



## Recent Developments in Virginia and North Carolina Concerning the Department of Labor and Industry's COVID-19 Regulations

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### Virginia Developments

Readers will no doubt recall that, during the week of July 27, 2020, the Virginia Department of Labor and Industry adopted an Emergency Temporary Standard concerning COVID-19 and how employers were to protect employees in the workplace from being exposed and/or contracting COVID-19. Virginia was the first state to adopt such standards. When the Emergency Temporary Standard went into effect, it was made clear that it would expire either within six months of its adoption, upon the expiration of Governor Northam's State of Emergency Order for Virginia, which has not occurred, or when superseded by a permanent standard, whichever came first. Williams Mullen's prior articles concerning the Emergency Temporary Standard can be found [here](#).

On December 10, 2020, the Virginia Department of Labor and Industry issued its "Revised Proposed Permanent Standard for Infectious Disease Prevention of SARS-CoV-2 Virus that Causes COVID-19" ("Permanent Standard"). While much of the Emergency Temporary Standard is carried over, there are some important changes effected by the Permanent Standard, and such changes are summarized herein. A link to the Permanent Standard can be found [here](#).

Section 10 of the Emergency Temporary Standard largely remains in place; however, it does provide now that, when applying the standard to any place of employment, and in determining the exposure risk level in the workplace, the hazard of encountering exposure to respiratory droplets and potential exposure to the airborne transmission of the SARS virus has been added as a potential hazard.

Section 20 of the Permanent Standard will be revised in anticipation that it will be put in place on January 27, but it may also go into effect at such time as

- the Governor reviews the Permanent Standard and requires no revisions, at which time the standard can be published in a newspaper of general circulation in the City of Richmond, Virginia

and become effective;

- if the Governor's review results in one or more requested revisions, the Safety and Health Codes Board shall reconvene to approve or reject the revisions, and, thereafter, the Permanent Standard will take effect upon filing with the Registrar of Regulations and publication in the newspaper of general circulation in the City of Richmond, Virginia; or
- if the Governor fails to review the standard, it will go into effect within 30 days after the approval of the Safety and Health Codes Board, filing with the registrar of regulations and publication in a newspaper of general circulation in the City of Richmond, Virginia.

In addition, to the extent that the Permanent Standard makes changes or adds additional requirements for employer's infectious disease preparedness and response plans pursuant to Section 70 of the Permanent Standard, the requirements will take effect on March 26, 2021. Finally, the Permanent Standard provides that the regulations will expire within 14 days after the expiration of the Governor's COVID-19 State of Emergency Order and the Commissioner of Health's COVID-19 Declaration of Public Emergency, provided the Virginia Safety and Health Code Board does not believe there is a continued need for the Permanent Standard.

Section 30 of the Permanent Standard amends and adds several definitions. These changes include the following definitions:

The "Duration and frequency of employee exposure" definition includes changes to provide that, when evaluating duration and frequency of employee exposure, an employer should review how often its employees are exposed to a customer, patient or other person not wearing a face covering or other protective equipment and to eliminate the phrase "or coughing or sneezing directly in the face of the employee."

The definition of "Face Covering" has changed significantly. If adopted, it will provide that neck gators may be considered a substitute. The definition further says that face coverings shall not have exhalation valves or vents that allow virus particles to escape and shall not be made of material that makes it hard to breathe.

The "Face Shield" definition is modified to provide that a face shield is not a substitute for a face covering, a surgical/medical procedure mask or a respirator.

The permanent standard creates a new definition for "Minimal occupational contact" which is defined to mean "no or very limited brief and infrequent contact with employees or other persons at the place of employment." Examples include but are not limited to remote work (i.e., those working from home); employees with no more than brief contact with others inside six feet (i.e., passing another person in a hallway that does not allow physical distancing of six feet); healthcare employees providing only telemedicine services; a long distance truck driver.

"Severely immunocompromised" is also a new definition. This definition provides that a person is severely immunocompromised if they have been on "chemotherapy for cancer, being within one year out from receiving a hematopoietic stem cell or solid organ transplant, untreated HIV infection and

receipt of Prednisone at [greater than] 20 milligrams per day for more than 14 days.? The definition goes on to provide that the degree of immunocompromise is determined by the treating provider, and preventive actions are tailored to each individual and situation.

The definition for ?Signs of COVID-19? has been changed to provide that those signs are ?abnormalities that can be objectively observed, and may include fever, trouble breathing or shortness of breath, cough, vomiting, new confusion, bluish lips or face, etc.?

There is a new definition for ?Symptoms of COVID-19? which provides that such symptoms are ?abnormalities that are subjective to the person and not observable to others and may include chills, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, nausea, congestion or runny nose, diarrhea, etc.?

