

Va. Workplace Virus Safety Mandate Has High Compliance Bar

By Jon Snare, Kaiser Chowdhry and Alana Genderson

(July 31, 2020, 1:23 PM EDT)

On July 27, Virginia became the first state in the nation to enact enforceable workplace safety standards to address the risks of coronavirus. The Virginia Safety and Health Codes Board finalized a regulation that will be enforced by the Virginia Occupational Safety and Health Program, and that will apply to most private employers in Virginia.

To date, the federal Occupational Safety and Health Administration has not adopted any new nationwide standards related to COVID-19. In the absence of such guidance, Virginia Gov. Ralph Northam touted Virginia's leading efforts in "creating the nation's first enforceable workplace safety requirements."

In many ways, Virginia's new standard tracks existing guidance from both OSHA and the Centers for Disease Control and Prevention. In other ways, the standard is more expansive.

Recognizing this interplay, the Virginia standard expressly confirms that if an employer actually complies with CDC guidelines that provide equivalent or greater protection than the Virginia standard, those actions will be deemed compliant with the standard.

If an employer follows a less stringent CDC guideline that falls short of the Virginia standard, then the employer's actions will not necessarily be found compliant with Virginia's rules, but may be considered as evidence of good faith in any potential enforcement action. Compliance on paper is not enough — to benefit from this provision, employers must show on-the-ground execution and enforcement of COVID-19 policies based on CDC guidelines.

Because Virginia is the first out of the gates, many employers are focusing time and energy to develop a robust Virginia plan. Then, when other states follow suit, employers hopefully will be able to use the preexisting Virginia plan to satisfy requirements in other states.

At the very least, it can serve as a jumping off point for programs outside of Virginia. Savvy employers



Jon Snare



Kaiser Chowdhry



Alana Genderson

will write their Virginia plan with this national approach in mind, knowing that more regulations may come.

Assessing Risk Level and Actions to Be Taken

The standard imposes different sets of requirements on employers depending on the exposure risk levels their employees may face, including very high, high, medium and lower. The standard contemplates that these risk levels are task-specific, such that the same employee could theoretically be classified as both high and low risk, depending on the nature of the work performed throughout the workday.

Accordingly, employers will need to carefully evaluate the job duties of their workforce to develop proper classifications of their employees. Although the standard provides some clear indicators — for instance, an office building setting is considered to fall within the low-risk classification — for many employers this will be a context-specific assessment that may vary from one worksite to another and possibly from one task to another. The higher the risk, the stricter and more burdensome the standards.

General Requirements for All Virginia Employers

In addition to risk-based requirements for different job tasks and hazards, the standard imposes baseline requirements for all Virginia employers. These fall into several categories.

Exposure Assessment and Notification Requirements

To meet these standards, employers must:

- Assess workplaces for hazards that could potentially expose employees to COVID-19, and classify each job task based on the exposure risk levels of very high, high, medium and lower.
- Inform employees to self-monitor for symptoms, and employers must provide information about how to do so.
- Avoid relying on antibody tests to make decisions about returning employees to work.
- Develop and implement policies and procedures for employees to report when they are experiencing symptoms consistent with COVID-19; such employees will be designated as suspected to have COVID-19.
- Ensure that employees who are suspected or confirmed to have COVID-19 do not return to the workplace until they have been cleared to do so.
- Ensure sick leave policies are flexible and consistent with public health guidance and communicated to employees.
- Coordinate with subcontractors and/or companies that provide contracts or temporary employees to prohibit individuals who are known or suspected to have COVID-19 from the worksite.
- Establish a system for the employer to receive reports of positive COVID-19 tests from employees, contractors or temporary employees who were present at the worksite within 14

days of having a positive test. Employers must then notify employees who may have been exposed to that person, other employers with employees present at the same worksite, and the building or facility manager, and within 24 hours the Virginia Department of Health. If more than three positive cases are discovered in a 14-day period, the Virginia Department of Labor and Industry must be notified.

- Ensure that employees can access their own COVID-19 exposure and medical records, if any.

