

VIRGINIA: NEW COVID SAFETY STANDARD FOR EMPLOYERS EFFECTIVE SEPTEMBER 8, 2021

NOTE: THIS CLIENT ALERT HAS BEEN UPDATED BASED ON RECENT VDOLI GUIDANCE. VDOLI CLARIFIED THAT IT INTERPRETS THE REVISED VOSH COVID-19 STANDARD'S "HIGHER-RISK" WORKPLACE REQUIREMENT TO APPLY ONLY TO EMPLOYERS WITH MIXED VACCINATION STATUS WORKFORCES THAT ALSO MEET ONE OF MORE OF THE "HEIGHTENED RISK" FACTORS SET OUT IN 16VAC25-220-60(A)(1)-(5). THEREFORE, VDOLI STATED IT WILL NOT INTERPRET THE STANDARD TO REQUIRE AN EMPLOYER TO COMPLY WITH THE "HIGHER-RISK" WORKPLACE REQUIREMENTS OF 16VAC25-220-60 BASED SOLELY ON "SUBSTANTIAL" OR "HIGH" COVID-19 TRANSMISSION RATES. THE MASK MANDATE OF 16VAC25-220-40, HOWEVER, STILL APPLIES BASED SOLELY ON TRANSMISSION RATES.

A revised [COVID workplace safety standard](#) ("Standard") went into effect on September 8, 2021, for virtually all private employers in Virginia. Covered employers are those covered by Virginia Occupational Safety and Health ("VOSH") safety regulations. Covered employers are referred to in this Alert as "employers."

The Standard establishes requirements applying to all employers and a subset of requirements applying to employers with higher-risk workplaces having certain categories of vulnerable employees. Certain employers with healthcare settings are treated differently (see below).

To assist with implementing the revised Standard, the Virginia Department of Labor and Industry ("VDOLI") issued updated [Frequently Asked Questions](#) ("FAQs"), along with links to updated resources.

Shifting the Focus to Vulnerable Employees and Higher-Risk Workplaces

The Standard shifts the COVID-19 response strategy from mitigating the risk of exposure for all employees to instead protecting certain vulnerable employees. The Standard establishes different rules for employers depending on (i) the presence of certain categories of employees in the workforce and (ii) whether the workplace is considered one of "higher risk."

EMPLOYERS SUBJECT TO "HIGHER-RISK" ADDITIONAL MEASURES ARE THOSE WITH:

- Unvaccinated / partially vaccinated employees; and
- Employees that work in certain workplaces where there is heightened risk due to workplace factors.

Key Steps for Employers That Are Not Exempt From the Standard

The Mandatory provisions for all employers are found here: [16VAC23-220-40](#)

MANDATORY STEP #1: HAZARD ASSESSMENT & RISK DETERMINATION.

- Assess the workplace for COVID hazards and tasks with potential COVID exposure.
Either:
 - Ask all employees about vaccination status (the Standard states that the employer may accept the employee's answer as proof or request proof and requires confidentiality of records) and identify the number of vaccinated versus unvaccinated and partially vaccinated employees; and
 - Ask all employees if they want to self-identify as "otherwise-at-risk" (immunocompromised) for purposes of the implementation of the Standard. (Employers must follow the EEOC's American's with Disabilities Guidelines regarding this question.)
 - Determine through the VDH website the level of community transmission where the worksite is located.

Or:

 - Employers may choose not to make a risk determination and instead assume that all employees are either unvaccinated/partially vaccinated or considered "otherwise-at-risk, and comply with the requirements of the "higher-risk" protections for the entire worksite.

IMPORTANT NOTE: The [Virginia Department of Health's \("VDH"\) Level of Community Transmission](#) website contains the data to determine a Virginia locality's COVID-19 transmission rate.

As of the date of this Alert – almost every community in Virginia is at a "high" transmission level, and therefore almost every employer has employees that trigger additional measures (such as mandatory masking). A locality's COVID-19 transmission level changes are reported weekly on the VDH's website.

MANDATORY STEP #2: DETERMINE IF A "HIGHER-RISK" WORKPLACE.

- Using the information learned from the hazard assessment, employers must determine if the workplace qualifies as "higher risk" pursuant to 16VAC25-220-60(A), or alternatively choose to apply the "higher-risk" protections set forth in 16VA250220-60 for the entire worksite. As written, this section of the Standard does not clearly define "workplaces of higher risk." However, VOSH has confirmed the following:
 1. A workplace is considered higher-risk if there are workers who are not fully vaccinated; **and**
 2. If unvaccinated / partially vaccinated or otherwise at-risk (i.e., immunocompromised) employees:
 - work closely to one another (including close contact in breakrooms and while clocking in and out, etc.);
 - work closely or have frequent contact with members of the public;
 - work in enclosed indoor spaces with inadequate ventilation;
 - may be exposed to virus droplet in the air, are exposed to surfaces contaminated with the

- virus, or share break rooms or points of ingress and egress;
- share transportation; or
- share living quarters.

MANDATORY STEP #3: MASK MANDATE.

