the above referenced CDC recommendations.