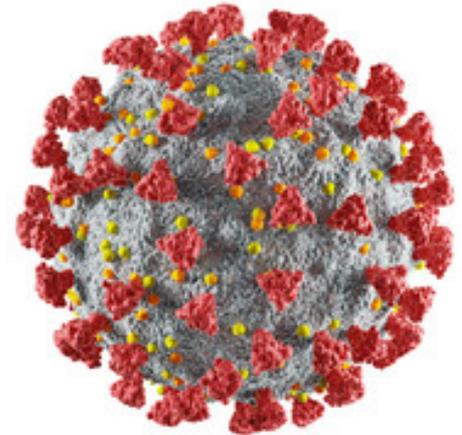


# Virginia Employer Legal Issues: *Bringing Employees Back to the Office During COVID-19*

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# Agenda

- Virginia Workplace Safety Standards
- Virginia Governor Orders
- OSHA update
- Practical Considerations
- Questions

# VA Workplace Safety Standard

- Originally issued on emergency basis and became effective July 27, 2020
- Has now become final, effective January 27, 2021
- Will continue to be in effect until the Safety and Health Codes Board determines that there is no longer a need for the standard
- All employers located in Virginia must comply



# General Requirements

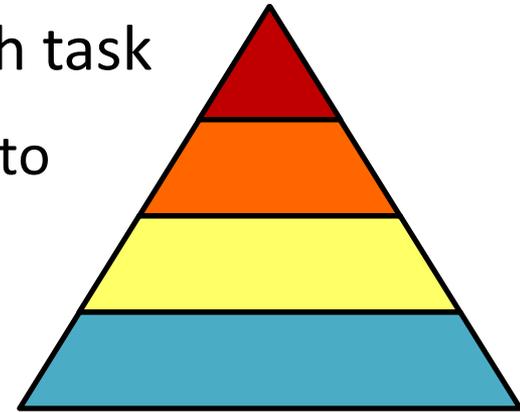
- Conduct a risk assessment on job tasks and determine the risk exposure level of each task

**Very High:** extremely high risk of exposure to Sars-CoV-2 virus, such as those conducting aerosol procedures or collecting/handling specimen of the virus

**High Risk:** high potential for exposure to those known or suspected to be infected with virus (most healthcare providers)

**Medium Risk:** require more than minimal contact inside 6 feet with others (restaurants, transportation, gym)

**Low Risk:** do not require contact inside 6 feet



# General Requirements

- Establish system for employee self-assessment and screening
  - Educate employees on the symptoms of COVID-19
  - Ask each employee to take a temperature before reporting to work; or take employee's temperature before starting work
  - See also, VDH's guidance on daily COVID-19 screening at:  
<https://www.vdh.virginia.gov/content/uploads/sites/182/2020/06/Employee-Screening.pdf>
- Implement engineering, administrative and workplace controls to minimize the spread of and exposure to the virus

# General Requirements

- Implement procedure in case of confirmed or suspected infection
  - To receive report of positive test from those who were at the worksite within 2 days before and 10 days after onset\*
- Notification system for confirmed case of infection
  - To employees who may have been exposed during the same period
  - Dept. of Health if 2 or more cases within 14 days\*
  - Dept. of Labor & Industry if 3 or more cases within 14 days

# General Requirements

- Establish procedure for return to work after infection or isolation due to COVID-19\*
  - All infected employees must be excluded from work until:  
(1) no fever for 24 hours; (2) improvement in respiratory symptoms; and (3) at least 10 days since the onset
  - 10 days since the initial positive test without onset
  - Employees with severe illness or severely immunocompromised may require extended isolation. Should consult infectious disease control experts \*



# General Requirements

- Create infectious Disease Preparedness and Response Plan
  - Required for all Very High and High exposure job tasks
  - Required for Medium exposure job tasks with 11 or more employees
  - Must have a plan in place by March 26, 2021
- Provide training on the hazards and characteristics of the virus and COVID-19 disease
  - Required of all employers who has any Very High, High or Medium job tasks
  - Must be provided to all employees regardless of the level of job tasks performed
  - Must have the training by March 26, 2021\*

- Training materials and other sources available at:  
<https://www.doli.virginia.gov/covid-19-outreach-education-and-training/>

# General Requirements

- The Standard prohibits discrimination or retaliation against employees
  - Who exercise their rights or the right of others under the standard
  - Who voluntarily provide and wear their PPE
  - Who raise a reasonable concern about infection control (this includes raising the concern to public via social media)

# Potential Liability

- Standard enforced by VOSH
- VOSH will issue citation with order of abatement and time allowed for abatement
- VOSH may impose civil penalty for offenses
  - Serious or below: up to \$13,047
  - Willful or repeated: up to \$130,463
  - Failure to abate: up to \$13,047 **per day**

# Complaints and Citations

(as of Jan. 27, 2021)

- Virginia's DOLI (VOSH) has received over 13,000 complaints around workplace safety due to COVID-19
- 100 required a full investigation due to serious concerns
- 27 employers were cited for violations

# Virginia Governor – Order 72 (Effective through February 28, 2021)

- Modified Stay at Home with Curfew
  - Telework encouraged “whenever possible”
- Gatherings – more than 10 people prohibited
  - Does NOT include employment, retail business, religious services, educational instruction
- Face Coverings –
  - Outdoors if unable to maintain 6 feet distance
  - Indoors if in a shared space
  - All employees must wear face coverings while working at place of employment
  - Exceptions noted (e.g., eating/drinking, accommodations, etc.)

