

### **New York Requires Employers to Implement Airborne Infection Diseases Exposure Prevention Plans Under the NY 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 a plan and making it available to employees, as well as the non-retaliation provisions of the Act.

Employers were required to have a plan in place by August 6, but were not required to immediately activate those plans because, at the time, the Governor had lifted all COVID-19-related restrictions on New York businesses. In response to the uptick in cases related to the "delta variant," Governor Kathy Hochul announced on September 6 that the New York State Commissioner of Health had designated COVID-19 as a "highly contagious communicable disease that presents a serious risk of harm to the public health."

This designation means that employers must activate their airborne infectious disease exposure prevention plans and implement the safety measures contained in those plans. Activation of exposure prevention plans mean employers must implement many measures aimed at curbing the spread of COVID-19. For an overview of additional measures, see [our prior coverage](#).

Thus far, the State has not set a deadline for employers to implement their plans, so employers should begin implementation as soon as reasonably possible. The current designation lasts until September 30, 2021, at which time Governor Hochul will evaluate whether to extend the designation. Employers that have not yet reopened their offices (and will not reopen before September 30, 2021) may wish to wait and see whether the designation is extended beyond September 30, 2021. Given Governor Hochul's focus on public health, other pandemic employment-related legislation or regulations might also be modified or expanded in the coming weeks.

#### **Vaccination**

Notably absent from the HERO Act and Department of Labor regulations is new guidance on employee vaccinations. At this time, nothing in the Act or the Governor's proclamation requires (or prohibits) employers to mandate COVID-19 vaccinations.

#### **Litigation Alleging Violations of Airborne Infection Diseases Exposure Prevention Plans**

Under the Act, employees can sue to obtain injunctive relief against their employer if the employer violates their plan in a manner that "creates a substantial probability that death or serious physical harm." Before suing, an employee must notify the employer of the alleged violation, and the employer then has 30 days to cure the violation. A successful plaintiff may be able to recover their costs and reasonable attorney's fees (but not money damages). The Act also allows an employer to recover its attorney's fees and costs if the employee's claims are determined to be frivolous.

## Steps Employers Should Take

Under the Act, the Governor's proclamation means that employers (regardless of whether its office is open) must take the following steps immediately:

- Review and (if needed) update their plans;
- Verbally review the plan with employees, which can be done in person or remotely;
- Provide each employee with a copy of the plan in English or the employee's primary language; and
- Post a copy of the exposure prevention plan in a visible and prominent location in the office.

With respect to implementing exposure prevention controls, there has been no guidance on how long employers have to comply. We recommend that employers that have reopened their offices implement their plans as soon as reasonably possible. Employers opening their offices in the near future should aim to implement their plans before employees return to the office. Employers who do not plan to reopen their offices until at least October 1, 2021, should continue to monitor the situation and be prepared to implement their plan before employees return to the office. Such employers are required under the Act to provide a copy of the plan in writing to all employees within 15 days of reopening, regardless of whether the designation remains in place at that time.

There is also currently no guidance as to whether "advance controls" must be implemented at this time. Given that these measures are only required "when normal exposure controls are insufficient," and in many cases involve expensive modifications to the workspace, it is reasonable to await further guidance from the State.

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<b><u>Lisa E. Cleary</u></b>	<b>212.336.2159</b>	<b><u>lecleary@pbwt.com</u></b>
<b><u>Catherine A. Williams</u></b>	<b>212.336.2207</b>	<b><u>cawilliams@pbwt.com</u></b>
<b><u>Douglas L. Tang</u></b>	<b>212.336.2844</b>	<b><u>dtang@pbwt.com</u></b>
<b><u>Leigh E. Barnwell</u></b>	<b>212.336.2176</b>	<b><u>lbarnwell@pbwt.com</u></b>
<b><u>George B. Fleming</u></b>	<b>212.336.2841</b>	<b><u>gfleming@pbwt.com</u></b>
<b><u>Ryan J. Kurtz</u></b>	<b>212.336.2405</b>	<b><u>rkurtz@pbwt.com</u></b>
<b><u>Andrew M. Willinger</u></b>	<b>212.336.2003</b>	<b><u>awillinger@pbwt.com</u></b>

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