

# NYS HERO Act

Protecting Workers from Airborne Disease



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RISK MANAGEMENT  
& SAFETY

**New York State Health and Essential Rights Act | Information & Overview**

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# Topics

- HERO Act overview
- **Employer responsibilities** and timelines
- Components of the required **Airborne Infectious Disease Exposure Prevention Plan**
- **Implementation** of your Airborne Infectious Disease Exposure Prevention Plan
- Employee **training and communication** requirements
- **Safety Committee** requirements
- Penalties for non-compliance

# HERO Act Overview

The *amended* HERO Act took effect on July 5, 2021.

On July 6, 2021 the NY State Department of Labor (NYSDOL) published the following:

- The Airborne Infectious Disease Exposure Prevention Standard
- A general model Airborne Infectious Disease Exposure Prevention Plan (AIDPP)
- Several industry specific model Airborne Infectious Disease Exposure Prevention Plans (Agriculture, Construction, Delivery, Domestic Work, EMS, Food Service, Manufacturing, Personal Services, Private Ed, Private Transportation, Retail)

# HERO Act Overview

The HERO Act continues to have two distinct requirements for private employers in the State of NY.

1. Covered employers were to establish an Airborne Infectious Disease Exposure Prevention Plan by August 5, 2021. This applies to ALL private employers, except those noted in the exceptions.
2. Safety Committee - By November 1, 2021 the law requires covered employers with at least 10 or more employees to **permit** employees to establish and administer a joint labor-management workplace safety committee.

# HERO Act Plans Implemented

On 09-06-2021 the NY State Commissioner of Health designated COVID-19 a highly contagious communicable disease that presents a serious risk of harm to the public health under New York State's HERO Act. This designation required all covered employers to implement their Airborne Infectious Disease Exposure Prevention Plan as required per the HERO Act.

# HERO Act Plans Implemented

- 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.
- NY covered employers must now keep their HERO Act workplace exposure prevention plans activated until at least December 15, 2021.

# Exceptions

- Public Employers - Employees or independent contractors of the state, any political subdivision of the state, a public authority, or any other governmental agency or instrumentality.
- Healthcare (currently) - Any employee within the coverage of a temporary or permanent standard adopted by the Occupational Safety and Health Administration setting forth applicable standards regarding COVID-19 and/or airborne infectious agents and diseases.

# Exceptions

- Seasonal / endemic disease - Any seasonal or endemic infectious agent or disease, such as the seasonal flu, that has not been designated by the Commissioner of Health as a highly contagious communicable disease that presents a serious risk of harm to the public health.



# Airborne Infectious Disease Exposure Prevention Plan

Each covered employer shall establish a written Airborne Infectious Disease Exposure Prevention Plan designed to eliminate or minimize employee exposure to airborne infectious agents in the event of an outbreak of an airborne infectious disease.

**TIME TO PLAN**



# Plan Components

- ✓ **Health Screening** - Health screening for the disease shall be **performed at the beginning of the workday**, in accordance with guidance issued by State DOH or the CDC.
- Employers must **limit the exposure** of other individuals to employees demonstrating any symptoms of an airborne infectious disease.
- Follow State DOH and or the CDC **protocols regarding testing, isolation and quarantine** before allowing employees to return to the worksite and inform employees of the same.

# Plan Components – Face Coverings

- ✓ **Face Coverings** - The employer shall select and provide at no cost to employees face coverings deemed appropriate and in accordance with guidance from NY DOH or the CDC
- The employer shall **require that employees wear appropriate face coverings when physical distancing cannot be maintained** and in accordance **with applicable guidance from State DOH or the CDC**



# Plan Components – Face Coverings

**Revision to Model Plan Template on Face Coverings:** The NY State Department of Labor amended the model plan template prevention plan to address the use of face coverings.

This change explained 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.

