

Virginia Becomes the First State to Enact Coronavirus Workplace Safety Measures

By Jessica Summers

On July 15, Virginia became the first state to enact mandated COVID-19 workplace safety rules. This move, which other states are expected to follow, is largely seen as a response to the fact that, while the federal Occupational Safety and Health Administration (OSHA) has put out discretionary guidance, it has not answered calls to issue any COVID-19-specific mandatory rules. Unfortunately, as states take matters into their own hands, a further patchwork of COVID-19 related rules may create additional headaches for multi-jurisdictional businesses, like many in the DMV.

For employers in Virginia, the new rules will require prompt attention in the coming weeks. The "Emergency Temporary Standard" (16 VAC 25-220), which applies to all Virginia businesses regardless of size, is anticipated to go into effect the week of July 27 (under state procedure, the Standard will technically go into effect when it is published in a Richmond newspaper).

Unless further modified, the requirements will remain in effect until six months after the end of the Governor's declared state of emergency. Failure to comply with the Standard may result in penalties for the employer.

In the interim period before the Standard is published and goes into effect, the state has provided that it will be preparing to conduct trainings and outreach and develop FAQs to help businesses understand their obligations.

A clean and complete version of the Standard as amended and approved by the Virginia Safety and Health Codes Board has not yet been published. Rest assured that when it is we will be following up with a full detailed analysis. In the meantime, the following are some of the most significant requirements that employers can expect to see in the Standard:

- While the Standard is clear that it does not require employers to conduct contact tracing, in the event of an employee testing positive for COVID-19, within 24 hours employers will be required to notify any employee who is believed to have been exposed, as well as the owner of the facility where the infected employee was working and any other employers whose employees may have been the workplace. In the event that three or more employees test positive within a single fourteen day period, the business will be required to notify the Virginia Department of Labor and Industry.
- Employers will be required to establish a system for employees to report symptoms, preclude employees with symptoms or a potential exposure from entering the workplace and follow procedures set forth in the Standard for returning an employee to work after a positive COVID test.
- Employers will be required to implement and enforce specific requirements related to physical distancing and workplace layout, the provision and use of employee PPE and sanitizing supplies and the cleaning of the workplace.
- An employer that is operating what are classified under the Standard as medium or high risk work environment will be also need to develop an infectious disease preparedness and response plan within 60 days of the Standard going into effect.
- Employers will be prohibited from discriminating or taking action against an employee who raises a "reasonable concern" regarding the spread of COVID-19. This includes protections for concerns raised internally to the employer or fellow employees, as well as those raised externally to a third party, including a state or federal agency or the media.

A number of Virginia businesses that have already reopened will be happy to discover that they have already taken many of the actions directed by the Standard, as many parts reflect advice and best practices being promoted by the Centers for Disease Control (CDC) and other public health agencies and experts. For others compliance may take more effort. Either way, come the end of July all Virginia

businesses should be preparing to take a detailed look at their current practices and procedures to ensure compliance.

Understandably, the Standard may be a source of concern or anxiety for a number of businesses, especially in light of the financial and other pressures that COVID-19 is causing. That said, in addition to protecting public health and preventing further shutdowns, having detailed safety requirements in place may have a positive impact for some businesses – particularly when it comes to liability issues. For many businesses, a huge area of concern as they reopen has been the potential for COVID-19 related claims. While there is some discussion that the next round of COVID-19 legislation will include some type of liability shield or safe harbor for reopening businesses no such protections currently exist. And, while employee claims can largely be expected to be covered within the workers' compensation framework, this still leaves claims by patients, customers, visitors and other third parties. At this stage it is difficult to predict the scope and form these claims might take. However, taking for example a claim of negligence against a business, it will be extremely difficult for a plaintiff to prove that a business failed to take necessary and appropriate measures to reduce the risks of COVID-19 if the business is in compliance detailed government requirements – like Virginia's – that are designed to mitigate that exact risk.

Stay tuned for more Paley Rothman coverage and details on the Standards and of course our Employment Law Group is always here to answer any of your questions.