Labor Day 2021 saw another protection being implemented for workers in New York State: The NY HERO Act was triggered when the New York State Department of Health (NYSDOH) designated COVID-19 as a highly contagious airborne disease. The act mandates comprehensive workplace health and safety protections. It also requires all employers to adopt a workplace safety plan that addresses airborne infectious diseases.

The act's goal, which was signed into law in May 2021, is to prepare employers to implement an airborne infectious disease management plan for the next pandemic. At the time of the law's signing, the pandemic showed signs of waning, with more vaccinations occurring and the number of hospitalizations dipping.

However, vaccine uptake has slowed. A new variant – Delta – has altered the expectations of both health officials and the public. This new strain has changed the contagiousness, spread, hospitalization and medical system infrastructure strain projections. The existence of the NY HERO Act in and of itself is an example of the patchwork of pandemic management strategies throughout the nation.

With the passage of the law in May 2021, employers were expected to have:

1. Written Airborne Infectious Disease Exposure Prevention Plan (deadline was August 5, 2021).
2. Verbally communicated this plan to employees (deadline was September 5, 2021).

With the designation coming down on Labor Day, employers are now required under the NY HERO Act to take the following actions:

1. Update the plan to conform to the most current information and operational realities.
2. Implement the control measures laid out in the written plan.
3. Provide verbal communication about anti-retaliation measures: employees shall not be discriminated against, threatened, retaliated against, have adverse actions taken against them for exercising their right to report a violation or a good faith reasonable belief that a violation has occurred. These protections allow for employees to refuse to work where they reasonably believe in good faith that doing so would expose them or others to an unreasonable risk of exposure, so long as they notify the employer of this problem, and the employer failed to cure the condition(s), or that employer should have reasonably known about the inconsistent working condition and kept it so. This notification from employee to employer can be made without limitation to format recording the existence of a potential risk of exposure. This documentation should be kept for two years as of the date of the conclusion of NYSDOH disease designation.
4. Provide each employee with a copy of the plan in English or the primary language, if available.
5. Post a copy of the plan in a visible and prominent location at the worksite (except if worksite is a vehicle).
6. Ensure a copy of the plan is accessible to all employees during all work shifts.
7. Employers with 10 or more employees must permit (not implement) employees to establish and administer a joint labor-management workplace safety committee, two-thirds of which must be non-supervisory staff. This committee will be authorized, but not limited to, raising health and safety concerns, complaints and violations employers must respond to.
Additionally, review all workplace health and safety policies, including policies required under the NY HERO Act, regularly schedule meetings up to two hours during work hours at least once per quarter and provide a maximum of four hours of training – by 11/1/2021.

Note: Employers can substitute their existing labor-management workplace safety committee if it is consistent with the requirements set forth.

With New York as a model, employers across the country should be considering drafting their own Airborne Infectious Disease Prevention Plan. NFP recommends including the following in your plan:

1. Assign enforcement responsibilities to ensure adequate enforcement of the plan.
2. Monitor and maintain exposure controls.
3. Regular checks for updated information and guidance provided by DOH and CDC, and update plan accordingly.
4. Designate one or more supervisory employees to enforce compliance with the plan, as it applies to employees, customers, contractors, members of the public within the workplace.
5. Ensure that no individual who is not a supervisory employee has responsibility for overseeing compliance with plan.

What controls do you need to have in place? We suggest the following:

1. Select appropriate controls based on the types and level of exposure risks employees have during all activities performed at work.
2. Include health screenings at the beginning of the workday per DOH or CDC guidelines.
3. Require medical removal and immediate isolation of any symptomatic individuals onsite.
4. Require testing, isolation and quarantine for symptomatic individuals before allowing them to return to work; inform employees on protocols.
5. Cover cost of face coverings deemed appropriate and when they should be worn per CDC and DOH.
6. Enforce physical distancing as per CDC and DOH (minimum six feet apart).
7. Install hand hygiene facilities and sanitizers.
8. Develop a cleaning and disinfecting regimen for immediately cleaning contaminated items and surfaces, frequently cleaning high-touch items and surfaces, cleaning between users for shared tools/equipment, and daily cleaning of regular surfaces in common areas, shared vehicles, etc. (at least daily).
9. Clean before disinfecting dusty or dirty surfaces. Methods should minimize dispersal.
10. Allow as much time as possible to pass – isolate the area – before cleaning and disinfecting potentially infectious materials and areas.
11. Determine what personal protective equipment is required, ensure its functionality and adequacy, and proper use.
12. Augment current ventilation, install and use HEPA filtration and other HVAC related controls to limit exposures.

For templates specific to your industry, visit the New York Department of Labor website.

Even in the absence of any state-level or federal action requiring action plans to address airborne contagions, it behooves organizations to adopt and implement their own safety measures. Staying ahead of risks allows your organization to pivot quickly should a government mandate be issued.

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