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MEMORANDUM

TO: Retail Council of New York State

FROM: Hinman Straub P.C.

RE: Impact of The Hero Act on Private Employers

DATE: May 13, 2021

NATURE OF THIS INFORMATION: This is information regarding recent amendments to the New York State Labor Law relating to employee exposure to airborne infectious disease in the workplace and allowing employees to participate in a workplace safety committee.

DATE FOR RESPONSE OR IMPLEMENTATION: July 4, 2021 for the first part of the Act and November 1, 2021 for the second part of the Act.

HINMAN STRAUB CONTACT PEOPLE: Sean Doolan, Elena DeFio Kean, and Kristin Foust

THE FOLLOWING INFORMATION IS FOR YOUR FILING OR ELECTRONIC RECORDS:
Category: Suggested Key Word(s):

On May 5, 2021, the Governor signed into law the Hero Act, a two-part piece of legislation expanding and amending the labor law to provide protections to employees in the workplace relative to the exposure to airborne infectious disease and allowing employees to participate in a workplace safety committee. S1034B/A2681B (Chapter 105 of 2021). Subsequent to its passage, a Chapter Amendment was negotiated and recently introduced (A7477). We anticipate it will be passed by the legislature and signed by the Governor shortly thereafter. This Chapter Amendment revises certain aspects of the law with the intent to address some of the concerns raised by private businesses.

The first part of the Hero Act creates a new section of the labor law that requires private employers to adopt an airborne infectious disease exposure prevention plan. (Labor Law § 218-b). This will take effect on July 4, 2021, 60 days[1] after it has been signed into law by the Governor. (S1034B, Section 4).

The second part of the Hero Act adds a new section to the labor law, requiring private employers to allow employees to establish and administer a joint labor-management workplace safety committee at each worksite. (Labor Law § 27-d). This section will take effect on November 1, 2021, 180 days after the Governor has signed it into law. (S1034B, Section 4).

Airborne Infectious Disease Prevention Plan

Labor Law Section 218-b **requires all private employers** to adopt an airborne infectious disease exposure prevention plan ("prevention plan") that satisfies the minimum standards as defined in the law.

Prevention Plan:

Employers will be permitted to adopt a model prevention plan published by the Commissioner of the Department of Labor ("the Commissioner") or adopt one that meets or exceeds the minimum model standards. The Commissioner will publish a general model airborne infectious disease[2] exposure prevention standard, as well as a model for industries representing a significant portion of the workforce, or those having unique characteristics requiring distinct standards. (Id. at § 218-b (2)). The model standards will establish minimum requirements for the workplace to prevent airborne infectious disease exposure, taking into account the varying levels of exposure, whether a state of emergency has or has not been declared due to an airborne infectious disease, and all applicable federal guidelines in the event a state of emergency has been declared. (Id.).

The law provides that the Commissioner in consultation with the Department of Health shall create and publish the model standards. The model standards, as well as any prevention

[1] The Chapter Amendment extended the effective date from 30 days to 60 days.
[2] Defined by the law as "any infectious viral, bacterial or fungal disease that is transmissible through the air in the form of aerosol particles or droplets and is designated by the commissioner of health a highly contagious communicable disease." (Id. at § 218-b(1)(e))).

plan independently adopted by an employer, must at least include procedures and methods for the following factors:

