LABOR AND EMPLOYMENT LAW
INFORMATION MEMO
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New York State Legislature Passes HERO Act – Significant Workplace Health and Safety Obligations for Employers are on the Horizon

On April 20, 2021, the New York Legislature passed the "New York Health and Essential Rights Act" or "HERO Act." To date, the bill has not been signed by the Governor, but we expect it to be executed in the near future. The bill, as written, would impose significant obligations on employers, regardless of size, in an effort to prevent exposure to airborne infectious diseases.

The bill amends the New York Labor Law by adding two new sections. First, the bill adds Section 218-b, which mandates covered employers to adopt and publish a written "airborne infectious disease exposure prevention plan." The law explicitly excludes public employers, including the state, political subdivisions of the state, public authorities, and any other governmental agency or instrumentality from the definition of "employer." However, as noted above, the law does ***not*** currently contain an exemption based on employer size or income.

The prevention plan must include and address a number of topics, including but not limited to: employee health screenings; face coverings; required personal protective equipment (PPE); hand hygiene; regular cleaning and disinfection of high-risk areas; social distancing (for both employees and customers); compliance with mandatory or precautionary orders of quarantine; compliance with applicable engineering controls (such as ventilation); designation of one or more supervisory employees to enforce compliance with the prevention plan and any other applicable guidance; compliance with applicable laws, rules, regulations, or guidance related to potential exposure to airborne infections disease at the worksite; and verbal review of the prevention plan standards, related employer policies, and rights under the law.

In addition to the above topics, the law also requires the prevention plan to include an anti-retaliation provision. The law specifically protects workers from retaliation, discrimination, adverse action, or threats for: exercising their rights under the law or under the implemented prevention plan; reporting violations of the law or applicable prevention plan; or reporting an airborne infections disease exposure concern, or seeking assistance or intervention with respect to such concerns. Also notable is that the law protects workers from adverse action or retaliation for refusing to work where such worker reasonably believes, in good faith, that such work exposes him/her, or other workers to the disease due to the existence of working conditions that are inconsistent with law, rules, policies, orders of any governmental entity, including but not limited to, the minimum standards provided by the model airborne infectious disease exposure prevention standard. However, in order for this protection to apply, the employer must have known or had reason to know of the inconsistent working conditions and failed to cure them.

The bill tasks the New York State Department of Labor – in consultation with the State Department of Health – with developing industry-specific standards and a model airborne infectious disease exposure prevention plan. Accordingly, employers may adopt the model prevention plan, or in the alternative, develop and implement their own prevention plan that meets and/or exceeds the minimum standards.

Where an employer wishes to adopt an alternative airborne infectious disease exposure prevention plan, the law requires employers to develop such a plan pursuant to an agreement with the collective bargaining representative (if applicable), or with "meaningful participation of employees" for all aspects of the plan, even if there is no collective bargaining representative. Employers who adopt their own plan must tailor it to the specific hazards in their specific industry and their work sites.

Provisions of Section 218-b may be waived by collective bargaining agreement. However, for such wavier to be valid it must explicitly reference Section 218-b.

Employers would also be required to post the plan in a visible and prominent location in the workplace and distribute the plan to their employees in writing, in English and the employee's primary language, on the effective date of the law, at time of hire or upon reopening after a period of closure due to airborne infectious disease. The Department of Labor will provide model prevention plans in various languages. If an employee's primary language is not one of such documents made available by the Department of Labor, employers will be deemed to have complied with this requirement by providing an English-language notice. In addition to posting the plan within the workplace, employers who have an employee handbook will be required to include the prevention plan in the handbook as well. Employers would also be required to make the prevention plan available upon request to all employees, independent contractors, employee representatives, collective bargaining representatives, and the Commissioner of Labor, or Commissioner of Public Health.

The bill also gives the Department of Labor authority to enforce the law by vesting it with authority to assess civil penalties, as well as power to enjoin the conduct of violators of the law. Violations of Section 218-b could result in assessment of civil penalties in the amount of $50 per day for failure to adopt a prevention policy. Failure to abide by an adopted prevention plan could result in civil penalties from $100 to $10,000 per day. Subsequent violations carry higher penalties.

In addition, the bill also creates a private right of action to obtain injunctive relief against employers for failing to comply with the Section under certain circumstances. Courts may grant injunctive relief and award attorneys' fees and costs, and liquidated damages up to $20,000 to successful plaintiffs. Retaliation may also give rise to a separate cause of action. The law also makes available sanctions against attorneys or parties that assert HERO Act claims that are completely without merit and undertaken primarily to harass or maliciously injure another.

If signed by the Governor, Section 218-b would take effect 30 days thereafter.

Second, the bill also amends the New York Labor Law to add Section 27-d, which would require covered employers with at least 10 or more employees to permit employees to establish and administer a join labor-management workplace safety committee. Covered employers ***do not*** include public employers such as the state, any political subdivision of the state, public authorities, or any other governmental agencies or instrumentalities.

The bill contains specific requirements of any such committee. For example, the committee must be composed of employee and employer designees, of which at least two-thirds must be non-supervisory employees and co-chaired by a representative of the employer and non-supervisory employees.

The law grants such committees with authority to: raise health and safety concerns to which the employer must respond; review workplace policies required by the HERO Act or Workers' Compensation Law and provide feedback; review workplace policies adopted in response to a healthy

or safety law, ordinance, rule, regulation, executive order, or other related directive; participate in any site visit by a government entity responsible for enforcing health and safety standards; review any report filed by the employer related to the health and safety of the workplace; and regularly schedule a meeting during work hours at least once per quarter.

In addition, employers must provide paid leave for designated members of the safety committee to attend certain related trainings as provided by the Act.

The Section also contains an anti-retaliation provision which prohibits retaliation against any employee who participates in activities or establishment of a workplace safety committee. Here too, retaliation gives rise to a cause of action for which liquidated damages and attorneys' fees may be awarded.

The provisions in Section 27-d also may be waived by a collective bargaining agreement, provided that for such a waiver to be valid, it must explicitly reference Section 27-d.

If signed by the governor, Section 27-d would not go into effect until 180 days thereafter.

The HERO Act is on Gov. Cuomo's desk and is anticipated to be signed in the coming days. If enacted, employers should be prepared to adopt and implement either the model prevention plan, or one of their own (in compliance with the requirements of the Section in so doing). Employers should consult with labor and employment counsel for assistance in navigating these significant changes and ensuring compliance moving forward.

If you have any questions about the information presented in this memo, please contact Stephanie H. Fedorka, any attorney in Bond's Labor and Employment practice or the Bond attorney with whom you are regularly in contact.

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