



HR Forum: New York-Based Discussion on the HERO Act and Religious Accommodations

Kimberly Altschul Straker
Daniel I. Small
Ashley N. Ehman

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Seyfarth Shaw LLP

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Speakers



Kimberly Altschul Straker
Senior Counsel
NEW YORK



Daniel I. Small
Associate
NEW YORK

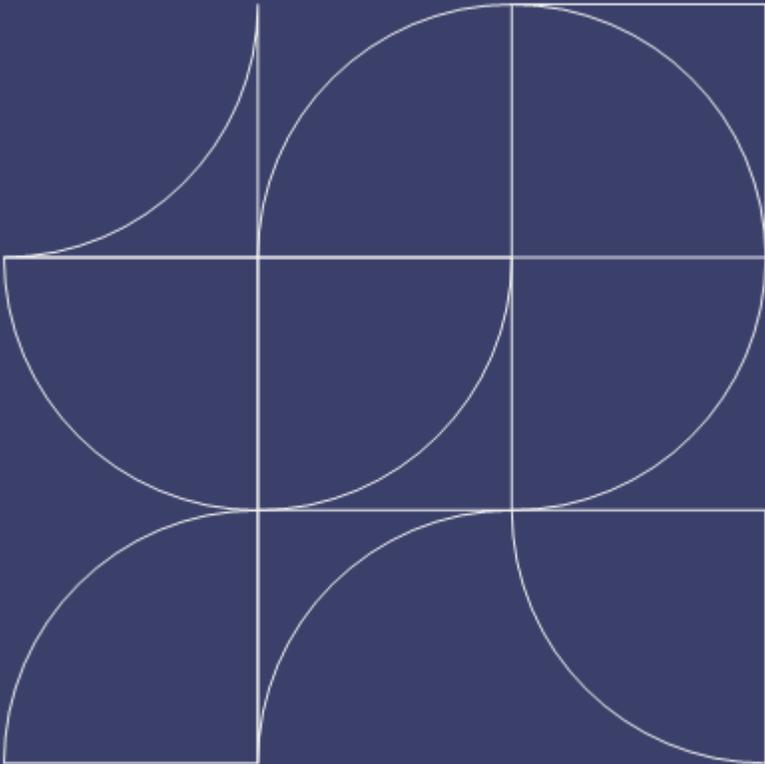


Ashley N. Ehman
Senior Fellow
NEW YORK

Agenda

- 01** Welcome and Introductions
- 02** New York HERO Act
- 03** Religious Accommodations
- 05** Questions
- 06** Speaker “Office Hours”

New York HERO Act



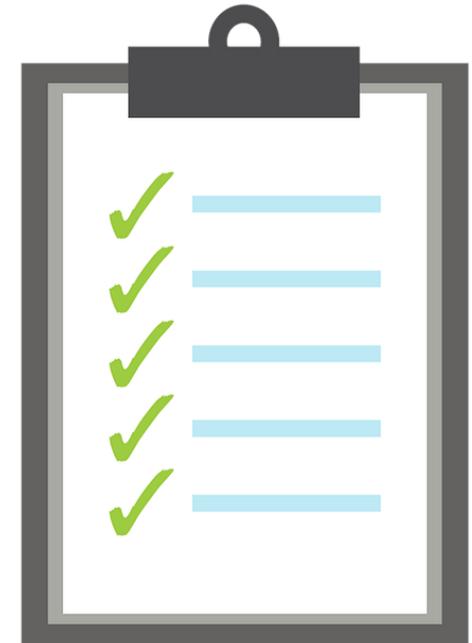
NY HERO Act – Basics

- Signed into law on **May 5, 2021**
 - Amended on June 14, 2021
- Law intended to combat the spread of airborne infectious diseases in the workplace by requiring the adoption of workplace safety standards
- Applies to all private employers – no size or employee count threshold
- Employee defined broadly
 - Includes independent contractors; part-time, domestic workers; home health and personal care workers; seasonal workers, etc.



