

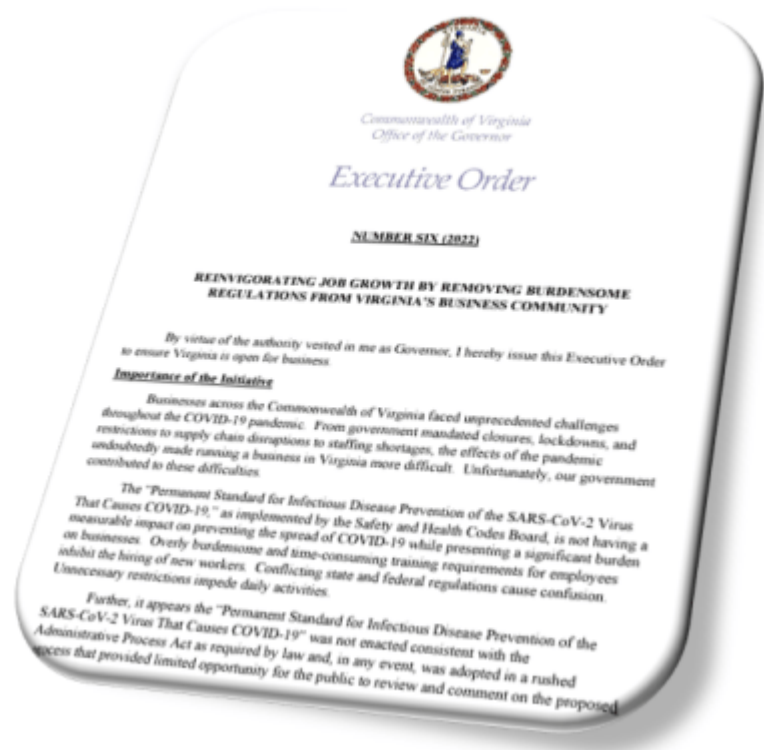
MARCH 2, 2022 | WORKPLACE SAFETY & HEALTH

# VOSH Begins the Process of Withdrawing its "Permanent" COVID-19 Rule

By Conn Maciel Carey LLP's [COVID-19 Task Force](#)

Last Wednesday (February 16<sup>th</sup>), at the direction of Virginia's new Governor, Virginia OSHA's Safety and Health Codes Board voted to withdraw VOSH's COVID-19 Regulation. The Board's vote came after VOSH recommended that COVID-19 no longer constituted a "grave danger," the legal showing required to justify an emergency rule.

Procedurally, the board vote was just the first step. Next is a 30-day public comment period, followed by a public hearing, then a final Board vote. If the measure is in fact repealed after the final Board vote, then Virginia employers would no longer have to require employees who work indoors to wear a face covering;; social distance; provide employee training; improve or maintain ventilation systems; or inform the VA Department of Health about outbreaks.



Although this move comes in lock step with Friday's CDC announcement that it is rescinding mask guidance, along with other states like California and New Jersey rescinding their mask mandate, on January 15<sup>th</sup> Virginia's newly elected Governor Glenn Youngkin issued an [Executive Order](#) instructing the Board to consider whether the

standard was still needed. The Rule also contained a sunset provision tied to fed OSHA's COVID-19 Emergency Standard for the healthcare industry, requiring the Board to decide whether the rule was still needed if OSHA withdrew its COVID-19 healthcare standard. Of course, on December 27, 2021, federal OSHA announced it was no longer enforcing the healthcare standard. Finally, Jay Withrow, VOSH's career Director of the Division of Legal Support, cited a University of Virginia forecast calculating the rate of new infections in the state by late April to be below the state's previous low in the summer of 2021 as yet another reason for withdrawing the rule. Moreover, although the Omicron variant is more contagious than previous variants of COVID-19, it is significantly less likely to cause deaths or hospitalizations, per CDC studies. That said, Withrow did not foreclose the opportunity of the Board enacting a new standard, explaining that if the forecasts are wrong, or a new variant of COVID-19 emerges that poses a grave danger, the Board could enact a new emergency standard.

The key take away is VOSH is on the path to joining several other agencies in rescinding COVID-19 rules, but until then, the rule remains in effect and enforceable. However, in the meantime, recall that the VOSH rule allows employers to comply with updated CDC guidance, even when they deviate from the specific terms of the regulation. In light of the CDC's updated guidance then, employers in Virginia can remain in compliance with the VOSH COVID-19 rule for however much longer it is in effect, and still allow employees to drop masks if they are in counties with Low and Medium community transmission. Indeed, VOSH actually updated its COVID-19 Regulation FAQs on Monday to address this:

***“The Department and VDH agree that, with the exceptions noted for employers and employees whose job duties do not include providing medical care/non-medical care to known or suspected COVID-19 persons, an employer’s compliance with the updated CDC guidance on mask wearing issued on February 25, 2022, would be in compliance with 16VAC25-40.G. [the rule’s mandatory mask requirement for all employers]”***

NEW! added 02-28-22

● THE CDC RECENTLY UPDATED ITS GUIDANCE ON COVID-19 FOR MASK WEARING. IF I AM AN EMPLOYEE WHOSE JOB DUTIES DO NOT INCLUDE PROVIDING MEDICAL ASSISTANCE/NON-MEDICAL CARE TO KNOWN OR SUSPECTED COVID-19 PERSONS CAN I FOLLOW THE UPDATED CDC GUIDANCE REGARDING MASKS?

Yes, except as otherwise noted in these FAQs, and only in areas of medium and low COVID-19 community levels as defined by the CDC.

16VAC25-220-40.G, Mandatory requirements for all employers, contains a mask requirement for "employees that are not fully vaccinated, fully vaccinated employees in areas of substantial or high community transmission, and otherwise at-risk employees (because of a prior transplant or other medical condition)."[1]

16VAC25-220-40.G further provides a list of exceptions to the masking requirement, including when an employee is alone in a room, etc.

#### CDC Guidance Update

On February 25, 2022, the CDC updated its mask wearing guidance based on community level metrics. "CDC looks at the combination of three metrics — new COVID-19 admissions per 100,000 population in the past 7 days, the percent of staffed inpatient beds occupied by COVID-19 patients, and total new COVID-19 cases per 100,000 population in the past 7 days — to determine the COVID-19 community level." [2]

In areas of low COVID-19 community level, the CDC updated guidance does not include mask wearing.

In areas of medium COVID-19 community level, the CDC updated guidance provides:

- If you are immunocompromised or at high risk for severe disease, talk to your healthcare provider about whether you need to wear a mask and take other precautions (e.g., testing).

In areas of high COVID-19 community level, the CDC updated guidance provides:

- Wear a well-fitting mask indoors in public, regardless of vaccination status.
- If you are immunocompromised or high risk for severe disease, wear a mask or respirator that provides you with greater protection.
- If you are immunocompromised or high risk for severe disease, talk to your healthcare provider about whether you need to wear a mask and take other precautions (e.g., testing).

You can determine your place of employment's COVID-19 community level at:

<https://www.cdc.gov/coronavirus/2019-ncov/your-health/covid-by-county.html>

We will be sure to provide updates as that withdrawal moves through the process.

[Let us know](#) if you have any questions or if we can do anything to help as you adjust your COVID-19 protocols over the next few weeks.