

1. Q - *Are Public Utilities exempt from this act?*

A – One of the exceptions from the section of the HERO Act that requires the Airborne Infectious Disease Exposure Prevention Plan does exempt what are commonly referred to as public employers. The language from the NYSDOL's standard reads as follows: ***Public Employers - Employees or independent contractors of the state, any political subdivision of the state, a public authority, or any other governmental agency or instrumentality.***

A public utility may or may not fit into this exception. You would need to verify if the public utility is possibly a public authority or any of the other described exceptions. If the public utility is considered one of the exceptions identified by the State then yes, the public utility would be exempt from the section of the HERO Act that requires the Airborne Infectious Disease Exposure Prevention Plan.

2. Q - *Are outpatient practices subject to the HERO Act?*

A - One of the exceptions from the section of the HERO Act that requires the Airborne Infectious Disease Exposure Prevention Plan does exempt what are generally considered to be healthcare organizations. The language from the NYSDOL's standard reads as follows: ***Any employee within the coverage of a temporary or permanent standard adopted by the Occupational Safety and Health Administration setting forth applicable standards regarding COVID-19 and/or airborne infectious agents and diseases.***

Thus, the employer of these employees (within the coverage of a temporary or permanent standard) would be exempt from the section of the HERO Act that requires the Airborne Infectious Disease Exposure Prevention Plan.

An employer would need to determine if their operations (and thus the employees) are covered by OSHA's Emergency Temporary Standard (ETS) for COVID-19. OSHA has published a flow chart that organizations can use to determine if they are covered by the OSHA ETS. This flowchart can be found at <https://www.osha.gov/sites/default/files/publications/OSHA4125.pdf>

Answering the specific questions found in the OSHA flow chart will guide you to determine whether or not a specific outpatient practice is covered by the OSHA ETS, and thus not covered by the section of the HERO Act that requires the Airborne Infectious Disease Exposure Prevention Plan.

3. Q – *Could you provide further clarification or more details for the healthcare industry, specifically primary care providers?*

A – See the answer to question #2.

4. Q - *Can we use the template online and be compliant?*

A – Yes. Properly using one of the model programs provided by the NYSDOL will comply with the requirement to have an Airborne Infectious Disease Exposure Prevention Plan.

5. Q - *If you use serviced offices, presumably many of these requirements fall on the office providers? And what about if your employees now ordinarily work from home?*

A – If an employer is leasing office space in which their employees work, it is their (the employer's responsibility) to comply with the HERO Act.

The NYSDOL has stated that a workplace is defined (for the HERO Act) as follows: ***The worksites for which employers must adopt plan(s) are now explicitly limited to those "over which an employer has the ability to exercise control." Worksites do not include telecommuting or telework sites over which the employer lacks the ability to exercise control or vehicles.***

So an employee's residence or telework site would not be covered by the HERO Act. However, if you have locations where employees do work (such as an office, shop, warehouse, construction site, etc.) those work places would be covered by the HERO Act.

NOTE – although the NYSDOL has indicated that vehicles are not considered a workplace, my interpretation is that for employers that have company owned vehicles that are operated by employees in the course of employment (think of a delivery / transportation service) then these vehicles would be a workplace covered by HERO Act. That is my current interpretation and this may be clarified in the future by the NYSDOL.

6. Q - *Who is responsible for training temporary employees on a client site?*

A – Based on language from the HERO Act, temporary employees are included in the definition of employees covered under this Act. Therefore, the employer utilizing the temporary employee would be required to meet all aspects of the HERO Act (including training) for temporary employees. This is the language from the original legislation for the HERO Act.

Employee shall mean any person providing labor or services for remuneration for a private entity or business within the state, without regard to an individual's immigration status, and shall include, but not be limited to, part-time workers, independent contractors, domestic workers, home care and personal care workers, day laborers, farmworkers and other temporary and seasonal workers. The term shall also include individuals working for staffing agencies, contractors or subcontractors on behalf of the employer at any individual work site, 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 chapter. The term shall not include employees of the state, any political subdivision of the state, a public authority, or any other governmental agency or instrumentality.