NY HERO Act – Workplace Safety Standards

- The Act required NYS Department of Labor (“DOL”) to publish model safety protocols.
 - Both general standard and industry specific standards
- The Act required employers to either (i) adopt the DOL-issued protocol that is relevant to their industry, **OR** (ii) establish disease prevention plan that meets or exceeds the requirements of the DOL-issued standard **+** solicit employee participation.
- The protocol/plan must address many familiar topics, including:
 - (1) employee health screenings, (2) face coverings, (3) personal protective equipment, (4) social distancing, and (5) cleaning and disinfecting protocols

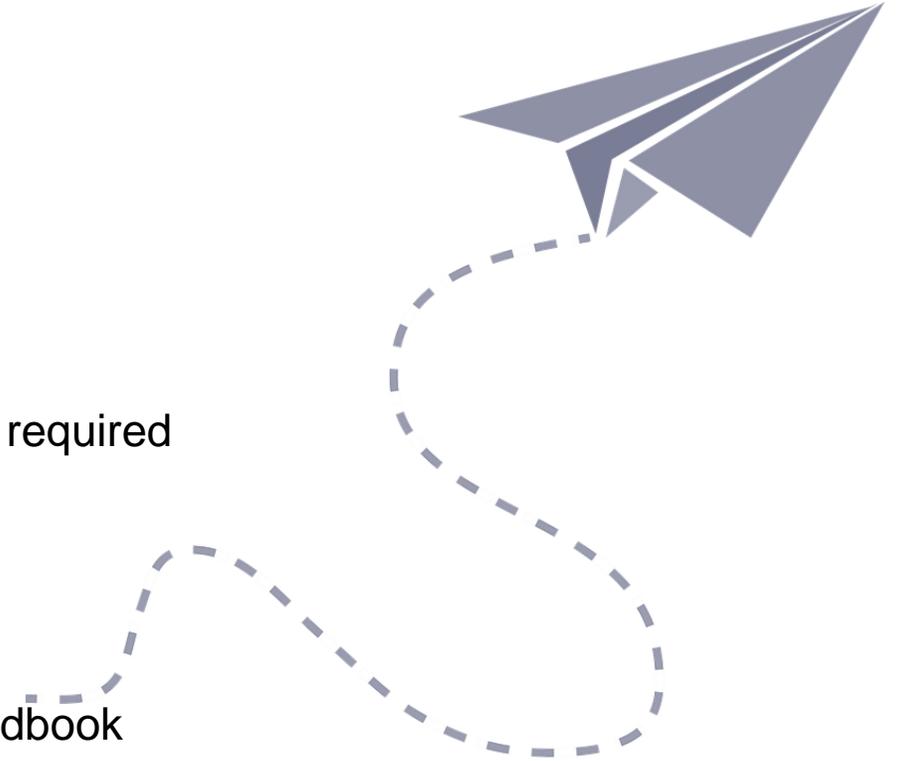


NY HERO Act – Workplace Safety Standards (Cont.)

- Industry-Specific Guidance from the NYS DOL includes:
 - (1) Agriculture, (2) Construction, (3) Delivery Services, (4) Domestic Workers, (5) Emergency Response, (6) Food Services, (7) Manufacturing and Industry, (8) Personal Services, (9) Private Education, (10) Private Transportation, and (11) Retail
 - Industry specific templates found here: <https://dol.ny.gov/ny-hero-act>
 - Notably, office-based work did not warrant its own specific guidance.
- Link to the Model Prevention Plan:
<https://dol.ny.gov/system/files/documents/2021/07/model-airborne-infectious-disease-exposure-prevention-plan-p765.pdf>

