

New York Lifts COVID-19 HERO Act Designation, But Employer Obligations Continue

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The New York State Commissioner of Health rescinded the designation of COVID-19 as a “highly contagious communicable disease that presents a serious risk of harm to the public health under the HERO Act” (Health and Essential Rights Act) on March 17, 2022. While this change in designation means private sector employers are no longer required to *implement* their workforce safety plans, based on the HERO Act statutory language, employers will still be required to comply with the other obligations under the HERO Act.

2021 Designation

Since September 6, 2021, the New York State Commissioner of Health has designated COVID-19 a “highly contagious communicable disease that presents a serious risk of harm to the public health.” As a result of that designation, all private sector employers in New York State were required to implement an Infectious Disease Exposure Prevention Plan tailored to address COVID-19 in the workplace in accordance with the HERO Act, which was signed into law on May 5, 2021.

Employers’ Continuing Obligations

Under the HERO Act, Section 1, NYLL Section 218-b, “Prevention of Occupational Exposure to an Airborne Infectious Disease,” employers must:

- Keep in place an airborne Infectious Disease Exposure Prevention Plan (IDEPP), even though employers are no longer required to implement the plan at this time;
- Provide employees and new hires written notice of the IDEPP;
- Include a copy of the IDEPP in employee handbooks (if have one); and
- Post a copy of the IDEPP in a visible prominent location within each worksite.

While the HERO Act statutory language and New York Department of Labor FAQs state that employers are required to comply with these steps even absent a designation, on the HERO Act website page that was updated to indicate the change in COVID-19 designation, the following statement was added: “When designated, employers are required to provide a copy of the adopted airborne infectious disease exposure prevention plan and post the same in a visible and prominent location within each worksite.”

Thus, some ambiguity exists in an employer’s HERO Act obligations under Section 1 absent the designation of an a highly contagious communicable disease that presents a serious risk of harm to the public health.

In addition to IDEPP obligations, under Section 2, NYLL Section 27-d, “Workplace Safety Committee,” employees have the right to create a joint employer and

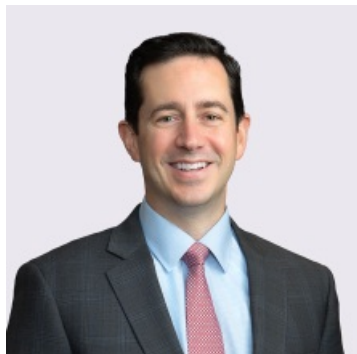
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employee committee to address workplace health and safety issues. Currently, proposed regulations have been issued to address the workplace safety committee requirements.

The penalties associated with non-compliance remain in effect, including a penalty of not less than \$50 a day for failure to adopt an IDEPP. In addition, the HERO Act permits employees to bring a civil action against an employer for non-compliance with the requirements.

New York City Employers

While COVID-19-weary employers and employees alike welcome the lifting of the COVID-19 designation under the HERO Act and improving pandemic conditions, New York City employers should be mindful that the City's workforce vaccine mandate remains in effect for all employers, at least for now.

Other Considerations

In addition, even absent a HERO Act requirement, employers may want to consider continuing some form of a COVID-19 prevention plan that effectively addresses the COVID-19 transmission risk for their workplace. While the Occupational Safety and Health Administration (OSHA) does not have a specific standard for COVID-19, the Occupational Safety and Health Act's General Duty Clause requires employers to provide a workplace free of recognized hazards. Further, even though COVID-19 may not be considered an occupational hazard in all workplaces, it may be in some.

Additionally, OSHA, as well as state and local health departments, may require all employers to take some basic steps to ensure a safe workspace, such as complying with Department of Health isolation orders for individuals who test positive for COVID-19.

Finally, from an employee relations perspective, having some form of a COVID-19 plan may be a comfort to employees returning to the worksite.

Jackson Lewis attorneys will continue to monitor changes in COVID-19 guidance and regulations in the workplace. If you have questions about the HERO Act or related workplace safety issues, please reach out to the Jackson Lewis attorney with whom you often work or any member of our [Disability, Leave and Health Management Group](#) or [Workplace Safety and Health Group](#).

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