# Plan Components – Face Coverings

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.**

# UPDATE 12-13-21 Plan Components - Face Coverings

## **New NY State Commissioner's Determination on Indoor Masking Pursuant to 10 NYCRR 2.60 - December 10, 2021**

Employers must continue to comply with the NYS Health and Essential Rights Act (NY HERO ACT), which affords protections for private sector employees against an airborne infectious disease outbreak by requiring employers to **ensure employees wear appropriate face coverings in accordance with Department of Health guidance.**

# UPDATE Plan Components - Face Coverings

For purposes of complying with the NY HERO Act, the Commissioner's Determination constitutes Department of Health guidance related to face coverings, **meaning employers must ensure their employees adhere to masking requirements or require proof of vaccination as a condition of entry into the business.**

# UPDATE Plan Components - Face Coverings

## Face Covering/Masking Requirements per NYS DOH

1. Healthcare
2. Adult Care Facilities
3. Schools
4. Correctional Facilities
5. Homeless Shelters
6. Public Transportation
7. All Indoor Public Places Not Otherwise Covered by This Determination



# UPDATE Plan Components - Face Coverings

## Indoor Public Places:

1. 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 any indoor public place.
2. For purposes of this determination “indoor public place” shall mean **any indoor space that is not a private residence.**
3. This requirement shall not apply to any indoor public area that requires proof of vaccination as a condition of entry.
4. This requirement shall be in effect until January 15, 2022.

# UPDATE Plan Components - Face Coverings

Indoor public place is defined as any indoor space that is not a private residence. This means businesses and venues New Yorkers typically frequent that are either publicly owned or owned by private business entities. This includes indoor entertainment venues, concert halls, indoor sports stadiums, recreational spaces, restaurants, office buildings, shopping centers, grocery stores, pharmacies, houses of worship and common areas in residential buildings.

# UPDATE Plan Components - Face Coverings

## Business/Venue Mask-Wearing Requirement

- Businesses and venues that implement a mask requirement must ensure all patrons past their second birthday and medically able to tolerate a face covering wear a mask at all times while indoors, outside of physical eating or drinking.
- No “Mix and Match” plan option - A business or venue must choose whether it will implement a full-course vaccine requirement **or** a mask requirement, which applies to both patrons and employees and then must be followed in its entirety throughout the facility at all times each day.

# UPDATE Plan Components - Face Coverings

## Vaccine option:

- Businesses and venues that implement a proof of vaccination requirement must ensure that anyone 12 years of age or older is fully vaccinated before entering indoors.
- Businesses/venues can accept Excelsior Pass, Excelsior Pass Plus, SMART Health Cards issued outside of New York State, full-course vaccination through NYC COVID Safe app, a CDC Vaccination Card, or other official immunization record.

# UPDATE Plan Components - Face Coverings

- **Fully vaccinated** is defined as 14 days past an individual's last vaccination dose in their initial vaccine series (14 days past the second shot of a two-dose Pfizer-BioNTech or Moderna vaccine; 14 days past the one-shot Janssen/Johnson & Johnson vaccine). The State also accepts WHO-approved vaccines for these purposes.
- Vaccines for **children ages 5-11** have only been available since November 2021. Therefore, in order to enter a business or venue that implements a proof of vaccination requirement, children ages 5 – 11 only have to show proof of having had at least one dose of the COVID-19 vaccination.

# Plan Components

- ✓ **Physical Distancing** - Physical distancing shall be used, when possible, to **keep employees at least six feet apart** from other individuals or as recommended by State DOH or CDC.
- ✓ **Hand Hygiene** - The employer shall, to the extent practicable and feasible, **provide handwashing facilities** with an adequate supply of tepid or warm potable water, soap, and single-use towels or air-drying machines.
  - When providing handwashing facilities is not practical and feasible, the employer shall provide hand sanitizing facilities and/or supplies.

# Plan Components

- ✓ **Cleaning and disinfection** - The employer shall determine and implement an appropriate plan for cleaning and disinfection that includes the methods of decontamination based upon the location, facility type, type of surface(s) to be cleaned, type of material present, tasks or procedures being performed in the area, and as otherwise directed by State DOH or CDC for the disease outbreak.
- Surfaces known or believed to be **contaminated with potentially infectious materials shall be cleaned and disinfected immediately or as soon as feasible**, unless the area and surfaces can be isolated for a period of time prior to cleaning.

# Plan Components

- **Frequently touched surfaces**, such as handrails, doorknobs, and elevator buttons, shall be disinfected throughout the workday and/or as recommended by State DOH or CDC.
- **Shared tools, equipment, and workspaces** shall be cleaned and disinfected prior to sharing and/or as recommended by State DOH or CDC.
- **Common areas**, such as bathrooms, dining areas, break rooms, locker rooms, vehicles, and sleeping quarters, shall be **cleaned and disinfected at least daily** or as recommended by State DOH or CDC.



