

## EMPLOYMENT LAW UPDATE

### Virginia's Emergency Temporary COVID-19 Workplace Requirements

In mid-July 2020, Virginia became the first state to announce mandatory workplace requirements for all businesses with employees working in the Commonwealth. Under the new Emergency Temporary Standard (the "Standard") adopted as part of the Virginia Occupational Safety and Health Program ("VOSH"), employers must take various steps to protect employees including:

- ❖ Assess their workplace for potential exposure to the virus and classify job tasks and hazards according to the risk levels established by the Standard;
- ❖ Inform employees of the methods to monitor for COVID-19 symptoms and establish a system for self-assessment and screening;
- ❖ Develop and implement policies and procedures for social distancing and sanitization; post signage; and provide personal protective equipment (PPE) where applicable;
- ❖ Develop procedures for employees (and subcontractors/temporary employees) to report when they are experiencing symptoms of COVID-19 and to leave the worksite until cleared to return; provide flexible leave arrangements and ensure employees are aware of available leave;
- ❖ Prohibit employees and other persons known or suspected to have COVID-19 from reporting to the worksite until either: (i) they test negative twice, do not have a fever, and their respiratory symptoms have improved; or (iii) at least 72 hours have passed since they last had a fever, their respiratory symptoms have improved, at least 10 days have passed since symptoms first appeared, and a healthcare provider has been consulted;
- ❖ Establish a system to receive reports of positive tests by employees, subcontractors, contract workers, and temporary employees present at the workplace within 14 days from the date of the positive test and notify employees, other employers with workers onsite, the building owner, the Virginia Department of Health ("DOH"), and the Virginia Department of Labor and Industry ("DOLI") in accordance with the Standard;

- ❖ Train employees based on the employer’s risk level assessment by August 26, 2020; and
- ❖ Create an Infectious Disease Preparedness and Response Plan if risk levels are Very High or High, or if risk levels are Medium and the employer has at least 11 employees, and train employees on the Plan by September 25, 2020.

The Standard became effective Monday, July 27, 2020 and will remain in effect for: (i) the earlier of 6 months, the expiration of Governor Northam’s State of Emergency, or when a permanent standard is adopted; or (ii) the Standard is repealed.

**What Are the Exposure Risk Levels Established by the Standard?**

The first step in complying with the new Standard is to conduct a workplace assessment to identify the Risk Level into which the employer’s workplace and positions fall. Employers must assess the likelihood of employee exposure and classify their workplace and where applicable, specific job tasks, pursuant to the following four risk level categories:

<i>Risk Level</i>	<i>Definition</i>	<i>Examples</i>
Very High	Job tasks or workplaces with high potential for employee exposure to sources or persons known or suspected to be infected with COVID-19.	Job tasks that include: <ul style="list-style-type: none"> <li>➤ Treatment of patients with known or suspected case of COVID-19 and come into contact with contaminants</li> <li>➤ Performance of testing or handling specimens of such persons</li> <li>➤ Performance of certain dental procedures and exams</li> <li>➤ Performance of autopsy procedures on persons with a known or suspected case of COVID-19</li> </ul>
High	Job tasks or workplaces with high potential for employee exposure within 6 feet of sources or persons known or suspected to be infected with COVID-19 that are not otherwise “high risk.”	Job tasks that include: <ul style="list-style-type: none"> <li>➤ Healthcare (physical or mental) delivery</li> <li>➤ Care or support services including wellness services to persons known or suspected to be COVID-19 infected</li> <li>➤ First responders and medical transportation providers</li> </ul>

		<ul style="list-style-type: none"> <li>➤ Mortuary services involving persons known or suspected to have COVID-19 at the time of death</li> </ul>
Medium	<p>Job tasks or workplaces that require more than minimal occupational contact within 6 feet of other employees, persons, or general public who <i>may be</i> infected with COVID-19 but are not known or suspected to be infected.</p>	<p>Job tasks in the following areas:</p> <ul style="list-style-type: none"> <li>➤ Poultry, meat, and seafood processing</li> <li>➤ Commercial passenger transportation</li> <li>➤ Campus educational settings</li> <li>➤ Daycare and afterschool settings</li> <li>➤ Restaurants and bars</li> <li>➤ Grocery stores, convenience stores, drug stores/pharmacies</li> <li>➤ Manufacturing settings</li> <li>➤ Construction settings</li> <li>➤ Correctional facilities</li> <li>➤ Work performed on customer premises, such as homes or businesses</li> <li>➤ Retail stores</li> <li>➤ Call centers</li> <li>➤ Veterinary settings</li> <li>➤ Personal care, grooming, salon, spas</li> <li>➤ Sports and entertainment venues</li> <li>➤ Movie theaters and other forms of mass gatherings</li> <li>➤ Homeless shelters</li> <li>➤ Fitness, gym, exercise facilities</li> <li>➤ Airports, bus and train stations</li> </ul>
Lower	<p>Job tasks or workplaces that do not require contact within 6 feet of persons who are known to be, suspected of being or may be infected with COVID-19.</p>	<p>Job tasks in the following areas:</p> <ul style="list-style-type: none"> <li>➤ Office building settings and workplaces that are able to achieve minimal occupational contact through implementation of safety and social distancing protocols and mechanisms</li> </ul>

## **What Actions Must Employers Take to Ensure Compliance?**

### **1. Develop and Follow Policies and Procedures to Protect Employees**

Regardless of the risk level an employer falls under, all employers must develop policies and procedures to inform employees of methods of self-monitoring for signs and symptoms of COVID-19, how to report and leave the worksite when they are experiencing symptoms, and the types of available leave.

