

Labor & Employment Alert

Virginia COVID-19 Workplace Standard —First in the Nation

Virginia has become the first state in the nation to issue a mandatory workplace safety and health standard for private employers. On May 29, the Governor ordered the Safety and Health Codes Board to develop and promulgate a standard. After public meetings and more than 3,000 written comments from businesses, labor organizations, and private citizens, the SHCB approved a final “Emergency Temporary Standard” on July 15. The official rule will become effective when it is published in the Virginia Register of Regulations, which is expected the week of July 27.

PURPOSE, SCOPE, APPLICABILITY (Section 10)

By its terms, this standard is designed to “establish requirements for employers to control, prevent, and mitigate the spread” of COVID-19 in the workplace. It will last as long as the emergency that gave rise to the standard. The unofficial version published on July 17 is thirty-five pages and contains nine sections, which mirror the subtitles of this Alert.

The new COVID Standard applies to virtually all employers in the Commonwealth, public and private (but not federal). It is intended to “supplement and enhance” existing workplace safety and health standards, but if a conflict arises between the new COVID Standard and the existing rules, “the more stringent” will apply. Hence, employers still must be mindful of VOSH standards governing personal protective equipment, respiratory protective equipment, sanitation, medical records, hazardous chemicals, and hazard communication in connection with COVID-19, in addition to learning and applying the new dedicated COVID Standard. This will be something of a “bicycle built for two” for employers to follow both regulatory tracks to accomplish a single purpose: employee safety and health in the context of COVID-19.

As explained in our June 1 Client Alert ([linked here](#)) regarding federal OSHA and “Returning to Work” in the context of COVID-19, federal OSHA is looking at COVID-19 primarily through the lens of the General Duty Clause, although specific standards like those just mentioned can be implicated in specialized situations. Virginia has its own state law General Duty Clause, but it will be supplanted for purposes of COVID-19 compliance by the new COVID Standard.

At the outset, the COVID Standard provides something of a safe harbor that would seem to align it with the federal OSHA enforcement. That is, employers who comply with published return-to-work guidelines of the Centers for Disease Control will be deemed to be in compliance with the new VOSH COVID Standard, and compliance with CDC guidelines will be deemed evidence of good faith on the part of employers in any VOSH enforcement proceedings. Public and private universities and public and private primary and secondary schools get a similar pass if they comply with return-to-school plans approved by the State Council of Higher Education and the Virginia Department of Education. However, the COVID Standard claws back some of that safe harbor by inserting a proviso that it applies so long as the CDC recommendation or the school guidelines provide “equivalent or greater protection” than required under the new COVID Standard.

The COVID Standard offers four categories of exposure risk for employees: “**Very High**,” “**High**,” “**Medium**,” and “**Lower**.” Yet, it is not clear who and what is categorized this way. That is, at times the COVID Standard refers to employers who are in one of those categories, while other times it refers to employees in those categories. Still other times it refers to hazards or job tasks that fit those categories. However, the best characterization of the four categories appears to be that they refer to employers whose employees face hazards or job tasks that pose a risk of exposure to COVID-19 that can be characterized as Very High, High, Medium, or Lower, as those terms are defined in the COVID Standard.

DATES (Section 20)

As mentioned, the new COVID Standard is expected to take effect the **week of July 27**, whenever it is published in the Virginia Register of Regulations. The training requirements, discussed further below, will take effective **thirty days** after the COVID Standard becomes effective, except that training on the written Preparedness and Response Plan will take effect **sixty days** after the COVID Standard becomes effective. The same **sixty-day period** is allowed for completing the written Preparedness and Response Plan. The new COVID Standard will expire upon the first to occur of the following events: **(1)** six months after its effective date; **(2)** expiration of the Governor's State of Emergency; **(3)** when superseded by a permanent standard; and **(4)** the COVID Standard is repealed by the SHCB.