# Plan Components

- ✓ **Personal Protective Equipment** - In addition to that required or recommended by State DOH or CDC, personal protective equipment that is identified as necessary for the protection of the employee shall fit the employee, and be provided, used, and maintained in a sanitary and reliable condition at the expense of the employer.
- The **employer shall provide and require employees use** the personal protective equipment and other personal protective equipment deemed necessary or recommended by State DOH **and provide appropriate training and information to each employee required to use** personal protective equipment.

# Plan Components

- Where **employee-owned personal protective equipment** is used at the worksite, the employer shall be responsible for ensuring that the employee-owned personal protective equipment is adequate and functioning properly.
- All personal protective equipment, including employee-owned personal protective equipment used at the worksite, shall be **stored, used, and maintained in a sanitary and reliable condition** in order to be used at the work site.

# Alternative Plan

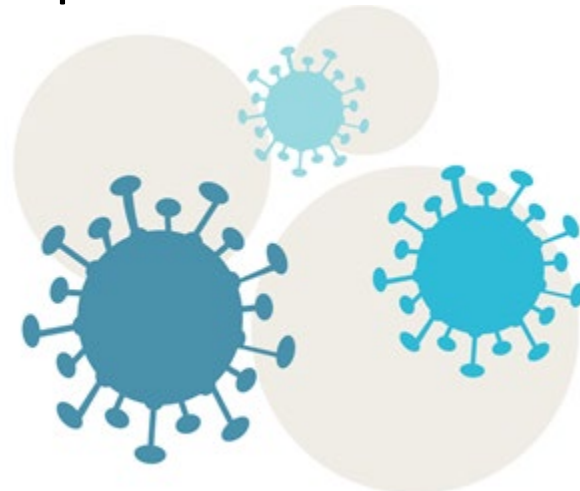
- Employers may choose to adopt the applicable model plan provided by the NYSDOL, or create their own plan—which must meet (at a minimum) or exceed the standards laid out in the state-developed plans.
- Employers that develop their own plan shall adopt such plan pursuant to an agreement with the collective bargaining representative, if any, **or with the meaningful participation of employees where there is no collective bargaining representative**, for all aspects of the plan, and such plan shall be tailored and specific to the hazards in the specific industry and worksites of the employer.

# Communication / Training

- ✓ **Employers have 60 days after the publication of the model plans, or until September 4, 2021, to distribute and communicate the plans to employees.**
- Employers will be required to conduct a **verbal review** of employer **policies, employee rights** under this section and **section 218-b** of the labor law, and the employer's **exposure prevention plan.**
- Employers must add the plan to their employee **handbook, 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.

# Plan Implementation

On 09-06-2021 the NY State Commissioner of Health designated COVID-19 a highly contagious communicable disease that presents a serious risk of harm to the public health under New York State's HERO Act. This designation required all covered employers to implement their Airborne Infectious Disease Exposure Prevention Plan as required per the HERO Act.



# Plan Implementation

- Immediately **review** the worksite's exposure prevention plan and **update the plan**, if necessary, to ensure that it incorporates current information, guidance, and mandatory requirements issued by federal, state, or local governments related to the infectious agent of concern.
- **Finalize and promptly activate** the worksite exposure prevention plan. Provide the **verbal review** as required.
- **Provide each employee with a copy** of the exposure prevention plan in English or in the language identified as the primary language of such employees.

# Plan Implementation

- **Post a copy of the exposure prevention plan** in a visible and prominent location at the worksite (except when the worksite is a vehicle).
- Ensure that a copy of the exposure prevention plan is **accessible to employees during all work shifts**.
- Assigning enforcement responsibilities in accordance with Labor Law Section 218-b(2)(i) – which means supervision enforces - and ensuring that adequate enforcement of the worksite's exposure prevention plan takes place.

# Plan Implementation

- Monitor and **maintain exposure controls.**
- Regularly **checking for updated information and guidance provided by State DOH or CDC** concerning the airborne infectious disease and updating the exposure prevention plan so that the plan reflects current State DOH or CDC recommended control measures.



# Plan Implementation

- **Designate one or more supervisory employees to enforce compliance with the exposure prevention plan;** the standard and any other federal, state, or local guidance related to preventing the spread of the airborne infectious disease as applicable to employees and third parties such as customers, contractors, and members of the public within the workplace.
- No individual who is not a supervisory employee shall have responsibility for overseeing compliance with the requirements of the exposure prevention plan.

# Plan Review, Update and Availability

- The plan shall be reviewed and updated whenever necessary to reflect new or modified tasks and procedures which affect occupational exposure and to reflect new or modified employee assignments.
- Each employer shall make the exposure prevention plan available, upon request, to all employees, employee representatives, collective bargaining representatives, independent contractors, the department of labor, and the department of health.