NY HERO Act – Notice & Distribution

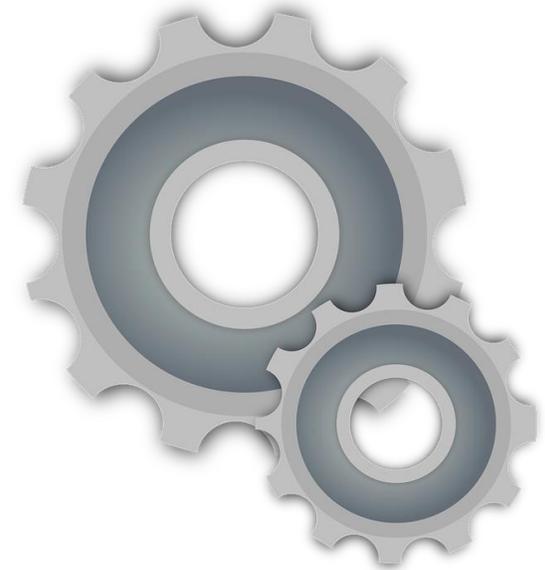
- As of **September 4, 2021**, employers were required to:
 - Distribute protocol to their current employees
 - Provide protocol to all new employees (see below re: handbook)
 - Provide protocol to all employees after a business reopens (if it was required to close due to airborne infectious disease)
 - Post in a “visible and prominent location” in the workplace
 - Include in an employee handbook if the employer already has a handbook



NY HERO Act – Plan Activation

- As of **September 6, 2021**, employers were required to activate their plans and implement the various mitigation measures detailed in safety plan, including:
 - Masking
 - Daily health screening
 - Training

*Designation triggering activation is currently in place only through **October 31, 2021**. If not extended, above measures (other than training) can end.*



NY HERO Act – Employee Rights & Non-Retaliation

- Under the Act, employees may:
 - Report violations of the prevention plan to any state, local, or federal government
 - Report airborne infectious disease exposure concerns to his/her employer, or state, local, or federal government
 - Refuse to work if the employee “reasonably believes” in “good faith” that the work exposes him/her, other workers, or the public to “unreasonable” risk of exposure
- Employers, their agents, or persons acting on behalf of the employer are prohibited from:
 - Threatening, retaliating against, or taking adverse action against an employee who exercises his or her rights under the Act

NY HERO Act – Penalties for Violations

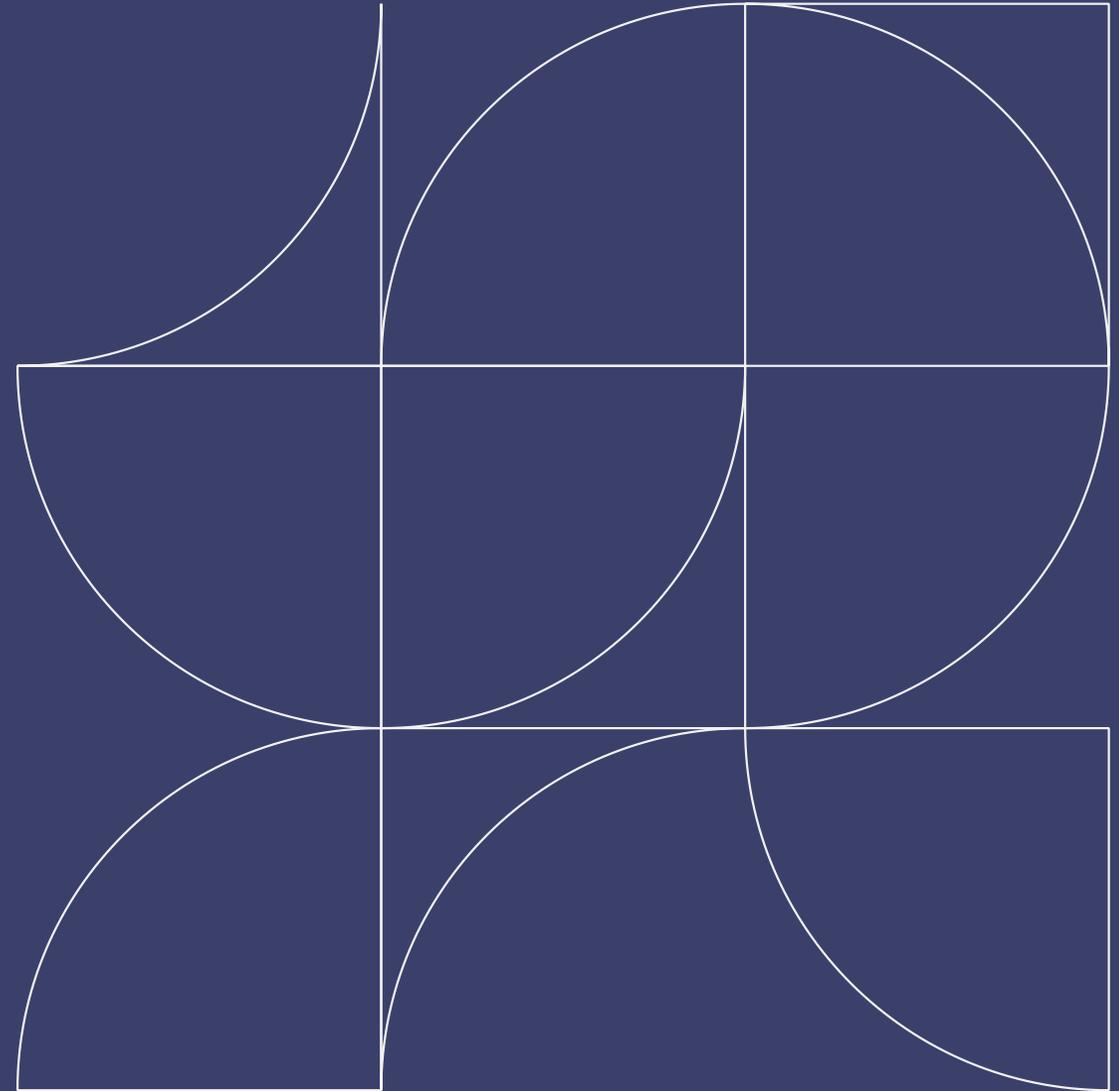
- The NYS DOL can assess penalties against employers for non-compliance:
 - \$50 per day for failure to adopt or establish a prevention plan
 - \$1,000 to \$10,000 for failure to comply with that plan
- The Act provides a private right of action
 - Individuals can sue for injunctive relief if an employer fails to comply with the Act.
 - Allows for awards of attorney’s fees and costs to prevailing plaintiffs
 - Notice and cure period of 30 days, unless employee demonstrates “unwillingness to cure a violation in bad faith” by employer
 - Employers can be awarded attorney’s fees and costs if required to defend against lawsuit deemed to be “frivolous.”