DEFINITIONS (Section 30)

The formal definitions are the most extensive part of the new COVID Standard. Of the forty-four terms and phrases that are formally defined, the following are among the more important:

- Community spread—Minimal
- Community spread—Moderate
- Community spread—Substantial (controlled)
- Community spread—Substantial (uncontrolled)
- Exposure risk level—Very high
- Exposure risk level—High
- Exposure risk level—Medium
- Exposure risk level—Lower
- Face covering
- Face shield
- Filtering facepiece respirator
- Known to be infected
- May be infected
- Suspected to be infected
- Respirator—Tight-fitting
- Respirator—Loose-fitting (Purifying)
- Respirator—Loose fitting (Atmosphere supplying)

MANDATORY FOR ALL EMPLOYERS (Section 40)

All covered employers, meaning employers in all four categories of risk level or having hazards or job tasks that qualify for all four risk levels, are required to take at least **eight key steps** in their workplace. **First**, they must conduct an assessment of the workplace for hazards and job tasks that potentially expose employees to COVID-19, and must classify them in one of the four categories of risk (Very High, High, Medium, or Lower).

Second, employers must establish procedures for receiving reports of positive tests by employees and others who have been present in the workplace in the two weeks prior to the test. This must include procedures for notifying five different constituencies: **(1)** employees who may have been exposed, while maintaining appropriate confidentiality for the infected person; **(2)** other employers whose employees may have been exposed in the workplace; **(3)** the building or facility owner where exposure may have occurred; **(4)** the Virginia Department of Health; and **(5)** the Virginia Department of Labor and Industry (but only if there were three or more employees testing positive within the same two-week period). The notification deadline for all of those groups is 24 hours after discovery of the positive test.

It appears there is no job relatedness analysis that goes with those notifications. Indeed, there is no mention of "job relatedness" anywhere in the COVID Standard, which suggests that every case of COVID-19 in an employee is deemed to be job-related if the employee was present in the workplace within two weeks prior to the positive test. The COVID Standard does not mention recordkeeping at all, but if job-relatedness is deemed to be present for reporting purposes, it would seem to follow that it applies as well for recording purposes. Note that the notices to the Virginia DOLI also do not require the same criteria as the reporting requirements for all other workplace injuries and illnesses (hospitalization, etc.).

Third, employers must prohibit individuals "known" or "suspected" to have COVID-19 (both defined terms) from reporting to or remaining at the workplace until the individual is "cleared to return to work." This does not prevent an employer from requiring telework or some "other form of work isolation" that would avoid exposure during the quarantine period. Employers who use contract or temporary staff to supplement their workforce, must take the same precautions with the supplemental staff and must "discuss" these requirements with the staffing companies that supply the workers.

Fourth, for employees who are “known” or “suspected” to have COVID-19 (again, defined terms), employers are required to develop policies and procedures governing their return to work after an appropriate period of being away. These rules may be “symptom-based or test-based”, depending on local healthcare and testing circumstances” (emphasis added). The COVID Standard provides a safe harbor here, stating that employers will be deemed to have complied with this requirement if their policy “involves consultation with appropriate healthcare professionals concerning … symptoms” if the consultation follows a protocol that:

“Excludes an employee from returning to work until at least 3 days (72 hours) have passed since … resolution of fever without the use of fever-reducing medications and improvement in respiratory symptoms … and at least 10 days have passed since symptoms first appeared.”

The COVID Standard includes a more detailed requirement for a test-based strategy, if employers prefer that approach. The return-to-work policy must also address when individuals who test positive but are asymptomatic may return to work. This includes a time-based protocol and a test-based protocol. Again, a safe harbor is provided, this time for employers whose policies require asymptomatic employees to stay away for ten days after a positive test if they remain asymptomatic throughout that period. However, if they experience symptoms at any point, they may not return until satisfying a test-based protocol that is described in the COVID Standard.

Fifth, employers must develop and enforce policies and procedures that implement physical distancing “unless otherwise provided in this standard.” This must include all times when employees are on the premises, including “during paid breaks on the employer’s property.” The policies must include rules for “verbal announcements, signage, or visual cues” that promote physical distancing, and decreased worksite density (for instance, by restricting non-employees access). Here, another safe harbor is provided. If employers comply with the occupancy limits contained in an emergency health notice from a Virginia government agency, they are deemed to have satisfied this requirement.

Sixth, employer policies and procedures must close, or control access to, common areas, breakrooms, and lunchrooms at the worksite. The COVID Standard provides detailed requirements for implementing this, including rules for distancing and for cleaning areas used for eating—after each use—and providing necessary supplies for such cleaning.

