

# LABOR AND EMPLOYMENT LAW

## INFORMATION MEMO

SEPTEMBER 10, 2021

### NY HERO ACT “FAQs”

New York employers are presently “activating” their HERO Act plans, after the New York State Department of Health (DOH) officially designated COVID-19 as a “highly contagious communicable disease that poses risk to the public health.”

We will be further addressing this urgent issue – on Tuesday, Sept. 14 at noon (EST) – during the next installment of our weekly “Business in 2021” webinar series. Specifically, we plan to discuss many of the unsettled questions employers currently face when “activating” their HERO Act plans, as well as other developing legal issues, including President Biden’s vaccine mandate announcement.

To register for our “Business in 2021” weekly programming, please click [here](#).

We know that our clients and Bond friends nevertheless have many urgent questions about “activating” their HERO Act plans, so we have developed these “FAQs” for their reference. Yesterday, New York issued additional [guidance](#) on this subject. Where appropriate, we have referenced this guidance below.

1. *Is there a grace period or deadline for activation of our HERO Act plan?*

Neither the legislation nor any of the available guidance contains a grace period or deadline for employers to “activate” their HERO Act plans. But as a best practice, it is recommended that employers take this step as soon as practicable and considering the particular facts and circumstances.

2. *What steps do we need to take to activate our HERO Act plan?*

According to New York regulators, employers must take the following steps to activate their HERO Act plans:

- Immediately review the worksite’s exposure prevention plan and update the plan, if necessary, to ensure that it incorporates current information, guidance, and mandatory requirements issued by federal, state or local governments related to the infectious agent of concern.
- Provide a “verbal review” of the exposure prevention plan with their employees.
- Provide each employee with a copy of the exposure prevention plan in English or in the language identified as the primary language of such employees, if the state has published a translated version in that language.
- Post the exposure prevention plan at the worksite and make sure it is accessible to employees during all work shifts.

3. *What if we do not currently have a HERO Act plan in place?*

Covered private sector employers were required to have adopted their exposure prevention plans by Aug. 5, 2021, and to have conducted a verbal review (including distribution of a written copy) of those plans with employees by Sept. 4, 2021.

If these steps have not already been completed, then your business or organization should

immediately work to develop, adopt, disseminate and review with employees a compliant HERO Act plan.

New York previously published an [Airborne Infectious Disease Exposure Prevention Standard](#) under the HERO Act, as well as a general and industry-specific [Model Airborne Infectious Disease Exposure Prevention Plans](#), for reference purposes.

*4. What happens if I make changes to a “model” HERO Act plan?*

According to the relevant statute and state guidance, employers are allowed to adopt “alternative” prevention plans under the HERO Act, so long as these plans: (i) are tailored and specific to the hazards in the respective industry and worksites of the employer; and (ii) equal or exceed the minimum standards provided by the state’s Model Airborne Infectious Disease Exposure Prevention Plan.

If adopting an “alternate” plan, non-unionized employers are required to have “meaningful participation” from employees, as part of the process. Employers with represented workers must go even further and obtain union approval.

Notably, New York regulators have indicated that not all changes to the “model” plans will trigger the above HERO Act obligations. For example, modifications to the “Controls” or “Advanced Controls” sections of New York’s model plans will not necessarily result in creation of an “alternate” plan. It also stands to reason that other non-material revisions to the model plans, such as removing state logos and adding information to open fields, likewise will not trigger the HERO Act’s employee “participation” or union “approval” requirements.

*5. What does “verbal review” mean when it comes to our employee communications about the activated HERO Act plan?*

In light of DOH’s designation, employers are now required to conduct a “verbal review” of their HERO Act plans with employees. Unfortunately, the underlying legislation does not define this term. The word “verbal” is generally defined simply as “using words.” In turn, there is a question of whether or not the HERO Act review needs to be conducted through some type of oral communication to workers. And an argument can be made that written communications about an employer’s HERO Act plan will suffice.

In recent guidance, New York regulators did not squarely address this issue and instead advised that employers “should conduct the verbal review in a manner most suitable for the prevention of an airborne infectious disease.” New York further advised that this process could include a review “via audio or video conference technology,” and state regulators did not expressly rule-out that other communication methods could be compliant.

*6. Do we have to train employees on our activated HERO Act plan?*

Employers are required to conduct a “verbal review” of their HERO Act plan, upon activation. Please see the answer to FAQ 5, above, for more information on how this review may be conducted.

In general, this verbal review is akin to regular employee training, and, among other things, should convey the applicable workplace requirements (screening, masking, social distancing, etc.), as well as the resources and protections available to employees.

We additionally note that the model plans contain references to employee “training” and include certain enumerated topics for discussion with employees. Seemingly, New York regulators are using the term “training” here interchangeably with the “verbal review” required under the HERO Act and thereby delineating what this review should entail. Employers who have adopted these model plans should proceed accordingly.

*7. Do we have to screen employees now that our HERO Act plan is activated? What about visitors?*

The HERO Act requires that employers screen employees, in accordance with applicable DOH or CDC guidance. However, there is no such guidance currently in place.

In the absence of such authority, one potential compliance approach for employers to consider entails following the same screening procedures that were in place under the prior “NY Forward” requirements, e.g., by issuing and reviewing daily employee queries about whether they have experienced any COVID-19 symptoms or been exposed to any infected individuals.

