

LABOR AND EMPLOYMENT LAW

INFORMATION MEMO

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NYDOL Publishes Long-Awaited Proposed Regulations Relating to Workplace Safety Committees Under the NY HERO Act

On Dec. 22, the New York State Department of Labor (NYSDOL) published long-awaited proposed regulations relating to the second half of the NY HERO Act relating to workplace safety committees.

By way of brief background, on May 5, 2021 the state signed the NY HERO Act into law. The NY HERO Act added two new sections to the New York Labor Law: (1) New York Labor Law Section 218-b, regarding occupational exposure to airborne infectious disease, which created certain obligations for private employers and protections for employees, including the requirement to adopt an “airborne disease exposure prevention plan”; and (2) New York Labor Law Section 27-d, dealing with employee rights to form workplace safety committees. The first part of the NY HERO Act (NYLL 218-b) went into effect on July 4, 2021. The second part of the NY HERO Act (NYLL 27-d) went into effect on Nov. 1, 2021.

The proposed regulations reaffirm much of what was already understood or suspected from the plain letter of the law. However, the regulations also include additional clarifications and definitions with respect to some of the logistics of the formation, composition and rights of the workplace safety committees.

Coverage and Applicability

The law was clear that the provisions of NYLL 27-d only apply to private employers with 10 or more employees. The proposed regulations clarify that for purposes of coverage, the number of employees is determined by only counting the total number of employees employed by the employer within New York state. The proposed regulations further clarify that employees on paid or unpaid leave, including sick leave, leaves of absence, disciplinary suspension or any other type of “temporary” absence must be counted as long as the employer has a reasonable expectation that the employee will return to active employment. However, if there is no employment relationship (e.g., if the employee is laid off or terminated, whether temporarily or permanently) the individual is not counted towards the 10-employee threshold. The proposed regulations affirm that part-time, newly hired, temporary and seasonal employees must be counted.

In addition, the proposed regulations provide that “employees jointly employed by more than one employer shall be counted by each employer, whether or not they are on the employer’s payroll records, in determining employer coverage and employee eligibility to participate in the workplace safety committee.”

The proposed regulations also contain several definitions, most related to the definition of a “worksite.”

Establishment of Workplace Safety Committees

The statute itself provides “employers shall permit employees to establish and administer a joint labor-management workplace safety committee, but not more than one committee per worksite.” Accordingly, the law does not, by its plain meaning, impose an affirmative obligation on employers to create such committees, but rather an entitlement and protection for employees that wish to form such a committee in accordance with the new law. The regulations seem to affirm this interpretation.

In addition, recall that the law itself provides that an employer that already has a workplace safety committee that is otherwise consistent with the requirements of the law and regulations, need not create an additional safety committee. However, the law also provides that “committees representing geographically distinct worksites” may be formed “as necessary.”

The proposed regulations state that “workplace safety committees may be established for each worksite following a written request for recognition by at least two non-supervisory employees who work at the worksite.” The proposed regulations define “non-supervisory employee” as “any employee who does not perform supervisory responsibilities, which includes but is not limited to the authority to direct and/or control the work performance of other employees” and excludes “managerial and executive employees.” “Multiple requests” for committee recognition must be combined and treated as a single request to form a committee.

Upon receipt of a request for recognitions, employers must “respond to the request with “reasonable promptness,” however, the proposed regulations do not further define what will constitute “reasonable promptness.” The comments to the proposed regulations recognize that circumstances surrounding recognition may not align to a simple deadline, and therefore provide some flexibility for what may be “reasonable.”

The proposed regulations further provide that requests for committee recognition received *after* a committee has been recognized must be denied and referred to the committee itself. In addition, requests for committee recognition where an employer already has a workplace safety committee that is otherwise consistent with the requirements of NY Labor Law Section 27-d and the proposed regulations may also be denied and referred to the recognized committee.

Under the proposed regulations, within five days of recognition of the workplace safety committee, the employer must provide “notice” to all employees at the worksite of the recognition. The proposed regulations define “notice” as “a written, posted, or electronic method of providing information to an individual that is reasonable calculated to provide actual notice but shall not require acknowledgment of receipt.” Accordingly, under the proposed regulations, it seems that employers will have some flexibility with how exactly to comply with the notice requirement upon recognition of a workplace safety committee.

Selection and Composition of Workplace Safety Committee Members

The law itself was clear that employers are prohibited from interfering with the selection of non-supervisory employee members, however, the proposed regulations provide additional information and guidance in this regard.

Workplace safety committees must be comprised of at least two-thirds non-supervisory employees, and have at least one employer representative. The proposed regulations further clarify that the ratio of non-supervisory employees to employer representatives cannot be less than two non-supervisory employees to one employer representative at any given time. The proposed regulations also set a maximum number of members of such committees of either 12 members (inclusive of non-supervisory and employer representatives), **OR** one-third of the total number of employees at a worksite, whichever is fewer. The proposed regulations also considers where a worksite has fewer than 10 employees, in which case such workplace committee shall have three members.