Employers must prohibit employees (and other individuals) known or suspected to have COVID-19 from reporting to and remaining at the worksite (including a customer location) until *either*:

- (i) the employee tests negative twice (at least 24 hours apart), does not have a fever (without using medication), *and* the respiratory symptoms have improved (known as the “test-based strategy”); or
- (ii) at least 72 hours have passed since the employee last had a fever, respiratory symptoms have improved, at least 10 days have passed since symptoms first appeared, *and* a healthcare provider has been consulted (known as the “symptom-based strategy”).<sup>1</sup>

Employers must pay the costs associated with return-to-work testing. Although these employees are barred from coming to work, employers cannot prohibit teleworking if working remotely is a feasible option.

The Standard mandates that, to the extent feasible and permitted by law, employers must ensure sick leave policies are flexible and consistent with public health guidance and other laws (including the Families First Coronavirus Response Act) and that employees are aware of their leave policies.

### **2. Implement and Observe Physical Distancing**

All employers must ensure social distancing to the greatest extent possible given job requirements and employ strategies to ensure social distancing, such as:

- ❖ Decreasing the number of people at a worksite, staggering shifts, and requiring employees who cannot physically distance to use face coverings or other personal protective equipment.
- ❖ Utilizing signage or verbal announcements promoting physical distancing.

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<sup>1</sup> Notably, the Standard expressly *prohibits* employers from using antibody test results (also known as serologic test results) to make decisions about employees returning who were previously known or suspected to have COVID-19.

- ❖ Closing common areas, such as break/lunch rooms, unless occupancy limits, sanitizing requirements, and hand washing requirements are posted and enforced.

### 3. Ensure Proper Cleaning and Sanitation

In addition to complying with VOSH sanitation standards applicable to the employer's particular industry, all employers must observe the following:

- ❖ Provide workers with readily available and frequent access to soap and water, and, where feasible, hand sanitizer.
- ❖ Employees who interact with customers, contractors, the general public, or other persons must be provided with and must immediately use cleaning supplies to disinfect surfaces contacted during the interaction.
- ❖ All common spaces, bathrooms, doors, and frequently touched surfaces must be cleaned and disinfected at the end of each shift.
- ❖ Tools and other equipment must be cleaned and disinfected prior to transfer between employees.
- ❖ Employers are required to provide and use cleaning supplies listed in the Environmental Protection Agency's List N for use against SARS-CoV-2.
- ❖ Employers must clean and disinfect areas and surfaces where employees or others with known or suspected cases of COVID-19 worked or accessed prior to reentry, unless such areas have been unoccupied for at least 7 days. Where feasible, a period of 24 hours must be observed prior to initiating any such cleaning.

### 4. Create Reporting and Notification Protocols

To extent permitted by law, including HIPPA, all employers must establish a system to confidentially receive reports of positive COVID-19 tests from employees, subcontractors, contractors, and temporary employees who have been present at the workplace within the previous 14 days from the date of the positive test. Upon receipt of a positive test, the employer must:

- ❖ Notify its employees who have been exposed within 24 hours of the possible exposure, while keeping the identity of the person infected confidential;
- ❖ Notify other employers that had employees present at the worksite during the same time period, while keeping the identity of the person infected confidential;

- ❖ Notify the building/facility owner, while keeping the identity of the person infected confidential, so various areas of the building can be sanitized and proper notification to other building tenants can be provided;
- ❖ Notify the Virginia Department of Health within 24 hours of the discovery of a positive test; and
- ❖ Notify the Virginia DOLI within 24 hours of the discovery of *3 or more* employees who tested positive for COVID-19 and who were present at the worksite within a 14 day time period.

#### **5. Coordinate Compliance with Subcontractors and Companies that Provide Workers**

Employers with subcontractors or companies that provide contract or temporary employees are required to work together to monitor employees and individuals who enter the workplace to ensure those with known or suspected cases of COVID-19 stay home until cleared to return to work.

#### **6. Basic Employee Training**

By August 26, 2020, all employers are required to provide written or verbal information to employees regarding the hazards and characteristics of the SARS-CoV-2 virus and COVID-19 disease, the extent of which depends on the risk level.

For employers classified in the Lower Risk Level, the VOSH has created a written document that can serve as the training, which can be found on the DOLI's website at:

<https://www.doli.virginia.gov/covid-19-outreach-education-and-training/>.