a) Employee health screenings;
b) Face coverings;
c) Personal protective equipment ("PPE") applicable to each industry and based upon the hazards for each industry;
d) Accessible hand hygiene stations and providing break times for employees to use the handwashing facilities as needed;
e) Regular cleaning and disinfecting of shared equipment and other frequently touched surfaces;
f) Effective social distancing policies and procedures for employees and consumers or customers, including signage, increasing physical space between employees at the worksite, limiting capacity, delivering services remotely, reconfiguring workspaces, flexible meeting and travel options, flexible worksites, or implementing flexible work hours such as staggered shifts;
g) Compliance with mandatory or precautionary orders of isolation or quarantine that have been issued to employees;
h) Compliance with applicable engineering controls such as proper air flow or, exhaust ventilation;
i) Designation of one or more supervisory employees to enforce compliance with the airborne infectious disease exposure prevention plan and any other federal, state, or local guidance related to avoidance of spreading an airborne infectious disease;
j) Compliance with any applicable laws, rules, regulations, standards, or guidance on notification to employees and relevant state and local agencies of potential exposure to airborne infectious disease at the work site; and
k) Verbal review of infectious disease standard, employer policies and employee rights under this law.

(Id. at § 218-b (2)(a)-(k)).

Adoption of the Prevention Plan:

The Chapter Amendment provides specific time frames for adoption and circulation of the prevention plan.

Within thirty (30) days of the Commissioner's publication of the model standard, employers must establish an airborne infectious disease exposure prevention plan. (Id. at § 218-b(4)(a)). Employers may either adopt the model plan as is or develop another plan that meets or exceeds the minimum standards of the model plan. (Id. at § 218-b(4)(a)). Non-supervisory employees are prohibited from overseeing compliance with the exposure prevention plan. (Id.). However, if the employer adopts an alternative plan, the employer must do so in agreement with any union, if present, or with the meaningful participation of employees where no union is present. (Id. § 218-b(4)(b)).

Within thirty (30) days of the employer's adoption of the prevention plan, the employer must provide employees with a written copy of the plan in English or the employee's primary language, unless the Commissioner has not published a model plan in that particular language, providing same in English is sufficient. (Id. at § 218-b (5)). Employers must also provide the plan within fifteen (15) days after reopening "after a period of closure due to airborne infectious disease" and to new employees upon hiring. (Id.). Note that the law further provides that "[b]usinesses permitted to operate as of the effective date of this [law] shall provide such a plan to all employees within sixty (60) days after the [C]ommissioner publishes the model standard relevant to the industry." (Id.). Moreover, the employer must post the plan in a conspicuous place at the worksite, include the plan in a handbook and make the plan available upon request. (Id. at §§ 218-b (6), (7)).[3]

Therefore, although the time frame for implementation is short, it is not required until model standards and a model plan are created by the Commissioner. However, due to the short time frame for implementation once that occurs, most employers will be placed in a position to only adopt the model plan, particularly since to do otherwise would require union participation and/or employee participation for which 30 days becomes an exceptionally short time frame to meet, confer and agree upon the terms of the plan.

Who is Covered under this New Law? Important Definitions

Employer: This section of the labor law only applies to private employers and does not apply to the "state, any political subdivision of the state, a public authority, or any other governmental agency or instrumentality." (Id. at § 218-b(1)(d)).

Employee*:* The definition of "employee" under this section of the labor law is quite broad, and includes full-time and part-time workers, "independent contractors, domestic workers, home care and personal care workers, day laborers, farmworkers and other temporary and season workers." (Id. at § 218-b (1)(a)). It goes even further to include those "individuals working for digital applications or platforms, staffing agencies, contractors or subcontractors on behalf of the employer at any individual worksite, as well as any individual delivering goods or transporting people at, to or from the work site on behalf of the employer, regardless of whether delivery or transport is conducted by an individual or entity that would otherwise be deemed an employer [under this law]." (Id.).

Excluded from Employee Definition*:* Specifically excluded from the employee definition are those employees or independent contractors "of the state, any political subdivision of the state, a public authority, or any other governmental agency or instrumentality." (Id.).

Work Site*:* The term refers to "a physical space, including a vehicle, that has been designated as the location where work is performed over which an employer has the ability to exercise control." (Id. at § 218-b(1)(b)). This also includes employer-provided housing and transportation, but excludes "the residence of the employer or employee, unless such residence

[3] The requirement to post in the workplace is not required if a vehicle is considered an employee's worksite.

has been provided by the employer and is used as the primary place of work or such residence is provided by an employer covered under [minimum wage provisions for farm laborers under the labor law]." (Id.). Notably, the worksite does not include "telecommuting or telework site unless the employer has the ability to exercise control of such site." (Id.).