- Mandate face coverings for all employees who are unvaccinated or partially vaccinated, “otherwise at-risk,” or are vaccinated and work in a “substantial” or “high” COVID-19 transmission locality. **As of today, this mandate applies to all employees working for employers in almost all Virginia localities and will remain until the transmission rate decreases to “moderate” or “low.”**
 - Exceptions apply, such as being alone in a room, eating and drinking with six feet of separation or a barrier, or having an exemption due to a disability or based on religion among other exceptions.
 - The mask mandate applies even if the workplace does not meet any of the “higher risk” factors.

MANDATORY STEP #4: REQUIRED COVID-19 PROCESSES FOR ALL EMPLOYERS.

Create the necessary processes to, among other things:

- Receive anonymous complaints about COVID-19 protocol violations;
- Report positive tests or COVID-19 symptoms to VDH or VDOLI (VDOLI and VDH have collaborated on a Notification Portal so employers no longer need to notify the VDH separately. See FAQ Sec. 40, No. 11)
- Return to work after positive test or symptoms;
- Implement social distancing rules for employees that are unvaccinated or otherwise at-risk;
- Close or control access to breakrooms and common areas for unvaccinated or otherwise at-risk employees; and
- Comply with CDC / VOSH sanitation guidelines.

ADDITIONAL REQUIREMENTS FOR EMPLOYERS WITH A “HIGHER-RISK” WORKPLACE.

REMINDER: Even if an employer has a 100% vaccinated workforce, during times of substantial or high transmission, the employer must follow the following additional requirements.

In addition to the requirements of 16VAC23-220-40, employers with employees in a workplace of “higher risk” must follow the requirements found here: [16VAC23-220-60 – 16VAC2323-220-80](#) which include the following:

- Create a written COVID-19 response plan by October 8, 2021 if the employer has 11 or more employees who are either unvaccinated or partially vaccinated.
- Provide training to all employees by November 7, 2021. The training for vaccinated employees may be written, while the training for unvaccinated or partially employees must either be “live” or computer based.

Additionally, these employers must do the following to limit the spread of COVID-19 for each such employee in workplaces where there is a “higher risk:”

- Review and implement – where feasible – certain engineering controls regarding:
 - Ventilation and air-flow control; and
 - Physical barriers (i.e., clear plastic sneeze guards).
- Review and implement – where feasible – certain administrative controls regarding:
 - Prescreening or surveying for COVID 19 symptoms
 - Providing face coverings to non-employees;
 - Staggering break times and arrival/departure times;
 - Implementing flexible hours;
 - Providing signage to support social distancing; and
 - Delivering services remotely.
- Create a process to assess COVID-19 risk to unvaccinated or partially vaccinated workers only, and determine whether PPE is appropriate for those workers only.

Exemption and Special Rules for Employers with “Healthcare Settings”

[16VAC23-220-50](#)

Employers covered by the federal Occupational Safety and Health Administration (“OSHA”) COVID Emergency Temporary Standard (for healthcare settings) are exempt from the requirements of the VOSH Standard—except for the VOSH and VDH reporting requirements and the anti-retaliation provisions, which all Virginia employers must meet. Employers should check the scope of the federal OSHA ETS, as it is not as simple as “all healthcare providers.”

Many traditional healthcare providers are not covered by the federal rule (and, hence, must comply with the new VOSH Standard). Some other employers are covered by the federal rule even though they do not consider themselves to be healthcare providers (e.g., a manufacturing facility or school with a qualifying infirmary). This exemption applies only as long as the federal OSHA ETS remains in effect. [Click here](#) to read our Client Alert on the federal OSHA ETS.

For employers who are not covered by the federal OSHA ETS but who have covered “healthcare settings,” the new VOSH Standard imposes special requirements, some of which are more stringent than the federal ETS. As with the federal ETS, these special requirements do not apply to all traditional healthcare providers and do apply to some employers who may not consider themselves to be healthcare providers.

Virginia is a “State Plan State” and is authorized by federal OSHA to administer its own state agency (VOSH) to regulate workplace safety. When OSHA issued the first federal ETS, it directed all State Plan States to adopt the federal ETS or implement their own. President Biden announced the development of a second emergency temporary standard to address COVID-19 in the workplace on September 9, 2021, which we addressed in a more recent Client Alert ([click here](#)). We addressed the two federal ETS’s in separate Client Alerts, the first on June 14 and the second on September 10. It is not known if or how this second federal ETS will apply to State Plan States.

CDC Safe Harbor

Employers who follow CDC guidance, whether mandatory or non-mandatory, to address a “provision” of the Standard shall be considered in compliance with the Standard, and such compliance will be considered “evidence of good faith” in any enforcement proceeding related to the VOSH Standard. FAQ Section 10, No. 4.

However, the Standard contains multiple provisions that are not addressed in the CDC guidance. Therefore, merely complying with the CDC guidance may not be adequate evidence of good faith compliance with all provisions of the Standard. There is a risk that VDOLI or a court could determine that compliance with the CDC guidance only supports compliance where the CDC guidance overlaps with the provisions of the Standard.



This Alert is intended to keep readers current on developments in the law and is not intended to be legal advice. If you have any questions, please contact [Karen S. Elliott](mailto:kelliott@eckertseamans.com), kelliott@eckertseamans.com, or other members of Eckert Seamans' [Labor & Employment](#) section, or any attorney at Eckert Seamans with whom you have been working.