

Emergency Virginia Department of Labor and Industry Regulations Governing Employers' Obligations to Employees Issued on Friday, June 12, 2020

Throughout the COVID-19 Pandemic, the Virginia Department of Labor and Industry ("VDOLI") had seemingly looked towards OSHA and the CDC for direction on how employers should deal with COVID-19. VDOLI's stance changed dramatically on Friday, June 12, 2020, when it published a Notice of Meeting, scheduled for June 24, 2020 where it will consider the adoption of "16 VAC 25-220, Emergency Temporary Standard/Emergency Regulation Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19" ("Emergency Regulation."). The Emergency Regulation was posted contemporaneously with the Notice of Meeting on VDOLI's website, and such posting kicked off a 10-day comment period for the public to provide written comments on the Emergency Regulation. Depending on the comments received from the public, the Emergency Regulation could go into effect as early as June 24, 2020. Virginia employers will need to become familiar with the Emergency Regulation and, in some cases, revise policies and procedures for dealing with their workforces in the coming months.

While the Emergency Regulation is lengthy and at times industry specific, there are key points that every Virginia employer will have to consider and work with. First, the Emergency Regulation is "designed to establish requirements for employers to control, prevent, and mitigate the spread of COVID-19 to and among employees and employers." 16 VAC 25-20 § 10(A). The Emergency Regulation attempts to reach these goals by having employers classify the risk in the workplace for catching or spreading COVID-19 ("Exposure Risk Level"). There are four Exposure Risk Levels – "Very High," "High," "Medium" and "Low." *Id. at § 10(D)*. The Emergency Regulation makes clear that, within a workplace, there can be various risk categories based on the hazards and job tasks in place. *Id. at § 10(D)(1)*. These job risks and hazards will include the job tasks being undertaken, the known or suspected presence of COVID-19 or a person with COVID-19, the number of employees in relation to the work area, the working distance between employees, and the duration and frequency of employee exposure through close contact with other employees and persons. *Id. at § 10(D)(2)*. The Exposure Risk Level(s) of a workplace will dictate what steps an employer must take to protect its employees.

In all circumstances, no matter the Exposure Risk Level, all Virginia employers will have to:

- Assess the workplace for hazards and job tasks that potentially can expose employees to COVID-19 and classify each employee into one of the Exposure Risk Levels;
- Inform employees of the methods to self-monitor for signs and symptoms of COVID-19 and encourage them to do so;
- Implement policies and procedures for employees to report when they have tested positive for COVID-19 antibodies through serologic testing or when employees are experiencing symptoms consistent with COVID-19;
- Make sure that employees and others known or suspected to have COVID-19 are not allowed to report or remain at work or on a work site until they are cleared to return to work or the job site in person;
- Ensure that sick leave policies, including the Families First Coronavirus Response Act, are in place and that employees are aware of these policies;
- Instruct all subcontractors and companies that provide the employer with contract or temporary labor that any worker suspected or confirmed to have COVID-19 must stay at home and that the contracting companies adopt non-punitive sick leave policies;
- Notifying, without disclosing the name of an individual, its employees and other employers who were present on the worksite when an employee, a contract worker or a temporary employee, who was present in the place of employment, has tested positive for COVID-19 when that individual was in the workplace within 14 days before the positive test;
- Ensure that employees have access to COVID-19-related exposure and medical records in accordance with industry specific standards;
- Develop and implement return to work policies and procedures for employees known or suspected to have COVID-19, including asymptomatic employees, using either a symptom-based or test-based strategy based on local healthcare and testing circumstances;

- Ensure that employees observe social distancing while on the job and during paid breaks on the employer’s property;
- Ensure that access to common areas, break areas, or lunchrooms is closed or controlled;
- Ensure that, if two or more employees are in a vehicle for work purposes, all respiratory and personal protective equipment (“PPE”) standards applicable to the industry are adhered to;
- If employees cannot socially distance in the workplace, ensure that respiratory and PPE standards for the industry are adhered to;
- Requests by an employee not to wear PPE must be handled in accordance with applicable federal and state standards; and
- Employers must adhere to the Virginia Occupational Safety and Health standards for cleaning and disinfecting the workplace based on applicable industry standards.

