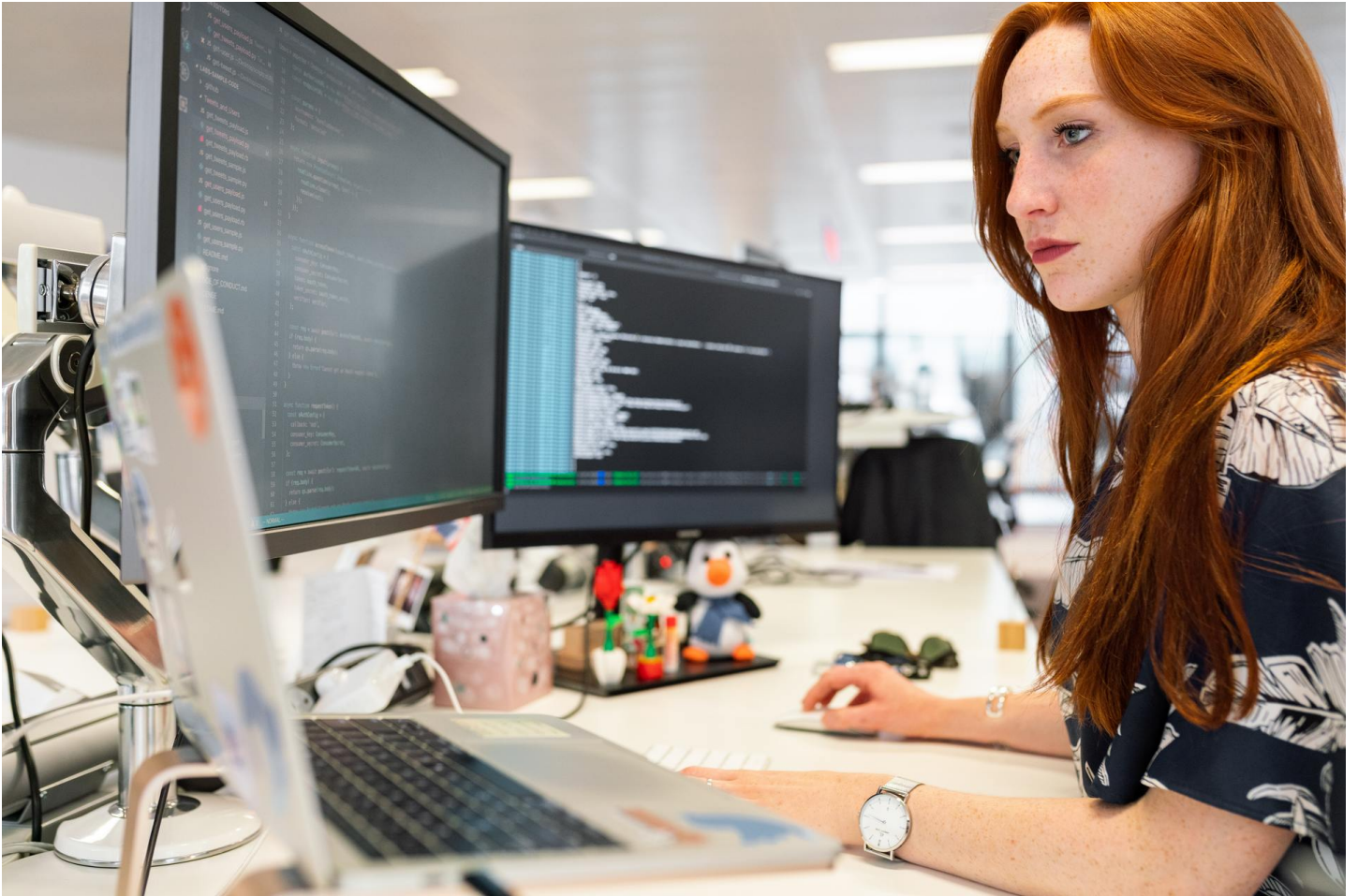


NYS HERO Act Imposes Substantial Workplace Burdens on Employers



May 7, 2021 | **CLIENT ALERTS**

On May 5, 2021, Governor Cuomo signed the New York Health and Essential Rights Act (HERO Act) into law. The HERO Act amends the New York Labor Law (NYLL) by adding two new sections to the NYLL, and, in doing so, imposes significant new health and safety burdens on private employers. The first section of the HERO Act requires that all employers prepare a model safety plan. The second section of the HERO Act requires employers with at least 10 employees to permit the establishment of joint labor-management workplace safety committees with their employees. Both sections of the HERO Act provide employees with significant protections for exercising rights under the law.

