

Home Care Developments

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Hochul Activates the Hero Act Obligations, but is your Agency Covered by the Hero Act?

On Labor Day, Governor Hochul announced that the COVID-19 resurgence warrants implementing the safety plans required by the New York HERO Act (the “Act”). The Act permits the NYS Commissioner of Health to direct covered employers to activate their Hero Act airborne infectious disease exposure prevention plan (“Plan”) if the Commissioner determines that a highly contagious communicable disease presents a serious risk of harm to the public health.

The Act became law as a result of the coronavirus pandemic earlier in 2021. However, it was intended to apply to future outbreaks and, while covered employers were required to adopt Plans (by August 5, 2021) and issue Plans to employees (by September 4, 2021), the Plans were not technically in effect because COVID was, seemingly, under control and there was no highly contagious communicable disease in effect. But now that Governor Hochul has declared a contagious disease to be in effect, many providers have asked, **are we required to comply with the Hero Act and, if so, for which workers?**

Scope of Coverage and Applicability

As readers of our alert will recall, OSHA adopted an emergency temporary standard (the “ETS”) in June 2021 that established workplace safety standards for healthcare providers specifically related to the coronavirus health risks. The Hero Act exempts from coverage employees that are covered by an OSHA standard, even a “temporary” OSHA standard like the ETS. Thus, to the extent an organization or segments of a workplace are covered by OSHA’s ETS, then the Plan requirements of the Hero Act would not apply. Note, however, that once the ETS expires or is revoked, the Hero Act will take effect for those providers who were previously only under OSHA’s ETS. Thus, eventually, all providers in New York will be covered by the Hero Act.

The OSHA ETS exempts from coverage “home healthcare settings where all employees are fully vaccinated and all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not present.” Until October 7, 2021, when the vaccination mandate takes effect in New York, this exception to the OSHA ETS requirements is unlikely to apply to LHCSA providers in New York because very few employers have “all employees” fully vaccinated as of today. Thus, at least for the caregiver population of LHCSAs, the OSHA ETS is now in effect. This means that the Hero Act Plans do not have to be activated for the caregivers. Providers are reminded, however, to ensure that they are complying with the ETS requirements.

The OSHA ETS further provides an exemption for “healthcare support services not performed in a healthcare setting (e.g., off-site laundry, off-site medical billing).” Thus, it appears that LHCSA office settings are exempt from coverage of the OSHA ETS. That would also mean, however, that the LHCSA offices and office employees are covered by the Hero Act.

Turning to fiscal intermediaries, due to a very specific definition of healthcare services

under OSHA's ETS, it is our opinion that fiscal intermediary services do not qualify as healthcare services under the OSHA ETS. Thus, we have taken the position that the ETS does not apply to personal assistants. However, the Hero Act appears to apply.

As discussed in prior alerts, the Hero Act has a broad definition of employee, employer, and work site. Employee is defined in the Act as "any person providing services for remuneration...and shall include part-time workers, independent contractors, domestic workers, home care and personal care workers..." The term "employer" in the Act includes "any person, entity, business, corporation..." Thus, even for fiscal intermediaries that are not the employer of the personal assistant, the consumer him or herself would be considered an "employer" of the personal assistant and trigger the Hero Act's requirements. The Hero Act requires covered employers (such as consumers) to adopt and implement a model plan. Readers will note that there is a general Plan, and a domestic worker Plan, available on the DOL's website. The Plans are designed, depending on the nature of the worksite. Questions have arisen whether the Act will apply to consumers' homes, because worksite is defined as "any physical space...that has been designated as the location where work is performed over which an employer has the ability to exercise control." The consumer has the ability to exercise control in his/her home and, thus, this definition does not relieve a consumer employer from compliance with the Hero Act. Moreover, the definition of worksite specifically states that the term "worksite" will include "employer-provided housing...but shall not include the residence of the employer or employee unless such residence has been provided by the employer and is used as the primary place of work..." In the CDPAP, since the residence is provided by the employer (i.e., the consumer) and the home is the primary place of work, the Act would apply.

To summarize, based on our review, LHCSAs and FIs should ensure that they have adopted and implemented the Hero Act requirements for their office staff. LHCSAs should ensure that they follow the OSHA ETS for caregivers. Fiscal intermediaries should assist their consumers, as the employer of the personal assistants, to comply with the Hero Act. Even in a joint employer scenario, the Hero Act would seem to apply and require the fiscal intermediary and/or the consumer to adopt the Plans for personal assistants.

Effective Dates

Note, for the workforce covered by the Hero Act, the initial designation of an airborne disease is currently only effective until September 30, 2021. The Commissioner of Health may extend it at that time.

Reminders of Hero Act's Requirements

Now that the Hero Act's requirements have been activated, covered employers must conduct a verbal review of their policies with the covered employees, employee rights under section 218-b of the NYS Labor Law and their Plan. This review should be done "in a manner most suitable for the prevention of an airborne infectious disease." Options suggested by the DOL include in-person with good ventilation and face masks or via audio/video conference technology.

Employers must also provide a copy of their plan to all employees as implemented. Some employers may need to provide the plan in Spanish to employees for whom that is their primary language. (Additional languages may be required **when** the DOL provides model plans in that language.)

While the airborne infectious disease exposure prevention plan remains in effect, employers must continually ensure that it is adhered to by doing the following:

- assign enforcement responsibilities to supervisory employees and ensure adequate enforcement;
- monitor and maintain exposure controls; and
- regularly check for updated information and guidance from the NYS DOH and the CDC.

Contact us with Questions

Please let us know if you have any questions regarding the OSHA ETS, the Hero Act, or if you might need assistance with implementing your obligations under either of these laws.



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