

4 Urgent Employer Steps After NY's New Airborne Virus Law

By **Leni Battaglia, Jonathan Weinberg and Dan Kadish** (July 29, 2021)

The New York State Department of Labor recently released the Airborne Infectious Disease Exposure Prevention Standard,[1] which, as required by the New York Health and Essential Rights, or Hero, Act, creates industry-specific airborne infectious disease standards that must be used by all employers doing business within the state of New York.

By Aug. 5, employers must either adopt an applicable template-compliant safety plan[2] or establish an alternative plan that meets the standard's minimum requirements.

While employers must make available and communicate their plan to employees, they do not need to actually implement the safety controls in the plan until the New York Department of Health declares an outbreak of an infectious disease, which has not happened yet.

Additional details regarding the Hero Act, its requirements and practical implications can be found below.

1. Understanding the DOL Model Standards and Template Plans

The Hero Act, which was signed into law in May, requires all private employers, regardless of size, to adopt airborne infectious disease exposure prevention plans.

It also directed the DOL to create model standards setting forth the minimum guidelines that all employers must follow to limit the risk of infectious disease exposure.

In addition to its standard, the DOL also published template industry-specific plans for the following industries: agriculture, construction, delivery services, domestic workers, emergency response, food services, manufacturing/industry, personal services, private education, private transportation and retail.

Notably missing from this list is a template plan for office-specific workplaces. Employers with office-based work sites in the state should therefore continue to carefully monitor future guidance from the DOL.

Conversely, the standard is a one-size-fits-all guideline that sets forth the minimum requirements for all employers, regardless of industry.

Employers can choose to adopt the applicable policy template provided by the DOL or establish an alternative plan that meets or exceeds the standard's minimum requirements, which include all of the following: (1) daily health screens and exclusion/isolation of symptomatic employees; (2) provision of appropriate face coverings and additional protective equipment; (3) a physical distancing plan; (4) hand hygiene facilities; and (5) regular cleaning and disinfecting of workplaces.



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In many respects, the standard defers to the state DOH and U.S. Centers for Disease Control and Prevention guidance that may be in effect during a designated outbreak.

2. Complying With Upcoming Deadlines

By Aug. 5, all employers with New York work sites must develop an infectious disease exposure plan that meets the minimum requirements of the DOL's standard.

Employers must then communicate the details of the plan to employees by Sept. 4.

Finally, by Nov. 1, employers must create a workplace safety committee charged with reviewing employer policies related to occupational safety and health.

Employers that already have a workplace safety committee that meets the minimum requirements of the Hero Act are exempt from creating a new committee.

While employers must adopt a plan and communicate it to their workforce, there is no requirement to implement the various safety control provisions until the DOH designates an airborne infectious disease as "a highly contagious communicable disease that presents a serious risk of harm to the public health."

Although no outbreak has been designated by the DOH at this time, employers must still take steps to adopt a plan and communicate it to their employees.

When doing so, it is important to weigh the advantages of using the model plan versus adopting an alternative plan, as illustrated in the table below.

	Model Plan	Alternative Plan
General Contents	Far exceeds the minimum requirements in the standard	Can be tailored to mirror the standard's requirements
Notice Requirements	Requires a verbal review of the: (1) existence of the plan, (2) circumstances under which it can be activated and (3) the HERO Act and employees' rights thereunder	Requires a verbal review of: (1) employer policies; (2) employee rights under the HERO Act and Section 218-b of the state's Labor Law; and (3) the employer's exposure prevention plan
Employee Input	No employee input required	Requires meaningful participation of employees or a collective bargaining representative

Although the DOL provides some incentives for employers to use the model plan (e.g., no requirement for employee input or communication of the contents of the plan), employers should be cognizant of the heightened requirements built into the model plan as compared to those in the standard.

Unsurprisingly, the DOL has left employers in the dark about two major considerations for

this issue; namely, what constitutes meaningful participation of employees, and whether employers need to review the detailed contents of an alternate plan with employees (compared to the model plan, which only requires notice that the plan exists).

3. Implementing the Plan During a Designated Outbreak

In the event that the DOH designates an outbreak, employers will be required to immediately review and update their airborne infectious disease safety plan, review the plan with employees, provide written notice to employees of the plan in English or their primary language and post a copy of the plan at the workplace.

Following its implementation, employers must then ensure the plan is followed and designate a supervisory employee to monitor compliance.

4. Implementing Reporting and Anti-Retaliation Measures

As with other employment laws, the standard provides that an employer cannot retaliate against an employee for reporting a violation of a safety plan or of the Hero Act.

Additionally, the standard prohibits an employer from retaliating against an employee for refusing to work during a designated outbreak where an employee reasonably believes, in good faith, that work exposes them, 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 laws, rules, policies or orders of any governmental entity, including a plan or the Hero Act.

In such circumstances, the employee or their designee must notify their employer of the conditions at issue. The employer then has an opportunity to cure the conditions, unless it knew of or should have known about the issues and failed to correct them.

Any records regarding notice of a potential risk must be maintained for two years from the designation of an outbreak.

Violations of the Hero Act may result in civil fines and penalties. Employees are also entitled to bring a civil action seeking injunctive relief against employers alleged to have violated their plans.

Best Practices and Key Takeaways

Employers should immediately begin taking steps to come into compliance with the Hero Act's new requirements, including:

- Deciding whether to use the DOL's model plan or adopting an alternative plan;
- Considering the best forum to communicate with employees about the plan (especially if part or all of the workforce is remote);
- Updating existing health and safety policies and practices;

- Establishing a method of distribution for the plan that will reach all employees (for example, on a company intranet, or in an employee handbook, shared workspace or other forum);
- Creating and implementing a reporting and investigation procedure for alleged violations of the plan;
- Designating employees to serve in newly required positions (i.e., a compliance monitor, safety committee members); and
- Training human resources employees to be well versed on the Hero Act and its requirements, including the anti-retaliation provision.

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[1] <https://dol.ny.gov/system/files/documents/2021/07/p764-the-airborne-infectious-disease-exposure-prevention-standard-v4.pdf>.

[2] <https://dol.ny.gov/system/files/documents/2021/07/model-airborne-infectious-disease-exposure-prevention-plan-p765.pdf>.