# Anti-Retaliation

- ✓ **An anti-retaliation provision is required that will protect workers from retaliation, discrimination, adverse action, or threats for:**
  - Exercising their rights under the law or under the implemented prevention plan.
  - Reporting violations of the law or applicable prevention plan.
  - Reporting an airborne infectious disease exposure concern.
  - Seeking assistance or intervention with respect to such concerns.

# Anti-Retaliation

- Also notable is that the law protects workers from adverse action or retaliation for refusing to work where such worker reasonably believes, in good faith, that such work exposes him/her, or other workers to the disease due to the existence of working conditions that are inconsistent with law.
- Notification of a violation by an employee may be made verbally or in writing, and without limitation to format including electronic communications.

# Anti-Retaliation

- To the extent that records exist between the employer and employee regarding a potential risk of exposure, without limitation to format including electronic communications, they shall be **maintained by the employer for two years after the conclusion of the designation of a high-risk disease from the Commissioner of Health.**

*\* It is suggested that employers create an anti-retaliation policy statement and share that with employees.*

# Safety Committee

- ✓ **Section 2 of the HERO Act - Safety Committee** - By November 1, 2021 the law requires covered employers with **at least 10 or more employees to permit** employees to establish and administer a joint labor-management workplace safety committee.
  - An employer need not create a second committee if **one that *meets the Act's requirements* is already in existence.**
  - A committee's role shall be limited to reviewing and/or raising occupational health and safety concerns **implicated by the Act's provisions.** A committee's scope does not reach all parts of New York's Labor Law.

# Safety Committee

- The regularly scheduled **quarterly meetings** of the committee shall last **no longer than two hours**. These meetings must occur during work hours.
- The **training that safety committee members are entitled to attend**, without loss of pay, is limited to a duration of **no more than four hours**.



# Safety Committee

- ✓ **The law contains specific requirements for any such committee which include:**
  - Employers must permit employees to establish a Safety Committee composed of **at least two-thirds non-supervisory employees**. The non-supervisory employees are **NOT selected by the employer**, they are selected by themselves.
  - The Safety Committee is **co-chaired** by a representative of the employer and non-supervisory employees.
  - If a collective bargaining agreement is in place, the **collective bargaining representative shall be responsible for the selection of employees**.



# Safety Committee

- An employer **cannot interfere** with the Safety Committee members' performance of their duties.
- An employer can have different Safety Committees for geographically different worksites.



# Safety Committee

- ✓ **Specific Safety Committee actions include 7 items:**
  1. Raise health and safety concerns, hazards, complaints and violations to the employer to which the employer must respond.
  2. Review any policy put into place in the workplace required by any provision of **this chapter** relating to occupational safety and provide feedback to such policy in a manner consistent with any provision of law.
  3. Review the adoption of any policy in response to any health and safety law, ordinance, rule, regulation, executive order, or other related directive.

# Safety Committee

4. Participate in any site visit by government health and safety officials.
5. Review any report filed by the employer related to health and safety.
6. Attend quarterly meetings during work hours (limited to two hours per meeting).
7. Employers must allow employees without loss of pay to attend training on the function of the Safety Committee, on an introduction to occupational safety and health and the responsibilities and rights under this law. The paid training will be limited to no more than four hours.

# Safety Committee

- An employer cannot retaliate against an employee who participates in a Safety Committee.
- Collective Bargaining Agreements can waive the Safety Committee rule as long as they explicitly reference the HERO Act.

# Penalties for Non-Compliance

**Failure to abide by an adopted prevention plan** could result in civil penalties from **\$100 to \$10,000 per day**. Subsequent violations carry higher penalties.



# Private Suits

- The law initially created a **private right of action for employees** to obtain injunctive relief against employers for failing to comply with the Act under certain circumstances. **The remedies which employees can recover in a civil action have been limited.**
- 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.

# Private Suits

- The approved amendments also **require employees to provide their employer with 30 days' notice and an opportunity to cure the violation before filing a civil action, 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.

# Links

- NYSDOL HERO Act <https://dol.ny.gov/ny-hero-act>
- Frequently Asked Questions: Proof of Full Vaccination or Mask Requirement for Businesses and Venues  
<https://coronavirus.health.ny.gov/frequently-asked-questions-proof-full-vaccination-or-mask-requirement-businesses-and-venues>



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**THANK YOU**

**QUESTIONS?**