Section 40 of the Permanent Standard deals with the mandatory requirements of all employers. Within Section 40 there are several significant changes. First, Section 40(b)(8) has been revised to provide that, when an employer establishes a system to receive reports of positive COVID tests, the employer should receive such reports from employees and others present at the place of employment within two (2) days prior to symptom onset (or positive test if the employee is asymptomatic) and until 10 days after onset (or positive test). In those circumstances, the employer must take that information and use it to notify others who may have been exposed.

The requirements to notify the Virginia Department of Health have also changed. Specifically, in Section 40(b)(8)(d) an employer must only notify the Virginia Department of Health when it has had two (2) or more confirmed cases of COVID-19 at a worksite. In such circumstances, the employer must report the matter as specified by the Virginia Department of Health. Once the Virginia Department of Health has investigated and closed out the outbreak investigation, the employer will not have an obligation to report to the Virginia Department of Health again until it has a subsequent identification of two (2) or more confirmed cases.

The requirement to report to the Virginia Department of Labor and Industry within 24 hours of discovery of three or more cases has been changed also to reflect that it is within 24 hours of discovery of three (3) or more of an employer?s own employees testing positive for COVID-19 during a fourteen (14) day time period. The presence of the employee at work requirement has been struck.

The return to work protocols in Section 40 have been significantly changed. You will recall there were both time-based and test-based protocols. Now the return to work protocols deal simply with symptomatic employees. There is currently no guidance on how employers should address asymptomatic individuals. The return to work protocols now provide that employers must develop and implement policy and procedures for employees known or suspected to be infected with COVID-19 to return to work. Specifically, in the case of symptomatic employees who are known or suspected to be infected with SARS-COVID-19, such employees must be excluded from returning to work until all three of the following have been met: 1) the employee is fever free (less than 100 degrees Fahrenheit for at least 24 hours without the use of fever reducing medications; 2) respiratory symptoms such as cough and shortness of breath have improved; and 3) at least 10 days have passed since symptoms first appeared. In addition, the Permanent Standard goes on to provide that a limited number of employees

with severe illness may produce the virus beyond 10 days, and, in such circumstances, that can warrant extending the duration of isolation for up to 20 days after symptom onset. It is important to note that the Emergency Temporary Standard's test-based strategies for employees to return to work seem to have been struck.

While the requirements for employers who have employees working in Very High- or High-risk categories have changed significantly, such changes are beyond the scope of this article, and such employers are cautioned to review the Permanent Standard once adopted.

Section 70 of the Permanent Standard makes several changes to the Infectious Disease Preparedness and Response Plans that some employers must adopt. Specifically, the plans for Very High-, High- and Medium-Risk employers must consider and include plans for those employees who work in higher risk activities where there will be large numbers of people in enclosed areas. The Permanent Standard specifically mentions such events as large social gatherings, weddings, funerals, parties, restaurants, bars, hotels, sporting events, concerts, parades, movie theaters, rest stops, airports, bus and train stations, cruise ships, river boats and airplanes. According to the Permanent Standard, when developing the Infectious Disease Plans, employers should plan for the fact that, with increased rates of employee absenteeism, an understaffed business can be at increased risk for workplace accidents, which are also reportable events under DOLI's jurisdiction. Finally, should an employer rely on CDC mandatory and non-mandatory guidelines, employees should be trained on such guidelines.

As you can see, there are significant changes on the horizon, and Virginia employers would be wise to review their policies and procedures to ensure compliance.

### **North Carolina Developments**

Cherie Berry will retire after serving as the North Carolina Commissioner of Labor for the last 20 years. As one of her duties, Commissioner Berry oversaw the operation of the state's OSHA program. The five-term Commissioner faced criticism, including from Governor Roy Cooper (Democrat), that she was too lenient on businesses that have poor safety records. A Republican, Commissioner Berry believes that the Department of Labor should be more of a partner to businesses than a punisher of businesses.

Josh Dobson (Republican) won the general election to succeed Commissioner Berry, and he is expected to continue her approach. He has served in the North Carolina House of Representatives for four terms, representing the people of Avery, McDowell and Mitchell counties. Commissioner-elect Dobson will leave his legislative positions as Chairman of the Appropriations Committee and Chairman of the Health Policy Committee.

As one of her final acts, on November 9, 2020, Commissioner Berry rejected a petition from worker advocacy groups seeking the adoption of their proposed rule as an emergency measure to combat COVID-19 in workplaces, or initiate a rulemaking to create a new COVID standard. A copy of that petition is found [here](#). Commissioner Berry concluded that "[i]mplementing more regulations will not eradicate the virus [and] is not the most efficient means to help control the spread of the virus." Worker advocacy groups are reportedly considering legal action to overturn Commissioner Berry's decision.

Time will tell whether Commissioner Dobson will take a different view given the trend of other state OSHA plans to impose emergency measures, or whether, under the Biden administration, the federal OSHA will overcome its current resistance to implementing new COVID-based regulations and compel North Carolina to follow suit.

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