

September 28, 2021

# COVID-19 Update: New York HERO Act Model Plan Is Updated With Respect To Face Covering and Social Distancing Requirements

Last week, New York State issued an updated New York Health and Essential Rights Act (the “NY HERO Act”) model plan (the “Model Plan”) with the new face covering and physical distancing guidance “applicable for most workplaces.”<sup>1</sup> In workplaces where all individuals on premises are fully vaccinated, appropriate face coverings are recommended but not required. Physical distancing should be maintained to the extent feasible and consistent with guidance from the New York State Department of Health (the “DOH”) and the Centers for Disease Prevention and Control (the “CDC”).<sup>2</sup>

## Key Takeaways

- The updated NY HERO Act Model Plan provides that (1) face coverings are “recommended, but not required” in workplaces where all individuals on premises are fully vaccinated and (2) physical distancing should be maintained “to the extent feasible.” The plan previously required that employees, at a minimum, wear face coverings and maintain physical distancing as much as feasible.

## Updated NY HERO Act Model Plan

As we previously reported,<sup>3</sup> the NY HERO Act requires employers to promptly activate their exposure prevention plans and take steps to ensure that such plans are adequately implemented upon designation by the New York State Commissioner of Health (the “Commissioner”) that a disease is an “airborne infectious disease.”<sup>4</sup> In early September, Governor Kathy Hochul announced the designation of COVID-19 as an airborne infectious disease, triggering employer obligations, including to activate an exposure prevention plan and to provide a verbal review of such plan and make it accessible to employees.<sup>5</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.

<sup>1</sup> NY Hero Act Model Plan, [https://dol.ny.gov/system/files/documents/2021/09/p765-ny-hero-act-model-airborne-infectious-disease-exposure-prevention-plan-09-21\\_0.pdf](https://dol.ny.gov/system/files/documents/2021/09/p765-ny-hero-act-model-airborne-infectious-disease-exposure-prevention-plan-09-21_0.pdf).

<sup>2</sup> CDC, When You’ve Been Fully Vaccinated, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html> (updated Sept. 16, 2021).

<sup>3</sup> For additional details about the NY HERO Act and the designation of COVID-19 as an airborne infectious disease thereunder, refer to our [September 15, 2021 memorandum](#).

<sup>4</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>.

<sup>5</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>.

The Model Plan made the following changes in the sections concerning face coverings and physical distancing:

**Face Coverings**

In workplaces where all individuals on premises, including but not limited to employees, are fully vaccinated, face coverings are “recommended, but not required.” For all other workplaces, employees are required to wear appropriate face coverings in accordance with guidance from the DOH and the CDC that unvaccinated individuals wear a mask in indoor public places.<sup>6</sup> The previous version of the plan required employees to wear face coverings “throughout the workday to the greatest extent possible.”

Individuals are considered fully vaccinated (1) two weeks after their second dose in a two-dose series, such as the Pfizer or Moderna vaccines, or (2) two weeks after a single-dose vaccine, such as Johnson & Johnson’s Janssen vaccine.<sup>7</sup>

**Physical Distancing**

The Model Plan requires physical distancing “to the extent feasible” in accordance with guidance from the DOH and the CDC, removing prior references to “avoiding unnecessary gatherings” and “using a face covering when physical distance cannot be maintained.” The Model Plan still requires employers to determine whether additional controls beyond certain minimum controls are necessary and to implement such controls as necessary.<sup>8</sup>

**Implications for Employers**

- 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 may want to determine whether to revise their exposure prevention plan’s requirements regarding face coverings and social distancing per the Model Plan.
- Employers may want to stay abreast of any further guidance on the NY HERO Act standard and requirements. Additionally, employers may want to monitor COVID-19 guidance from relevant federal, state, and local authorities as the public health situation is rapidly developing.

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

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

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

Additional details regarding the NY HERO Act from the Department of Labor will be shared [here](#).

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<sup>6</sup> CDC, How to Protect Yourself & Others, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (updated Aug. 13, 2021).

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

<sup>8</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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