



Legislative Affairs  
One Whitehall Street  
New York, NY 10004  
212-607-3300  
www.nyclu.org

**Comments of the New York Civil Liberties Union  
to  
The New York State Department of Labor  
regarding  
12 NYCRR 840.1, Proposed Regulations Implementing Labor Law § 218-b**

**Wednesday, November 17, 2021**

The New York Civil Liberties Union (NYCLU) is grateful for the opportunity to submit the following comments regarding the proposed regulations implementing the New York H.E.R.O. Act (NY HERO), in relation to the prevention of airborne infectious disease in the workplace.

The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and over 190,000 members and supporters. The NYCLU defends and promotes the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including the fundamental right of every New Yorker to health and safety protections.<sup>1</sup> Through an integrated program of litigation, legislative advocacy, public education and community organizing, the NYCLU has long been a leader in the fight to ensure every person’s ability to enjoy the assurance of their fundamental rights in the State of New York.

We submit these comments to: 1. illuminate the background and intent of the NY HERO legislation; 2. urge the department of labor to provide clear and enforceable standards for every work site in New York; and 3. follow the legislature’s specific requirements for subject matter areas to be included in every model airborne

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<sup>1</sup> Article XVII of the New York Constitution provides that “[t]he protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefore shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine.” N.Y. Const. art. XVII, § 3

infectious disease exposure prevention standard, as required by the State Administrative Procedure Act.<sup>2</sup>

### **Background and Intent of NY HERO**

In March of 2020, as New York was already in the grips of the current pandemic, Governor Cuomo declared a state of emergency in response to COVID-19 and ordered all but essential workers to shelter in place. What became clear in the weeks and months that followed was that, for the men and women risking their health and lives every day to perform essential work, there were not sufficient protections in place to guard against the exposure to airborne infectious disease at work. Legislation would be required to protect the lives and health of workers, which would in turn protect the public as well.

On May 5, 2021, Governor Cuomo signed the NY HERO into the law, enacting the first in the nation permanent airborne infectious disease exposure prevention standard for all workplaces in New York.<sup>3</sup> The law is straightforward. A core provision is its requirement that the department of labor, together with the department of health, create industry-specific model airborne infectious disease exposure prevention standards, and a general standard for work sites not covered by the industry-specific standards. The standards are intended to establish minimum requirements for preventing exposure to airborne infectious diseases in the workplace to protect workers, their families and communities, and the public at large.

However, from the very beginning the regulations have caused confusion. Because of the various forms the department of labor utilized to publish its standard – including model plans, model templates, and one document entitled standards that contains not much more than a reiteration of the NY HERO language itself -- it has been unclear what constitutes a requirement versus a suggestion or guidance, and whether the industry-specific templates are in fact the standards required by the statute or something else. In addition, the regulations fail to include standards regarding subject matters that were explicitly required by the legislation. The current proposed regulations are therefore insufficient in both form and substance.

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<sup>2</sup> See *N.Y. A.P.A. Law § 100, et seq; Med. Soc'y of State of New York, Inc. v. Levin*, 723 N.Y.S.2d 133 (2001). See also, *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987).

<sup>3</sup> NY LABOR § 218-b.

## Proposed Form of the Regulations: Standards vs. Plans vs. Templates

At best, the regulations are confusing and fail to provide adequate guidance. At worst, they undermine the purpose of the law itself.

NY HERO expressly requires the creation of:

a model airborne infectious disease exposure prevention standard for industries representing a significant portion of the workforce, or those with unique characteristics requiring distinct standards... [and] a general model airborne infectious disease exposure prevention standard applicable to all worksites not included in the specific industry standards.<sup>4</sup>

Other than a “general provisions” section detailing the entities for whom the standard applies and for whom it does not,<sup>5</sup> the current regulations don’t even use the term “standard.” Subsection (b) of the regulations requires employers to establish written exposure prevention plans which “shall contain exposure controls identified in paragraph (c).”<sup>6</sup> Subsection (c), however, only incorporates some of the requirements set forth in the legislation. In addition, even for regulations that impose minimal burdens on employers - like social distancing and hand hygiene stations – the regulations run counter to the legislation by changing what was mandatory to “when possible”<sup>7</sup> or “to the extent practicable.”<sup>8</sup>

The regulations regarding industry specific plans suffer from the same defect. They require that plans “consider and incorporate”<sup>9</sup> controls outlined in the appropriate industry specific model templates that are published on the department of labor website. It is unclear why the term “consider” has been included. **Standards require mandatory and enforceable provisions.** If the regulations are to function as standards, the term consider must be deleted as it implies a suggestion and not a mandate.

It is also unclear whether the department of labor has published any industry specific standards at all. The referenced industry-specific templates that were

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<sup>4</sup> *Id.*

<sup>5</sup> *See* 12 NYCRR 840.1(a).

<sup>6</sup> 12 NYCRR 840.1(b).

<sup>7</sup> 12 NYCRR 840.1(c).

