

New York Designates COVID-19 an Airborne Infectious Disease, Triggering HERO Act Safety Plan Requirements

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On September 6, 2021, New York state's commissioner of health designated COVID-19 a highly contagious communicable disease that presents a serious risk of harm to the public health under **New York state's HERO Act (the Act)**. This designation requires all New York employers to "promptly activate" a workplace airborne infectious disease exposure prevention plan (safety plan). As discussed further below, masks are mandatory once again for all New York City employees when social distancing cannot be maintained, even for those who are vaccinated.

As noted in our prior alerts (see [here](#), [here](#) and [here](#)), New York employers were required to adopt a safety plan in August by using the **model safety plan** crafted by the New York State Department of Labor (DOL) or to develop their own safety plan in compliance with the Act's **standard**; however, employers were not previously obligated to activate the elements of the safety plan. With New York's formal designation of COVID-19, employers must now implement the safety measures—including mandatory health screening, social distancing, advanced cleaning, and masking—in their plan. They must also provide employees with training about the plan and employee rights under the Act.

Employers' Next Steps

New York's designation of COVID-19 as an airborne infectious disease under the Act means employers must:

- Immediately review the worksite's safety plan and update it if necessary to ensure that it incorporates current information, guidance, and mandatory requirements issued by federal, state, or local governments related to COVID-19.
- Provide each employee with a copy of the safety plan, and post a copy in a visible and prominent location at the worksite.
- Provide training to employees that covers all

elements of the safety plan and a review of the Act's **standard**, including employees' rights to be protected against retaliation for alleging/reporting a violation of the safety plan or the Act.

- Ensure that the safety plan is effectively followed by (i) assigning enforcement responsibilities to supervisory employees, (ii) monitoring and maintaining exposure controls, and (iii) regularly checking for updated information and guidance provided by the State Department of Health and the Centers for Disease Control (CDC).

While the designation remains in effect, employers must implement the following:

- **Health Screening.** Employers must screen employees for symptoms of infectious disease before they enter the workplace at the beginning of their shift. The specifics of that screening are not stated in the Act's standard or the DOL model safety plan. Rather, employers are directed to "follow guidance from NYSDOH [New York Department of Health] and CDC guidance, if available." New York's most recent office screening guidance is contained in the archived June 8, 2021 **Interim Guidance for Office-Based Work** and is instructive; however, that guidance no longer remains in effect and has not been updated to align with the CDC's more recent **recommendation** that fully vaccinated individuals who come into close contact with someone with COVID-19 get tested three to five days after exposure and wear a mask indoors in public for 14 days following exposure or until their test result is negative. Employers should be on the lookout for additional guidance from the New York DOL regarding specific screening requirements.
- **Face Coverings.** Employers are required to provide employees with appropriate face coverings at no cost to employees, and employees are required to wear appropriate face coverings when social distancing cannot be maintained. Upon designation, the Act's

standard incorporates the **Centers for Disease Control Mask Guidance** and requires New York employers to follow that guidance. This means all individuals, regardless of vaccination status, must wear a mask indoors in public when social distancing cannot be maintained if the employee works in an area of substantial or high transmission. According to **CDC tracking data**, community transmission in New York City is currently “high.”

- **Physical Distancing.** Employers must direct physical distancing, “when possible” to keep employees at least six feet away from other individuals.
- **Hand Hygiene.** Employers must provide hand-washing facilities with an adequate supply of water, soap, and single-use towels or air drying machines “to the extent practical and feasible” or otherwise provide hand-sanitizing facilities and/or supplies.
- **Cleaning and Disinfection.** Employers must implement an appropriate cleaning and disinfection plan that includes the methods of decontamination based on the location, facility type, type of surface to be cleaned, type of material present, and as otherwise directed by the state Department of Health or the CDC.
- **Engineering and Administrative Controls.** For activities for which the above controls alone will not sufficiently protect employees, employers

should determine whether the temporary suspension or elimination of risky activities, engineering controls relating to ventilation, or administrative controls (i.e., work rules to prevent exposure) are necessary.

As of the date of this publication, New York has not stated a specific date when full implementation of an employer’s safety plan is required; however, the Act’s standard advises employers to “promptly activate” their safety plans. According to the **DOL HERO Act website**, the “DOL will be sharing more details about [the Act] in the near future.” Employers are advised to check the website for updates.

The **designation of COVID-19** as a highly contagious communicable disease is set to expire on September 30, 2021, unless continued by the commissioner of health.

Lowenstein Sandler’s Employment Law Practice Group will continue to monitor further developments related to the HERO Act. We remain ready to counsel employers through the myriad legal issues brought about by the COVID-19 pandemic.

To see our prior alerts and other material related to the pandemic, please visit the Coronavirus/COVID-19: Facts, Insights & Resources page of our website by clicking [here](#).

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