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## New York Releases Model Airborne Infectious Disease Prevention Plans

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As set forth in our March 15, 2021 [alert](#) and April 23, 2021 [alert](#), the New York Health and Essential Rights Act (HERO Act) requires almost all employers in the state to adopt a health and safety plan to protect workers from future airborne infectious disease outbreaks.

Employers do not need to implement the plan until the New York State Commissioner of Health designates an airborne infectious agent or disease as a highly contagious communicable disease that presents a serious risk of harm to the public health. And at this time, no designation is in effect.

Nonetheless, the law requires employers to act now to prepare for a future outbreak.

### Industry Specific Model Plans

On July 6, 2021, the New York State Department of Labor (“NYDOL”) published [an airborne infectious disease exposure prevention standard](#) (“Standard”) and [general model airborne infectious disease prevention plan](#) (“Plan”). The NYDOL also published 11 industry specific plans, including one for the [Food Service](#) industry. The Plans all contain minimum and advanced controls for preventing the spread of disease. They also contain additional disinfection, cleaning, and training requirements.

Employers with worksites in New York must adopt a written airborne infectious disease exposure prevention plan by August 5, 2021. Employers can choose to adopt the NYDOL Plan for their industry or establish an alternative plan that meets or

exceeds the Standard’s minimum requirements. However, if an employer decides to create a plan of its own, employees must meaningfully participate in the drafting of such employer-specific plan. In addition, regardless of whether the employer implements the NYDOL Plan or their own plan, the plan must be provided in English and the primary language of employees, if available. (The employer only needs to provide an English-language notice to the employee if the Commissioner does not provide one in the employee’s self-identified primary language, even if the employer adopts its own plan). If employers adopt the NYDOL plan, the employer is not responsible for any errors in translation of the plan to another language.

### Adopting a Disease Prevention Plan and Next Steps

When adopting a plan, whether its own or the model NYDOL plan, employers must list all the worksites where the plan will apply, name supervisory employee(s) to enforce compliance with the plan, designate a contact person for questions about the plan, list engineering and administrative controls, and list PPE required.

- Employers must provide the adopted plan to employees (in both English and employee’s primary language, if available) within 30 days after adoption of the plan, within 15 days after reopening after a period of closure due to airborne infectious disease, and to a newly hired employees at the commencement of employment.

- The plan must also be made available upon request to all employees, their representatives (a term which is undefined under the law), collective bargaining representatives, independent contractors, the NYDOL, and the New York Department of Health.
- The adopted plan must be posted in a visible and prominent location within each worksite, unless the “worksite” is a vehicle (e.g., food truck).
- If the employer maintains an employee handbook, the plan must also be included in the handbook and provided to all current employees and new hires.
- The employer must verbally review the plan, the circumstances under which it can be activated, and employee rights under the HERO Act (see below) with its employees.

#### **What Happens If the New York Commissioner of Health Declares a Public Health Crisis?**

If the Commissioner designates a public health emergency based on an airborne infectious disease, an employer would be required to implement the plan it has adopted. In such event, the employer must:

- Immediately review the worksite’s exposure prevention plan and update it to reflect current information, guidance, and mandatory requirements issued by federal, state, or local governments, and periodically review and revise the plan to reflect current governmental requirements.
- Finalize, promptly activate, and distribute the updated plan to employees.
- Post a copy of the plan in a visible and prominent location at the worksite and ensure that a copy of the plan is accessible to employees during all work shifts.

- Verbally inform all employees of the existence and location of the plan.
- Designate a supervisory employee to monitor any updates to federal, state, or local guidance related to preventing the spread of the airborne infectious disease.
- Train employees during working hours (either in-person in a well-ventilated environment or via audio or video conference) on all elements of the plan. That includes (1) the infectious agent in question and the disease(s) it can cause, (2) the signs and symptoms of the disease, (3) how the disease can be spread, (4) an explanation of the plan, (5) the activities and locations at the employer’s worksite that may involve exposure to the infectious agent, (6) the use and limitations of exposure controls, and (7) a review of the Standard and employee rights under New York Labor Law, Section 218-B.

- **Employee rights under New York Labor Law, Section 218-B include:**

- To receive and have access to the employer’s plan and training on such plan.
- To report violations of the employer’s obligations or violations of the employer-adopted airborne infectious disease exposure prevention plan to any state, local, or federal government entity, public officer or elected official.
- To report airborne infectious disease exposure concerns or seek assistance or intervention with respect to airborne infectious disease exposure concerns to their employer, a governmental entity, public officer or elected official.

- To refuse to work where an employee reasonably believes, in good faith, that such work exposes the individual, other workers, or the public to 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, the Standard, or the adopted-plan. However, the employee, another employee, or employee representative must have notified the employer of the inconsistent working conditions and the employer must have failed to cure the conditions. It also works if the employer had or should have had reason to know about the inconsistent working conditions and maintained the inconsistent working conditions.
- To be protected from retaliation when asserting such rights.

If the employee reasonably believes in good faith that the workplace is violating the requirements, or if an employee asserts their rights under the plan, the employee may not be subjected to retaliation. Further, employers are required to keep documentation concerning any written communication between employee and employer about the risk of exposure to the airborne disease at issue for at least two years after the conclusion of the Governor's emergency declaration of high-risk disease.

### **Joint Labor-Management Workplace Safety Committee**

As of November 1, 2021, employers with at least ten employees will be required to permit employees to establish and administer a joint labor-management workplace safety committee. These committees will be authorized to be

involved in the review of the employer's health and safety policies. As an example, the committee may meet during work hours to raise health and safety concerns, review safety policies, and participate in certain site visits. The New York Department of Health is expected to propose regulations related to the implementation of workplace safety committees.

In the meantime, we encourage employers to review and adopt the industry specific model plan and call counsel for any questions to ensure compliance with these new requirements.

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