

Virginia Drafts COVID-19 Guidance As It Mulls Eliminating Standard

Article By:

Labor and Preventive Practices

Virginia has drafted workplace guidance in the event it strikes down its first-in-the-nation COVID-19 standard.

On his first day in office, Governor Glenn Younkin declared Virginia “open for business” and issued Executive Order 6: [“Reinvigorating Job Growth by Removing Burdensome Regulations from Virginia’s Business Community.”](#) The order directed the Virginia Safety and Health Codes Board to convene an emergency meeting to determine whether the COVID-19 standard was still necessary.

The Board proposed to rescind the standard and opened a 30-day comment public comment period, which ends on March 19. The Board plans to meet on March 21 to take a final vote on the proposal to rescind the standard.

State Plan States

The Occupational Safety and Health Act of 1970 authorizes Virginia and 26 other “State Plan” states to enact state-specific standards and operate their own occupational safety and health program under a matching grant with the Occupational Safety and Health Administration (OSHA). [California](#), [Michigan](#), and [Oregon](#) followed suit with state-based standards of their own.

Virginia Standard

On July 15, 2020, the Board (which included author Courtney Malveaux) made Virginia the first state in the nation to promulgate an [Emergency Temporary Standard](#) to address COVID-19 in workplaces, and it [made the standard permanent](#) on January 27, 2021.

In addition to Centers for Disease Control and Prevention (CDC) and OSHA guidelines, the standard includes provisions that require employers to:

- Provide both handwashing stations and hand sanitizer when feasible;
- Notify the Virginia Department of Health and the Virginia Department of Labor and Industry of outbreaks of two or more positive COVID-19 tests;

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- Assess hazard levels of all job tasks;
 - Provide COVID-19 training for employees;
 - Prepare infectious disease preparedness and response plans;
 - Post or present agency-prepared COVID-19 information to all employees;
 - Screen employees prior to entry to work;
 - Establish requirements for employees with COVID-19 positive tests and symptoms before returning to work;
 - Require social distancing or, when social distancing is not possible, respiratory protection;
 - Clean and disinfect commonly used areas and equipment; and
 - Maintain air handling systems in accordance with manufacturers' instructions and American National Standards Institute and American Society of Heating, Refrigerating and Air-Conditioning Engineers standards.

The standard protects employees who raise reasonable concerns about infection control to print, online, social, or other media. It also requires building and facility owners to report positive COVID-19 tests to employer tenants. In a more recent iteration, the standard also includes a safe harbor provision for employers that follow CDC guidance.

If the Board votes to rescind the standard, Virginia Occupational Safety and Health (VOSH), an OSHA-approved program within the Virginia Department of Labor and Industry, has taken the rare step of preparing state-based guidance. In most cases, VOSH points employers and others to OSHA guidance, rather than developing its own.

Draft Guidance

The draft guidance makes clear the agency's and the Commonwealth's policy to "support and respect the rights of individuals to choose whether to wear masks or to not wear masks in non-federally mandated environments, unless required by law or as medically appropriate in cases of acute illness or in certain healthcare environments." It also makes clear VOSH and the Commonwealth "will not allow or condone illegal discrimination based on wearing or not wearing masks, and people should not be fired or terminated for not wearing a mask" in most circumstances.

The draft guidance indicates that employers should encourage workers to mitigate COVID-19 transmission by:

- Facilitating employee vaccinations;
- Encouraging workers with COVID-19 symptoms to stay home from work and seek a physician's advice on testing and treatment;
- Requiring workers infected with COVID-19 to stay home;

- Providing workers with face coverings or surgical masks;
- Encouraging personal hygiene, including frequent handwashing;
- Educating workers on employers' COVID-19 policies in languages employees understand;
- Operating and maintaining ventilation systems in accordance with manufacturers' specifications;
- Recording and reporting work-related COVID-19 infections when required under longstanding OSHA recordkeeping standards; and
- Following other applicable VOSH standards, including those governing respiratory protection, personal protective equipment, sanitation, bloodborne pathogens, and Virginia's General Duty Clause, which requires employers to provide employment and a place of employment that is free of recognized hazards.

The draft document does not make clarify whether VOSH will enforce Virginia's General Duty Clause if employers fail to follow generally recognized hazards related to COVID-19, including failure to follow guidance provided by the CDC. It also does not clarify whether VOSH will continue its two-year-long practice of initiating Rapid Response Inquiries in which the agency asks employers to answer complaints from employees or others on COVID-19 hazards in workplaces.

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