The screening of visitors is not required under the HERO Act. But employers may wish to undertake such precautions depending on the particular facts and circumstances, and if necessary to comport with any other local, state or federal requirement.

*8. What about employee masking under our activated HERO Act plan?*

The HERO Act requires that employers establish requirements for the use of face coverings, once again, in accordance with applicable DOH or CDC guidance.

Currently, New York has adopted the [CDC’s masking recommendations](#). Accordingly, New York employers are advised to have all **non-vaccinated** employees wear appropriate masks while indoors. Additionally, the CDC advises that even vaccinated persons should wear masks if they work in areas with substantial or high COVID-19 transmission rates. Presently, the CDC has designated all of New York state as a substantial or high transmission area.

*9. Is social distancing required under our activated HERO Act plan, even for those who are vaccinated?*

The HERO Act specifies that employers must maintain “effective social distancing” requirements. And the state’s model standard further specifies that employers should maintain, when possible, at least six feet of physical distancing between workers or as otherwise specified by the state or CDC.

*10. Are we required to publish the entire HERO Act plan in our employee handbook?*

A plain reading of the HERO Act seemingly requires the entire plan to be published in your employee handbook. State guidance likewise indicates this is the case. This requirement makes more sense now, seeing as the plans must be finalized and activated due to DOH’s designation.

*11. Are we required to provide employees with a copy of the HERO Act plan?*

The HERO Act standard requires employers to provide each employee with a copy of the exposure plan in English or, if the state has published a translated model plan, in the language identified as the primary language of the employee.

Currently, the state has only published a Spanish translation of its general model plan. So if an employee's primary non-English language is something other than Spanish, it will be compliant for employers to provide an English version of plan, for the time being. It is possible that New York will publish additional translations in the future.

Employers should also keep in mind that copies of such plans must additionally be provided to independent contractors and other contingent workers at their sites who are covered under the HERO Act.

*12. What are we supposed to do with employees who are working remotely?*

The HERO Act's definition of a "worksites" does not include locations where employees are telecommuting or teleworking unless the employers has the ability to exercise control over the area. Presumably, these exempt locations include personal residences and other private locations where employees are performing remote work. However, state officials have advised that employer-owned vehicles and employer-provided housing would constitute a "worksites" under the HERO Act (although the posting requirement would not apply to employer-owned vehicles).

*13. Does the HERO Act only apply to employees?*

No, the HERO Act applies to employees, as well as to non-employee contingent workers, such as independent contractors, domestic workers, home care and personal care workers, day laborers, farm workers and other temporary and seasonal workers.

Even so, differing requirements may apply to these contingent workers under the HERO Act. For example, according to the state, employers are not required to conduct a "verbal review" of their HERO Act plans with contingent workers from staffing agencies, with contractors and subcontractors or with individuals delivering goods or transporting people to and from the worksite.

*14. What if employees at my worksite are already covered by OSHA's Healthcare Emergency Temporary Standard (ETS)?*

New York has advised that its [Airborne Infectious Disease Exposure Standard](#) and the corresponding infection control requirements do not apply to any employee who is already covered under a temporary or permanent OSHA standard regarding COVID-19 or other airborne infectious agents and diseases.

Accordingly, this exemption covers workers who are covered by OSHA's COVID-19 Healthcare ETS. But employers in the healthcare industry should keep in mind that, if OSHA's ETS expires or is rescinded, or otherwise does not apply to their particular operations or to specific employees, then the HERO Act requirements will apply.

*15. What does activation under the HERO Act require, if I have multiple work locations?*

If employers have different worksites, industries and environments it may be prudent or necessary to include differing infection control measures, or even separate plans for multiple work sites. On this point, New York regulators have advised:

"Employers should select the most appropriate template and customize the controls section to add appropriate controls for the industry or work site(s) by assessing specific employee

or contractor functions and unique circumstances and conditions of particular work sites to determine the appropriate template to utilize.”

Employers may be required to take additional compliance steps, e.g., by making separate postings at each worksite.

*16. What are the penalties for non-compliance with the HERO Act?*

New York regulators have advised that non-compliant employers may be subject to daily penalties of \$50 and violations ranging up to \$10,000 for failing to abide by the requirements of the HERO Act. There are increased penalties for subsequent violations that occur within a six year period. The HERO Act also permits employees bring a private cause action under certain circumstances.

*17. Does the HERO Act apply to school districts, local government, or public authorities?*

No, in drafting the HERO Act, New York expressly exempted the state government, as well as any political subdivision of the state (e.g., local government), public authorities and “any other governmental agency or instrumentality of the state.”

*18. Does the HERO Act apply to private, nonprofit institutions.*

Yes, the HERO Act applies to all private-sector employers, including nonprofit organizations in New York.

We appreciate that our clients and Bond friends likely have more questions. We will do our best to address these issues on this Tuesday’s webinar and through our continuing community outreach.

We must reiterate that nothing in this memorandum constitutes legal advice, and New York employers should contact their Bond attorney or other legal counsel when addressing compliance issues under the HERO Act.

Finally, if you have any questions or need Bond’s help, please contact [Andy Bobrek](#), [Adam Mastroleo](#), [Stephanie Fedorka](#) or the Bond attorney with whom you are regularly in contact, for assistance.

