

VIRGINIA'S NEW COVID-19 RULES

What are the Covid-19 rules for Virginia employers?

The Virginia Department of Labor and Industry (VDOLI) revoked Virginia's Covid-19 workplace safety rules (the "Permanent Standard") effective March 23, 2022. Employers no longer need to comply with the requirements of the Permanent Standard. In its place, VDOLI has issued draft "[General Guidance for Employers to Mitigate the Risk of Covid-19 to Workers](#)" (the "Guidance"). The draft Guidance does not create new mandatory rules for employers. Instead, it provides "general COVID-19 recommendations that may be implemented in the workplace." The draft Guidance is under a public comment period until April 27, 2022, but VDOLI encourages employers to rely on the draft guidance now.

The Guidance reiterates that Virginia employers have a "duty to provide a healthy workplace free from recognized hazards likely to cause death or serious physical harm." The Guidance also states that employers "should" follow Covid-19 guidance provided by other agencies including the Virginia Department of Health (VDH), the Occupational Safety and Health Administration (OSHA), and the Centers for Disease Control and Prevention (CDC).

What does the Guidance provide?

The Guidance provides detailed recommendations regarding ventilation, masking, Covid-19 screening, and other Covid-19 protocols including the following:

- Facilitate employees getting vaccinated and boosted;
- Train employees on Covid-19 prevention;
- Develop a masking policy in accordance with CDC guidelines;
- If the transmission rate in a locality returns to "high," masking indoors is recommended;
- Require infected workers to stay home;
- Encourage symptomatic workers to stay home;
- Regularly disinfect surfaces;
- Promote frequent handwashing;
- Incorporate proper ventilation;
- Create a flexible sick leave policy; and
- Record and report to VDOLI Covid-19 infections, hospitalizations or deaths when required by VOSH regulations or, in some cases, federal OSHA industry-specific regulations or standards.

What does this mean for employers?

Employers now have more flexibility to create a Covid-19 policy based on their own workplace. VDOLI reiterated that employers are responsible to provide a safe workplace, but employers now have more discretion on how best to accomplish that goal. Employers need to consider the VDH, CDC and OSHA recommended best practices in establishing Covid-19 protocols. There is still the risk of a VOSH workplace safety violation, workers' compensation

claim, or civil suit in the event of a work-related infection or outbreak. Employers need to understand that risk and develop Covid-19 protocols that make sense for the business.

Can employers eliminate all Covid-19 protocols?

Although VDOLI is no longer mandating specific Covid-19 protocols, employers still need to provide a safe workplace. Some workplaces (i.e., remote work teams or outdoor work) may be safe with very few protocols. Other workplaces (i.e., many workers indoors working in close proximity) may still require more protocols to maintain safety. The future of Covid-19 is also uncertain. Employers need to be prepared to implement protocols (i.e., masking, screening, physical distancing, etc.) if the danger increases again. Every employer should regularly review the agency guidance and check the CDC community transmission rate page (and if Virginia reinstates its community transmission page, check the VDH website). Employers must be prepared to adapt their Covid-19 policies in the event the threat changes or community transmission substantially increases.

Can employers still implement Covid-19 protocols, such as mandatory masking or screening?

Yes. However, employers should assess whether their workplace presents a risk to justify a Covid-19 protocol before implementing it. At a minimum, all employers should consider how to separate workers who are infected and/or symptomatic from other workers—including requiring them to stay home or test before returning to a congregate setting.

Does the VDOLI guidance provide employees any new protections?

Yes. The new VDOLI guidance provides some protection to workers who refuse to wear a mask, including prohibiting termination. If an employee refuses to comply with Covid-19 protocols, employers should speak with counsel before taking any disciplinary action in this new environment.

Are employers required to report positive cases of Covid-19 to VDOLI or VDH?

The rules for recording and reporting Covid-19 infections are now largely the same as for other injuries or occupational diseases. Therefore, Virginia employers need to first understand their recording and reporting obligations under VOSH and, in some cases, federal OSHA industry-specific regulations and standards. Employers that are required to record and report generally must perform a “work-relatedness” determination for each employee who becomes infected. If the employer determines that a Covid-19 infection is “work-related,” then the employer must determine if it also meets the criteria for recording it on the workplace illness logs or for reporting it to VDOLI (recording and reporting are distinct duties). There are also industry-specific additional obligations that must be considered. For more information on recording and reporting obligations for Covid-19, please see our firm’s [Legal Alert of June 1, 2020](#), which discusses the still-current OSHA recording and reporting requirements in more detail. Reporting outbreaks to VDH is now voluntary.

Other business-specific rules to consider:

- **Health Care.**
 - Health care employers should review and understand OSHA’s Temporary Healthcare Emergency Temporary Standard (“Healthcare ETS”) and how it applies to their workplace. It is important to remember that not all health care employers met the definition of “health care setting” to be covered by the Healthcare ETS. Additionally, although OSHA stopped enforcing most provisions of the Healthcare ETS in December 2021, some record keeping and reporting obligations remain in effect,

which covered employers must understand. OSHA is now developing a permanent standard to take the Healthcare ETS's place. Until that new permanent standard is implemented, OSHA has stated it still intends to pursue health care employers for workplace safety violations. OSHA, however, has also stated that compliance with the requirements of the Healthcare ETS should satisfy health care setting employers' obligation to provide a safe and hazard-free workplace.

- Facilities certified to treat Medicare/Medicaid patients must consider the CMS final rules regarding Covid-19, including the vaccine mandate.
- Health care employers must understand their industry-specific recording and reporting obligations under VOSH regulations and, if applicable, the Healthcare ETS.
- **Public Transportation.** Federal regulations still require masking on public transportation at least until April 18, 2022.