

September 15, 2021

# COVID-19 Update: President Biden Announces COVID-19 Vaccine Mandates and New York State Designates COVID-19 as an Airborne Infectious Disease under the NY HERO Act, Triggering Employer Obligations

Last week, President Biden announced several initiatives and measures designed to reduce the number of unvaccinated individuals across the nation, including a forthcoming emergency rule that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any unvaccinated workers to submit a negative COVID-19 test result on a weekly basis.<sup>1</sup> It is expected that the Occupational Safety and Health Administration (“OSHA”) will issue an Emergency Temporary Standard (“ETS”) to implement this vaccination mandate.

On September 6, 2021, New York State designated COVID-19 as an “airborne infectious disease” under the New York Health and Essential Rights Act (the “NY HERO Act”)<sup>2</sup> which became effective July 4, 2021.<sup>3</sup> The NY HERO Act requires employers, among other things, to activate their disease exposure prevention plan when an airborne infectious disease designation by the New York State Commissioner of Health (the “Commissioner”) is made. The designation will remain in effect until September 30, 2021, at which point the Commissioner will determine whether to continue the designation.<sup>4</sup>

## Key Takeaways

- In the coming weeks, OSHA is expected to issue an ETS that will require all employers with 100 or more employees to ensure that their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative COVID-19 test

<sup>1</sup> A transcript of President Biden’s September 9, 2021 speech (the “September 9 Transcript”) can be found [here](#).

<sup>2</sup> Commissioner’s Designation Pursuant to Labor Law § 218-b for COVID-19 (Sept. 6, 2021), [https://health.ny.gov/press/releases/2021/docs/2021-09-06\\_commissioner\\_designation.pdf](https://health.ny.gov/press/releases/2021/docs/2021-09-06_commissioner_designation.pdf).

<sup>3</sup> Governor Kathy Hochul, Governor Kathy Hochul Announces Designation of COVID-19 as an Airborne Infectious Disease Under New York State’s HERO Act (Sept. 6, 2021), <https://www.governor.ny.gov/news/governor-kathy-hochul-announces-designation-covid-19-airborne-infectious-disease-under-new>.

<sup>4</sup> *Supra* note 2.

result at least weekly before coming to work. It is expected that the ETS will also require covered employers to provide paid time off for the time it takes for workers to get vaccinated or to recover from any related symptoms post-vaccination.

- Per the Commissioner’s recent designation of COVID-19 as an airborne infectious disease under the NY Hero Act, employers in New York are now required to promptly activate their exposure prevention plans. Pursuant to the model plan provided by the New York State Department of Labor (the “NYS DOL”), employees are required, at a minimum, to wear face coverings and maintain physical distancing as much as feasible while the designation remains in effect.

## Forthcoming Federal Vaccine Mandate

The Biden Administration announced that OSHA is developing an ETS that will require all employers with 100 or more employees (i) to ensure their workers are fully vaccinated or require any workers who remain unvaccinated to produce a negative COVID-19 test result on at least a weekly basis before coming to work and (ii) to provide paid time off for the time it takes for workers to get vaccinated or to recover from any related symptoms post-vaccination.<sup>5</sup>

President Biden, as part of his national strategy to combat COVID-19 (the “COVID-19 Action Plan”), intends to “reduce the number of unvaccinated Americans by using regulatory powers and other actions to substantially increase the number of Americans covered by vaccination requirements.”<sup>6</sup> These vaccination requirements, according to the White House, “will become dominant in the workplace.”<sup>7</sup> In unveiling his new COVID-19 Action Plan, President Biden stated that “the vaccine requirements . . . will affect about 100 million Americans—two-thirds of all workers.”<sup>8</sup>

When published, the forthcoming ETS will be OSHA’s second ETS related to COVID-19. In June 2021, OSHA issued a COVID-19 Healthcare ETS, which required certain healthcare employers to develop and implement effective COVID-19 plans.<sup>9</sup> The COVID-19 Healthcare ETS required covered employers to provide reasonable time off and paid leave for COVID-19 vaccinations and vaccine side effects<sup>10</sup> and provided that “[u]nder various anti-discrimination laws, workers who cannot be vaccinated because of medical conditions, such as allergies to vaccine ingredients, or certain religious beliefs may ask for a reasonable accommodation from their employer.”<sup>11</sup> The COVID-19 Healthcare ETS became effective immediately upon publication in the Federal Register and required covered employers to comply with most provisions within 14 days and the remaining provisions within 30 days.<sup>12</sup>

It is expected that OSHA will publish the ETS in the coming weeks.<sup>13</sup>

## NY HERO Act

### Overview of the NY HERO Act

The NY HERO Act, which broadly covers businesses in New York “employing, hiring, or paying for the labor of any individual,”<sup>14</sup> requires covered employers to establish an “airborne infectious disease exposure prevention plan” either by adopting the relevant model plan promulgated by the Commissioner (the “NY HERO Act Model Plan”)<sup>15</sup> or by establishing an alternative plan that equals or exceeds the minimum standards provided by the NY HERO Act Model Plan.<sup>16</sup> The NY HERO Act, among other

<sup>5</sup> White House, Path Out of the Pandemic: President’s Biden’s COVID-19 Action Plan, <https://www.whitehouse.gov/covidplan/#vaccinate>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> September 9 Transcript.

<sup>9</sup> OSHA, COVID-19 Emergency Temporary Standard, 29 C.F.R. 1910, Subpart U, [https://www.osha.gov/laws-regs/regulations/standardnumber/1910#1910\\_Subpart\\_U](https://www.osha.gov/laws-regs/regulations/standardnumber/1910#1910_Subpart_U).