Seventh, employers must develop and enforce rules to protect employees who must ride together in the same vehicle for work purposes. The only guidance provided here is that the rules must comply with “respiratory and personal protective equipment standards” in the employer’s industry. This same rule and oblique standard applies when “the nature of an employee’s work or the work area does not allow” physical distancing in the workplace.

Eighth, the employer’s policies and procedures must set forth rules for sanitizing and disinfecting the workplace on an ongoing basis, including after use of specific facilities or tools or equipment by employees or guests. The COVID Standard lays out detailed requirements for these rules.

Additional requirements include: **(1)** employers must “ensure that sick leave policies are flexible and consistent with public health guidelines” and must train employees on those policies; **(2)** employers must allow employee access to employer medical records regarding employee exposure to COVID-19 (maintaining confidentiality for individual employees); and **(3)** employers may NOT use serologic (antibody) test results to make decisions relating to COVID-19.

Finally, the COVID Standard notes that nothing requires a respirator or other face covering if it could impair the health of the subject employee, but the employer is not thereby absolved of the requirement for respiratory protection. Basically, the COVID Standard tells the employer to figure it out, presumably in the interactive process under applicable disability discrimination laws. Also, the COVID Standard allows for requests to the DOLI for “religious waivers” from the use of respirators or face coverings, but does not provide the procedures for same.

“VERY HIGH” AND “HIGH” RISK OF EXPOSURE (Section 50)

In addition to the requirements for all employers, outlined above, the COVID Standard imposes specific additional duties on employers whose employees face hazards or job tasks that involve a “Very High” or “High” risk of exposure to COVID-19. These requirements are organized into the familiar workplace safety strategies known as “Engineering Controls,” “Administrative and Work Practice Controls,” “Personal Protective Equipment (PPE).”

Engineering Controls

The Engineering Controls required for these employers are detailed and are not susceptible of being easily summarized, but they cover such topics as: **(1)** air handling systems generally and for healthcare facilities; **(2)** healthcare facilities and Airborne Infection Isolation Rooms (AIIR’s) for “known” and “suspected” cases of COVID-19; **(3)** postmortem activities and facilities for autopsies of “known” and “suspected” decedents; **(4)** special precautions associated with BioSafety Level 3 (BSL-3) for handling specimens from “known” or “suspected” persons; and **(5)** installation of physical barriers.

With respect to air handling, the COVID Standard does not define “air handling system,” which suggests it refers at least to any central HVAC system. Employers in these categories must maintain the air handling systems in accordance with manufacturer’s instructions. That may seem simple enough on its face, but could present significant problems for large facilities with highly sophisticated and customized systems. Employers also must comply with ANSI standards for “outdoor air ventilation” and “outdoor and total air ventilation” in residential, non-residential, and healthcare facilities.

Administrative and Work Practice Controls

The Administrative Controls section for “Very High” and “High” risk employers begins with a requirement that all employers in these two categories must “[p]rior to the commencement of each work shift,” use prescreening or surveying procedures “to verify each covered employee does not have signs or symptoms of COVID-19.” Employers in these categories also must, with some provisos or exceptions:

- Offer “enhanced medical monitoring” during “outbreaks;”
- Provide initial and refresher “job-specific education and training” on COVID-19;
- Offer psychological and behavioral support for employee stress “at no cost to employees;”
 - But only “to the extent feasible;”
- Limit non-employee access to the workplace;
- Provide face coverings for non-employees suspected of infection “until they leave the premises;”
- For healthcare employers:
 - Follow “existing guidelines and facility standards” for COVID-19 protection;
 - Provide alcohol-based hand sanitizer in fixed work settings and in the field;
 - Post signs for patients and family to “immediately report symptoms” and “use disposable face coverings.”
- Where feasible, implement:
 - Flexible worksites for teleworking;
 - Flexible work hours, such as staggered shifts;
 - Physical distancing for all persons of at least six feet;
 - Flexible meeting and travel options (telephone, video conference);
 - Delivery of customer services remotely;
 - Delivery of customer products by curbside pick-up.

Personal Protective Equipment (PPE)

As for PPE, employers in these two categories must conduct an assessment of their workplace to determine if “hazards or job tasks are present, or are likely to be present, which necessitate the use of PPE” to protect against COVID-19. Moreover, employers must provide for involvement by an “employee representative” in this assessment process. If the assessment determines that such hazards or job tasks are present, employers must select and require employees to use “the types of PPE that will protect the affected employee from” COVID-19.

