

Locke Lord QuickStudy: Update – New York Revises Its Model Airborne Infectious Disease Exposure Prevention Plan Under the HERO Act

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On September 10, 2021, we alerted New York employers in a [QuickStudy](#) about COVID-19 being officially designated as an “airborne infectious disease” under the New York Health and Essential Rights Act (commonly referred to as the “HERO Act”). This designation, which has since been extended through December 15, 2021, required nearly all New York employers to take immediate action to implement their previously created or adopted workplace safety plans. Our prior update also included a link to the New York Labor Department’s Model Airborne Infectious Disease Exposure Prevention Plan (the “Model Plan”) and various industry-specific model plans, which the New York Department of Labor (“DOL”) released for employers to consider and/or adopt.

The DOL recently released updates to the Model Plan concerning face coverings and physical distancing in the workplace. Regarding the DOL’s attempt to clarify when masks are required in the workplace, the Model Plan’s revision now provides for the following two scenarios:

1. [APPLICABLE FOR MOST WORKPLACES] *Employees will wear appropriate face coverings in accordance with guidance from State Department of Health or the Centers for Disease Control and Prevention, as applicable.*
2. [APPLICABLE FOR WORKPLACES where all individuals on premises, including but not limited to employees, are fully vaccinated – defined as having completed a federally authorized or approved vaccination series for an airborne infectious disease designated as a highly contagious communicable disease that presents a serious risk of harm to the public health (as is currently the case for COVID-19, pursuant to the Commissioner of Health’s designation)] *Appropriate face coverings are recommended, but not required, consistent with State Department of Health and the Centers for Disease Control and Prevention applicable guidance, as of September 16, 2021.*

Current guidance from the [DOH](#) and [CDC](#) relating to face coverings is likely to change, so it is important for employers to check regularly as to any modifications to the same. With few employers having all employees and individuals on premises as fully vaccinated, it is advisable for those employers to use the first of the two above-referenced scenarios.

Regarding the DOL’s revised guidance as to social distancing in the workplace, the Model Plan removes references to “avoiding unnecessary gatherings” and “using a face covering when physical distance cannot be maintained.” Instead, its social distancing section now reads: *“Physical distancing will be used to the extent feasible, as advised by guidance from State Department of Health or the Centers for Disease Control and Prevention, as applicable.”* However, the Model Plan still requires employers to list the health and safety controls

it will implement in circumstances where distancing cannot be maintained.

New York employers who previously adopted the Model Plan or drafted their own should review and revise their workplace safety plan based on the above-referenced recent revisions.

Those employers with ten or more employees should also remain mindful of Section 2 of the HERO Act (effective November 1, 2021), which requires those employers to allow employees to establish a joint employer-employee workplace health and safety committee authorized to raise health and safety issues and evaluate workplace health and safety policies. The DOL plans to provide additional guidance for Section 2 of the Hero Act.

Additional information relating to the HERO Act can be found within the DOL's recently issued FAQs, available on its [website](#).

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