

New York Releases New Guidance on Implementation of the HERO Act

On May 5, 2021, New York enacted the New York Health and Essential Rights Act, or NY HERO Act ("the Act"), which is aimed at curbing the spread of airborne infectious diseases in the workplace. Our [coverage of the HERO Act](#) details the requirements for creating an airborne infectious disease exposure prevention plan and making it available to employees, as well as the non-retaliation provisions of the Act.

On July 7, 2021, the New York Department of Labor issued [guidance on the implementation of Airborne Infection Diseases Exposure Prevention](#), as required under the Act. Employers have until August 6, 2021 to adopt their own plan. They must also update their plans "whenever necessary" to reflect new or modified employee tasks or procedures.

The Labor Department has provided a template infectious disease prevention plan for employers to utilize, as well as specifically-tailored model plans for the following industries: agriculture, construction, delivery services, domestic workers, emergency response, food services, manufacturing and industry, personal services, private education, private transportation, and retail. These templates can be accessed at <https://dol.ny.gov/ny-hero-act>.

The control measures contained in employers' plans take effect only "when an airborne infectious disease is designated by the New York State Commissioner of Health as a highly contagious communicable disease that presents a serious risk of harm to the public health." Because Governor Cuomo has lifted all State restrictions related to COVID-19, it seems likely that, at this time, employers do not need to implement the control measures contained in their plans. Because there has been no definitive guidance on this issue, we will continue to monitor the situation.

The following is a summary of the exposure controls set forth in the Labor Department's guidance and model plan.

Implementation

When the Commissioner of Health designates a disease as a "highly contagious communicable disease . . . presenting a serious risk of harm to the public health," employers must review, update (if needed), and activate their plans. They must also verbally review and provide a copy of the plan to all employees. Employers must then ensure their plan is adhered to and designates one or more supervisory employees to enforce compliance with the plan and other applicable standards and law.

Stay at Home Policy

If an employee develops symptoms of the infectious disease, the employee should not be in the workplace. The employee should inform the designated contact and follow applicable guidance regarding obtaining medical care and isolating.

Respiratory Etiquette

Employees should exercise appropriate respiratory etiquette by covering their nose and mouth when sneezing, coughing, or yawning.

Health Screenings

Employers must conduct health screenings for a covered disease at the start of each work day. Screenings must be conducted in accordance with the guidance issued by the State Department of Health ("Health Department") or the Centers for Disease Control and Prevention ("CDC"). Employees must limit exposure of other individuals to employees demonstrating symptoms of an airborne infectious disease. Employers must also ensure employees comply with applicable quarantine requirements.

Face Coverings

Employers must provide face coverings to employees at no cost. When required by the Health Department or the CDC, employers must require employees to wear appropriate face coverings in situations where physical distancing cannot be maintained.

Physical Distancing

When recommended by the Health Department or the CDC, employers must require employees to maintain six feet of physical distancing, when possible.

Hand Hygiene

Employers must, to the extent practical and feasible, provide handwashing facilities for employees with adequate warm or tepid water, soap, and either paper towels or air-drying machines. If handwashing facilities cannot be feasibly provided, then the employer must provide hand sanitizer to employees. Hand sanitizer must contain at least 60% alcohol or other composition determined by the Health Department or CDC to be appropriate.

Cleaning and Disinfection

Employers should develop and implement a plan to clean and disinfect workspaces. Employers should consider "the location, facility type, type of surface(s) to be cleaned, type of material present, tasks or procedures being performed in the area" and should follow any directions from the Health Department or the CDC. Any surface known or believed to be contaminated by an infectious disease must be cleaned immediately or as soon as feasible. If not feasible, the surface should be isolated until cleaning is possible. Cleaning processes should minimize the dispersal of dust. Frequently touched surfaces (for example, handrails, doorknobs, and elevator buttons) must be cleaned and disinfected throughout the workday. Shared equipment/tools must be disinfected prior to sharing. Common areas (for example, bathrooms, dining areas, break rooms, locker rooms, vehicles, and sleeping quarters) must be disinfected at least once a day or as recommended by the Health Department or the CDC.

Personal Protective Equipment

Employers must provide personal protective equipment ("PPE") to employees and require their use, when required by the Health Department or the CDC. PPE must properly fit employees and be maintained in a sanitary and reliable condition. Employees must not be required to pay for PPE. Employers must provide training on use of PPE.

When employee-owned PPE is used at the worksite, the employer must be responsible for ensuring the PPE is adequate and functions properly.

Advanced Controls During an Outbreak

When normal exposure controls are insufficient during an outbreak, employers should consider the following additional controls.

- Mechanical ventilation of workspaces (vents, fans, air filters)
- Natural ventilation of workspaces (opening windows)
- Automatic disinfection systems (ultraviolet light)
- Installation of physical barriers or partitions
- Modification of worksite layout to reduce employee congregation

Steps Employers Should Take

Employers have until August 6, 2021 to adopt an Airborne Infectious Disease Exposure Prevention Plan. Employers should use the template provided by the Department of Labor or, if applicable, one of the industry-specific templates, which can be found at <https://dol.ny.gov/ny-hero-act>. As discussed, it is unclear whether employers must also implement the control measures in their prevention plans on August 6, 2021, but this seems unlikely in view of Governor Cuomo's decision to lift all COVID-19-related restrictions. Even so, employers should take steps now to prepare to implement the control measures on short notice, such as purchasing materials, installing hand washing stations, and having a system in place to conduct employee health screenings.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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