NY HERO Act – Joint Labor-Management Workplace Safety Committee

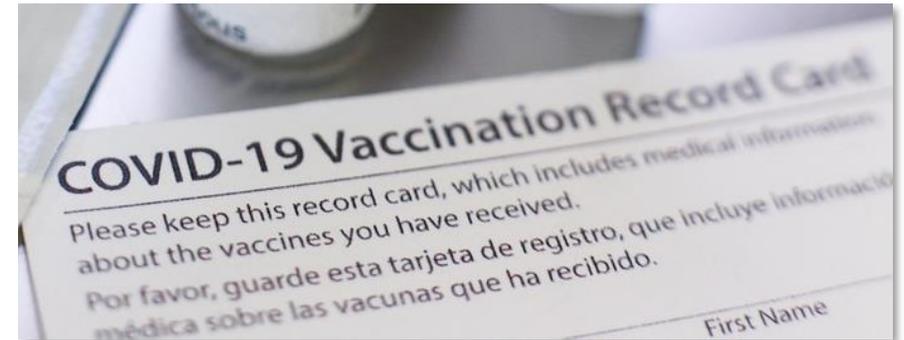
- Starting **November 1, 2021** – employers with 10 or more employees must *permit* formation of joint labor-management workplace safety committees.
- Committees will be comprised of at least 2/3 non-supervisory employees and selected by non-supervisory employees.
- Committee members are allowed to: raise concerns regarding workplace health and safety issues, review employer workplace safety policies, participate in government site visits, meet at least once a quarter, and attend trainings on-the-clock.
- DOL has promised to issue guidelines before the effective date.

Religious Accommodations



Religious Accommodations During the Pandemic

- Employers can mandate vaccines for employees who physically enter the workplace.
- What about employees who cannot vaccinate because of a sincerely held religious belief?
 - Under the New York State Human Rights Law, employees with a sincerely held religious belief may request a reasonable accommodation.