Return-to-Work, Social Distancing and Sanitization Requirements

To meet these standards, employers must implement policies and procedures for employees returning to work after a positive test or a suspected case of COVID-19. For symptomatic employees, these policies can rely on symptom-based or test-based strategies; for asymptomatic employees, these policies can rely on time-based or test-based strategies.

Each strategy is defined in the Virginia standard. If test-based strategies are used, the employer must pay for the cost of the test.

Additionally, employers must ensure physical distancing is maintained through signage, announcements, decreased worksite density or other means. They also must limit occupancy of common spaces used by employees to ensure that physical distancing can be maintained during breaks. Common spaces must be cleaned and disinfected throughout the day.

Under the new standards, employers must comply with respiratory protection and personal protective equipment standards where distancing cannot be maintained, including in vehicles, subject to special provisions for medical accommodations and religious objections.

They are also required to follow cleaning procedures detailed in the standard, particularly for high-touch surfaces, doors, bathrooms, common spaces, tools, equipment, workspaces and vehicles.

Employers must ensure that any area used by an employee who has tested positive or is suspected positive has been cleaned before other employees use that area, after waiting 24 hours where feasible.

Finally, employers must provide cleaning and disinfection products that meet the U.S. Environmental Protection Agency's standards for COVID-19 for employees to use to clean the worksite, and train employees on how to use these products and any associated hazards.

They will also need to ensure that employees have easy and frequent access to soap and water for hand-washing, or hand sanitizer where feasible.

Training Requirements for Employers

If an employer determines that some of its workforce faces very high, high or medium exposure risk to COVID-19, the employer must be prepared to train employees on:

- The requirements of the Virginia standard, or the CDC and/or OSHA guidelines the employer is following in lieu of any provision of the standard;
- The employer's infectious disease preparedness and response plan;

- Signs and symptoms of COVID-19;
- Risk factors of COVID-19 to individuals with health conditions;
- Transmission of the virus, including by presymptomatic and asymptomatic individuals;
- Safety and health work procedures, including the use of personal protective equipment; and
- The anti-discrimination provisions in the standard.

According to the most recent guidance, employers will have 60 days after the Virginia standard becomes effective to train employees under this section of the standard. Employers must maintain certification records of employee trainings per this requirement.

Employers with hazards or job tasks classified at lower risk must provide written information to employees on the potential hazards and symptoms of COVID-19 and measures to minimize exposure.

What Virginia Employers Should Do Now

With the passage of this standard, employers in Virginia should begin preparing a plan to comply with these new workplace safety standards. Employers should immediately evaluate the potential hazards for COVID-19 exposure that employees face in performing different workplace tasks and classify those tasks in accordance with the standard.

Additionally, they should review existing policies related to COVID-19 and revise and update those policies as necessary, including with respect to employee reporting of potential COVID-19 symptoms, social distancing, workplace cleaning and sanitization, and the like.

Evaluation and modification of workplace configurations to ensure compliance with the regulations, including areas like break rooms and common spaces will also be necessary.

Employers should also ensure the availability of necessary personal protective equipment, develop an infectious disease plan, and create and conduct necessary training within the time frames established in the standard where employees are performing tasks in the medium-, high- and/or very-high-risk categories.

Finally, employers should document all changes to plans, policies and procedures taken in order to comply with the standard.

Even employers outside of Virginia may consider implementing some of the requirements set forth in the standard as well, albeit on a voluntary basis.

Many of the mandates in Virginia's emergency standard mirror existing guidance from OSHA and the CDC. However, failing to follow the standard where it is more expansive than CDC guidelines may result in an enforcement action and possible penalties for noncompliance. Further, although Virginia is the first state to pass enforceable workplace standards, other states may soon follow suit.

of labor at the U.S. Department of Labor, and as acting and deputy assistant secretary of labor at OSHA.

Kaiser Chowdhry is an associate at the firm.

Alana Genderson is an associate at the firm.

Liliya Kramer and Matthew Sharbaugh, associates at the firm, contributed to this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.