

NEW YORK STATE DEPARTMENT OF LABOR PROPOSES REGULATIONS ON HERO ACT WORKPLACE SAFETY COMMITTEES

Hodgson Russ Labor & Employment Alert
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As we reported [here](#), [here](#), [here](#), and [here](#), the New York Health and Essential Rights Act (“HERO Act”) was signed into law on May 5, 2021 and amended on June 14, 2021. The HERO Act added two new sections to the New York Labor Law:

- Section 218-b, which addresses the “Prevention of Occupational Exposure to an Airborne Infectious Disease” and took effect on June 4, 2021; and
- Section 27-d, which requires employers with 10 or more employees to allow employees to form “workplace safety committees” and took effect on November 1, 2021.

As a reminder, these new provisions do not apply to the state, any political subdivision of the state, any public authority, or any other governmental agency or instrumentality.

On December 22, 2021, nearly two months after Section 27-d took effect, the New York State Department of Labor (“NYSDOL”) issued a Notice of Proposed Rulemaking regarding the HERO Act’s workplace safety committee requirements. Here are the key takeaways from the proposed regulations:

Requests for Recognition

- For purposes of determining whether an employer is covered by Section 27-d, the employer must count all employees employed within the State of New York. This includes part-time and temporary or seasonal employees, as well employees on any type of paid or unpaid leave so long as the employer has a reasonable expectation that the employee will return to active employment.
- Workplace safety committees are to be established for each worksite following a written request for recognition by at least two non-supervisory employees who work at the worksite. A non-supervisory employee is defined as any employee who does not perform supervisory responsibilities, which includes but is not limited to the authority to direct and/or control the work performance of other employees. Managerial and executive employees are considered supervisory employees.

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- Upon the receipt of a request for recognition, the employer must respond to the request with “reasonable promptness.”
- Multiple requests for committee recognition must be combined and treated as a single request to form a committee. However, if a request for committee recognition is made after a committee has already been recognized, the request must be denied and referred to the established committee.
- Within five (5) days of recognition, employers shall provide notice to all employees at the worksite of the recognition.

Composition

- Workplace safety committees must be comprised of not less than two (2) non-supervisory employees and not less than one employer representative. The ratio of non-supervisory employees to employer representatives cannot be less than two non-supervisory employees to one employer representative. The committee must be co-chaired by one non-supervisory employee and one employer representative.
- Where there is no collective bargaining agreement in place, the non-supervisory employees who will serve on the committee are to be selected by and amongst the non-supervisory employees “as determined by the non-supervisory employees.” Employees can choose any method of selection, including (but not limited to), self-selection, nomination by co-workers, and elections. At a worksite where there is a collective bargaining agreement in place, the collective bargaining representative shall select the employee representatives.
- Workplace safety committees shall have a maximum of 12 members or one-third of the total number of employees at a worksite, whichever is fewer. Workplace safety committees at worksites that have fewer than 10 employees shall have three (3) members.
- Non-supervisory employees may not be members of two different workplace safety committees for the same employer, even if the committees relate to different worksites.
- Employers are prohibited from interfering with the selection of the non-supervisory employees of a workplace safety committee.

Rules

- Workplace safety committees may establish rules or bylaws that are consistent with Section 27-d.
- Workplace safety committees may provide an official training opportunity for committee members, not to exceed four hours in any calendar year. Such trainings must be without loss of pay to committee members.
- Workplace safety committee meetings are to take place at least once per quarter, but are limited to a maximum of two (2) hours in total for all meetings per quarter. Meetings should be scheduled at times that do not unreasonably conflict with the employer’s business operations. Time spent in such meetings is considered hours worked and must be paid. Committees are free to conduct additional meetings beyond the two (2) hours per quarter, but must do so outside of work hours and without pay unless the employer agrees to allow the extra meetings on work time.

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Employer Obligations

- The proposed regulations do not require an employer to affirmatively inform employees of their ability to establish workplace safety committees.
- After the establishment of a workplace safety committee, employers must:
 - Respond, in writing, to each safety and health concern, hazard, complaint, and other violations raised by the workplace safety committee or one of its members within a reasonable time period;
 - Respond to a request for policies or reports that relate to the duties of the workplace safety committee as specified in Section 27-d within a reasonable time period;
 - Provide notice, where practicable and not prohibited by law, to the workplace safety committee and its members ahead of any visit at the worksite by a governmental agency enforcing safety and health standards;
 - Appoint an employer representative, who may be a non-supervisory employee, an officer, the employer, or other representative, to serve as a co-chair of the committee; and
 - Permit members of the workplace safety committee to attend a meeting for up to two hours per quarter and an official training as scheduled by the committee.
- Employers may not interfere with the performance of the duties of the workplace safety committee or its members authorized by Section 27-d.

NYSDOL's proposed regulations are subject to a notice and comment period. NYSDOL will hold a public hearing regarding the proposal on February 9, 2022, and will continue to accept public comments until five days after the last public hearing. After the close of the comment period, NYSDOL will consider the comments and may issue a final rule. Employers should consider whether to attend the public hearing or otherwise submit comments, and should continue to monitor the situation until NYSDOL issues a final rule.

If you have any questions regarding the HERO Act, these proposed regulations, or how they may impact your business, please contact [John Godwin](#) (716.848.1357), [Lura Bechtel](#) (416.595.2693), [Kinsey O'Brien](#) (716.848.1287), or any member of Hodgson Russ's [Labor & Employment Practice](#).