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New Rules for Employers: There Is No Escape

By Stephen D. Haner

7/20/2020 -- The first thing every employer in Virginia needs to understand about the state's new COVID-19 temporary workplace standard ([here](#)) is it is universal. It applies to every workplace, public and private, for-profit and non-profit, with 10,000 workers or two. The rules are the same, "one size fits all," without regard to the nature of the industry.

The second thing every employer in Virginia needs to understand about the standard is that it is only *temporarily* temporary. The goal, and work will begin quickly, is to convert the set of requirements into a permanent regulation, with a permanent burden on employers going forward to protect their employees from a disease circulating widely outside their establishments.

The third thing every employer in Virginia needs to understand about the standard is that complying with federal standards or specific industry standards may not protect you from state complaints or fines. Efforts to create a regulatory "safe harbor" for those who met similar federal standards was initially accepted, but in the end watered down under vast union pressure, peaking in [this story](#) in *Virginia Mercury* the day of the final meeting.

The "loophole" (*Mercury's* loaded word) created by relying on compliance with the Center for Disease Control's recommendations was closed, and such compliance only provides protection if the CDC approach "provides equivalent or greater protection than provided by a provision of this standard." If you can't prove it does *to the satisfaction of the state*, you may be fined. What you've been doing to date, no matter how well it has worked, may not match these new standards.

Only Virginia's public and private schools of higher education, and public and private K-12 schools, can rely on re-opening plans cleared by the state rather than this standard. But, again, those plans must "provide equivalent or greater levels of employee protection than a provision of this standard." It is not really an exemption.

For the other estimated 300,000 work locations around the Commonwealth, the new paperwork, the costs of compliance and the consequences of violation are unavoidable. Any case involving an employee or somebody else in the workplace must be reported to the Department of Health, and three cases within fourteen days must be reported to the Department of Labor and Industry.

The July 15 approval by the Virginia Safety and Health Codes Board, after four contentious meetings marked by close internal votes, is being cheered by labor unions as a victory with national repercussions, and Governor Ralph Northam has been happy to [take a deep bow](#). They claim it will lead to more economic activity, but there is reason to fear it will add costs and uncertainty that impede re-openings and hiring. People will ultimately pay for compliance twice, as a customer or as a taxpayer.

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The full 35-page text of the [standard](#) with all the changes incorporated was released July 17 and should be published in a Richmond newspaper within a week or so. Once published, it is in effect for six months, or until Governor Northam lifts his emergency declaration, or until a permanent version is adopted.

These rules must be viewed in connection with the other shoe which may drop, an effort to make COVID-19 a recognized workplace disease covered by workers compensation benefits. Unlike with traditional occupational diseases, no job or workplace activity causes COVID-19. People can catch and spread it anywhere.

All Virginia employers – even those with only a few employees and perhaps even the self-employed – must begin to assess and rank every job, job task and facility for their level of risk to viral spread, screen all employees and suppliers entering, begin to keep detailed records on employees showing symptoms or testing positive, conduct contact notifications within their workplaces, and prevent the return of known or suspected sick employees until medically cleared.

That clearance could include two negative test results, taken 24 hours apart, but given the backlog of testing in recent weeks that may greatly extend the employee's absence. Getting medical clearance after a period of three days with no symptoms may prove quicker. Any employee who tests positive but shows no symptoms will also be unable to enter for at least ten days. Employers must pay for tests.

Every employer with ten or more workers has 60 days to prepare a written disease prevention and response plan. Within 30 days they must conduct extensive training with all employees, geared to the risk level of their jobs. If the employee then behaves as if the training didn't stick, another round must be provided, as must be the case if the company's plan is amended or the understanding of the disease changes.

The initial draft of this was published in mid-June, with only a few days allowed for public comment. Thousands poured in anyway during that short period, including the most impressive and near unanimous outcry from the business community in recent memory. Only a few changes were made to accommodate those employer concerns, although a minority on the board put up a spirited resistance in close votes. Ex-officio votes controlled by Northam cabinet officers were often crucial in overriding amendments.

One of the final debates July 15 involved protection for employees who complain of workplace violations, not just to regulators or their fellow employees, but also to outside news media or on social media platforms. Even if false or posted in malice, Facebook comments accusing your employer on this issue cannot lead to any internal disciplinary action.

Following a pattern on other controversial elements over this process, a motion to remove the part about outside media was defeated on a 5 to 5 vote, with various abstentions and absences. Five of fourteen board members imposed that standard. The final adoption by only 9 of the 14 members was the final indication that this was not a consensus product and is likely to meet continued resistance.

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