<sup>8</sup> *Id.*

<sup>9</sup> 12 NYCRR 840.1(b).

published on the DOL website are not enforceable standards.<sup>10</sup> Close examination reveals that what is required of employers, even under the “minimum controls during an outbreak” sections of the templates, are identical for each industry and lack any mandates for employers. Shockingly, the only people who are required to do anything during an airborne infectious disease outbreak are employees.

Below are the nine “requirements” that constitute the entirety of the minimum controls during an outbreak:

1. General Awareness: Individuals may not be aware that they have the infectious disease and can spread it to others. *Employees should* remember to:
  - Maintain physical distancing;
  - Exercise coughing/sneezing etiquette;
  - Wear face coverings, gloves, and personal protective equipment (PPE), as appropriate...
2. “Stay at Home Policy”: If an employee develops symptoms of the infectious disease, *the employee should* not be in the workplace. The *employee should* inform the designated contact and follow NYSDOH and CDC guidance regarding obtaining medical care and isolating.
3. Health Screening: Employees will be screened for symptoms of the infectious disease at the beginning of their shift.
4. Face Coverings:
  - **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....
5. Physical Distancing: 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....
6. Hand Hygiene: To prevent the spread of infection, *employees should* wash hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol....
7. Cleaning and Disinfection: See Section V of this plan [Section V covers training and information during a designated outbreak].
8. “Respiratory Etiquette”: Because infectious diseases can be spread by droplets expelled from the mouth and nose, *employees should* exercise appropriate

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<sup>10</sup> See Department of Labor, NY HERO Act, <https://dol.ny.gov/ny-hero-act>

respiratory etiquette by covering nose and mouth when sneezing, coughing or yawning.

9. Special Accommodations for Individuals with Added Risk Factors: Some employees, due to age, underlying health condition, or other factors, may be at increased risk of severe illness if infected. Please inform your supervisor or the HR department if you fall within this group and need an accommodation.<sup>11</sup>

The only delineation by industry in the templates is found under the section entitled, “advanced controls during an outbreak.” However, none of the advanced controls are mandated. That section begins, “For activities where the Minimum Controls alone will not provide sufficient protection for employees, additional controls from the following hierarchy *may be necessary*.”<sup>12</sup> Each subsequent subsection either begins with the phrase, “*employers should consider...*” or lists examples of types of protections, among which the employer is free to choose.<sup>13</sup> Once again, the regulations fail to create any enforceable standards to protect the health and lives of workers during an outbreak of an airborne infectious disease.

### **Failure to Issue Regulations for Standards Required by NY HERO.**

To guide the creation of model airborne infectious disease prevention standards, the NY HERO specifies eleven issue areas that all model standards must include. The eleven areas are not intended to be limiting, but the law is very clear that all model standards shall establish requirements related to procedures and methods for each of the issue areas.<sup>14</sup>

A critical piece of preventing the spread of airborne infectious disease is ventilation. Therefore, all model standards must establish requirements on procedures and methods for “compliance with applicable engineering controls such as proper air flow or exhaust ventilation.”<sup>15</sup> Inexplicably, however, there is no mention of ventilation in the minimum controls section of the models plans. Ventilation is mentioned in the advanced controls sections but only as a suggestion. All industry specific templates require only that employers “*should consider* appropriate controls to contain and/or

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<sup>11</sup> See e.g., Department of Labor, NY HERO Act, Model Airborne Infectious Disease Exposure Prevention Plan for Construction, <https://dol.ny.gov/system/files/documents/2021/09/p765b-ny-hero-act-construction-exposure-prevention-plan.pdf>. (emphasis added). The minimum controls section is identical for each industry specific template.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> N.Y. Lab. Law § 218-b.2.

<sup>15</sup> N.Y. Lab. Law § 218-b.2(h).

remove the infectious agent, prevent the agent from being spread, or isolate the worker from the infectious agent.”<sup>16</sup> Examples of engineering controls are provided, but choosing to implement any, some, or none of the controls is totally optional. With the enactment of NY HERO, New York has the opportunity to take the lead in preventing exposure to airborne infectious disease in the workplace, not only for COVID, but for the next airborne disease that arrives in our state.<sup>17</sup> The NYCLU strongly urges the department of labor, through these regulations, not to squander that opportunity.

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<sup>16</sup> See e.g., Department of Labor, NY HERO Act, Model Airborne Infectious Disease Exposure Prevention Plan for Construction, <https://dol.ny.gov/system/files/documents/2021/09/p765b-ny-hero-act-construction-exposure-prevention-plan.pdf> (emphasis added).

<sup>17</sup> The protections afforded under NY HERO have become even more critical now that the federal courts have enjoined the implementation of OSHA’s COVID-19 Emergency Temporary Standard. See *Fate of OSHA’s COVID-19 Vaccine ETS in the Hand of the Sixth Circuit Court*, National Law Review (November 17, 2021), <https://www.natlawreview.com/article/fate-osha-s-covid-19-vaccine-ets-hands-sixth-circuit-court>.