AMERICAN SOCIETY OF SAFETY PROFESSIONALS

Niagara Frontier Chapter

June 2021 Newsletter

From the President's Perspective:

It's June; and the Albany legislative mill once again provides us with new and interesting legislation to make our professional careers interesting. For perspective; remember the Chinese curse: "May you live in interesting times!"; it does not get much better than this. Going along with the perspective view; legislation based on emotion vs. logic and facts generally leads to bad outcomes. Let's look at the recently passed Health and Essential Rights Act – the HERO act, S 1034B, that was signed in early May.

While the intent of this legislation may be good; the execution is not. Looking at the 2 sections of the act, both contain language that will have severe impact to the viability of small to medium (large ones, too) businesses in NY and run contrary to existing legal principles that have served both employees and employers well. Let's look at them. Please keep in mind this is written before the State has issued any additional information regarding "model programs" or any other interpretation.

The act requires **ALL** employers to adopt model airborne infectious disease control plans "for all work sites, differentiated by industry"; either a standard promulgated by the State or one designed by the employer. We saw this before with the "Guidances" issued by the NYS Department of Health (NYS DOH). They were not very well written documents; there were inconsistencies with existing laws and codes as well as information disseminated by Federal Agencies such as EEOC, HHS, CDC, NIOSH and OSHA. This left employers in a confusing situation regarding legal compliance; some of which is still in a gray area. One concern is that the Interim Guidances developed by the DOH will be adopted without review in consideration of current (and frequently changing) requirements of Federal Agencies.

Do we really need (or want) the NYS DOH (or Department of Labor, DOL) to define what constitutes an "airborne infectious disease"? Will the common cold and seasonal flu qualify? Quoting from the act: "**(e) "Airborne infectious disease" shall mean any infectious viral, bacterial or fungal disease that is transmissible through the air in the form of aerosol particles or droplets and is designated a highly contagious communicable disease by the commissioner of health that presents a serious risk of harm to the public health."** That interpretation sounds quite broad to me.

Another extremely broad interpretation is who is considered an "employer"; from the act itself; **(d) "Employer" shall mean any person, entity, business, corporation, partnership, limited liability company, or association employing, hiring, or paying for the labor of any individual in any occupation, industry, trade, business, or service. The term shall not include the state, any political subdivision of the state, a public authority, or any other governmental agency or instrumentality.** Does this mean that you become an employer if you hire the neighbor kid to mow your lawn during the summer? This is a distinct possibility given that the definition of an "employee" covers just about anybody who gets paid to perform work (independent contractors are not excluded, the hiring entity is now on the hook).

Also you need to consider that the "work site" also includes vehicles that have been designated as a location where work is performed. Will we need to consider private, employee owned vehicles used during work hours as is common in some industries? That could be a huge liability and civil rights issue itself.

Now on to the requirements of the standards themselves. Per the act, "**The model standard shall explicitly specify and distinguish the extent to which the provisions are applicable for different levels of airborne infectious disease exposure, and shall take into consideration circumstances where a state of emergency has or has not been declared due to an airborne infectious disease…".** This statement seems a bit confusing to me; however, the standard will not only allow for plan variations based on a declaration of emergency (more confusion) but will also explicitly specify the procedures and methods of airborne infectious disease controls we are already familiar with. Will any of these change? It also will require employers to designate a supervisor (may not be an employee who is not designated as a supervisor) to enforce the requirements of the plan. What penalties will they be allowed to assess non-compliance?

Embedded within this act is the requirement that: "**(h) Compliance with applicable engineering controls such as proper air flow, exhaust ventilation, or other special design requirements;** be ensured by the employer. Remember when we did a Chapter Technical Meeting on this topic? Jason Mock, our presenter described the issues with ventilation upgrades and system modification. It's not easy or cheap. It may also require design per industry segment served.

That brings me to the issue that these "model standards" are to be risk based. Here is one area that gives me issues. The NYS DOH Interim Guidances were a "one size fits all" guidance (the industry segment ones were quite generic within that segment) that did not take the individual workplace variability in to consideration. Physical space configuration, numbers of employees, type of equipment used, etc. all impact the risk evaluations that are an integral part of the workplace assessments. Not just those that have public exposure (retail, service shops, offices, etc.) but those with limited non-employee exposure as well (manufacturing, logistics, construction, etc.). Therefore, the need to perform individual workplace risk assessments to determine what controls will be necessary. The lack of flexibility inherent in the Interim Guidances created enforcement issues for employers by State Agencies. This will create larger issues as outlined below. Will the Safety Committee be responsible? See the comments on that below.

Set aside the penalties that would be assessed for simple violations from a State enforcement action regarding the provisions of this act. Compared to the following, they are minimal. Per the provisions of this act; **(b) Any employee may bring a civil action seeking injunctive relief in a court of competent jurisdiction against an employer alleged to have violated the airborne infectious disease exposure prevention plan in a manner that creates a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, by the employer at the work site, unless the employer did not and could not, with the exercise of reasonable diligence, know of the presence of the violation. The court shall have jurisdiction to restrain such violations and to order all appropriate relief, including enjoining the conduct of the employer; awarding costs and reasonable attorneys' fees to the employee; and ordering payment of liquidated damages of no greater than twenty thousand dollars, unless the employer proves a good faith basis to believe that the established health and safety measures were in compliance with the applicable airborne infectious disease standard.** The way I read this statement, is that employees may bring suit without proving damages (injury or economic) if the allege that the airborne infectious disease control plan was not effective. Trust the judicial system in NYS to

properly evaluate a claim of damages? Not unless you have a good attorney on your side. Generously, the act does allow for penalties to employees for false accusation, including "sanctions".

