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Insights: Alert

Virginia Enacts the First Comprehensive COVID-19 Workplace Safety Standards

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On July 15, 2020, the Virginia Safety and Health Codes Board adopted §16VA25-220, an emergency temporary standard for preventing COVID-19 infections. The emergency standard is "designed to establish requirements for employers to control, prevent, and mitigate the spread of [COVID-19]…" among their employees. Virginia becomes the first state to adopt comprehensive workplace safety standards in response to the COVID-19 pandemic. These rules went into effect on July 27, 2020, and will expire within six months, unless extended. Although only required in Virginia, employers nationwide may want to look to these standards as a guide to ensuring they make a good-faith reasonable effort to create a safe workplace and protect employees, customers, clients, vendors, and other visitors from the inherent risks of COVID-19.

Under the Virginia standard, employers will be required to classify job tasks according to their associated risks of exposure ("very high," "high," "medium," or "lower"). Heightened accountability standards apply when employees are at an increased risk of infection. Those employers whose employees engage in "very high" or "high" risk job tasks, or whose employees engage in more than 11 "medium" risk job tasks, must formulate a written plan for protecting employee safety during each of these job tasks. One employee must be designated to ensure compliance with the plan. At any work site where risks are "medium" or higher, employers must also provide comprehensive COVID-19 safety training to all employees at that worksite. Employers will verify the training with written certification records. At job sites where risks are "lower," employers need only provide employees with written or oral information on the hazards, characteristics, and symptoms of COVID-19 and measures to minimize exposure.

Required safety policies include cleaning and disinfecting of shared sites and high touch surfaces, hand washing, social distancing, providing and wearing personal protective equipment (PPE), testing, and reporting known and suspected positive cases to others in the workplace. Where feasible, employers are instructed to implement flexible sick leave policies, stagger employee shifts, and allow teleworking.

Cleaning and Disinfecting Requirements

The new standards mandate frequent cleaning and disinfecting of shared work sites. All common spaces and bathrooms must be cleaned, at a minimum, at the end of each shift. All shared tools, equipment, and vehicles must be cleaned and disinfected prior to transfer to another employee. Employees who interact with other people shall be provided with and required to immediately use supplies to clean and disinfect surfaces where there is a potential for exposure. If someone who has been at the work site is known or suspected to be infected with COVID-19, employers must clean and disinfect the contaminated area (ideally after observing a 24 hour waiting period) before allowing employees to access the area. Employees must also have easy, frequent access to soap and water and, when feasible, hand sanitizer.

Social Distancing Requirements

Based on the risk factors present at the relevant work site, the emergency standard requires employers to enforce social distancing via applicable engineering and administrative controls. In some cases, employers may need to re-examine and re-engineer the physical layout of the workspace, such as by ensuring that buildings are well-ventilated and installing physical barriers to minimize the spread of germs. For example, some employers might be required to install clear plastic walls separating employees from customers. Administratively, employers are required to limit access to workplace areas, use verbal announcements and signage, restrict access to common spaces, reconfigure common areas, and post clear occupancy requirements so that employees can remain physically separated by at least six feet.

Personal Protective Equipment Requirements

When social distancing is not feasible, employees must wear face masks or other PPE. For “lower” risk employees who cannot avoid being within six feet of other people, employers must require the use of face masks. “Medium” risk employees must also wear face masks unless the particular hazards of the job necessitate wearing more effective personal protective equipment, such as surgical masks. “High” or “very high” risk employees who must come into contact with people known or suspected to be infected with COVID-19 must wear gloves, a gown, a face shield or goggles, a respirator, and possibly a surgical mask. Employers must provide the required masks and PPE. The standards include an exception applicable to employees who have an underlying health condition such that usage of face masks or PPE because would jeopardize their health or safety.

Testing and Reporting Requirements

In addition to its workplace safety requirements, the Virginia Occupational Safety and Health Program envisions a robust system of testing and reporting to stop the spread of COVID-19. Individuals known or suspected to be infected with COVID-19 are not permitted entry to the work site. At work sites where hazards are assessed as “medium” or higher, employers are required to prescreen or survey employees for symptoms of coronavirus prior to each shift. Under the standard, employers must implement symptom or test-based strategies to determine whether individuals with known or suspected infections may safely return to work. If using a symptom-based strategy, these individuals must wait at least 10 days after the appearance of symptoms and three days after the resolution of symptoms before returning to work. Under a test-based strategy, individuals must stop experiencing symptoms and test negative for the virus twice in two consecutive tests. In making return to work determinations, employers may not use antibody tests or require employees to pay for testing.

Beyond implementing testing protocols, employers must establish systems where employees can report positive tests. Within 24 hours, the employer is required to notify other employees who may have been exposed that a positive test result has occurred. Employers are also required to report cases to the Virginia Department of Health and Virginia Department of Labor and Industry, as well as to building owners. Building owners, in turn, must report positive cases to other tenants within the building.

Employer Takeaways

The new Virginia rules represent minimum standards for workplace safety amidst the pandemic; crucially, employees are largely free to take additional steps to voluntarily protect their own safety. Employees are not prevented by the standard from refusing to do work or enter a location they feel is unsafe. Furthermore, employees may not be discriminated against for exercising rights under this standard, for voluntarily providing and wearing

their own PPE, or for raising a reasonable concern about infection control to the employer, other employees, the government, or the public via print, online, social, or any other media. Virginia employers must comply with these safety standards, and, for the health of their employees and businesses, should consider taking extra reasonable safety precautions suited to their individual needs.

Additionally, employers in other states may want to use these standards as a template for setting their own workplace guidelines. Although the emergency standard is not enforceable outside of Virginia, in the absence of centralized federal guidance, it may prove a valuable guidepost for employers nationwide.