New Required Health and Safety Plans for all Private Employers

The first section of the HERO Act, which is codified at Section 218-b of the NYLL, requires the New York State Commissioner of Labor, in consultation with the New York State Department of Health, to establish industry-specific minimum requirements for preventing exposure to airborne infectious diseases in the workplace. The New York

State Department of Labor's (DOL) new standards must address employee health screenings, face coverings, personal protective equipment, hand hygiene, cleaning and disinfecting, social distancing, and compliance with mandatory or precautionary orders of quarantine. All New York employers, regardless of size, will be required to: (i) implement a health and safety plan that meets or exceeds these standards; (ii) post that plan in the workplace; and (iii) distribute a copy of the plan to all employees. This first section of the HERO Act broadly defines "employees" to include seasonal workers, part-time employees, and independent contractors.

Employers who fail to adopt a plan will be subject to a penalty of at least \$50 per day until a plan is implemented, and employers who fail to comply with an adopted plan could be subject to fines ranging from \$1,000 to \$10,000. In addition to these civil fines, the HERO Act creates a private right of action against non-compliant employers in certain circumstances. In such circumstances, employees could bring a claim in court and seek remedies such as liquidated damages (up to \$20,000), attorney's fees, and injunctive relief against their employer. The Act also provides employees a separate cause of action for retaliation when employees are retaliated against for, among other things, reporting a plan violation or *refusing to work* if they reasonably believe that the workplace exposes them to health and safety risks because of working conditions that are inconsistent with HERO Act's requirements.

It is anticipated that the DOL will promulgate these industry-specific standards by July 4, 2021 and that employers will then have until August 3, 2021 to adopt the DOL issued standard. At this time, we understand employers will also be provided an additional 30 days to communicate the standard to employees.

Joint Labor-Management Workplace Safety Committee

The second section of the HERO Act, which is codified in Section 27-d of the NYLL and effective 180 days after the Governor's signing of the bill, applies to employers that employ at least 10 employees. These employers must permit employees to establish and administer a joint labor-management workplace safety committee.

At least two-thirds of any labor-management workplace safety committee must consist of non-supervisory employees, and it must be co-chaired by both an employer representative and a non-supervisory employee. Employers cannot interfere with the selection of the employees who shall serve on the committee. The HERO Act authorizes such committees to: (i) raise health and safety concerns, to which the employer must respond; (ii) review any employer policy required by the HERO Act or the New York Workers' Compensation Law and provide feedback; (iii) review any workplace policy promulgated in response to any health or safety law; (iv) participate in any site visit by a government entity responsible for enforcing health and safety standards; (v) review any employer health and safety report; and (vi) regularly schedule a meeting during work hours at least once per quarter. Committee members must also be permitted to attend training associated with their role without loss of pay.

Similar to the first section of the HERO Act, retaliation against committee members is prohibited and punishable by a civil fine of up to \$10,000. Committee members who believe that they have suffered retaliation can also assert claims in court and can recover liquidated damages and attorney's fees.

Employers Be Ready

At the time of signing the HERO Act, Governor Cuomo released a memorandum indicating that the New York Legislature had agreed to make technical changes to the HERO Act within approximately a month. While the memorandum does not detail all of the changes, it does reference that employers will be provided a cure period for any alleged violations and other changes intended to limit litigation allowed by the law. The forthcoming changes will also provide a more clear timeline on when employers have to implement these workplace changes.

Regardless of what technical changes are made, the HERO Act imposes substantial new burdens on employers who are no strangers to change in the ever-evolving environment of COVID-workplace regulations. As employees continue to return to work with positivity rates falling and vaccinations rising, New York-based employers should review their return-to-work guidelines and budget for potential new expenditures related to PPE and cleaning. Employers should also contemplate management training for the Act's anti-retaliation provisions and how best to abide by the workplace safety committee requirements.

Our firm will continue to review guidance provided from the DOL and to monitor updates to the HERO Act. [Amy Habib Rittling](#), [Vincent Miranda](#), and [Emma McEvoy](#) are available to discuss the HERO Act's new workplace requirements and how best to prepare.

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