

WEBSTER, CHAMBERLAIN & BEAN, LLP | NONPROFIT ALERT

MANDATED COVID-19 STANDARDS FOR COVERED VIRGINIA EMPLOYERS

New Emergency Temporary Standards.

Virginia's COVID-19 Emergency Temporary Standard¹ ("ETS") became effective on July 27, 2020. The federal Occupational Safety and Health Act² gives States an opportunity to administer their own COVID-19 workplace safety and health programs, and Virginia is the first state to do so through the ETS. The ETS is designed to supplement and enhance existing COVID-19 related laws, rules, regulations, and standards under the Virginia Occupational Safety and Health (VOSH) program. The ETS seeks to have employers mitigate, control, and prevent the spread of COVID-19.

Application of the ETS.

The ETS applies to nearly all employers, including nonprofits, in Virginia that fall within the jurisdiction of VOSH.³ Virginia recognizes that COVID-19 risks and hazards differ depending on the type of employment. As such, the ETS's requirements depend upon the exposure risk level to COVID-19 disease-related hazards present or job tasks undertaken. Hazards or job tasks at the same place of employment can be designated as "very high, high, medium, or lower exposure risk." Determining exposure risk levels includes examining the employee's job tasks, the work environment (e.g., indoors, or outdoors), and the ability to practice physical distancing.

Summary of the ETS Requirements.

Regardless of the exposure risk level, the ETS requires nine steps⁴ before covered Virginia employers may achieve compliance to include, among others:

- Conducting a hazard risk assessment for hazards and job tasks that may potentially expose employees to COVID-19 and classifying each job task according to the enumerated "very high, high, medium, or lower" exposure risks;
- Enabling employees to have "easy, frequent access, and permission to use soap and water, and hand sanitizer where feasible, for the duration of work;"
- Providing flexible sick leave policies consistent with public health guidance "to the extent feasible and permitted by law, including but not limited to the Families First Coronavirus Response Act;"⁵

¹ §16VAC25-220, Emergency Temporary Standard. Retrieved from: <https://www.doli.virginia.gov/wp-content/uploads/2020/07/RIS-filed-RTD-Final-ETS-7.24.2020.pdf>.

² 29 U.S.C. § 651 et seq.

³ §§ 16VAC25-60-20 and 16VAC25-60-30. Retrieved from: <https://law.lis.virginia.gov/admincode/title16/agency25/chapter60/section20/> and <https://law.lis.virginia.gov/admincode/title16/agency25/chapter60/section30/>.

⁴ Virginia Department of Labor and Industry Guidance for Employers and Employees. Retrieved from: <https://www.doli.virginia.gov/wp-content/uploads/2020/07/COVID-19-ETS-EMPLOYER-GUIDE-FINAL-7.23.2020-English.pdf>.

⁵ Public Law. 116-127 – Mar. 18, 2020.

- Encouraging employees to “self-monitor for signs and symptoms of COVID-19” and “inform employees of the methods of” self-monitoring;
- Developing and implementing policies and procedures to report when experiencing symptoms of COVID-19; and
- Enacting physical distancing measures and face coverings for employees in customer-facing positions when physical distancing is not possible.

Employers with employee job tasks or hazards at a certain level are to provide training and create a written Infectious Disease Preparedness and Response Plan. These requirements take effect on August 26, 2020, and September 25, 2020, per the Virginia Department of Labor and Industry News Release, dated July 27, 2020.⁶

The ETS and the CDC.

The ETS intersects with the U.S. Centers for Disease Control and Prevention (“CDC”) recommendations and guidelines for employers. Section 10.G.1 of the ETS provides that:

To the extent that an employer actually complies with a recommendation contained in CDC guidelines, whether mandatory or non-mandatory, to mitigate SARS-CoV-2 virus and COVID-19 disease related hazards or job tasks addressed by this standard, and provided that the CDC recommendation provides equivalent or greater protection than provided by a provision of this standard, the employer’s actions shall be considered in compliance with this standard.

The FAQs⁷ on the ETS add some additional information:

In order for an employer to take advantage of the language in 16VAC25-220-10.G to be “considered in compliance with” the ETS in the context of a VOSH inspection, the employer will have to inform VOSH what CDC guidelines they are complying with that they contend provide “equivalent or greater protection than provided by a provision of this standard.”

Employer Education on the ETS and Potential Fines.

Employers in Virginia should consult these new rules and assess their workplace policies and adjust them accordingly. The ETS is in effect for six months and will expire upon expiration of the Governor’s State of Emergency or when replaced by a permanent regulation, whichever occurs first unless repealed. Employers that do not comply with the ETS may be subject to significant fines.

⁶ Virginia Department of Labor and Industry News Release dated July 27, 2020. Retrieved from: <https://www.doli.virginia.gov/wp-content/uploads/2020/07/COVID-19-ETS-News-Release-DRAFT-7.23.2020-1.pdf>.

⁷ FAQs on the ETS. Retrieved from <https://www.doli.virginia.gov/cononavirus-covid-19-faqs/>.

Extensive additional information, including a hazard assessment form, is available from the Virginia Department of Labor and Industry.⁸

Lauren L. Dockter | ldockter@wc-b.com | 202-785-9500

David S. Lieberman | dlieberman@wc-b.com | 202-785-9500

⁸ Additional information from the Virginia Department of Labor and Industry. Retrieved from: <https://www.doli.virginia.gov/covid-19-outreach-education-and-training/>.

Disclaimer: This article is for informational purposes only and does not provide legal advice, nor does it create an attorney-client relationship with you or any other reader.