

ADOPTION OF NEW COVID-19 EMERGENCY WORKPLACE REGULATION AND EMERGENCY TEMPORARY STANDARD ANTICIPATED ON JUNE 24, 2020

June 16, 2020

On Friday, June 12, the Virginia Department of Labor and Industry (DOLI) published a draft emergency temporary standard/emergency regulation that applies to all employers in the Commonwealth. See [DOLI Safety and Health Codes Board 6/24/20 Meeting Agenda](#). The standard/regulation is designed to encourage infectious disease prevention, mitigation, and control in the workplace relating to the SARS-CoV-2 virus that causes COVID-19. The emergency temporary standard and emergency regulation is intended to supplement and enhance existing Virginia Occupational Safety and Health (VOSH) laws which do not address many of the known hazards posed by SARS-CoV-2 and COVID-19 specifically, or infectious diseases generally.¹ In the event of a conflict between current VOSH rules, regulations or standards and the emergency temporary standard/regulation, the more stringent rule will apply. The draft standard/regulation will be finalized and voted on at the next DOLI meeting which is scheduled for June 24, 2020.

After adoption, the emergency temporary standard will be effective immediately upon publication in the *Richmond Times-Dispatch*. The emergency temporary standard will expire within six months of the effective date, or when superseded by a permanent standard, whichever occurs first, or when repealed by the Virginia Safety and Health Codes Board. The emergency regulation shall become effective when signed by the Governor and published in the *Virginia Register* and are effective for up to 18 months. Because these requirements are classified as both an emergency temporary standard and an emergency regulation, the effective date may be immediate and employers should be prepared to be in compliance as close to June 24, 2020, as possible.

CATEGORIZATION OF EMPLOYEES

The proposed regulation mandates that every employer categorize all employees (including full-time, part-time, management and non-management, temporary, and others jointly employed) into one of four categories based upon risk of exposure in the workplace and while performing assigned job tasks. The four risk categories for employees are: “very high,” “high,” “medium,” and “lower.” Exposure risk level is a multi-factor analysis that includes, but is not limited to, the job tasks undertaken; the known or suspected presence of the virus; the presence of a known or suspected COVID-19 person (symptomatic); the number of employees in the work area; the working distance between employees; the duration

¹ The current VOSH general industry regulations that have been relied upon to address SARS-CoV-2 or COVID-19 hazards include those governing personal protective equipment, eye and face protection, respiratory protection, hand protection, sanitation, temporary labor camps, hazard communications and occupational exposure to hazardous chemicals in laboratories. Ideally, Virginia employers should already be in compliance with these standards.

and frequency of employee exposure through close contact (i.e., less than six feet) with other employees or persons; the type of contact; contact with contaminated surfaces; and whether shared transportation is a common practice. The applicable regulation/standard varies based upon categories of employees in each workforce. After categorizing its employees therefore, employers need to review and comply with the specific standards applicable to their organization by putting in place necessary engineering controls, administrative and work practice controls, and in some cases requiring use of personal protective equipment (PPE).

The four exposure risk levels are divided as follows:

- “very high” means employees are in a place with high potential for exposure to known or suspected sources of the SARS-CoV-2 virus. This includes, but is not limited to, employees performing aerosol-generating procedures (e.g., intubation), collecting specimens from a known or suspected COVID-19 patient, or performing an autopsy on persons known or suspected to have SARS-CoV-2.
- “high” means an employee’s job tasks are performed in places with high potential for exposure within six feet of known or suspected sources of the SARS-CoV-2 virus. This includes, but is not limited to, health care delivery and support services, first responder services, medical transport services, and some mortuary services.
- “medium” means an employee is exposed to or performing job tasks in a place of employment with a risk exposure not otherwise classified as “very high” or “high” and with minimal contact (inside six feet) with other employees and persons who may be infected by the virus. This category includes drug stores and pharmacies, veterinary settings, food processing, agricultural labor, sports and entertainment, indoor and outdoor construction, manufacturing, educational settings, commercial transportation, and fitness, gym and exercise facilities. It may also include certain health care employers in non-hospital settings such as skilled nursing facilities, outpatient medical facilities, clinics, drug treatment programs, home health care, nursing homes, assisted living facilities, hospice care, rehabilitation center, doctors, dentists, chiropractors and other health care providers whose workplaces require more than minimal contact with others who may be infected with SARS-CoV-2 but do not involve exposure to known or suspected sources of SARS-CoV-2.
- “lower” means an employee works in an occupational setting that does not require contact with the general public or other persons (within six feet) known or suspected of being infected with the virus. It may also include employers who are able to achieve minimal occupational contact through measures such as physical barriers, telecommuting, staggered shifts, or delivery of services remotely (e.g., curbside pickup). “Face covering” measures as defined by the regulations do not allow an employer to achieve the “lower” categorization.

