

Virginia Passes Permanent COVID-19 Employee Health and Safety Requirements

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Last summer, [we reported](#) on Virginia's adoption of an "Emergency Temporary Standard for Infection Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19" (the "Temporary Standard"), which made Virginia the first state to implement workplace safety and health standards for COVID-19. The Temporary Standard expired on January 26, 2021.

On January 27, 2021, Governor Ralph Northam approved the [Final Permanent Standard](#) (the "Permanent Standard") previously adopted by the Virginia Safety and Health Codes Board (the "Board"), which provides continued protection for Virginia employees for the duration of the pandemic and supersedes the previous regulations. In addition to extending many of the employer obligations set forth in the Temporary Standard, the Permanent Standard creates new requirements and dispenses with some previous guidance.

This Advisory provides an overview of key provisions carried over from the Temporary Standard and summarizes the Permanent Standard's new requirements.

The Temporary Standard

Since late July, Virginia Occupational Safety and Health (known as "VOSH") has enforced the state's Temporary Standard, which covers most private employers. Key provisions in the Temporary Standard that remain part of the Permanent Standard include requirements to:

- take precautions to protect employees within the physical workplace, including taking steps to ensure six feet of physical distancing between employees;
- conduct workplace assessments of the hazards that potentially expose employees to COVID-19;
- categorize positions within the company as "very high," "high," "medium," or "low risk" for contraction of COVID-19;

- create a workplace infectious disease preparedness and protection program if a company has job tasks with risks classified as “very high” or “high,” and/or if the company has 11 or more employees with job tasks classified as “medium” risk;
- offer enhanced medical monitoring of employees during COVID-19 outbreaks, and provide psychological and behavioral support to address employee stress;
- provide COVID-19 training to employees; and
- provide access to hand-washing and cleaning supplies, and undertake regular cleaning processes

Key Differences Between the Permanent Standard and the Temporary Standard

Similar to the Temporary Standard, the Permanent Standard requires Virginia employers to take steps to strengthen protections and procedures regarding overall COVID-19 safety in the workplace. To that end, the Permanent Standard largely adopts obligations previously set forth in the Temporary Standard. However, there are some notable changes:

- An employer now must only report cases to the Virginia Department of Health if the employer discovers *two* positive COVID-19 tests *in a 14-day period*, as opposed to being required to report every positive test. The report must be made within 24 hours and include the name, date of birth, and contact information related to each case.
- The Permanent Standard clarifies that an employer must notify the Virginia Department of Labor and Industry within 24 hours of the discovery of three or more *of the employer’s own employees* present at the workplace within a 14-day period who test positive for COVID-19 during that time.
- An employer will not face enforcement actions for failure to provide personal protective equipment (“PPE”) if it is in short supply and the employer makes good faith efforts to secure such PPE that is “readily available on commercially reasonable terms.”
- A time-based return-to-work framework has replaced the Temporary Standard’s test-based requirement. Now, previously symptomatic employees are excluded from physically returning to work until (i) the employee is fever-free for at least 24 hours, (ii) respiratory symptoms have improved, and (iii) at least 10 days have passed since symptoms first appeared. This symptom-based return-to-work requirement is consistent with current Centers for Disease Control and Prevention guidance.
- Face coverings must not have exhalation valves or vents, as they allow virus particles to escape. Face coverings must not be made of material that makes it difficult to breathe, such as vinyl. Additionally, employees may not use a face shield as a substitute for a face covering. The Permanent Standard, however, is

silent as to whether and how to accommodate people with disabilities who are unable to wear face coverings.

- There is no longer a provision that would have required that the Permanent Standard not conflict with requirements and guidelines applicable to businesses set out in any applicable Virginia executive order or order of public health emergency. Thus, the Permanent Standard cannot be used to enforce Governor Northam's executive orders.
- The Permanent Standard provides alternatives to the requirement for employers to comply with respiratory standards when multiple employees travel together in work vehicles, due to shortages of N-95 and similar face coverings. Such alternative controls include providing fresh air ventilation and not circulating cabin air, as well as setting occupancy limits or sitting in alternate seats.
- Areas where multiple shifts are employed must be cleaned and disinfected no less than once every 12 hours.
- The Board removed requirements unrelated to occupational safety and health (such as contingency planning for business operations in the event of an outbreak and flexible sick leave policies).
- While employers must pay for any COVID-19 testing performed for return-to-work purposes, the Permanent Standard clarifies that the employers' health insurance may cover such costs.

Despite the increased attention on COVID-19 vaccines, the Permanent Standard does not provide any guidance or requirements with respect to vaccination of employees.

What Virginia Employers Should Do Now

Although the Permanent Standard is similar to the Temporary Standard, Virginia employers should review the key differences outlined above in connection with existing policies and procedures to ensure they are in compliance with all of the new requirements. Failure to comply could be costly: employers may be subject to fines up to \$12,726 for serious violations, and up to \$127,254 for willful violations.

Therefore, Virginia employers should:

- review their infectious disease preparedness and response plans to ensure compliance with the new regulations in the Permanent Standard;
- update any test-based return-to-work requirements;
- prohibit the use of face shields, unless they are used in addition to other face coverings;

- if they are unable to secure sufficient PPE to provide their workforce, document the reasons why obtaining PPE was difficult;
- ensure that common areas and those where workers on multiple shifts operate are disinfected every 12 hours; and
- train or notify supervisors and employees on new workplace safety policies, as needed.

Additionally, employers should know that President Biden issued an executive order on January 21, 2021, directing the Occupational Safety and Health Administration (“OSHA”) to issue revised guidance to employers, within the next two weeks, on workplace safety during the pandemic. As we [previously reported](#), the executive order also directed OSHA to evaluate whether federal temporary emergency standards are necessary and, if so, to issue them by March 15, 2021. Employers should continue to monitor these federal developments, which may use the Virginia Permanent Standard as a roadmap or even impose further requirements.

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