Supervisor: The term "supervisor" as used in the model standards, refers to "any person who has the authority to direct and control the work performance of other employees, or who has the managerial authority to take corrective action regarding the violation of the law, rules or regulations." (Id. at § 218-b (1)(c)). A "supervisor" does not include an employee who is a member of labor organization that "primarily represents employees not otherwise deemed to be a supervisor or supervisory employee as defined by this [section of the law]." (Id.).

Prohibitions, Protections & Penalties:

- ***Employees Have Protection from Discrimination, Threats or Retaliation***: The law prohibits employers and their agents from "discriminat[ing], threaten[ing], retaliat[ing] against, or tak[ing] adverse action" against any employee for:
    - exercising their rights under this law or the prevention plan,
    - reporting a violation of the plan to a governmental entity,
    - reporting a concern of the plan or seeking assistance or intervention with respect to the prevention plan to the employer or government entity,
    - reasonably believing, in good faith, that such work exposes him or her, or 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, including but not limited to, the minimum standards provided by the model airborne infectious disease exposure prevention standard.

  (Id. at §§ 218-b (8)(a)-(d)).
- ***Employer's Right to Cure Prior to Refusal To Work:*** In order for the refusal to work provision referenced above to apply, the employee must have notified the employer of the working conditions and the employer failed to address or remedy the conditions, or the employer should have "had reason to know" about the working conditions and maintained them. (Id. at § 218-b (8)(d)).
- ***Commissioner of Labor May Investigate and Assess Penalties:*** The Commissioner may investigate claims of violations, and in the event of a violation, asses a civil penalty of "not less than fifty dollars per day for failure to adopt an airborne infectious disease exposure prevention plan, or not less than one thousand dollars nor more than ten thousand dollars for failure to abide by an adopted airborne infectious disease exposure prevention plan." (Id. at § 218-b (10)(a)). If the employer has a previous violation within the past six years, the civil penalties increase. The Commissioner or Attorney General is empowered to seek injunctive relief. (Id.).
- ***Employee May Bring a Private Right of Action***: The law permits an employee to bring a private right of action against his or her employer for a violation of the

prevention plan. (Id. at § 218-b (10)(b)). The employee may seek injunctive relief, costs and attorney's fees, but only where the violation "creates a substantial probability that death or serious physical harm could result to the employee from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, by the employer at the work site, unless the employer did not and could not, with the exercise of reasonable diligence, know of the presence of the violation." (Id.). They may also assert a claim for discrimination or retaliation under this law.

- ***Penalties against Employees for Frivolous Actions***: In the event an employee brings a frivolous action, the employer may be entitled to costs and reasonable attorney's fees, which may be assessed against the employee or the employee's attorney, or both. (Id.).
- ***Employer Right to Cure Prior to Private Action***: Prior to bringing a private action against the employer, the employee "must give the employer notice of the alleged violation." (Id.). The employee must then wait thirty (30) days after providing the employer with notice before bringing an action, unless "the employer has demonstrated an unwillingness to cure a violation in bad faith." (Id.). Note that an employee "may not bring a civil action if the employer corrects the alleged violation" after providing notice of same. (Id.).
- ***Statute of Limitations***: The Chapter Amendment limited the time in which such a claim can be brought. The statute of limitations for this private right of action is six (6) months "from the date the employee had knowledge of the violation." (Id.).

In addition to the aforementioned, it is important to note that this law does not diminish rights under collective bargaining agreements, but permits the parties to a contract to waive the requirements of this plan, provided the waiver explicitly references the law in the agreement. (Id. at §§ 218-b (9)).