MINIMUM MANDATORY REQUIREMENTS FOR ALL EMPLOYERS²

The draft regulations require all employers to ensure compliance with the following requirements:

- Employers must assess the workplace for hazards and jobs that potentially expose employees to SARS-CoV-2 or COVID-19 and determine the risk exposure level for each of its employees consistent with the definitions in the draft regulations;
- Notice to employees and encourage employee self-monitoring;
- Develop and adopt policies and procedures for employees to report when they have tested positive for anti-SARS-CoV-2 antibodies through serologic testing and when experiencing COVID-19 symptoms; for return to work using either a symptom-based or test-based strategy; to ensure physical distancing while on the job (including while traveling for work) and during paid breaks in the workplace;

² The draft regulation includes over ten pages of definitions that are key to ensuring compliance. For example, the standards define a “known COVID-19,” a “suspected COVID-19,” a person who “may be infected with SARS-CoV-2,” community transmission, duration and frequency of employee exposure, economic and technical feasibility, and administrative, engineering, and work practice controls.

- Close or control access to common areas, breakrooms or lunchrooms with the required notices;
- Prohibit known or suspected COVID-19 employees from working;
- Ensure sick leave policies are flexible and consistent with public health guidance and applicable laws;
- Discuss with subcontractors and other companies that provide employees the company's practices and policies to address suspected and known COVID-19 cases;
- Notify employees and others when a co-worker tests positive for COVID-19 within certain time frames and in compliance with applicable federal and state confidentiality laws;
- Ensure employee access to SARS-CoV-2 and COVID-19 exposure and medical records in accordance with OSHA standards; and
- Sanitation and disinfecting requirements.

Numerous additional requirements including engineering, administrative, and work practice controls must be met by employers whose employees are classified as "very high" or "high" and even "medium" exposure risk. Employers should be prepared to respond to requests for religious waivers from the required use of respirators, masks, or face coverings.

To better protect employees from workplace exposures to the SARS-CoV-2 virus, employers with hazards or job tasks classified at anything greater than "lower" risk are required to verify that the COVID-19 workplace hazard assessment has been performed via a written certification that includes the workplace evaluated and the name of the person performing the certification. The written document must be dated and identified as a "Certification of Hazard Assessment."

Many of these requirements reflect CDC recommendations that employers are following today. If these new practices have not been memorialized into workplace policies and procedures however, development of these policies and procedures should begin immediately. Employers also must document and, in some cases, post sanitation and disinfecting procedures. For example, all common spaces and frequently touched surfaces must be cleaned and disinfected at the end of each shift or more frequently. If devices, instruments, tools, or other items are shared by employees, they must be cleaned prior to transfer from one employee to another where feasible. The proposed regulation also addresses employees' access to handwashing and sanitation and its requirements depend on the nature of the employees' work and potential exposure to others.

INFECTIOUS DISEASE PREVENTION AND RESPONSE PLAN

The proposed regulation obliges employers with employees categorized as "very high," "high," or greater than 11 employees categorized as "medium" to develop and implement a written "Infectious Disease Preparedness and Response Plan." Employers must designate a qualified person to be responsible for implementing the plan. The plan must address the levels of risk associated with various work locations as well as the nature and extent of potential employee exposures to known or suspected sources of SARS-CoV-2. The document must also include a contingency plan in case of an outbreak, and it must detail the basic infection prevention measures being implemented in the workplace.

TRAINING

Employers with employees categorized as “very high” or “high” must provide a training program for all employees (regardless of risk classification), which includes eight specific categories of information such as the requirements of the emergency standard/regulation, identifying COVID-19 symptoms, and procedures to minimize risk. Employers with employees classified as “very high” exposure risk must provide a detailed written certification of training and as required by the regulations, retraining.

ANTI-DISCRIMINATION

The draft regulations contain anti-discrimination provisions that prohibit an employer from discharging or discriminating against an employee for exercising their rights under the emergency standards and regulations. In addition, no employee can be discharged or discriminated against for voluntarily providing their own PPE, if such equipment is not provided for by the employer, “provided that the PPE does not create a greater hazard to the employee or create a serious hazard for other employees.” Lastly, no employee can be discharged or discriminated against for raising a reasonable concern about COVID-19 infection control to the employer, other employees, or to the public “such as through print, online, social or any other media.” If adopted, most Virginia employers will need to update existing anti-discrimination and perhaps social media policies to comply with the new requirements.

The emergency temporary standard/emergency regulation will be enforced in the same manner as other VOSH laws and standards. Civil violations include “serious,” “other than serious,” “repeat,” “willful,” and “failure to abate.” The minimum penalty for a single violation currently is \$13,047 and for a willful or repeat violation is \$130,463. Claims of discrimination are not subject to these parameters. While employers can receive penalty reductions for size, based upon the number of employees, and the defense of employee misconduct may be available, documented efforts to comply will be worth the investment.

For questions, please contact a member of our [COVID-19 Task Force](#).

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