



# **New York Health and Essential Rights Act (HERO Act)**

## **What Employers Need to Know**

May 26, 2021

**Roy Salins**

**Rodrigo Tranamil**



**Davis Wright  
Tremaine LLP**

# Today's Speakers



**Roy Salins**

**New York**

[RoySalins@dwt.com](mailto:RoySalins@dwt.com)

212.603.6435



**Rodrigo Tranamil**

**New York**

[RodrigoTranamil@dwt.com](mailto:RodrigoTranamil@dwt.com)

212.603.6429



# HERO Act's Two Major Requirements

## ✓ Establish a Prevention Plan Based on Minimum Requirements Established by Department of Labor (“DOL”)

2021

June  
4

- HERO Act requires DOL to establish minimum guidelines
- Employers must establish and implement an airborne infectious disease exposure prevention plan

## ✓ Permit Employees to Form a Safety Committee

2021

November  
1

- Employers with at least 10 employees must permit employees to establish and administer a joint labor-management workplace safety committee

# Exemptions



# New Workplace Health and Safety Standards

# NY Department of Labor's Model Standards

2021
June 4



The New York Department of Labor is **required** to create and publish industry-specific model airborne infectious disease prevention standards

# Must Include Procedures and Methods for:

1

Employee health screenings

2

Face coverings

3

Required personal protective equipment (PPE)

4

Hand hygiene

5

Regular cleaning and disinfecting

6

Social distancing

7

Compliance with mandatory or precautionary orders of isolation or quarantine

8

Compliance with applicable engineering controls (e.g., proper air flow)

9

Designation of one or more supervisory employees to enforce compliance

10

Compliance with employee notice requirements of potential exposure

11

Verbal review of health and safety standards

# Requirements for a Prevention Plan



# Two Options for a Prevention Plan

1

**Adopt**  
the model  
standard  
relevant to  
employer's  
industry

or

2

**Establish** an alternative plan that meets or exceeds the minimum standards provided by the model standards

- If an alternative plan is adopted, employers must develop such plan with:
  - A. the collective bargaining representatives of employees, if any; or
  - B. meaningful participation of employees where there is no collective bargaining representative.

**Note:** More specific instructions on developing and implementing workplace standards are expected in the final version of the HERO Act

# Other Requirement for a Prevention Plan



- **Provide** the prevention plan to employees by **June 4, 2021** (or upon reopening) and upon hiring
- **Be provided** in English and in the language identified by each employee as their primary language (only if the model standards are also provided in that language)
- **Be posted** in a visible and prominent location within the worksite and included in employee handbooks, if any
- **Be provided** to upon request to all employees, independent contractors, employee representatives, collective bargaining representatives, and the NYDOL

# Employee Workplace Safety Committees

# Safety Committee Authority

## *Raise*

health and safety concerns, to which the employer must respond

## *Review*

any employer policy required by the HERO Act or the New York Workers' Compensation Law and provide feedback

## *Review*

any workplace policy promulgated in response to any health or safety law

## *Participate in*

any site visit by a government entity responsible for enforcing health and safety standards

## *Review*

any employer health and safety report

## *Regularly schedule*

a meeting during work hours at least once a quarter

# Safety Committee Requirements



- **Be composed** of employee and employer designees
- **Be composed** of at least two-thirds non-supervisory employees
- Employee members must **be selected** by, and from among, non-supervisory employees
  - However, if there is a collective bargaining agreement, the collective bargaining representative must **be responsible** for the selection of employee members
- **Be co-chaired** by a representative of the employer and non-supervisory employees

# Other Requirements

**Employers may not interfere with the selection of employees who will serve on the safety committee or with such employees' performance of safety committee duties**

**Safety committee members must be permitted to attend training associated with their role without loss of pay**

**Retaliation against committee members is prohibited and punishable by a civil fine of up to \$10,000**

# Anti-Retaliation Provisions and Refusals to Work

# Prohibitions

**Employers  
are prohibited from  
discriminating,  
threatening, retaliating  
against, or taking  
adverse action against  
any employee for:**

- 1) Exercising their rights under the HERO Act or under a prevention plan
- 2) Reporting violations of the HERO Act or a prevention plan
- 3) Reporting a workplace health and safety concern
- 4) Refusing to work where such employee has a reasonable, good-faith, belief that such work exposes them, other employees, or the public to an unreasonable risk of exposure



# Private Right of Action for Non-Compliance

# Employees May Sue for Non-Compliance

Employees have a private right of action  
to bring claims for injunctive relief  
against their employers  
for failing to comply with a prevention plan

**Note:** The final version of the HERO Act will require employers to immediately cure any violations of their prevention plan and limit litigation to those private rights of action where employers are acting in bad faith and failing to cure deficiencies

# Recent Guidance

# New York's Reopening Guidance, Effective May 19

## Business are authorized to either:

- 1) **Require** masks and six feet of social distancing for employees and/or patrons within their establishments; or
- 2) **Adhere** to CDC guidance, which advises that fully vaccinated individuals do not need to wear masks or be socially distanced, but unvaccinated individuals must continue to wear masks and be socially distanced in most settings

## Exemptions:

- Pre-K to 12 schools
- Public transit
- Homeless shelters
- Correctional facilities
- Nursing homes
- Healthcare settings

# CDC Guideline Requirements

- Businesses that congregate patrons and operate above the social gathering limit:
  - Must require proof of vaccination via paper form, digital application, or Excelsior Pass

- Business that do not congregate patrons and/or that operate below the social gathering limit:
  - May rely upon self-reporting of vaccination status (e.g., honor system); or
  - May require proof of vaccination via paper form, digital application, or Excelsior Pass

# Capacity Limitations

## Businesses Requiring Proof of Vaccination

- Business can operate up to 100% capacity so long as all attendees are fully vaccinated

## Businesses Relying on Self-Reporting of Vaccination Status

- Business capacity is only limited by the space available for patrons or parties of patrons to maintain the required distance

## Other Considerations

- Businesses may decide to apply CDC Guidance to the entire establishment or a separate, designated part of the establishment
  - Indoor events above the gathering limit require unvaccinated individuals to present proof of recent negative test
- Implementation options to consider:
  - Assign part of space for vaccinated individuals based on % of the total capacity or absolute #
  - Assign different times to vaccinated and unvaccinated individuals



Questions?