16 VAC 25-220 at §40.

Very High Exposure Risk Levels apply to those job tasks or places of employment with high potential for employee exposure to known or suspected sources of COVID-19 including but not limited to specific medical, postmortem, or laboratory procedures. 16 VAC 25-220 at §30. **High** Exposure Risk Levels apply to those job tasks or places of employment with high potential for COVID-19 exposure inside of six feet of known or suspected sources of COVID-19. *Id.* These jobs include many healthcare jobs, medical transport services, first responders and mortuary services. *Id.* With the Very High and High Exposure Risk Levels, in addition to the standard employer obligations set forth above, such employers must:

- Engage in engineering controls such as appropriate air handling systems;
- In healthcare environments, ensure that hospitalized patients with known or suspected COVID-19 are placed in an airborne infection isolation room (“AIIR”);
- Use AIIR rooms when available for performing aerosol-generating procedures for patients with or suspected of having COVID-19;
- Use of autopsy suites for any postmortem activities;
- Install to the extent possible, physical barriers to stop the spread of COVID-19;
- Adopt administrative and work practice controls including work shift prescreening of employees, limiting non-employee access to the workplace and adhering to occupancy limits in any applicable executive order or order of public health, providing employees with education and training on preventing the transmission of COVID-19, ensuring psychological and behavioral support to address employee stress, providing appropriate hand sanitizers to employees in accordance with specific industry standards, providing face coverings to non-employees suspected of having COVID-19 and posting appropriate signage and social distancing guidelines and other flexible work arrangements;
- In accordance with specific industry standards, if any, provide employees with PPE;
- Develop and implement a written Infectious Disease Preparedness and Response Plan, including the Emergency Regulation’s requirements for inclusion in the plan, and designating the person responsible for administering the plan; and
- Provision of employee training to all employees on the requirements of the Emergency Regulation, the characteristics and methods of transmission of COVID-19, the symptoms of COVID-19, awareness that pre-symptomatic and asymptomatic individuals may spread COVID-19, the safety practices in place for the workplace, PPE, the Infectious Disease and Preparedness Plan, and the anti-discrimination provisions of the Emergency Regulation.

Id. at §§50, 70 & 80.

Medium Exposure Risk Levels apply to those job tasks or places of employment that are not classified as Very High or High and that require more than minimal occupational contact inside of six feet with other employees, other persons, or the general public who may be infected with COVID-19, but are not known to be carriers. These types of employers include, but are not limited to, poultry, meat, and seafood processing, agricultural labor, transportation services, educational settings, bars and restaurants, personal care businesses and gyms, exercise

facilities and spas. 16 VAC 25-220 at §30. In addition to the standard employer obligations set forth above, such Medium Exposure Risk Level employers must:

- Implement engineering controls that are in accordance with the manufacturer's instructions if there are installed air-handling systems and, to the extent feasible, install physical barriers, such as sneeze guards, to aid in mitigating the spread of COVID-19;
- Practice administrative and work practice controls such as, but not limited to, prescreening employees before the beginning of the workday for COVID-19 symptoms, providing face coverings for non-employees suspected of having COVID-19, limiting non-employees to workspace areas, implementing flexible worksites and work hours, increasing social distancing for employees and customers to six feet, reconfiguring places where employees congregate and using signage, verbal announcements and visual cues to enhance social distancing;
- Assess the workplace to determine if COVID-19 hazards necessitate the use of PPE, select such PPE to be used, and have employees use such PPE;
- Verify through a written certification that a workplace hazard assessment has been performed, the date the assessment was performed, and the certification must be identified as such; and
- In those circumstances where the employer has 11 or more employees, develop and implement an Infectious Disease Plan that complies with the Emergency Regulation requirements set forth above in the Very High and High Exposure Risk Level section.

Id. at §§60 & 70.

Low Exposure Risk Levels apply to those job tasks or places of employment that are not classified as Very High, High or Medium exposure risk and that do not require contact within six feet with persons known or suspected to be, or who may be, infected with COVID-19, nor contact inside of six feet with other employees, other persons, or the general public. In addition, exposure to COVID-19 can be limited by the implementation of engineering, administrative and work practice controls such as:

- Installation of floor to ceiling physical barriers;
- Telecommuting;
- Staggered work shifts;
- Remote delivery services;
- Mandatory physical distancing; and
- Employee use of face coverings where close contact with coworkers, customers or other persons is required.

16 VAC 25-220 at §30.

Finally, the Emergency Regulation contains anti-discrimination provisions that prohibit employers from discharging or discriminating against an employee because the employee has exercised rights under the Emergency Regulation on behalf of himself or herself or other employees. Also, employers cannot discharge or in any way discriminate against any employee who voluntarily provides and wears his or her own PPE. Finally, employers cannot discharge or otherwise discriminate against any employee who raises a reasonable concern about infection control related to COVID-19 with the employer, the employer's agent other employees, a government agency, or who discloses such a reasonable concern to the public through print, online, social or any other media. 16 VAC 25-220 at § 90.

As can be seen, this Emergency Regulation must be reviewed, digested and acted on by all Virginia employers. Such employers should take steps now to comply with the Emergency Regulation before it becomes live. The Emergency Regulation, once it becomes final, will remain in place for six months or when superseded by a permanent standard, whichever comes first.

* <https://www.williamsmullen.com/news/emergency-virginia-department-labor-and-industry-regulations-governing-employers-obligations>