The committees must be co-chaired by a non-supervisory employee and an employer representative. The employer representative may be a non-supervisory employee, an officer, the employer or “other representative.”

In terms of selection of non-supervisory members, the proposed regulations provides that where there is a collective bargaining agreement in place, the non-supervisory members of the committee shall be selected by the employee representative, who may be any non-supervisory employee or employee covered by the collective bargaining agreement. Where the worksite does not have a collective bargaining agreement in place, the non-supervisory employees must be selected by and amongst the non-supervisory employees of the employer. The proposed regulations provide the following non-exhaustive list of examples of methods to select such non-supervisory employees: self-selection, nomination by co-workers and elections.

The proposed regulations also limit non-supervisory employees to membership of one workplace safety committee for the same employer, in the event that the employer has more than one workplace safety committee for distinct worksites (as is permitted by the law and proposed regulations).

Other Rules

The proposed regulations provide other “rules” that apply to the administration of such workplace safety committees, including that the workplace safety committee may “establish rules or bylaws, provided that such operating procedures are consistent with the [proposed regulations] and [New York Labor Law Section 27-d].” Rules and bylaws may include, but are not limited to addressing issues such as selection of new members, terms of members and training of new members. The proposed regulations are clear that bylaws that “exceed or conflict with tasks authorized under” New York Labor Law Section 27-d(4) (which outlines a list of authorized duties of such committees), shall be considered *ultra vires*.

The proposed regulations state that workplace safety committees “may take action as a committee in a manner consistent with any rules or procedures adopted by the committee.” Where no rules or procedures are adopted by the committee, the committee can only take action by a majority vote.

Training

As one may recall, the law referenced training for committee members. The proposed regulations address this with additional detail. Under the proposed regulations, workplace safety committees may provide an “official training opportunity” for committee members, however, such training cannot exceed four hours in any calendar year for any member. The proposed regulation confirms that such “official training” must be without loss of pay for committee members.

Meetings

The statute also discussed the right of committees to meet on a quarterly basis. The proposed regulations provide that workplace safety committees must be scheduled in accordance with any rules adopted by the committee, or otherwise by agreement of the co-chairs. Such meetings must be scheduled at times that do not unreasonably conflict with the employer's business operations. Such quarterly meetings may be conducted for not longer than two work hours in total for all meetings *per quarter*. Under the proposed regulations, time spent during work hours for any such meetings is considered "hours worked," which will essentially require payment for such time and counting such time towards overtime. The proposed regulations further clarify that nothing therein "shall restrict a workplace safety committee's ability to conduct additional meetings beyond the meeting or meetings that consist of two work hours in total per quarter," *but*, any additional time or meetings outside of this two hour per quarter entitlement must be conducted outside of work hours and do not constitute hours worked, except where otherwise permitted by the employer.

In addition, the proposed regulations provide that nothing therein shall be construed to "restrict an employer's ability to prohibit the performance of committee duties during the work hours, except during quarterly committee meetings," and that such committee work and matters, aside from the quarterly meetings, "may not interfere with the performance of their work responsibilities."

Employer Obligations

In what appears to be an effort to clearly delineate an employer's obligations under this new law, the proposed regulations contain a section headed "employer obligations" and provide an enumerated list.

After the establishment of a workplace safety committee, employers must respond, in writing, to each safety and health concern, hazard, complaint and other violations raised by the committee or one of its members within a reasonable period of time. Employers must also respond to a request for policies or reports that relate to the duties of the workplace safety committee (as outlined in NY Labor Law Section 27-d(4)) from a workplace safety committee or one of its members within a period of time as well. Additionally, employers must provide notice, where "practicable" and where not otherwise prohibited by law, to the workplace safety committee and its members ahead of any visit at the worksite by a governmental agency enforcing safety and health standards.

Employers must also appoint an "employer representative" to serve on the committee (as discussed above), permit members of the committee to attend the quarterly committee meeting(s), official training, and not interfere with the performance of the duties of the workplace safety committee or its members as specifically and explicitly authorized.

Finally, the proposed regulation also makes clear that employers are not required to disclose information or documentation to the workplace safety committee or committee member where such disclosure would be prohibited by law, contains PII (as defined by the New York Labor Law, Section 203-d), and is outside of the scope of the information or documentation entitled to under the specific authorized duties provision in the law.

What's Next?

The proposed regulations were published in the state register on Dec. 22, 2021, and as such are open for public comment until Feb. 14, 2022. The public hearing on the proposed regulations is scheduled for Feb. 9, 2022 at 11:00 am. The NYSDOL has not yet issued any additional or supplemental guidance beyond the proposed regulations at this time.

Employers should review the regulations and determine whether there is anything that they should do to prepare for compliance in the event that employees request to establish and administer such committees.

If you have any questions or need Bond's help, please contact [Stephanie Fedorka](#), any [attorney](#) in Bond's [Labor and Employment practice](#) or the Bond attorney with whom you are regularly in contact.