Workplace Safety Committee

The second part to the Hero Act creates a new section to the labor law that requires private employers to allow employees "to establish and administer a joint labor-management workplace safety committee" at each worksite. (Labor Law § 27-d (2)). Under the Chapter Amendment, in the event the employer already has a similar committee in place that operates consistent with this new law, the employer is exempt from creating an additional workplace safety committee. (Id.).

- Only private employers that employ ten (10) or more employees are covered under this new law. (Id. at § 27-d (1)(a)).
- Safety committee shall consist of "employee and employer designees, provided at least two-thirds are non-supervisory employees," and shall be "co-chaired by a representative of the employer and non-supervisory employees." (Id. at § 27-d (2)).
- If there is a union present, the labor representative will be responsible for selecting the employees of the committee. (Id.).

- Employers are prohibited from interfering with the selection of the employees on the committee, those who serve on the committee, or the employee's performance of duties in relation to the committee. (Id. at § 27-d (3)).
- Employer must allow the "safety committee designees to attend a training of no longer than four hours, without suffering a loss of pay, on the function of worker safety committees, rights established under [the labor law], and an introduction to occupational safety and health." (Id. at § 27-d (5)).

Under this new provision of the labor law, the workplace safety committee is permitted to perform the following tasks:

a. Raise health and safety concerns, hazards, complaints and violations to the employer to which the employer must respond.
b. Review any policy put in place in the workplace required by law and relating to occupational safety and health and provide feedback to such policy.
c. Review the adoption of any policy in the workplace in response to any health or safety law, ordinance, rule, regulation, executive order, or other related directive.
d. Participate in any site visit by any governmental entity responsible for enforcing safety and health standards unless otherwise prohibited by law.
e. Review any report filed by the employer related to the health and safety of the workplace in a manner consistent with any provision of law.
f. Regularly schedule a meeting during work hours at least once a quarter that shall last no longer than two hours.

(Id. at § 27-d (4)(a)-(f)).

Similar to Section One of the Hero Act, the Airborne Infectious Disease Prevention Plan, this section of the Act also has certain prohibitions, protections and penalties.

- Employers are prohibited from retaliating against employees for participating in the workplace safety committee or creation thereof.
- Violations of this section are subject to the provisions of Labor Law Section 215, governing administrative actions by the Commissioner as well as permitting a private right of action by aggrieved employees. (Id. at § 27-d (6)).
- If an employer retaliates against the employee in violation of this section of the labor law, the employer could face civil penalties imposed by the Commissioner ranging from $1,000 to $10,000, with increased fines for repeat violations. (Id. at §§ 27-d (6); 215 (1)(b)).
- The Commissioner could also impose liquidated damages and seek injunctive relief for violations of this section. (Id.).
- Employees who have been retaliated against for activities associated with the workplace committee are entitled to bring a civil action seeking injunctive relief, liquidated damages, costs and attorneys' fees. (Id. at §§ 27-d (6); 215 (2)(a)).

The new law does not diminish rights under collective bargaining agreements, but permits the parties to a contract to waive the requirements of this plan, provided the waiver explicitly references the law in the agreement. (Id. at § 27-d (7)).

The Impact on Employers

The new law raises significant concerns about the potential for unnecessary and costly litigation. The recent Chapter Amendment, however, does provide some targeted relief. As indicated above, employers are now afforded notice and cure periods for claimed violations before an employee may bring an action, a short statute of limitations (6 months) to bring an action, elimination of the liquidated damages clause from the law, as well as the ability to seek costs and reasonable attorneys' fees in the event of a frivolous claim is brought. These provisions provide some balance against the impact of these new laws.

As the Commissioner works with the Department of Health on model standards, additional clarifying guidance should be provided. Hinman Straub will continue to monitor the guidance and provide updates as they are available. However, if you have any questions in the interim, or require assistance in the implementation of this new law, please do not hesitate to contact our firm.