Religion Defined

- Religion broadly defined
 - The EEOC defines “religion” to include “all aspects of religious observance and practice as well as belief.”
- Religious beliefs include:
 - Beliefs tied to formal, organized religions
 - Beliefs that are new, uncommon, or not part of a formal religion
 - Beliefs that are followed by a small number of people
- Religious beliefs do not include:
 - Social, political, and economic philosophies
 - Personal preferences



Sincerely Held Religious Belief

- Only sincerely held religious beliefs are protected by law.
- The burden is on the employee to present a sincerely held religious belief that conflicts with the job requirement.
 - An employee may do this by completing an exemption request form that includes:
 - A specific religious doctrine or belief
 - An explanation as to how the religious doctrine or belief prevents compliance
 - A request for a reasonable accommodation
- However, employers may take steps to inquire into the sincerity of the employee's religious belief.

Questioning the Sincerity of a Religious Objection

- Employers should use caution when inquiring into an employee's religious belief.
- Employers may conduct a further inquiry into the employee's religious belief when the employer has reason to question sincerity.
- Objective reasons to inquire:
 - Use of boilerplate forms purchased or downloaded online
 - Multiple employees submitting identical requests
 - Sudden shift from secular objections to religious objections
 - Vague or incomplete requests



Questioning the Sincerity of a Religious Objection (Cont.)

- The follow-up inquiry should take the form of an interactive dialogue between the employer and the employee.
- Open-ended questions will provide useful information.
- Areas of further inquiry may include:
 - What the employee knows about the vaccine
 - The specific religious doctrines or beliefs cited
 - How the company policies and/or procedures conflict with the employee's beliefs
 - Whether the employee has received other vaccinations as an adult and if so, how the COVID-19 vaccine is different





Permissible Follow-Up Questions

- “What is the name of your religion (if any)?”
 - “What is the nature of your beliefs/practices/observances?”
 - “When did you first begin to embrace these beliefs/observances/practices?”
 - “How do the company’s policies and/or procedures conflict with your beliefs, observances, or practices?”
 - “I am respectful of whatever you believe, but I need to better understand it in order to consider your request. What is it about your religious beliefs or practices that prevents you from getting vaccinated.”
 - “Have you ever received any vaccines before? What is the difference between your getting vaccinated before and now?”
 - “Any additional information regarding your beliefs, observances, or practices that support your request for a religious accommodation?”
- 

Undue Hardship

- If an employee states a religious belief that is sincerely held, employers must provide a reasonable accommodation unless doing so would pose an undue hardship.
- Undue hardship is defined as having more than a *de minimis* cost or burden on the employer.
- Things to consider:
 - Possibility of remote work
 - Frequency of in-person meetings or gatherings
 - Availability of alternative positions
 - Risk posed to other employees, patients, customers, clients, or vendors

Undue Hardship – Remote Work

- Many employees are requesting to work remotely in lieu of getting the vaccine.
- When evaluating such requests, employers should consider:
 - Whether other similarly situated employees work remotely?
 - If the job was remote during the pandemic, why or how is continuing remote work an undue hardship now?



Step-by-Step Religious Accommodation Hypothetical

Please specify the religious belief, practice, or observance that is the basis for your request for accommodation.

My religion is Christianity. In accordance with my Catholic faith, I do not believe in medical intervention. My faith instructs me that God is the ultimate healer and will protect me from disease.