7. Q - *Are outpatient practices subject to the HERO act?*

A – Please see the answer to question #2.

8. Q - *We have a few sites that fall under the OSHA ETS, remaining sites that will fall under NY Hero Act plan requirements. With the OSHA ETS being "temporary" (although date unknown as to when it is no longer in place) should we just make sure our plan covers all sites/locations as appropriate anyway?*
A - The NYSDOL does not speak to this situation. At this point it is not possible to know for certain what their position will be when the OSHA ETS is no longer in place. Your thought to develop a plan that will cover all of your locations does appear to be a prudent idea.
9. Q - *We have a safety handbook and an employee handbook. Can we put this policy in the safety handbook or does it have to go in the employee handbook?*
A – The NYSDOL states the Airborne Infectious Disease Exposure Prevention Plan must be added to the employer’s handbook.
10. Q - *Is the 10-employee trigger for FTE basis?*
A – No. The NYSDOL’s definition of employee for the HERO Act includes all employees, including those that work less than full time. Please see the answer in question #6 for the full definition of employee.
11. Q - *Do we need this plan regardless how many employees you have? We have under 10.*
A – Yes, covered employers must comply with the Airborne Infectious Disease Exposure Prevention Plan no matter the number of employees. The second part of the HERO Act, the Safety Committee, is only required for employers with 10 or more employees.
12. Q - *Thanks for clarifying that this doesn’t apply to people working from home. If all our employees work remotely, do we need a plan at all? Or do we still need a plan but with practically nothing in it*
A – You would still need the plan for any other covered workplace you may have, such as an office.
13. Q - *Is it 10 FTE employees? We are well under 10 FTE but over due to part-time employees*
A – Please see the answers to questions #11 and #6.
14. Q - *The HERO act says that employers shall provide the AIDEPP to employees within 30 days of adoption. Does this mean each employee must receive a copy or does it mean it needs to be available?*
A – My interpretation is that employers must provide a copy to employees. Per the NYSDOL, employers have 60 days after the publication of the model plans, or until September 4, 2021, to distribute and communicate the plans to employees. Employers are required to conduct a verbal review of employer policies, employee rights under this section and section 218-b of the labor law, and the employer’s exposure prevention plan. Employers must add the plan to their employee handbook, distribute their adopted plans to newly hired employees at the time of hire and to all employees within 15 days after reopening after a period of closure due to airborne infectious disease.

15. Q - *The language says PERMIT the formation of a committee. Do employers have to form a committee if the employees don't want one?*

A – The portion of the HERO Act that covers safety committees does not specifically answer this. My interpretation is that permitting employees to form a committee does not mean employers must form a committee if the employees don't want one. Remember, the law requires the committee to be jointly chaired and it must consist of 2/3 of non-supervisory employees. So it would not be possible to have the committee meet the requirements without non-supervisory employee participation.

I am anticipating the NYSDOL will issue additional guidance on the safety committee requirement.

16. Q - *If your company spans multiple states, how does the 2/3 apply, would it be of NYS employees or general multi-state non-supervisors?*

A – Per the NYSDOL's standard on the Airborne Infectious Disease Exposure Prevention Plan section of the HERO Act, they state that this section (the plan section, and not specifically the safety committee section) covers "Employers with worksites located in New York State". Thus, extrapolating that to the safety committee, I would suggest that an employer would only count those employees in the State of NY.

17. Q - *What if no one volunteers for the safety committee?*

A – Please see the answer to question #16.

18. Q - *Can you review the bargaining unit selecting the participants for the safety committees?*

A – The NYSDOL states **If a collective bargaining agreement is in place, the collective bargaining representative shall be responsible for the selection of employees.**

19. Q – *What about seasonal businesses?*

A – Seasonal operations are covered under the HERO Act.

