



NY ENACTS HERO'S ACT: IT'S A BRAVE NEW WORLD FOR EMPLOYERS

Starting June 4, 2021, ALL employers in New York will be required to adhere to the newly-passed Hero's Act. This means essentially anyone who comes to the workplace for reasons related to the employer's business, with the possible exception of visitors, will be protected under the Hero's Act—including the part time worker, who works 10 hours a week, and the FedEx delivery employee or water delivery person.

Employers will have to, at a minimum, comply with a "Model Plan" being developed by the Commissioner of Labor, which is not out yet. As such, the effective date of Section 1, including deadlines to implement a compliant standard, is expected to be extended by forthcoming amendments. When this plan does come out, it will cover the precise protocols all employers must follow in connection with ANY and ALL viral, bacterial, or fungal disease that is spread through the air in the form of aerosol particles or droplets, which is designated by the New York State Department of Health as a highly-contagious disease. Rest assured, the flu will fall into that category. While we do not know the exact content of the Model Plan, we do know it will cover 11 topics: (1) employee health screenings, (2) face coverings, (3) personal protective equipment provided at the employer's expense, (4) accessible hand hygiene stations and breaks for hand washing, (5) cleaning shared equipment and other frequently touched surfaces, (6) social distancing, (7) quarantine orders, (8) engineering controls such as air flow and ventilation, (9) designated supervisor(s) to enforce safety standards, (10) compliance with notice requirements to employees and government officials, and (11) verbal review of safety standards, employer policies, and employee rights.

Employers with Employee Handbooks—which should be just about everyone—must include the Safety Plan in their handbook as well. All in all, there will be significant costs associated with compliance.

So what if the employer falls short? The fines are \$50 per day for failure to adopt a Safety Plan. The fine for failure to abide by the Safety Plan ranges from \$1,000 to \$10,000, and if the employer has had another violation of the Hero's Act in the previous six years, however, the New York State Department of Labor can issue larger fines. But, that is not where the serious risk is for employers. The Hero's Act provides for a private right of action for employees who take issue with the employer's compliance. Employees can sue if the employer has violated the Safety Plan, and there is a "substantial probability of death or serious physical harm" that could result from the violation. In addition to injunctive relief, employees can recover court costs, liquidated damages of no more than \$20,000 and, of course, attorneys' fees which can often exceed the damages awarded in employment suits by leaps and bounds. Employers should be ready to consider hiring consultants who will put in the protocols required to comply with the law as keeping track of the myriad of requirements to ensure compliance will be a challenge.

Small employers may find themselves overwhelmed—especially when those employing 10 or more employees have to comply with Section 2 of the Hero's Act which goes into effect November 1, 2021 and requires the formation of a "Safety Committee" composed of at least two-thirds, non-supervisory employees. The Safety Committee is co-chaired by a representative of the employer and non-supervisory employees and does six things: (1) raise health and safety concerns to the employer to which the employer must respond, (2) review the employer's health and safety policy, (3) review the adoption of any policy in

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response to any health and safety law, (4) participate in any site visit by government health and safety officials, (5) review any report filed by the employer related to health and safety, and (6) attend quarterly meetings during work hours. And, by the way, the non-supervisory employees themselves select the non-supervisory employees on the Safety Committee, and the employer cannot interfere with the Safety Committee members' performance of their duties. Of course, they will have to be trained, and the Hero's Act is on top of this as employers must allow employees to attend training on the function of the Safety Committee without loss of pay. The hits keep coming.

The Hero's Act will also contain anti-retaliation provisions, expressly prohibiting retaliation against employees for the following: (i) "Exercising their rights" under the act; (ii) "Reporting violations of this [act] or the applicable airborne infectious disease exposure prevention plan to any state, local, or federal government entity, public officer, or elected official;" (iii) "Reporting an airborne infectious disease exposure concern or seeking assistance or intervention with respect to ... concerns, to their employer ... or government entity;" and (iv) "Refusing to work where such employee reasonably believes, in good faith, that such work ... [poses] an unreasonable risk of exposure to an airborne infectious disease due to the existence of working conditions that are inconsistent with laws, 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, provided that the employee ... notified the employer of the inconsistent working conditions and the employer failed to cure the conditions or the employer had or should have had reason to know about the inconsistent working conditions and maintained the inconsistent working conditions."

A finding of retaliation will come with what normally is associated with this claim—back pay, reinstatement, liquidated damages, and attorney's fees for the employer and the employee if she prevails. There is provision in the law which provides that frivolous claims may result in "sanctions against the attorney or party who brought such action." However, demonstrating that a claim is "frivolous" under the law is extremely difficult and often rare.

It will take some time to figure out what this all means in terms of the employer's administrative time and its costs that will be incurred as it implements these protocols. It will take an even longer time to determine how the courts will treat such cases and what will be the extent of the employer's exposure.

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