

## New COVID-19 Emergency Temporary Standard Becomes Effective Week of July 27<sup>th</sup>

July 23, 2020

On Friday, June 12, the Virginia Department of Labor and Industry (DOLI) published a draft emergency temporary standard (ETS), 16 VAC 25-220, that applies to all employers in the Commonwealth. On July 15<sup>th</sup> after four full-day meetings to discuss proposed amendments to the draft ETS and whether to adopt any standards beyond the current Occupational Safety and Health Administration (OSHA) laws and Centers for Disease Control and Prevention (CDC) guidelines, the Virginia Safety and Health Codes Board finalized the ETS. The ETS is designed to encourage infectious disease prevention, mitigation, and control in the workplace relating to the SARS-CoV-2 virus that causes COVID-19. It is intended to supplement and enhance existing OSHA and 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.<sup>1</sup> In the event of a conflict between current OSHA or VOSH rules, regulations, or standards and the ETS, the more stringent rule will apply.

The ETS will be effective immediately upon publication in the Richmond Times-Dispatch on or during the week of July 27<sup>th</sup>, the exact date yet to be determined. The emergency temporary standard will expire within six months of the effective date, or when superseded by permanent standard, whichever occurs first, or when repealed by the Virginia Safety and Health Codes Board.

### CATEGORIZATION OF JOB TASK

The ETS mandates that every employer classify each job task into one of four categories according to the hazards employees are exposed to in performance of the task. See § 40.A. 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 work environment (indoors or outdoors); the known or suspected presence of the virus; the presence of a person known or suspected have to COVID-19; the number of employees in the work area; the working distance between employees and other persons; the duration 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

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<sup>1</sup> 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. CDC guidelines also are being followed by many Virginia employers but were not enforceable, arguably necessitating the ETS.

is a common practice. After classifying all job tasks, 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 the job tasks occur in places with high potential for exposure to known or suspected sources of 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 job tasks are performed in places with high potential for employee exposure inside six feet with known or suspected sources of SARS-CoV-2 virus. This includes but is not limited to health care delivery and support services provided to patients known or suspected to be infected with SARS-CoV-2 virus, and similar first responder services, medical transport services, nursing home care, assisted living care, and some mortuary services.
- “medium” means the job tasks are performed in a place with a risk exposure not otherwise classified as “very high” or “high” and that require more than minimal contact (inside six feet) with other employees and persons who may be infected but are not known or suspected to have COVID-19. 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, 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 the job task is performed in an occupational setting that does not require contact (inside six feet) with persons 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 by themselves, as defined by the regulations, do not allow an employer to achieve the “lower” categorization.

## MINIMUM MANDATORY REQUIREMENTS FOR ALL EMPLOYERS<sup>2</sup>

The ETS §40 requires all employers to ensure compliance with the following requirements:

- Employers must assess the workplace for hazards and job tasks that can potentially expose employees to SARS-CoV-2 or COVID-19 and classify each job task consistent with the definitions in the standard;
- Notice to employees and encourage employee self-monitoring;
- Develop and adopt policies and procedures for employees to report when they are experiencing COVID-19 symptoms and no alternative diagnosis has been made;
- Prohibit known or suspected COVID-19 employees from working at the work site;
- To the extent feasible and permitted by law, ensure sick leave policies are flexible and consistent with public health guidance;

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<sup>2</sup> The ETS 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.

- Discuss with subcontractors and other companies that provide employees the company's practices and policies to address suspected and known COVID-19 cases;
- To the extent permitted by law, including HIPAA and the ADA, employers must establish a system to receive reports of positive SARS-CoV-2 tests and notify its own employees, employers of other employees present, the building/facility owner, and the Virginia Department of Health within 24 hours of a positive result; employers also must notify DOLI within 24 hours of discovery of three or more positive results at the place of employment within a 14 day period;
- Ensure employee access to SARS-CoV-2 and COVID-19 exposure and medical records in accordance with OSHA standards;
- Develop return-to-work policies and procedures using either symptom-based or test-based strategies. For known asymptomatic COVID-19 employees to return to work the employer shall develop a procedure using either a time-based or test-based strategy;
- Ensure employees observe physical distancing, including adopting related policies and procedures;
- Control or close access to common areas, breakrooms, or lunchrooms; and
- Sanitation and disinfecting requirements.

Employers also must ensure compliance with mandatory Virginia executive orders or orders of public health emergency. Numerous additional requirements, including engineering, administrative, and work practice controls, must be met by employers whose job tasks 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 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." Employers with job tasks classified as "lower" are required to provide oral or written information to employees regarding the hazards and symptoms of COVID-19.

Many of these requirements reflect CDC recommendations that employers are following today. If these current practices have not been memorialized into workplace policies and procedures, however, development of these policies and procedures should begin immediately, together with work on the mandatory risk assessment. Employers also must document and in some cases post certain information required by the ETS. 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. The ETS also requires employees have adequate access to handwashing and sanitation, depending on the nature of the employees' work and potential exposure to others.

## INFECTIOUS DISEASE PREVENTION AND RESPONSE PLAN

The ETS obliges employers with job tasks categorized as "very high," "high," or "medium" with 11 or more employees 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. DOLI will provide industry specific plan templates in the coming weeks. Employers must have the plan completed, and employees must be trained on the plan within 60 days of the effective date of this standard.

## TRAINING

Employers with job tasks categorized as “very high,” “high,” or “medium” must provide a training program for all employees (regardless of risk classification) which includes ten specific categories of information such as the requirements of the ETS, identifying COVID-19 symptoms, and procedures to minimize risk. Employers must have employees sign a detailed written certification of training as required by this standard. All training except that associated with the Infectious Disease and Response Plan must be completed within 30 days of the effective date of this standard. DOLI will provide sample PowerPoint presentations and certification forms for employers to use.

## ANTI-DISCRIMINATION

The ETS contain anti-discrimination provisions that prohibit an employer from discharging or discriminating against an employee for exercising their rights under the ETS. 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.” Most Virginia employers will need to update existing anti-discrimination and perhaps social media policies to comply with these new requirements.

The ETS 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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