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Virginia OSHA Rescinds Its “Permanent” COVID-19 Rule and Introduces New Workplace Guidance

By *Conn Maciel Carey's COVID-19 Task Force*

Under the direction of then-Democratic Governor Ralph Northam, the Commonwealth of Virginia was the very first U.S. State to implement a broad, all-industry programmatic COVID-19 emergency temporary standard (“ETS”) way back in July 2020. Through all the fits and starts with federal OSHA’s COVID-19 rulemaking, VOSH’s COVID-19 regulation was a consistent presence through most of the pandemic. Indeed, that ETS was made “permanent” in January 2021, months before federal OSHA had even adopted its COVID-19 ETS for Healthcare.

However, on his first day in office – January 15, 2022 – new Virginia Governor Glenn Younkin signed an  Executive Order directing the Virginia Safety and Health Codes Board (“Board”) to determine whether there was a continuing need for these regulations (with more than a little pressure from the Governor’s office to conclude it was not). Not surprisingly, under that political pressure, and in the wake of the Supreme Court’s harsh decision about federal OSHA’s authority to regulate COVID-19, by mid-February, the Board had adopted the position of the Virginia Department of Labor and Industry (“DOLI”) that *“based on emerging scientific and medical evidence, [COVID-19] no longer constitute[s] a grave danger to employees in the workplace.”*

That Board finding started a 30-day clock for public notice and comment about the Board’s intention to repeal the rule, and as expected, the Board voted on March 21st to rescind the ETS (effective March 23rd, 2022).

So where does that leave Virginia employers? Essentially in the same boat as employers in federal OSHA states – not subject to specific COVID-19 related requirements and prohibitions, but still potentially subject to enforcement under VOSH’s General Duty Clause if VOSH determines that the employer is not taking reasonable, recognized actions to address the spread of COVID-19 in the workplace. And also like employers in federal OSHA states, that means evaluating the employer’s policies and actions against CDC and OSHA guidance.

Consistent with that, DOLI officially published its new draft COVID-19 Guidance in the Virginia Register on March 28, 2022. That publication started a 30-day comment period that will close on April 27, 2022. In the meantime, employers in Virginia should look to the New Guidance, which is generally consistent with current federal guidance from the CDC and HHS. Specifically, in place of rescinded ETS, Virginia’s new COVID-19 workplace guidance asks employers to:

- Facilitate employees getting vaccinated and boosted;
- Encourage any workers with COVID-19 symptoms to stay home from work and seek advice on testing and treatment from their physician;
- Require all workers infected with COVID-19 to stay home from work;
- Provide workers with face coverings, but permit them the choice of whether to wear it in the workplace;
- Encourage good sanitary work habits, such as frequent hand washing;
- Educate workers on COVID-19 policies and procedures using accessible formats and in languages they understand; and
- Operate and maintain ventilation systems in accordance with manufacturers' specifications to achieve optimal performance.

It is important to note that the new VOSH guidance does not change the applicability of other existing VOSH regulations:

- PPE (part 1910, Subpart I (e.g., 1910.132 and 133)), respiratory protection (1910.134),
- Sanitation (1910.141),
- Employee access to medical and exposure records (1910.1020)
- Recording and reporting COVID-19 infections and deaths which are mandatory (1904).

And nothing in new guidance impedes an employer in Virginia from adopting more stringent COVID-19 health and safety requirements.

Meanwhile, the rest of the country is still waiting for OSHA to finally update its guidance, which has not been updated since last August – at least two variants ago. We do expect an update very soon. OSHA representatives have told us that the updated guidance is “final review” at the Secretary’s and Solicitor’s offices. We anticipate federal OSHA’s guidance will be more rigorous than what VOSH just issued. Governor Youngkin and President Biden have not exactly been using the same playbook.

[Let us know](#) if you have any compliance questions about your Virginia workplaces.