



121 STATE STREET
ALBANY, NEW YORK 12207-1693
TEL: 518-436-0751
FAX: 518-436-4751

MEMORANDUM

TO: **Memo Distribution List**

FROM: Hinman Straub P.C.

RE: Applicability of the NYS HERO Act on Healthcare

DATE: July 7, 2021

NATURE OF THIS INFORMATION: This is guidance relative to the NYS HERO Act.

DATE FOR RESPONSE OR IMPLEMENTATION: Implementation to begin as early as July 6, 2021

HINMAN STRAUB CONTACT PEOPLE: Sean Doolan, Elena DeFio Kean, and Kristin Foust

THE FOLLOWING INFORMATION IS FOR YOUR FILING OR ELECTRONIC RECORDS:

Category:	Suggested Key Word(s):
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As you know, the provisions of the New York State HERO Act (“NYS HERO Act”) became effective on July 4, 2021 as it relates to the implementation of an airborne infectious disease exposure prevention plan. To that end, New York State Department of Labor (“NYS DOL”) has released guidance and model plans. (NYS HERO Act, Protecting Workers from Airborne Disease, <https://dol.ny.gov/ny-hero-act>)

Pursuant to the law, employers must adopt a policy within the next 30 days. However, notwithstanding this obligation, the NYS DOL webpage provides the following statement:

“Currently, while employers must adopt plans as required by the law, as of the date of this writing no designation has been made and plans are not required to be in effect.” (Id.)

This is consistent with the fact that the State has lifted the state of emergency; however, it does not eliminate an employer’s obligation to have a plan. Therefore, the plan need not be utilized at this time, but rather created for future use.

NYS DOL also created industry specific plans for agriculture, construction, delivery services, domestic workers, emergency response, food service, manufacturing and industry, personal services, private education, private transportation and retail. There is no industry specific plan for health care.

In addition to the model plans, NYS DOL issued an Airborne Infectious Disease Exposure Prevention Standard: <https://dol.ny.gov/system/files/documents/2021/07/p764-the-airborne-infectious-disease-exposure-prevention-standard-v4.pdf>

A review of the standards reveals that the obligations under the NYS HERO Act do not apply to:

“Any employee within the coverage of a temporary or permanent standard adopted by the Occupational Safety and Health Administration setting forth applicable standards regarding COVID-19 and/or airborne infectious agents and diseases”. (Id.)

The standard goes on to state:

“The provisions of this section shall not be interpreted as relieving any employer from the requirements of any other state or federal guidance or requirements related to preventing the spread of an airborne infectious agent or disease to employees and third parties such as customers, contractors, and members of the public within the workplace.” (Id.)

Thus, healthcare providers¹ that are subject to the Emergency Temporary Standards (“ETS”) adopted by OSHA **are excused from the NYS HERO Act obligations**. This is important guidance

¹ Pursuant to the ETS, Healthcare providers are defined as employees that provide healthcare services or health care support services. The ETS defines “healthcare services” as:

services that are provided to individuals by professional healthcare practitioners (*e.g.*, doctors, nurses, emergency medical personnel, oral health professionals) for the purpose of promoting, maintaining, monitoring, or restoring health. Healthcare services are delivered through various means including: Hospitalization, long-term care, ambulatory care, home health and hospice care,

from the NYS DOL that clarifies any conflicting obligations under these laws. More importantly, under the ETS, a healthcare provider as defined by OSHA, is still obligated to ensure that there is a plan and it is in effect.

With regard to the ETS, please note that employers must have implemented their plan by July 6, 2021, and physical barriers, ventilation and training must be implemented by July 21, 2021. The link to the OSHA ETS model plan is https://www.osha.gov/sites/default/files/COVID-19_Healthcare_ET_S_Model_Written_Plan.docx

Hinman Straub will continue to monitor both the NYS DOL guidance relative to the NYS HERO Act and any OSHA-issued guidance relative to the ETS, and will provide updates as they are available. However, if you have any questions in the interim, or require assistance in the interpretation and implementation of these new laws and their requirements, please do not hesitate to contact Sean Doolan, Esq. (sdoolan@hinmanstraub.com), Elena DeFio Kean, Esq. (ekean@hinmanstraub.com) or Kristin Foust, Esq. (kfoust@hinmanstraub.com) at (518) 436-0751.

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emergency medical response, and patient transport. For the purposes of [the ETS], healthcare services include autopsies.

Id. at §1910.501(b).

The ETS defines “healthcare support services” as:

services that facilitate the provision of healthcare services. Healthcare support services include patient intake/ admission, patient food services, equipment and facility maintenance, housekeeping services, healthcare laundry services, medical waste handling services, and medical equipment cleaning/reprocessing services.

Id.