LABOR AND EMPLOYMENT LAW
INFORMATION MEMO
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Technical Amendments to NY HERO Act Passed – What's Next For Employers

As previously reported, the New York Health and Essential Rights Act (HERO Act) was signed into law by Gov. Andrew Cuomo on May 5, 2021. The governor announced that his approval was based on his having secured an "agreement" with the NYS Legislature to make certain "technical changes" to the bill. On May 26 the amendments passed in the NYS Senate, and on June 7, they passed in the NYS Assembly. On Friday, June 11, the bill was delivered to and signed by Governor Cuomo.

The HERO Act added two new sections to the New York Labor Law: (1) Section 218-b, governing airborne infectious disease prevention plans and standards; and (2) Section 27-D, governing joint management workplace safety committees. The HERO Act applies to private employers only, but each respective section contains a more specific definition of employer and employee.

Now that the technical changes have passed, we decided to take this opportunity to provide a recap and update of the HERO Act's substantive provisions.

New York Labor Law Section 218-b – Prevention of Occupational Exposure to an Airborne Infectious Disease

The first section of the HERO Act pertains to prevention of exposure of airborne infectious diseases in the workplace. This section applies to all private employers in New York State. Section 218-b mandates covered employers to adopt and implement an airborne infectious disease exposure prevention plan that satisfies certain minimum standards.

Notably, the definition of "employees" under Section 218-b is very broad. It encompasses part-time workers, independent contractors, domestic workers, home care and personal care workers, day laborers, farmworkers, temporary and seasonal workers, individuals working for staffing agencies, contractors or subcontractors on behalf of an employer at any individual work site, individuals delivering goods or transporting people on behalf of the employer and those working for digital applications or platforms.

Section 218-b tasks the NYS Department of Labor (NYSDOL), in consultation with the Department of Health, to create and publish a model airborne infectious disease exposure prevention standard. The NYSDOL will develop: (1) a general model prevention standard, and (2) model prevention plan standards for industries that represent a significant portion of the workforce or that have unique characteristics requiring distinct standards (as determined by the Department of Labor).

The model standards will establish minimum requirements for preventing exposure to airborne infectious disease in the workplace. The standards will include established requirements on procedures and methods for all of the following: (a) employee health screenings; (b) face coverings; (c) required personal protective equipment (PPE) (including a list of PPE that satisfies the requirements based on hazard assessments for each industry); (d) accessible hand hygiene stations in the workplace, including providing adequate break times for employees to use handwashing facilities; (e) regular cleaning and

disinfecting of shared equipment and frequently touched surfaces, and other surfaces and washable items in high risk areas (restrooms, dining/break rooms, locker rooms, vehicles, sleeping quarters); (f) effective social distancing for employees and consumers/customers; (g) compliance with mandatory/precautionary orders of isolation or quarantine issued to employees; (h) compliance with applicable engineering controls such as proper airflow or exhaust ventilation; (i) designation of one or more supervisory employees to enforce compliance with the prevention plan and any other federal, state, or local guidance related to avoidance of spreading an airborne infectious disease; (j) compliance with any applicable laws, rules, regulations, standards, or guidance on notification to employees regarding relevant state and local agencies of potential exposure at the work site; and (k) verbal review of the infectious disease standard, employer policies, and employee rights under this section of the HERO Act.

Employers have 30 days after the NYSDOL publishes the model general standard and the model industry standard to either: (1) adopt one of the model standards applicable to their industry, or (2) develop and establish an alternative prevention plan that meets or exceeds the minimum standards as set forth in the model standard.

If an employer develops an alternative prevention plan of their own, the employer is required to either develop the plan pursuant to a collective bargaining agreement (if applicable), or where there is no collective bargaining agreement, with "meaningful participation of employees".

Employers must provide written copies of the adopted prevention plan to their employees at the following times:

a. Within 60 days after the NYSDOL publishes the model standard relevant to the employer's industry if the business/employer is in operation as of the effective date of this section;

b. Within 30 days after adoption of the plan;

c. Within 15 days after reopening after a period of closure due to airborne infectious disease; and

d. Upon hire to newly hired employees.

Employers must provide the written copy in English as well as in the employee's identified primary language. The NYSDOL will publish model prevention standards in English, Spanish and selected other languages.

Employers must also post the prevention plan in a "visible and prominent location within *each* work site" (except vehicles). If an employer has an employee handbook, a copy of the prevention plan must also be included in the employee handbook.

Employees are protected from retaliation for exercising their rights under this Section 218-b or reporting violations or concerns. Additionally, the law includes a protection for employees who refuse to work if they reasonably believe the work exposes them, other workers or the public, to an unreasonable risk of exposure to an airborne infectious disease because of working conditions that are inconsistent with applicable laws or standards. However, this right is contingent on the employee, another employee, or an employee representative having notified the employer of the inconsistent working conditions, or where the employer had or should have had reason to know about the inconsistent working conditions, and the employer failed to cure the condition(s).

