The Business Council

Testimony to

New York State Department of Labor

Proposed Regulations – HERO Act
Workplace Safety Committees – NYS Labor Law §27-d

Presented by

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As the state's largest statewide employer advocacy organization, we represent more than 3,500 employers – large and small – across the entire state. The Business Council often addresses issues impacting the state's economic competitiveness, including business costs driven by state policy actions. We are here today to convey our concerns regarding proposed regulations for the implementation of §27-d of New York State Labor Law – Workplace Safety Committees.

While we appreciate the difficult position the Department often finds itself when promulgating regulations implementing flawed legislation, these regulations are vital in helping New York employers understand and comply with this new law. Business Council members are among the most progressive and innovative employers in the state. Specifically, regarding workplace safety, our members fully understand the importance of employee participation in creating a workplace free from recognized hazards that could lead to serious illness, injury, or death. In fact, during the current pandemic, studies show that employers have been highly effective in protecting their workers from COVID-19 and its variants. Workers were just not getting exposed at work.

Regardless of that success, employers – including very small employers – now face the administrative burden of managing workplace safety committees, absorbing the additional costs of employees performing these functions, and facing the risk of fines and penalties for unintentional non-compliance with §27-d and/or other state and federal labor laws. All while struggling to recover from the greatest business interruption in the last hundred years.

We appreciate your consideration of our concerns. They include:

General

The Department needs to make clear that §27-d, as part of the HERO Act, is intended to address the risk of airborne infectious diseases and is limited to such concerns. It seems clear that the legislative intent was to ensure employee input during the COVID-19 pandemic and to prepare for future airborne infectious disease outbreaks. Failure to do so will imbue this committee with almost unlimited authority.

For example, if an employer decides to move from a 5 day/week, 8-hour workday to a 4 day/week, 10-hour day…does this impact employee "safety" thus making the policy change subject to review of the workplace safety committee? Not limiting the scope of the committee to airborne infectious disease concerns will impose "collective bargaining-like" obligations on almost all employers on almost any topic. The legislature's clear intent was to link workplace safety committees to the current and future airborne infectious disease pandemic.

Conflict with Federal Law

It is our belief that sections of the proposed regulations will put employers in conflict with other state and federal labor law. Specifically, the Labor Management Relations Act (Taft-Hartley), the National Labor Relations Act (NLRA), and New York State Labor Law §704(3). Our specific concerns in the proposed regulations include:

850.3(a)(2)

Requests for committee recognition received after a committee has been recognized by an employer shall be denied and referred to the committee.

Two or more employees engaged in protected concerted activity regarding the terms and conditions of employment are entitled to protection under §8(a)(1) of the NLRA. Employers may not promulgate, maintain, or enforce work rules that reasonably tend to inhibit employees from exercising their rights under the Act. Blanket denial of employee request for recognition could result in unfair labor practice claims against the employer. The Department should provide additional guidance that will protect employers from such a charge.

850.3(b)(2)

Non-supervisory employees at a worksite without a collective bargaining agreement in place shall be selected by and amongst the employer's non-supervisory employees as determined by the non-supervisory employees of the employer. Examples of methods to select non-supervisory employees include, but not limited to, self-selection, nomination by co-workers, and elections.

All three selection methods mentioned in this section have been interpreted by the courts and administrative agencies to mean that any such group would constitute a "labor organization" and confer upon them rights and protections that go beyond what is included in §27-d. Employers, including very small employers (10 or more)

would be faced with complicated federal compliance issues they will not have the resources to navigate. NLRA §8(a)(2) makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." The Department needs to alert employers to potential conflicts with federal law or, at the very least, provide additional guidance to these employers as to how to navigate employee representative “elections” to avoid these potential conflicts.

850.3(c)(3) and (4)
The proposed regulations require that employers allow members of the workplace safety committee to both attend training for up to 4 hours annually and attend meetings up to 2 hours per quarter without loss of pay.

As discussed above, the nature of these committees and the selection process of representatives outlined in the proposed regulations will lead to the conclusion that these committees are “labor organizations and thus covered by a myriad of additional state and federal laws. For example, both Taft-Hartley §302 and NYS Labor Law §704(3) prohibit employer payments to representatives of labor organizations.

Specifically, Taft-Hatley §302 states, *It shall be unlawful for any employer ... to pay, lend, or deliver, or agree to pay, lend or deliver, any money or other thing of value . . . to any representative of any of his employees who are employed in an industry affecting commerce.*

NYS Labor Law §704(3): *It shall be an unfair labor practice for an employer: To dominate or interfere with the formation, existence, or administration of any employee organization or association, agency or plan which exists in whole or in part for the purpose of dealing with employers concerning terms or conditions of employment, labor disputes or grievances, or to contribute financial or other support to any such organization, by any means, including but not limited to the following… (c) by compensating any employee or individual for services performed on behalf of any such employee organization or association…*

The Department needs to clarify how 850.3(c)(3) and (4) can co-exist with current federal and state law.

Additional Concerns

§850.3 – Workplace Safety Committees

§850.3(a)(5) - Workplace safety committees representing geographically distinct worksites may also be formed by non-supervisory employees in accordance with the provisions set forth in this section.
We urge the Department to provide additional clarification regarding “geographically distinct” worksites. For example, a retail store with multiple locations throughout NYS – with generally identical store configuration, services and workforce should be able to permit only one workplace safety committee for the entire organization to address safety concerns common to each location. The suggestion that “geographically distinct” locations somehow face different safety concerns and require multiple separate workplace safety committees when the only distinction is their location within New Yok State seems unnecessarily burdensome.

§850.3(c)(1) - Workplace safety committees may take actions as a committee in a manner consistent with any rules or procedures adopted by the committee.
The Department should clarify that the committee does not have unlimited authority to adopt any rules it desires. Rather, those rules need to be consistent with the narrow mission of the workplace safety committee. That it could not, for example, adopt rules requiring excessive meetings during work hours, requiring employers to provide documentation not permitted by §27-d, change the makeup of the committee regarding the presence of supervisory employees and so forth. We urge additional guidance properly limiting the powers of the committee.

§850.4 Employer Obligations

§850.4(c) - No employer shall be required to disclose information or documentation to the workplace safety committee or committee member where such disclosure is prohibited by law, contains the personal identifying information of an employee as defined by Section 203-d of the Labor Law, or is outside of the scope of the information or documentation set forth in Section 27-d(4) of the Labor Law.
As Section 203-d of the NYS Labor Law only covers certain limited protected employee information (social security numbers, phone numbers, personal email addresses, etc.), our concern is for the confidentiality of other health and safety information. For example, the OSHA 300 log has confidential identifiable employee medical information relating to the nature and type of injury employees may have received. We would urge that the Department’s

guidance be modified to incorporate other forms of identifiable information – protecting that information from the committee.

The business recovery from the effects of COVID-19 is continuing and is fragile. Significant additional administrative and cost burdens on businesses, especially small businesses, could severely jeopardize that recovery and contribute to the perception that New York State is not business friendly. We urge the Department to consider the suggestions above before publishing any final regulations.

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