Employers with employees classified in the Very High, High, or Medium Risk Levels must provide more detailed training that includes:

- (i) the Standard's requirements and other State and CDC guidance with which the employer is complying;
- (ii) the characteristics and methods of transmission of the SARS-CoV-2 virus;
- (iii) the signs and symptoms of COVID-19;
- (iv) risk factors of severe COVID-19 illness;
- (v) the ability of pre-symptomatic and asymptomatic persons to transmit the virus;
- (vi) safe and healthy work practices and expectations;
- (vii) information about any required PPE and its use; and

(viii) the Standard's anti-discrimination provisions.

These employers must also prepare and maintain a written certification of the training to include the employees' names, signatures, training date, and trainer name. Further, remedial training is required if an employee who has already received training fails to understand or follow the workplace safety standards.

**7. Additional Protocols and Training for Very High, High, and Medium Risk Employers**

Employers classified in the Very High, High, or Medium risk categories must also do the following:

- ❖ Implement additional engineering controls, administrative and work practice controls;
- ❖ Conduct a workplace hazard assessment to determine the necessity of PPE and verify the assessment has been done via a signed, written certification;
- ❖ Provide PPE as determined in the risk level hazard assessment or the Standard; and
- ❖ Create and implement a written Infectious Disease Preparedness and Response Plan, and train employees on the Plan, by September 25, 2020.

Notably, the requirements associated with the Infectious Disease Preparedness and Response Plan, while applying to all Very High and High risk employers, only apply to Medium risk employers with at least 11 employees.

The Infectious Disease Preparedness and Response Plan must, at a minimum, contain:

- (i) the name of the person responsible for administering the Plan;
- (ii) provide for employee involvement in the Plan's design and implementation;
- (iii) consider and address employee job tasks and the hazards of exposure to COVID-19;
- (iv) address contingency plans that might be required in the event of an outbreak;
- (v) identify prevention measures being implemented by the employer;
- (vi) provide procedures for employees to promptly report symptoms and positive test results and for the isolation of such employees;
- (vii) address infectious disease preparedness and response with third party businesses;

- (viii) identify CDC and VOSH guidelines with which the employer is complying;
- (ix) ensure compliance with the Governor's Executive Orders and Public Health Emergency Orders.

The VOSH has created a template Plan, which can be found here:

<https://www.doli.virginia.gov/covid-19-outreach-education-and-training/>.

Employers required to implement an Infectious Disease Preparedness and Response Plan must train employees on the Plan and must prepare and maintain a written certification of the training to include the employees' names, signatures, date, and trainer name by September 25, 2020. Remedial training is required if an employee who has already received training fails to understand or follow the workplace safety standards.

## **8. Comply with the Standard's Anti-Discrimination Requirements**

All employers are prohibited from discharging and otherwise discriminating or retaliating against:

- ❖ Employees who exercise their rights or the rights of others under the Standard;
- ❖ Employees who voluntarily provide and wear their own PPE;
- ❖ Employees who raise a reasonable concern about infection control to the employer, the employer's agent, other employees, a government agency, or the public (including via social media); and
- ❖ Employees who refuse to do work or enter a location that they feel is unsafe based on a reasonable fear of injury or death if they have sought an abatement of the hazard from the employer and the statutory procedures for securing abatement would not have provided timely protection.

### **What Are the Penalties for Non-Compliance?**

VOSH will be responsible for enforcing the new Standard under their existing enforcement authority and regulations. Accordingly, VOSH may issue penalties to employers for willful, repeat and failure-to-abate violations, as well as serious violations that cause a fatal accident or are classified as "high gravity" violations. The maximum penalties for the VOSH violation types increase each year in accordance with the consumer price index, and are currently as follows:

- ❖ Serious and Other than Serious Violations - \$12,726 - \$13,047
- ❖ Willful and Repeat Violations - \$127,254 - \$130,463

❖ Failure-to-Abate - \$12,726 - \$13,047 **per day**.

When calculating violation penalties, VOSH considers the gravity of the violation, the size of the employer's business, the employer's good faith and the history of any previous violations.

Of note, the Standard expressly states that employers who comply with CDC guidelines and regulations that provide equivalent or greater protections are deemed in compliance with the Standard. Compliance with CDC guidelines will also be viewed as evidence of good faith on the employer's part in any enforcement proceeding relating to the new Standard.

### **Conclusion**

The new Temporary Emergency Standard may initially seem overwhelming and certainly places significant obligations on employers to ensure workplace safety and minimize exposure to COVID-19. However, employers should be encouraged that the majority of these mandatory requirements are similar to federal CDC and OSHA guidance that many employers are already following in some way, shape, or form.

We recommend reviewing the Standard (which can be found [here](#)) and is relatively straightforward, albeit information dense. Employers should promptly conduct an exposure risk level assessment for their workplace and job tasks. If you have not already, develop a written policy and plan for implementation of the required COVID-19 procedures and processes based on your risk exposure level(s) and the respective requirements for that level. After development of a written policy and plan, determine the best way to train your workforce on the plan so that employees are aware of their role in ensuring workplace safety and understand you take their health and well-being seriously.

**More Questions? We are here to help.**

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