Employers must verify that this assessment has been done, making a written certification that identifies the workplace evaluated, the person who is making the certification, the dates when the assessment was conducted, and it must state that it is a "Certification of Hazard Assessment."

Employers also are mandated to comply with federal OSHA Sections 1910.132 and 1910.134, which govern general environmental controls and respiratory protection, unless an industry-specific standard applies. Employers must implement a respiratory protection program that complies with Section 1910.134(b) through (d) and (f) through (m) (with certain carve-outs).

Finally, employees in these categories must be provided—and are required to wear—gloves, a gown, a face shield or goggles, and a respirator when in contact or within six feet of individuals who are "known" or "suspected" to have COVID-10, unless "contraindicated" by the mandatory hazard assessment and equipment selection process mentioned above. In other words, all employees in these categories must wear all that equipment in those circumstances unless the employer's assessment indicates it is not required.

"MEDIUM" AND "LOWER" RISK OF EXPOSURE (Section 60)

The requirements in the COVID Standard that are specific to Medium risk settings also are divided into Engineering Controls, Administrative Controls, and Personal Protective Equipment. The only requirement for Medium risk employers in the area of Engineering Controls relates to air handling systems. This requirement is, in essence, the same as for Very High and High risk settings.

The Administrative Controls required of employers in the Medium category are very similar to those required of employers in the Very High and High categories, although they are organized differently and in some cases described differently in this part of the COVID Standard than they are in the part covering Very High and High exposure risk. The PPE requirements in the new COVID Standard for Medium risk settings also are basically the same as for Very High and High, except that, again, some of them are described using different language. But the practical requirements are the same.

Finally, for employers whose employees are not exposed to hazards or job tasks that involve a risk of exposure that is Very High, High, or Medium, the new COVID Standard imposes no specific requirements other than those described earlier that apply to all employers.

WRITTEN PREPAREDNESS AND RESPONSE PLAN (Section 70)

All employers whose employees face hazards or job tasks with exposure risks in the Very High or High categories, and all employers in the Medium category with eleven or more employees, must develop a written "**Infectious Disease Preparedness and Response Plan**" for COVID-19. However, this plan and its associated training applies only to employees who face those categories of exposure risks.

The written plan must designate a person responsible for implementing the plan and must include: **(1)** employee involvement in the development and implementation of the plan; **(2)** consideration of the level of risk associated with the workplace and the hazards and job tasks that expose employees to risk of exposure to COVID-19; **(3)** contingency plans for situations that might arise as a result of "outbreaks;" **(4)** basic infection prevention measures to be implemented; **(5)** procedures for prompt identification of "known" and "suspected" individuals; **(6)** procedures for dealing with outside organizations whose people enter the workplace or otherwise encounter employees.

EMPLOYEE TRAINING (Section 80)

The training requirements apply to all employers whose employees are exposed to hazards or job tasks with Very High, High, and Medium risks of exposure to COVID-19, and for those employers, to all employees who are exposed to such hazards or job tasks. There are several elements that must be included in the training, including: **(1)** the requirements of the new COVID Standard itself; **(2)** "characteristics and methods of transmission" of COVID-19; **(3)** signs and symptoms of COVID-19; **(4)** risks associated with certain underlying conditions that exacerbate the potential harm of COVID-19; **(5)** safe and healthy work practices, and the use of PPE; **(6)** the written Infectious Disease Preparedness and Response Plan; **(7)** and the discrimination and retaliation provisions of the new COVID Standard.

Employers must certify in writing their compliance with the training requirements, identifying each trained employee, the persons who conducted or prepared the training, the dates and topics covered, and be signed by each employee. The training requirement includes “retraining” of employees “when the employer has reason to believe that any previously trained employee does not have the understanding and skill” that was intended to be conveyed by the previous training.

For employees exposed to hazards and job tasks categorized as Lower exposure risks, employers must provide training generally on the risks and symptoms of COVID-19 and should provide basic information enumerated in the COVID Standard, which will be included in a written form to be published by the DOLI.

DISCRIMINATION AND RETALIATION (Section 90)

The COVID Standard prohibits discrimination and retaliation against employees who have exercised their rights or otherwise participated in proceedings relating to the new COVID Standard



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