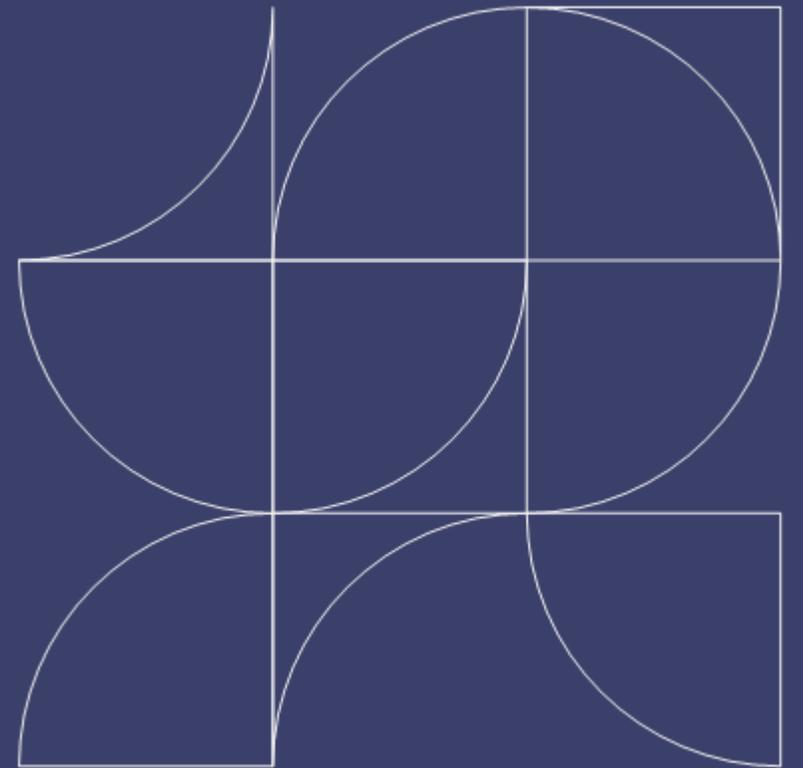
Please specify the work requirement that conflicts with the religious belief, practice, or observance described above and explain the nature of the conflict.

The company's mandatory vaccination policy conflicts with my beliefs, because a vaccine is considered medical intervention.

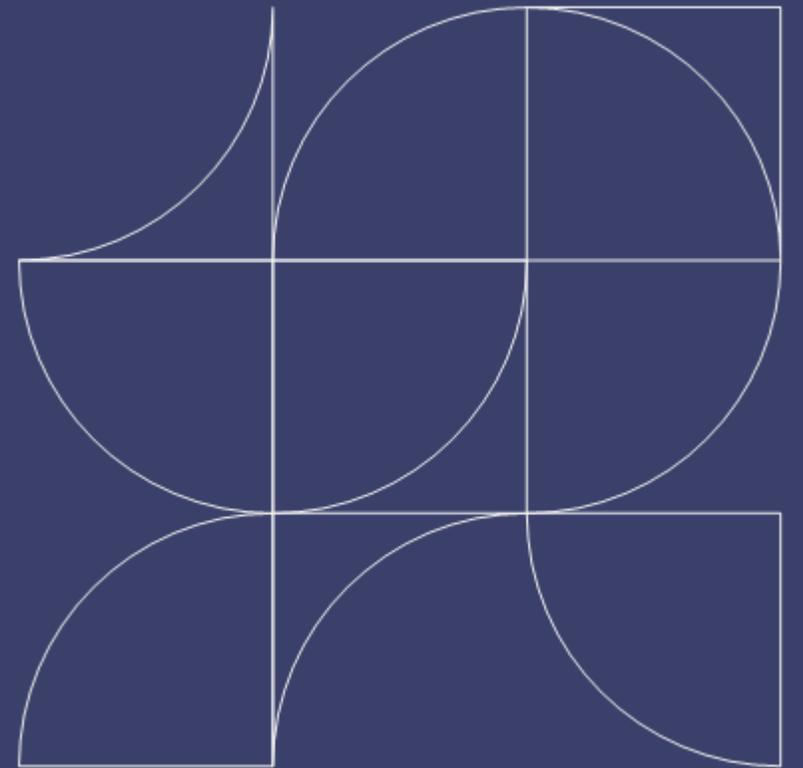
Please describe the specific accommodation(s) that you are requesting at this time, including an explanation of how the requested accommodation(s) will enable you to meet your religious obligations without impacting your ability to meet the required/essential functions of your job and the duration of the accommodation needed.

I am requesting to work remotely. I have worked remotely for the last year and a half, so doing so will not impact the quality of my work. If I am able to work remotely, my vaccination status will not pose a risk to others entering the workplace.

Questions



Thank You





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