There are, of course the appropriate statements requiring posting of the airborne infectious disease control plan, communication of the plan and the anti-retaliation provisions that include the employee's right to refuse to work if they believe the plan is ineffective.

There is much more to unpack in this act than what I have mentioned, but those are the "highlights" as I see them from the lens of 30+ years in Safety/Risk Management. It may seem strange to say this, but if OSHA issues a regulation regarding airborne infectious diseases; AND IT MUST BE A GENERAL REGULATION, NOT COVID-19 SPECIFIC, we may dodge this bullet to some degree. *One theme regarding the HERO act is that New York State Governmental Entities are* ***specifically excluded***. Since OSHA regulates the private sector in New York State, preemption of Federal regulations over State will prevail. In OSHA's defense, the COVID – 19 guidances from Federal Agencies have changed so quickly that writing enforceable regulations is severely impacted.

But there is another section to this act, an area I am quite familiar with, that also is fraught with issues. The second section of the act requires any employer with 10 or more employees to form a Safety Committee. The Safety Committee is required to address all issues of Workplace Safety, not just airborne infectious diseases. This will be a mandatory requirement; it also mandates that the Committee meet 1x/quarter as well as on paid time and committee members receive "training" on paid time.

Sounds innocuous, doesn't it? Well, consider this: **2. Employers shall permit employees to establish and administer a joint labor-management workplace safety committee. Each workplace safety** committee **shall be composed of employee and employer designees, provided at least two-thirds are non-supervisory employees. Employee members of the committee shall be selected by, and from among, non-supervisory employees. Committees shall be co-chaired by a representative of the employer and non-supervisory employees. Where there is a collective bargaining agreement in place, the collective bargaining representative shall be responsible for the selection of employees to serve as members of the committee. Committees representing geographically distinct work-sites may also be formed as necessary.** There is another Federal Agency that may have some say in the composition of a Safety Committee; the National Labor Relations Board (NLRB. I know this has been impacted by the current administration, but I have not seen policy changes in this area yet.) A 10 person workplace now has a 3 person (minimum) Safety Committee? Was it even necessary to begin with? Does the Organizational Culture support a Safety Committee? How healthy is your Safety Program, do you have good employee engagement and empowerment?

Hang on, it gets better! Now the duties of the Safety Committee are specified!

4. Each workplace safety committee and workplace safety designee shall be authorized to perform the following tasks, including but not limited to:
(a) Raise health and safety concerns, hazards, complaints and violations to the employer to which the employer must respond.

(b) Review any policy put in place in the workplace required by any provision of this chapter or any provision of the workers' compensation law and provide feedback to such policy in a manner consistent with any provision of law.
(c) Review the adoption of any policy in the workplace in response to any health or safety law, ordinance, rule, regulation, executive order, or other related directive.
(d) Participate in any site visit by any governmental entity responsible for enforcing safety and health standards in a manner consistent with any provision of law.
(e) Review any report filed by the employer related to the health and safety of the workplace in a manner consistent with any provision of law.
(f) Regularly schedule a meeting during work hours at least once a quarter.

In 1992 (*Electromation*) and 1993 (*DuPont*), the NLRB issued rulings. In *Electromation*, the Board stated that Management may not dominate and control a Safety Committee; in *DuPont*, the Board reaffirmed the control ruling and also stated that the Committee could not "negotiate" with Management. They could only present suggestions for issue resolution providing they were non-binding and non-negotiable. Provisions (a), (b), and (c) above seem to exceed that ruling. The traditional role of the Safety Committee for organizations that have one is one of assisting in employee education, workplace inspection for hazards on a routine basis, assisting in collecting safety related data, and assisting in promoting safety from both an on-site and off-site perspective. Does the Safety Committee now have responsibility for all workplace safety policy? Will they be responsible for performing Risk Assessments of the workplace to determine what controls are necessary for airborne infectious diseases?

Design, implementation and maintaining a safe and healthy workplace are still the responsibility of Management per OSHA; I strongly suspect it will remain that way. While encouraging and empowering employee participation and feedback is one hallmark of a healthy, successful, mature safety program, there is still the role of Management that cannot be abrogated. I can well imagine OSHA's response to the idea that the 300 log is maintained by Frank in the warehouse; the respiratory protection program is administered by Lucy, an administrative assistant; and the qualified and competent person for your fall protection program is Carl, the maintenance assistant. (Yes, theoretically it can be done, if the employees are properly trained. Key word here is PROPERLY.)

When Googling this act, 3 types of information come up. One are news articles regarding the HERO act. Another are Legal Offices that are offering interpretation of this act, lots of Legal Offices. The last type of sites that came up are like this one: https://protectnyheroes.org. Based on the trajectory of the history of this COVID – 19 pandemic in New York State, this act will be a Full Employment Act For Attorneys (FEAFA). It will be a compliance conundrum for ALL employers in this State; just when we had this figured out.

Worse yet, it is another prescriptive legislative answer to workplace safety. It means that the skills, knowledge and judgment of the Safety Professionals who have the best interests of both employees and employers in mind when they design safety programs for the organizations they work for. It would have been even better if the Legislators who wrote the HERO Act consulted Safety Professionals from organizations like ASSP and AIHA when they designed it. We can do much better than this.