<sup>10</sup> 29 C.F.R. § 1910.502(m).

<sup>11</sup> 29 C.F.R. § 1910.502(a)(2)(vii) (Note to paragraph (a)(2)).

<sup>12</sup> See OSHA Subpart U—COVID-19 Healthcare ETS, <https://www.osha.gov/sites/default/files/publications/OSHA4122.pdf>.

<sup>13</sup> See <https://www.natlawreview.com/article/osha-to-require-employers-100-employees-to-ensure-workers-are-vaccinated-or-tested>.

<sup>14</sup> N.Y. Lab. Law § 218-b(1)(d).

<sup>15</sup> NY Hero Act Model Plan, <https://dol.ny.gov/system/files/documents/2021/07/model-airborne-infectious-disease-exposure-prevention-plan-p765.pdf>.

<sup>16</sup> N.Y. Lab. Law § 218-b(4)(a).

things, prohibits employers from discriminating or retaliating against an employee for exercising their rights under the statute or the applicable exposure prevention plan and requires employers to post their plan at the worksite and, if applicable, include the same in their employee handbook.<sup>17</sup> Upon the Commissioner's designation that a disease is an "airborne infection disease" under the HERO Act, employers are required to promptly activate their exposure prevention plans and take steps to ensure that such plans are adequately implemented.<sup>18</sup>

### Designation of COVID-19 under the NY HERO Act

On September 6, 2021, Governor Kathy Hochul announced the designation of COVID-19 as an airborne infectious disease under the NY HERO Act. Accordingly, covered employers are required to:

- (1) immediately review their exposure prevention plan and update the plan, if necessary, to ensure that it incorporates current information, guidance, and mandatory requirements issued by federal, state, or local governments;
- (2) finalize and promptly activate the worksite exposure prevention plan;
- (3) provide a verbal review to employees of employer policies, employee rights under the NY HERO Act, and the employer's exposure prevention plan to employees;
- (4) provide each employee with a copy of the exposure prevention plan in English or the employee's primary language, if available, and make the plan accessible to employees by posting a copy at the worksite; and
- (5) while the designation remains in effect, ensure that the exposure prevention plan is effectively followed by (a) designating one or more supervisory employees to enforce compliance with the plan; (b) monitoring and maintaining exposure controls; and (c) regularly checking for updated information provided by the New York State Department of Health (the "NYS DOH") and the Centers for Disease Control and Prevention (the "CDC") and updating the exposure prevention plan as necessary.

### NY HERO Act Model Plan

The NY HERO Act Model Plan requires that employers maintain the following minimum controls while the designation remains in effect:

- **Stay Home When Sick:** If employees develop symptoms of COVID-19, they should not be in the workplace. Sick employees should inform the designated contact and follow the NYS DOH and CDC guidance regarding medical care and isolation.
- **Health Screening:** Employees should be screened for symptoms of COVID-19 before entering the workplace. Employees are to self-monitor for any symptoms of COVID-19.
- **Face Coverings:** Employers should ensure that employees wear face coverings "to the greatest extent possible."
- **Physical Distancing:** Employers should ensure that employees maintain physical distancing "as much as feasible."
- **Hand Hygiene:** Employers should ensure that employees can maintain hand hygiene by providing hand-washing facilities with an adequate supply of water, soap, or other hand-sanitizing supplies.
- **Cleaning and Disinfection:** Employers should provide clean and disinfected workplace surfaces and objects in accordance with appropriate methods and schedules based on specific workplace conditions.

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<sup>17</sup> *Id.* §§ 218-b(6); (8).

<sup>18</sup> New York State Department of Labor, NY Hero Act Airborne Infectious Disease Exposure Prevention Standard at B(8), <https://dol.ny.gov/system/files/documents/2021/08/p764.pdf>.

- **Special Accommodations for Individuals with Added Risk Factors:** Some employees, due to age, underlying health conditions, or other factors, may be at increased risk of severe illness if infected with COVID-19. Such employees who need an accommodation should inform their supervisor or the HR department.

NY HERO Act Model Plan also requires that employers determine whether additional controls beyond these minimum controls are necessary and implement such controls as necessary.<sup>19</sup>

The designation of COVID-19 under the NY HERO Act will remain in effect until September 30, 2021, at which point the Commissioner will determine whether to continue the designation.

### Implications for Employers

- Given that OSHA is expected to issue the ETS in the coming weeks, employers may want to take steps now to prepare themselves, including communicating with their employees about the anticipated requirements of the forthcoming OSHA ETS, encouraging employees to get vaccinated, and preparing for the requirement that covered employers must provide reasonable time off and paid leave for COVID-19 vaccinations and vaccine side effects.
- Employers should adopt an exposure prevention plan, if they have not done so already, and may want to review their plan to ensure that it is in compliance with the requirements of the NY HERO Act and other applicable public health guidance.
- Employers should stay abreast of any further developments regarding the OSHA ETS and further guidance on the NY HERO Act standard and requirements.
- Additionally, employers should monitor COVID-19 guidance from relevant federal, state, and local authorities as the public health situation is rapidly developing.

President Biden's COVID-19 Action Plan can be found [here](#).

The text of the NY HERO Act can be found [here](#).

The NY HERO Act Airborne Infection Disease Exposure Prevention Standard can be found [here](#).

The NY HERO Act Model Plan can be found [here](#).

Additional details regarding the NY Hero Act from the NYS DOL will be shared [here](#).

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<sup>19</sup> NY Hero Act Model Plan, <https://dol.ny.gov/system/files/documents/2021/07/model-airborne-infectious-disease-exposure-prevention-plan-p765.pdf>.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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