

Virginia COVID-19 Restrictions and Workplace Standards Challenged by Manufacturers' Association

By

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A manufacturers' association and several employers have filed a lawsuit to enjoin Virginia's [Emergency Temporary Standard for Infectious Disease Prevention related to COVID-19](#) which the Virginia Safety and Health Codes Board adopted on July 15, 2020.

The Virginia Manufacturers' Association and several employers (which include an entertainment venue, a Member of the Virginia General Assembly, and a church) filed the action to halt the first-in-the-nation standard to address the COVID-19 pandemic. The lawsuit also takes aim at a variety of Executive Orders issued by Governor Ralph Northam to curtail public gatherings, require face coverings, and restrict occupancy in places of public accommodation, such as restaurants and retail stores.

The Emergency Temporary Standard

The Emergency Temporary Standard, passed by the Virginia Safety and Health Codes Board (of which the author is a member), covers most private employers and all state and local employers. In addition to Centers for Disease Control and Prevention (CDC) and Occupational Safety and Health Administration (OSHA) guidelines, the Standard includes provisions that require employers to:

- Provide flexible sick leave policies, telework, and staggered shifts when feasible;
- Provide both handwashing stations and hand sanitizer when feasible;
- Assess risk levels of employers and of suppliers (before entry into workplaces);
- Notify the Virginia Department of Health of positive COVID-19 tests;
- Notify Virginia Occupational Safety and Health (VOSH) of three or more positive COVID-19 tests within a two-week period;
- Assess hazard levels of all job tasks;
- Provide COVID-19 training to all employees within 30 days (except for low-hazard places of employment);
- Prepare infectious disease preparedness and response plans within 60 days;
- Post or present agency-prepared COVID-19 information to all employees; and
- Maintain air handling systems in accordance with manufacturers' instructions and American National Standards Institute and American Society of Heating, Refrigerating and Air-Conditioning Engineers standards.

The Standard protects employees who raise reasonable concerns about infection control related to the disease "to the employer, the employer's agent, other employees, a government agency, or to the public such as through print, online, social, or any other media." It also implements provisions that echo CDC and OSHA guidance, including to:

- Place requirements on workplaces based on hazard levels (*i.e.*, "very high," "high," "medium," and "low");

- Screen employees prior to entry to work;
- Establish requirements for employees with COVID-19-positive tests and symptoms before returning to work;
- Require social distancing or, when social distancing is not possible, respiratory protection; and
- Clean and disinfect commonly used areas and equipment.

The Standard took effect once it was published on July 27, 2020, and it is set to expire within six months or upon expiration of the Governor’s State of Emergency or the enactment of a permanent standard.

The Suit

The plaintiffs cite a number of grounds in their suit against the Governor, the Virginia Safety and Health Codes Board, the Virginia Department of Labor and Industry, and others. They include:

- Failure to follow procedures prescribed in the Virginia Administrative Process Act, Va. Code §§ 2.2-4000 *et seq.*;
- Action beyond the authority afforded in the Code of Virginia for circumstances relating to quarantines and orders of isolation;
- Restrictions on rights of association and assembly;
- Undue interference by the Governor in an independent agency;
- Failure to establish that an emergency standard was necessary to address a grave danger, particularly with respect to “low hazard” employers;
- Unconstitutionally vague language in identifying individuals suspected of COVID-19 infection;
- Leave policy provisions exceeding statutory authority; and
- Infeasibility of employers’ ability to follow the Standard.

Currently, the repercussions of the lawsuit are unknown.

Employers should continue to comply with the Standard’s training requirements, which went into effect on August 26, 2020. All “medium hazard” employers with at least 11 employees and all “high” and “very high hazard” employers must prepare their Infectious Disease Preparedness and Response Plans no later than September 25, 2020.

Jackson Lewis attorneys can answer your questions or provide assistance in OSHA and VOSH matters.

Jackson Lewis attorneys are closely monitoring updates and changes to legal requirements and guidance and are available to help employers weed through the complexities involved with [state-specific or multistate-compliant plans](#).

If you have questions or need assistance, please reach out to the Jackson Lewis attorney with whom you regularly work, or any member of our [COVID-19 team](#).

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