The NYSDOL may investigate violations of Section 218-b. If the investigation reveals a violation, the NYSDOL may assess civil penalties of $50 (or more) per day for failure to adopt an airborne infectious disease exposure prevention plan, as well as $1,000 - $10,000 for failure to abide by

an adopted airborne infectious disease exposure prevention plan. Civil penalties for subsequent violations that occur within a preceding six year period carry greater penalties. The NYSDOL is also authorized to order injunctive relief.

Section 218-b also creates a limited private right of action. Employees may seek injunctive relief in court against an employer alleged to have violated the airborne infectious disease exposure prevention plan/standards in limited situations. In order to commence such a lawsuit however, an employee is required to give notice to the employer of the alleged violation. The employer then has 30 days to remedy the alleged violation. If the employer corrects the violation, the employee is barred from bringing suit. An employee must bring their lawsuit within six months from the date the employee had knowledge of the alleged violation. A successful plaintiff may be entitled to injunctive relief, costs and reasonable attorneys' fees.

The obligations under New York Labor Law (NYLL) Section 218-b may be waived by a collective bargaining agreement, however, to be valid, the waiver must explicitly reference Section 218-b.

The original effective date of this section was June 4, 2021, however, the chapter amendments pushed the effective date to July 4, 2021*.

New York Labor Law Section 27-D – Workplace Safety Committees

The second section of the HERO Act creates NYLL Section 27-D, which establishes a requirement for certain private employers to allow the creation and administration of joint labor-management workplace safety committees. This section applies to private employers in New York with at least 10 employees. The term "employee" under this section includes all employees in the state of New York.

NYLL Section 27-D requires covered employers to "*permit* employees to establish and administer a joint-labor management workplace safety committee." The plain reading of the language in the statute seems to suggest that employers are not required to create such committees, but simply, to permit their creation and administration.

If an employer already has a workplace safety committee that complies with the other requirements of the Section 27-D, the employer is not required to create an additional safety committee to comply with the law.

Such a workplace safety committee must be composed of employee and employer designees and must be at least two-thirds non-supervisory employees. Employee members must be selected by and from among non-supervisory employees. If a collective bargaining agreement is in place, the collective bargaining representative is responsible for selection of employee members. Employers are prohibited from interfering with the selection of employees who serve on such a committee or who serve as the workplace safety designee. The committees must be co-chaired by a representative of the employer and a representative of the non-supervisory employees. Committees representing geographically distinct work sites may be formed, as necessary, but only one committee per work site is "required."

Each workplace safety committee and workplace safety designee is authorized to engage in the following tasks (including but not limited to): (a) raise health and safety concerns, hazards, complaints and violations to the employer which the employer must respond to; (b) review any policy put in place in the workplace required by any provision of this chapter of the labor law relating to occupational safety and health, and provide feedback to the policy; (c) review the adoption of any policy in the

workplace in response to any health or safety law, ordinance, rule, regulation, executive order, or other related directive;(d) participate in any site visit by a governmental entity responsible for enforcing safety and health standards (unless otherwise prohibited by law); (e) review any report filed by the employer related to the health and safety of the workplace; and (f) regularly schedule a meeting during work hours at least once per quarter (the proposed amendments clarify that such meetings shall not last longer than two hours).

The law requires covered employers to permit safety committee designees to attend training, without loss of pay, on the function of worker safety committees, rights established under this section, and an introduction to occupational safety and health. The law states that such training must not be longer than four hours, however, it remains unclear if this is a one-time entitlement to such training or not.

In addition to non-interference with employee member selection, employers are also prohibited from interfering with the employees' performance of the duties authorized under the Section 27-D. Employees who participate in activities or the establishment of a workplace safety committee are protected from retaliation. Employees who have been retaliated against under Section 27-D may avail themselves to remedies available under Section 215 of the NYLL, which includes civil penalties and private right of action.

The obligations of Section 27-D may also be waived by a collective bargaining agreement, so long as the waiver explicitly references Section 27-D.

Section 27-D goes into effect Nov. 1, 2021.

Next Steps and Employer Considerations

Now that the technical amendments have been made official, employers should prepare a plan for compliance with these new requirements. Since employers will only have 30 days from the release of the NYS Department of Labor model plan/standards to implement a compliance prevention plan, they should be prepared to move quickly to evaluate the model prevention plans/standards and determine whether any of the model plans "fit" their work place, or whether development of an alternative compliant plan is more appropriate. Employers should also consider budgeting for additional costs of compliance with both new sections.

*Note: July 4, 2021 is a Sunday, and therefore the practical effective date is July 5, 2021, a Monday.

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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