20. Q - *We are a staffing agency, if we just use the model plan and give that to each employee along with the employee handbook does that cover us? Also for a safety committee, can I just use our internal staff?*

A – The general model plan appears to be the best model plan to use for a staffing agency. As far as your responsibilities to communicate the plan to the employees - you do have to provide employees the plan - and more. Per the NYSDOL, employers have 60 days after the publication of the model plans, or until September 4, 2021, to distribute and communicate the plans to employees. Employers are required to conduct a verbal review of employer policies, employee rights under this section and section 218-b of the labor law, and the employer's exposure prevention plan. Employers must add the plan to their employee handbook, distribute their adopted plans to newly hired employees at the time of hire and to all employees within 15 days after reopening after a period of closure due to airborne infectious disease.

For the safety committee question – using just the internal staff certainly appears to make the most sense. However, both your internal staff and the staff that are working at your businesses are considered employees. Considering the employer cannot select who is on the safety committee, the employer

deciding that only internal staff can be on the committee could be problematic. This is a question I am asking the NYSDOL.

21. Q - *Is there a minimum number of employees needed for the safety committee?*

A – No. The NYSDOL has not indicated a minimum total number of employees that are required to sit on the safety committee.

22. Q - *Is it correct that the employer is to ALLOW a safety committee to form, but it is up to the employees to initiate its formation?*

A – Overall yes. The NYSDOL states that employers must “permit” employees to establish and administer a joint labor-management workplace safety committee. The word permit is synonymous with allow. The NYSDOL further states that the non-supervisory employees are NOT selected by the employer.

23. Q - *If employees do not have interest in safety committee for this, wouldn't you have to offer that again at some point?*

A – There is currently no requirement to do so. This idea may however be addressed by future guidance from the NYSDOL.

24. Q – *Does a safety committee need to be established now or upon an issuance of an airborne emergency?*

A – No. The safety committee requirement due date is November 1, 2021

25. Q - *We are not required to submit these to DOL?*

A – Correct. At this point there is nothing in the HERO Act that requires employers to submit anything to the NYSDOL.

26. Q - *Does this law apply to tribal member-owned businesses that are on reservation land?*

A – I do not know what jurisdiction the NYSDOL may or may not have regarding this law and enforcing it on sovereign lands. I am attempting to get an answer to this from the NYSDOL.

27. Q - *What if you have delivery drivers for your restaurant that use their own vehicles...I'm assuming we (as the employer) have no control over their vehicles as a "worksites".*

A – The section of the HERO Act for the Airborne Infectious Disease Exposure Prevention Standard states that a workplace does not include telecommuting or telework sites over which the employer lacks the ability to exercise control or vehicles. In your specific situation I would consider these employee-owned vehicles not a workplace.

28. Q - *Section IIB - what is Engineering Controls? We lease our space (don't own) - Is that the landlord's responsibility?*

A – In regard to the Airborne Infectious Disease Exposure Prevention plans, engineering controls can include a number of potential controls such as improving ventilation, automatic disinfection systems, changing workplace layouts to avoid congregation of employees, etc.

The NYSDOL states where minimum controls alone will not provide sufficient protection for employees, additional controls from the following hierarchy may be necessary. Employers should determine if the following are necessary (they then list example engineering controls).

The NYSDOL is stating it is the employer's responsibility to determine what engineering controls may be necessary. They do not speak to the situation of the employer leasing the workplace and thus necessitating the landlord to get involved with some of the specific engineering controls, i.e. ventilation.

There may be some engineering controls you can do and some you may need the landlord's involvement with. I would suggest that once you identify engineering controls that you need the landlord's assistance with you very clearly document all your efforts to get the landlord's assistance and support.

Additionally, the landlord may have their employees working on occasion in this same workspace, and this would mean the landlord would also have responsibility to address engineering controls.