# Virginia Governor – Guidelines for All Business Sectors

- Phase 3: “Safer at Home”
- “Best Practices” being updated - most recently to address EO 72 and masks in the workplace
- Includes:
  - physical distancing (encouraging telework)
  - enhanced cleaning and disinfecting (with reference to CDC Reopening Guidance)
  - enhanced workplace safety

# Virginia Guidelines for All Businesses

- Enhanced Workplace Safety
  - Employee screening and sick employees stay home
  - If conducting health checks – safely and confidentially
  - Require face coverings (nose and mouth!) at work
  - Flexible sick leave policies
  - Encourage “vulnerable” employees to self-identify and employers should take particular care to reduce their risk of exposure
    - Over 65 and underlying medical conditions
    - BUT - must comply with Americans with Disabilities Act (ADA) and Age Discrimination in Employment Act (ADEA)

# Virginia Guidelines for All Businesses

- Suggestions for (self identified) vulnerable employees –
  - Offer duties that minimize contact with others, *if agreed to by employee*
  - Protect high risk employees by supporting and encouraging telework
- Designate a staff person to contact for COVID-19 concerns
- Returning to an unoccupied building – consider additional public health measures

# OSHA Guidance

## (Posted Jan. 29, 2021)

- OSH Act – Employers must provide a “*safe and healthy workplace*” free from recognized hazards likely to cause death or serious physical harm.
- Not applicable to healthcare or emergency response
- “Should” Implement COVID-19 Prevention Programs
  - Most effective way to mitigate the spread of COVID-19 at work is to implement a COVID-19 prevention program.

# OSHA: COVID-19 Prevention Program

- Largely tracks Virginia Workplace Safety Standards
  - Hazard assessment
  - Identify and adopt measures to limit spread in the workplace
  - Implement measures to ensure exposed or infected employees are separated and sent home
  - Protect employees against retaliation

# OSHA: COVID-19 Prevention Program

- OSHA identifies 16 Key Elements of the program:
  1. Workplace Coordinator
  2. Hazard assessment (risk of exposure)
  3. Implement controls (engineering controls, administrative policies, PPE, and others) to limit spread
  4. Policies/practices to address workers at higher risk for severe illness
  5. Communication (encourage self-reporting sick/exposed)

# OSHA: COVID-19 Prevention Program (Cont.)

- OSHA identifies 16 Key Elements of the program:
  6. Educate and Train Workers
  7. Instruct workers to stay home if infected or potentially infected
  8. Minimize negative impact of quarantine or isolation orders (allow telework, leave, etc.)
  9. Isolate workers with symptoms at work
  10. Enhanced cleaning (Following CDC recommendations)

# OSHA: COVID-19 Prevention Program (Cont.)

- OSHA identifies 16 Key Elements of the program:
  11. Screening and testing of employees (in accordance with CDC guidance)
  12. Recording and reporting infections and deaths
  13. Protect workers from retaliation; anonymous reporting
  14. Make the COVID-19 vaccine available at no cost to all eligible employees
  15. Not distinguishing between vaccinated and not vaccinated
  16. Comply with other existing OSHA standards (e.g., PPE, respiratory, sanitation, etc.) and the general duty clause

# OSHA: COVID-19

- Employers should provide all workers with face coverings
  - OSHA declined issuing such recommendation previously
  - Note – reasonable accommodations for masks must be addressed
    - Example: Nike has agreed to provide store workers with transparent masks to accommodate deaf/hard of hearing customers
- Stay Tuned!
  - Emergency Temporary Standards expected by March 15

# Practical Considerations – Vaccines

- Can an employer mandate vaccinations?
  - Yes, but the employer must have business necessity justifying the requirement (would the employee without vaccination pose significant danger to himself or others?)
  - Consider the job functions, the company's operations and why you need the vaccination
  - EEOC has stated that, while vaccination itself does not constitute a medical examination, pre-screening questions may implicate ADA. So before you ask any screening questions, ask whether such questions are job-related and necessary.
  - Be prepared to provide accommodations to those who cannot get the vaccine for religious or health related reasons

# Practical Considerations – Vaccines

- *Should* an employer mandate vaccinations?
  - Consider vaccine availability
  - Consider how to implement the mandate
    - Incentive based?
    - What if employee simply refuses?



# Liability Waivers

- Likely unenforceable (public policy and Virginia law)
- Inconsistent with employer obligations to provide a safe workplace?
- Bad for morale and provides opportunity to not return (if wont sign)?
- Alternative Protections –
  - “Acknowledgment” of enhanced safety requirements and individual responsibility
  - Workers’ Compensation? - limits recovery for work-related accidents and disease (and cannot be waived)
  - Virginia proposed House Bill 5028 – would amend the Workers’ Comp Act to cover certain high-risk workers
  - Potential coverage by Commercial General Liability Insurance (e.g., negligence)

# Communication with Employees

- Opportunity to alleviate concerns (if possible) and to solicit feedback from employees and address individual concerns such as:
  - Safety!
  - Employee exposure risk –
    - Own increased risk of severe illness (e.g., age or health conditions)
    - Family-member risks
  - Childcare

# Employee's Concerns about Return to Work

- What should an employer do if an employee claims they cannot come to work because of a medical reason?
  - Start communications with employee
  - Ask for a doctor's note: (1) what are the limitations; (2) recommended accommodations, if applicable.
- What should an employer do for employees at higher risk of serious illness?

# Other Considerations

- Leave entitlements FMLA, state paid leaves, etc.
- Potential for Congressional Action – new FFCRA?
- District of Columbia – COVID-19 Support Emergency Amendment Act (CSEA)
  - Amended DCFMLA and Accrued Sick and Safe Leave to require paid leave for COVID-19 (through Dec. 2021)
- Maryland Healthy Working Families Act (pre-COVID-19)
- Restrictions on Travel (Executive Orders)
- Coordination with others (contractors, clients, etc.)

