Engage PEO Client Alert:

NY HERO Act Requires New Workplace Safety Measures

On May 5, 2021, New York's Governor signed the Health and Essential Rights Act (the "HERO Act"), requiring the New York State Department of Labor (NYSDOL) to create industry-specific, enforceable workplace health and safety standards for private employers with ten or more employees. Amendments to the Act were subsequently proposed and recently enacted on June 11.

The Amendments delay the **deadline for the NYSDOL to publish its standards to July 5, 2021, provide a clear timeline for employers to adopt or create the safety protocols required by the Act, and set the deadline for employers to adopt a disease prevention plan for 30 days after the NYSDOL's model standards are published. Employers will then have 60 days following the NYSDOL's publication date to provide their safety protocol to employees**.

Workplace Safety Committees

Employers must begin permitting employees to form **a joint labor-management workplace safety committee with employee and employer designees by November 1, 2021**. The committee must be allowed to raise workplace health and safety concerns, review employer policies related to workplace health and safety topics, participate in government site visits relating to workplace health and safety standards, and attend committee meetings and trainings related to workplace health and safety standards.

Legal Liability

Businesses can be liable for discrimination or retaliation under the Act as of July 5, 2021. (See details below). While most employers will choose to wait for the NYDOL protocols to be published and act accordingly thereafter, businesses should begin working to ensure compliance with the various provisions of the Act.

Employers with unionized workforces must consider whether and how the requirements under the NY HERO Act will complement or conflict with their obligations under their respective collective bargaining agreements.

Who is covered under the Act?

The Act defines "employees" broadly to include those individuals "providing labor or services for remuneration" as well as part-time workers, independent contractors, domestic workers, home health and personal care workers, and seasonal workers, among others. State and other governmental agency employers/employees are exempt from the Act.

Model Safety Plans – Section 1

Section 1 of the Act requires the New York State Commissioner of Labor, in consultation with the state Department of Health, to create and publish a model airborne infectious disease exposure prevention standard for all work sites, differentiated by industry, and to establish minimum requirements for

preventing exposure to airborne infectious diseases in the workplace. **In establishing these minimum requirements, the NY labor commissioner is tasked with developing protocols to address the following topics:**

1. employee health screenings;
2. face coverings;
3. personal protective equipment (PPE) required by industry and at the employer's expense;
4. hand hygiene;
5. cleaning and disinfecting of shared work equipment and surfaces (i.e. telephones and door knobs);
6. social distancing protocols;
7. mandatory or precautionary isolation or quarantine orders;
8. engineering controls;
9. assignment of enforcement responsibility of the safety plan and federal, state, and local protocols to one or more supervisory employees;
10. compliance with employee notice requirements; and
11. verbal review of standards, policies, and employee rights.

The Act requires the Labor Commissioner to publish these industry-specific airborne infectious disease exposure prevention standards in both in English and Spanish in addition to other languages depending on population and languages spoken in certain industries.

Employers have the choice to either adopt the Labor Commissioner's model airborne infectious disease exposure prevention plan or to create their own safety plan that meets or exceeds the minimum standards established by the Labor Commissioner. If an employer chooses to establish its own airborne infectious disease exposure prevention standards, it must do so in consultation with collective bargaining representatives, or in a non-unionized workforce, with employee participation, and be customized to incorporate industry-specific hazards and worksite considerations.

Employers are required to distribute the plan to employees in both English and in an employee's primary language if other than English upon hire (provided there is a model policy developed in that specific language) and upon reopening after business closure due to an airborne infectious period. Employers must also post the plan at the worksite and incorporate it into an employee handbook if the employer maintains a handbook. In addition, employers must make the plan available for review upon request by an employee, independent contractor, employee representative, collective bargaining representative, the labor commissioner, or to the commissioner of public health.

Discrimination and Retaliation Prohibited

Section 1 of the Act also prohibits discrimination and retaliation against employees. Employers cannot "discriminate, threaten, retaliate against, or take any adverse action" against employees for: (1) exercising their rights under the Act or the employer's plan; (2) reporting violations of the Act or the employer's plan to officials; (3) reporting/seeking assistance for an airborne exposure concern to an employer or official; or (4) refusing to work when the employee, acting in good faith, believes that dangerous exposure caused by working conditions inconsistent with laws or the required safety plan exists, with certain exceptions.

Joint Labor-Management Workplace Safety Committee – Section 2

Section 2 of the Act, which takes effect on November 1, 2021, requires all private employers to allow employees to establish a joint employer-employee workplace health and safety committee authorized to raise health and safety issues and evaluate workplace health and safety policies.

The Act applies to employers that employ at least ten employees or have an annual payroll of over $800,000 and a "workers' compensation experience modification rating of more than 1.2." These covered employers must permit employees to establish and administer a joint labor-management workplace safety committee. The committee must be comprised of at least two-thirds non-supervisory employees who are chosen by non-supervisory employees (unless a CBA exists, in which case the collective bargaining representative will choose). The Act also authorizes the creation of multiple committees representing geographically distinct worksites. Covered employers are not permitted to interfere with the selection of employees who serve on this committee.

The Act authorizes committees to: (1) raise health and safety issues to employers; (2) review and comment on health and safety policies; (3) review policies enacted in the workplace in response to, among other things, laws and executive orders; (4) participate in government workplace site visits;(5) review employer-led reports on workplace health and safety; and (6) schedule and meet quarterly during working hours. Employers are not permitted to retaliate against employees involved in safety committees.

Penalties

The Commission may assess civil penalties in the amount of $50 per day for an employer's failure to adopt a plan and no less than $1,000 and not more than $10,000 for failing to follow a plan. The Act also permits employees in some instances to seek injunctive relief and for the courts to award costs, including attorneys' fees and liquidated damages up to $20,000.

Guidance for NY Employers

Engage will keep clients updated on when the NYDOL publishes its model airborne infectious disease exposure prevention standard. In the meantime, employers should consider the following:

- Review and, if necessary, update your existing New York Forward Safety Plan based on the New York reopening guidance that became effective on May 19, 2021;
- Post the current safety plan in visible and prominent locations within each worksite;
- Distribute the current safety plan to employees and communicate to employees the importance of complying with the plan's provisions and advising of potential consequences for non-compliance;
- Designate supervisory employees who are responsible for enforcing compliance with the safety plan;
- Train designated supervisory employees and managerial employees about the requirements of the Act.

If you have any questions, please contact Engage's Risk Team at wc@engagepeo.com.