

VIRGINIA Lawyers Weekly

Virginia mandates COVID-19 workplace precautions

How lawyers can prepare for this new phase of recovery

By: Maura Mazurowski July 27, 2020

Virginia made history by becoming the first state to adopt coronavirus-related workplace safety mandates on July 15.

The rules were adopted in a 9-2 vote by the Virginia Occupational Safety and Health Administration (VOSH) – the state’s version of the Occupational Safety and Health Administration (OSHA) – as an “emergency temporary standard” that will require businesses to implement safety measures to protect employees and customers from being infected with COVID-19 at work.

Companies could face fines of up to \$130,000 if they are found to have violated the policies.

“Workers should not have to sacrifice their health and safety to earn a living, especially during an ongoing global pandemic,” said Gov. Ralph Northam in a statement, criticizing OSHA’s decision not to adopt nationwide standards. “In the face of federal inaction, Virginia has stepped up to protect workers.”

The requirements will enforce a standard that mandates — and, in some ways, exceeds — guidance issued by the U.S. Centers for Disease Control and Prevention, or CDC, and OSHA.

Whereas the CDC issued guidelines, the new regulations “have the force of law and they carry potentially heavy penalties and other legal ramifications for violating something that, as a practical matter, cannot be complied with fully,” said Richmond attorney William Myers.

In addition to mandating social distancing, the rules require all employers to:

- Provide flexible sick leave policies, telework and staggered shifts when feasible;
- Provide both handwashing stations and hand sanitizer when feasible;
- Assess risk levels of employers and suppliers before entry;
- Notify the Virginia Department of Health of positive COVID-19 tests;
- Notify VOSH of three or more positive COVID-19 tests within a two-week period;
- Assess hazard levels of all job tasks;
- Provide COVID-19 training of all employees within 30 days (except for low-hazard places of employment);

- Prepare infectious disease preparedness and response plans within 60 days;
- Post or present agency-prepared COVID-19 information to all employees; and
- Maintain air handling systems in accordance with manufacturers' instructions and American National Standards Institute (ANSI) and American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) standards.



The new rules will go into effect as soon as they are publicly published in the Virginia Register of Regulations, which the Department of Labor and Industry said they expect to occur the week of July 27.

In the meantime, how can attorneys prepare to help clients comprehend and adapt to these new workplace requirements?

Employment lawyers offered some advice.

To whom do the rules apply?

"The first thing every employer in Virginia needs to understand about the state's new COVID-19 temporary workplace standard is [that] it is universal," wrote Stephen Haner, a senior fellow at the Thomas Jefferson Institute for Public Policy, in an essay.

Whether you are an employer with two or 10,000 employees, whether you are a public or private company or work for a nonprofit — the new COVID-19 workplace safety regulations will apply.

What "risk category" do I fall under?

The regulations may apply *differently* to your company, depending on your area of work. The COVID-19 safety rules have broken down more (or less) strict requirements for jobs deemed as medium, high or very high risk.

High and very high risk jobs are defined as those in which there is a high probability an employee will come in contact with people known or suspected to be infected with the virus, whereas "medium risk" jobs require "more than minimal occupational contact" with other employees or the general public.

Employment lawyers may counsel clients differently depending on which "risk category" they fall under.

"I would advise them to determine, in the assessment required of all covered employers, what their highest category is — because they may have employees and hazards and job tasks that fall into more than one — and comply with that," Myers said.



William Myers

For workers in the high and very high risk categories, employers would be required to provide training addressing the new regulations, screen employees for the virus at the beginning of each shift and provide appropriate personal protective equipment.

How should attorneys advise employers?

The first thing that Richmond attorney Karen S. Elliott is having her clients do is create a business continuity plan.

"I'm telling them, don't worry about what the new laws are. Instead, ask yourself how to continue running your business with two new considerations at play," Elliott said.



Karen S. Elliott

The first consideration is whether or not your employees will have “school-aged children” staying at home this fall. Many school districts — including Richmond, Henrico and Arlington County Public Schools — will have all virtual classrooms this fall.

Other counties, including Fairfax, are allowing students to opt-in for in-person classes, while counties like Alexandria have yet to decide.

“Interview your employees. Have them fill something out that explains if they’ll have kids at home... And try to come up with a plan for how the parents are going to manage their kids and still get work done,” Elliott said.

The second thing employees must consider is who their employees are coming into contact with outside of work and, if possible, continue having employees work from home.

“My recommendation is to leave people at home and rotate employees that need to come into the office in and out in groups,” Elliott said. “Keep the viral lid down... and the rigors of the VOSH requirements are automatically lessened.”

What happens if an employee gets sick?

The answer to this question is still up in the air.

“The issue is: What happens if [an employer] reports to the health department that they have three or four people in their workplace who tested positive? Are they going to be able to continue to operate, or do they have to put everyone out for two weeks?” Elliott said. “What happens to your business if that happens?”

Though whether or not a business will be required to shut down following positive COVID-10 test results has been the biggest concern for employers, Roanoke plaintiff’s lawyer Paul Beers has yet to be contacted by employees with similar concerns.

“I don’t think at this point the general public understands the ramifications – which are significant – of the new rules,” Beers said. “There hasn’t been enough publicity and there’s been lost in the confusion of whether there will be a congressional or federal mandate.”

How discrimination cases may come into play

The new regulations prohibit employers from retaliating or discriminating against workers who air concerns about infection risks on the job with each other, government agencies, traditional news outlets or on social media.

Beers said this stipulation “ushers in a brave new world” for Virginia employees, especially following the passing of the Virginia Values Act which, as of July 1, prohibited discrimination in employment and housing on the basis of sexual orientation, gender identity, veteran status and on “traits historically associated with race,” such as hairstyles.

The statute also removed the Virginia Human Rights Act’s 12-month back pay damages cap for employees.

“Let’s say someone complained about infection control in the workplace and they’re fired because of that. Ordinarily that would be the end,” Beers said. “But now, with these new COVID-19 rules and the [Virginia Values Act] working together, there’s real [financial] remedies for an employee.”

The new regulations also say no employer should discriminate against an employee who “voluntarily provides and wears” their own personal protective equipment.

“Let’s say an employer doesn’t believe in wearing a mask... They cannot tell an employee to get rid of their face mask,” Beers said. “That’s prohibited.”

What’s next?

Though the regulations are not expected to take effect until this week, Elliott is more eager to see what changes may arise out of the General Assembly’s special session on Aug. 18.

“One of the issues before the legislature is going to be assisting employers with liability exposure,” Elliott said. “What we’re wondering is: if any employer follows these guidelines, will there be an absence of liability if someone gets COVID-19 in the workplace? The businesses want to know.”

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