

JacksonLewis

# Virginia's Permanent Standard for COVID-19 In the Workplace

**Courtney M. Malveaux**

Jackson Lewis P.C. • Richmond, VA

Courtney.Malveaux@jacksonlewis.com • (804) 212-2862

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# Background on the Standard

# Occupational Safety and Health Administration (OSHA)

## OSHA enforces the Occupational Safety and Health Act generally

- OSHA enforces the federal Occupational Safety and Health Act (the “OSH Act”), 29 USC § 654, which incorporates standards such as
  - 29 CFR § 1910 (General Industry Standards)
  - 29 CFR § 1926 (Construction Standards)
- OSHA also enforces the General Duty Clause:  
“Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”  
29 USC § 654(5)(a)(1).

# Virginia Occupational Safety and Health (“VOSH”)

**Virginia is a “State Plan” state that governs most of its own workplaces**

**VOSH enforces Virginia occupational safety and health law (Title 40.1) for:**

- Most private sector employers
- All state and local employers
- Asbestos removal (including federal workplaces)

**OSHA enforces federal Occupational Safety and Health Act for:**

- Federal military facilities
- Federal enclaves where civil jurisdiction has been ceded to federal government
- Temporary employees working for federal government
- Maritime employment (including shipyards, marine terminals, longshoring)
- USPS contractors
- U.S. Department of Energy sites
- Aircraft cabin crew members

# VOSH Standard for COVID-19

## Virginia passed a first-in-nation COVID-19 standard

- The Virginia Safety and Health Codes Board approves OSHA standards
- It approved a first-in-the-nation Emergency Standard for COVID-19 on July 15, 2020
- Arose in response to Governor's Executive Orders
- Effective July 27, 2020
- Replaced with Permanent Standard as of January 27, 2021
- If Governor's State of Emergency is lifted, the Board will consider repeal

# **Purpose, Scope, and Applicability of the Standard**

# Purpose of the Standard Within VOSH

## The Standard supplements VOSH's existing regulations related to COVID-19

- Aim was to establish “requirements for employers to control, prevent, and mitigate the spread of SARS-CoV-2, the virus that causes coronavirus disease 2019 (COVID-19) to and among employees and employers.”
- Passed pursuant to Virginia Code § 40.1-22(6a)
- The Standard covers COVID-19-related hazards
- Where there is conflict with existing VOSH standards, the more stringent requirement applies



# Interplay with CDC Guidelines

## Following CDC guidance $\neq$ compliance with the Standard

- Employers following CDC guidelines are in compliance with the Standard only if guidelines provide equivalent or greater protection than the Standard
- Provision applies whether or not CDC guideline is mandatory or non-mandatory
- Compliance with CDC guidelines considered evidence of good faith

# Requirements Under Emergency Temporary Standard

# What Is In the Virginia Standard?

## General requirements for all employers

- Hazard assessment for all job tasks (“Very High,” “High,” “Medium” and “Low”)
- “Flexible” sick leave policies
- Employers must notify:
  - VA Dept. of Health of COVID-19 positive tests; and
  - VA Dept. of Labor and Industry (DOLI) of “hot spots”
    - 3 COVID-19 positive tests within a two-week period
- Building and facility owners must notify employer tenants of COVID-19 cases
- Nondiscrimination for:
  - Raising/reporting concerns
  - Voluntary PPE use
  - Reasonable work refusals

# Administrative Requirements for “Medium Hazard” Employers

- Employee COVID training within 30 days on:
  - New VOSH standard
  - CDC guidelines (mandatory and nonmandatory)
  - Signs/symptoms/methods of transmission
  - Risk factors for underlying health conditions
  - Asymptomatic/Presymptomatic spread
  - Safe and healthy work practices
  - PPE
  - Antidiscrimination
  - Infectious Disease Preparedness and Response Plan
  - Retraining
- Infectious Disease Preparedness and Response Plan (exception for ten or fewer employees)
  - Designated person for implementation
  - Employee involvement
  - Hazard assessment by job tasks and potential exposure sources
  - Employees with other jobs
  - Employees’ individual risk factors
  - Outbreak contingency plans to cover:
    - Absenteeism
    - Enhanced workplace control measures
    - Cross training/continued operation plans
    - Interrupted supply chains/delayed deliveries

# Changes In the Permanent Standard

# What Are the Changes from the ETS to the Permanent Standard?

- Requirements unrelated to occupational safety and health removed:
  - Business operation contingency planning
  - Flexible sick leave policies, have been removed
- No enforcement actions for good faith efforts to secure Personal Protective Equipment (PPE) in short supply
- Cannot be used to enforce Governor Northam's Executive Orders
- Face covering requirements
- Virginia Department of Health reporting of "outbreaks" of two or more cases
- Eliminates test-based return-to-work requirement
- Time-based return-to-work requirement consistent with CDC guidance
- Alternative controls to respiratory standards when multiple employees travel in work vehicles together

# Enforcement of the Standard

# VOSH's Enforcement Priorities

- OSHA enforcement priorities:
  - Reports of imminent danger
  - Fatalities
  - Accidents
  - Complaints from employees
  - Follow-up monitoring
- Fewer programmed inspections
- Informal investigation process for COVID-19 complaints



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## Courtney M. Malveaux, Esq.

804.212-2862

[Courtney.Malveaux@jacksonlewis.com](mailto:Courtney.Malveaux@jacksonlewis.com)



### Represents Employers In:

- OSHA Citations
- Regulatory and Employment Matters
- Government Affairs

### Regulatory Background:

- Virginia Labor Commissioner
- VA Safety and Health Codes Board
- President, National Association of Government Labor Officials