



FROM: Ostroff Associates

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RE: New York State HERO Act: S.1034-B (Gianaris)/ A.2681-B (Reyes)

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### **Summary and Background**

On Wednesday May 5, 2021, Governor Cuomo signed into law A.2681-B (Reyes)/ S.1034-B (Gianaris). The HERO Act is designed to establish standards for workplace safety protocols regarding airborne infectious disease prevention, and was a post-budget priority for labor unions. The bill requires the Department of Labor to create model workplace airborne infectious disease safety and health standards. Employers must either adopt the model standards or develop their own safety and health standards while adhering to a minimum set of requirements laid out by the Department. The bill further requires employers to allow for the creation of workplace safety and health committees. In addition, the bill contains multiple provisions to prevent employer retaliation. To ensure employer compliance, the bill includes fines and other mechanisms. There is a chapter amendment to the bill that addresses issues such as providing opportunities for employers to remediate violations. We expect the chapter amendment to be acted on prior to the close of session in June.

### **Model Airborne Infectious Disease Exposure Prevention Standards**

The Department of Labor and the Department of Health will create model airborne infectious disease exposure prevention standards for all worksites, differentiated by industry to establish minimum requirements for preventing exposure to airborne infectious disease in the workplace. The model standards will cover all employees and independent contractors as well as individuals working for staffing agencies, contractors or subcontractors on behalf of the employer at any individual work site. The model standards will consider different risks presented at various worksites as well as the presence of third parties. In addition, the model standards will include requirements on procedures and methods for: employee health screenings, face coverings, personal protective equipment, hygiene stations, worksite space and equipment cleaning, social distancing, air circulation, employee quarantine, verbal plan review, and compliance with the plan and or other applicable laws. Furthermore, the Department will update model standards as necessary and inform employers of changes. Lastly, the model plan will also include anti-retaliation requirements that employers must adhere to.

### **Employer Requirements**

Once the State creates a model airborne infectious disease prevention model plan, all employers must either establish the model plan for their respective industry or establish an alternate plan that equals or exceeds the minimum standards provided by the model standard. If an employer chooses to

establish an alternative plan, they must develop the plan in agreement with a collective bargaining representative, if any, or with meaningful participation of employees if there is no representative.

Employers must provide the plan in writing to their employees, in English and the language identified by each employee as their primary language. This must be provided upon hiring as well as upon reopening after a period of closure due to an airborne infectious disease outbreak. Additionally, the plan must be posted in a visible and prominent location within the worksite and employers who provide employee handbooks must include the plan in their handbook. Furthermore, employers must make the plan available upon request to all employees, independent contractors, employee representatives, collective bargaining representatives, in addition to the Commissioner of the Department of Labor and the Commissioner of the Department of Health.

Employees are also protected from employer retaliation when reporting a plan violation or concern. No employer shall discriminate, threaten, retaliate against, or take adverse action against an employee for: exercising their rights in the law, reporting violations of the plan, reporting an airborne infectious disease concern or refusing to work when an employee believes that such work exposes them to an unreasonable risk to an airborne infectious disease. However, any provisions in the bill may be waived by a collective bargaining agreement provided that the waiver within the collective bargaining agreement explicitly references the proper section.

### **Violations and Penalties**

If an employer does not adopt a plan, they may face fines of no less than \$50 per day. In the case of a violation to an adopted plan, employers face a fine of \$1,000 to \$10,000 for each violation. In the case of multiple violations within a six-year period, employers may face a fine of \$200 per day for failure to adopt a plan and \$1,000 to \$20,000 for a violation to the plan. In addition to fines, the bill also provides protections to employees by allowing them to bring a private right of action against employers for instances where an employer may have violated a plan and the result potentially caused serious harm to an employee.

### **Workplace Safety Committees**

The bill allows for employees to create joint labor-management workplace safety committees. These committees would be composed of employee and employer designees and ensures that at least two-thirds are non-supervisory employees. Employee members of the committee would be selected by, and among, non-supervisory employees. The committees would be co-chaired by both an employer and employee representative. If there is a collective bargaining agreement in place, the collective bargaining representative would be responsible for the selection of the employees to serve as members of the committee. If necessary, committees that represent geographically distinct worksites may also be formed. Lastly, employers are prohibited from interfering with the selection of employees who serve on such committees or who serve as the workplace safety designee.

Workplace safety committees will be authorized to perform a wide variety of tasks including, but not limited to: raising health and safety concerns, reviewing health and safety plans, providing feedback on health and safety plans, reviewing plans in response to new health laws or directives, participating in site visits by governmental entities, reviewing reports filed by the employer to the State, and scheduling meetings during work hours at least once per quarter. Further, the bill states that employees who participate in workplace safety committees are protected from employer retaliation and workplace safety committees may be waived under collective bargaining agreements.

## **Effective Dates**

The Department of Labor has 60 days from enactment of this legislation to develop model standards (July 4, 2021). Employers will then have 30 days to adopt the model standards or alternative standards (August 3, 2021). Employers must then notify employees 30 days after the adoption of standards (September 2, 2021). Workplace safety committees will become effective in 180 days (November 1, 2021). Additionally, for safety committees, the Department of Labor will begin developing regulations immediately.

## **Chapter Amendment**

The Governor and the Legislature have agreed to a chapter amendment, A.7477 (Reyes), which is intended to provide further clarity for employers as well as provide employers the opportunity to cure certain types of violations. The bill amends the original law by making technical changes such as amending the definition of a 'worksite' to limit the term to locations over which an employer has the ability to exercise control. Also, the bill amends the definition of an 'employee' to clarify that the term includes individuals working for digital applications and platforms while also clarifying that the term excludes independent contractors for the State of New York.

The model airborne infectious disease exposure prevention standard is amended to require the Commissioner of Labor to create model standards for each industry that represents a significant portion of the workforce, or with unique characteristics requiring distinct standards, as well as a general model standard to capture all other worksites. This directive slightly differs from the original law which directed the Commissioner to establish 'standards differentiated by industry'. The bill further clarifies when employers must adopt and provide standards to their employees. Employers must adopt either a model general standard, model standard for their respective industry, or an alternative standard that meets the minimum requirements within 30 days after the Commissioner publishes the approved standards. Employers must provide employees a written copy of their approved plan within 30 days of the adoption of their plan, within 15 days after a reopening period, and upon hiring of a new employee. Additionally, all employers operating at the effective date of this bill must provide employees a written copy of model standards relevant to their industry within 60 days of the Commissioner publishing the model standards. Lastly, the bill exempts vehicles as a worksite where standards must be posted.

The bill makes amendments to clarify the process for an employee to file a civil lawsuit against an employer. Previously included language referring to liquidated damages is removed and three additional technical changes are added. The bill requires employees to notify employers of alleged violations and allows employers a 30-day period to correct such violations, during which time an employee may not bring forward a civil action. If an employer cures the violation during the 30-day period, an employee may not file a civil action. In addition, there is a 6-month statute of limitations for alleged civil accusations. Further, if a court finds that a civil action is frivolous, a court may award costs of attorneys and legal fees to employers.

The final changes that the bill makes refer to labor management workplace safety committees. The bill limits the number of committees to one per worksite as well as provides an exemption to worksites with existing committees that meet the requirements of the section. Additionally, workplace safety committee meetings shall last no longer than 2 hours and workplace safety trainings shall last no longer than 4 hours.