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Recently the Commonwealth of Virginia, Department of Labor & Industry, Board of Health , was the first state agency in the United States to adopt workplace health and safety regulations specifically related to the virus COVID-19. All businesses in Virginia are subject to these regulations.

The enclosed is an outline of the regulations and, while it is not legal advice for a specific situation you may have, it is being sent to you for general education. and because you are a current client of McGeehan Pascale PLC or a former business client of McGeehan Pascale, PLC. Specific legal questions, should be addressed to an attorney experienced in employment and regulatory law.

Sincerely yours,

John P. McGeehan

The following is provided for informational purposes only to familiarize the reader, in a general way, with the provisions implemented by the Commonwealth of Virginia applicable to employers for the control of the COVID-19 virus, and is not intended as a substitute for review of the actual regulatory requirements themselves.

The following does not constitute legal advice, nor does its provision constitute the establishment of an attorney-relationship with the reader.

On May 26th, 2020 Governor Northam signed Executive Order Number 63 (2020), *Requirement to Wear Face Covering While Inside Buildings*.¹ Paragraph E of this Order directed the Commissioner of the Virginia Department of Labor and Industry to “promulgate emergency regulations and standards to control, prevent, and mitigate the spread of COVID-19 in the workplace.

The Virginia Safety and Health Codes Board (“VSHCB”) approved a temporary standard pursuant to Executive Order 63 on July 15th, 2020, which became effective July 27th, 2020,² though by the terms of the Temporary Standard itself, certain requirements become effective on August 26th, 2020, and September 26th, 2020, respectively.³

Compliance with the Temporary Standard is mandatory, with the potential for fines above \$13,000 and above \$134,000 for serious or repeat violations. Employers should also note that while in many instances the rules require that actions be taken where feasible, the Temporary Standard expressly provides that “[t]he cost of corrective measures to be taken will not usually be considered as a factor in determining whether a violation of this standard occurred. *If an employer’s level of compliance lags significantly behind that of its industry, an employer’s claim of economic infeasibility will not be accepted*”⁴ (emphasis added).

The Temporary Standard consists of sections and subsections:

- 16VAC25-220-10, Purpose, Scope, and Applicability.
- 16VAC25-220-20, Effective and Expiration Dates.
- 16VAC25-220-30, Definitions.
- 16VAC25-220-40, Mandatory Requirements for All Employers.
- 16VAC25-220-50, Requirements for Hazards or Job Tasks Classified as Very High or High Exposure Risk.
- 16VAC25-220-60, Requirements for Hazards or Job Tasks Classified at Medium Exposure Risk.
- 16VAC25-220-70, Infection Disease Preparedness and Response Plan.
- 16VAC25-220-80, Training.

¹ The Governor’s executive orders may be viewed at <https://www.governor.virginia.gov/executive-actions/>.

² The Emergency Standard is 16VAC25-220 and can be found at <https://www.doli.virginia.gov/2020/03/18/safety-and-health-codes-board-electronic-emergency-meeting-june-24-2020/>.

³ 16VAC25-220-20, Effective and Expiration Dates.

⁴ 16VAC25-2020-30, Definitions, “Economic Feasibility.”

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- 16VAC25-220-90, Discrimination Against an Employee for Exercising Rights Under this Standard is Prohibited.

The Temporary Standard is structured in three tiers differentiated by level of risk: 1) The basic level consisting of steps mandatory for all employers and jobs, including those of “lower” COVID-19 risk, set forth in 16VAC25-220-40; 2) requirements for employers or jobs with “medium exposure risk” set forth at 16VAC25-220-60; and 3) requirements for employers or jobs involving “very high or high exposure risk,” set forth at 16VAC25-220-50.

The Temporary Standard defines “Lower” exposure risk hazards or job tasks as “those not otherwise classified as very high, high, or medium exposure risk that do not require contact inside six feet with persons known to be, or suspected of being, or who may be infected with SARS-CoV-2. Employees in this category have minimal occupational contact with other employees, other persons, or the general public, such as in an office building setting; or are able to achieve minimal occupational contact through the implementation of engineering, administrative and work practice controls, such as, but not limited to 1. Installation of floor to ceiling physical barriers constructed of impermeable material and not subject to unintentional displacement (e.g., such as clear plastic walls at convenience stores behind which only one employee is working at any one time); 2. Telecommuting; 3. Staggered work shifts that allow employees to maintain physical distancing from other employees, other persons, and the general public; 4. Delivering services remotely by phone, audio, video, mail, package delivery, curbside pickup or delivery, etc., that allows employees to maintain physical distancing from other employees, other persons, and the general public; and 5. Mandatory physical distancing of employees from other employees, other persons, and the general public.”

The basic requirements applicable to all employers and jobs – including those of “lower risk” as defined above, are set forth at 16VAC25-220-40 are detailed and extensive, covering a range of issues, including but not limited to:

- Conduct of a workplace assessment for “hazards and job tasks that can potentially expose employees to SARS-CoV-2 virus or COVID-19 disease,” classification of each job by level of hazard, and determination of the measures that must be taken to mitigate the risk.
- Briefing of employees on means of COVID-19 transmission, signs and symptoms, and encouragement of employees to self-monitor for symptoms.
- Implementing policies and procedures for reporting by employees of COVID-19 symptoms not accounted for by another diagnosis and prohibiting such employees from being present at the worksite, and enforcing the same against subcontractors, contract, or temporary employees as well.
- Implementing flexible sick leave policies;
- Establishing system (consistent with HIPPA) for employees testing positive for COVID-19, and of notifying employees, subcontractors, and facilities owners who may have been exposed (keeping

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the identity of the infected or exposed person confidential) and of notifying the Virginia Department of Health and the Virginia Department of Labor of the same;

- Ensuring employees access to their SARS-CoV-2 and COVID-19 records;
- Return of employees known or suspected of COVID-19 to work, for both symptomatic and asymptomatic employees;
- Enforcing social distancing and procedures and the procedures for the use of Personal Protective Equipment, both on the job and on paid breaks, lunch, etc.;
- Procedures for sanitation and disinfecting of employees and of the workplace;

The Temporary Standard defines “Medium” exposure risk hazards or job tasks as “those not otherwise classified as very high or high exposure risk in places of employment that require more than minimal occupational contact inside six feet with other employees, other persons, or the general public who may be infected with SARS-CoV-2, but who are not known or suspected to be infected with the SARS CoV-2 virus. Medium exposure risk hazards or job tasks may include, but are not limited to, operations and services in: 1. Poultry, meat, and seafood processing; agricultural and hand labor; commercial transportation of passengers by air, land, and water; on campus educational settings in schools, colleges, and universities; daycare and afterschool settings; restaurants and bars; grocery stores, convenience stores, and food banks; drug stores and pharmacies; manufacturing settings; indoor and outdoor construction settings; correctional facilities, jails, detentions centers, and juvenile detention centers; work performed in customer premises, such as homes or businesses; retail stores; call centers; package processing settings; veterinary settings; personal care, personal grooming , salon, and spa settings; venues for sports, entertainment, movies, theaters, and other forms of mass gatherings; homeless shelters; fitness, gym, and exercise facilities; airports, and train and bus stations; etc.; and 2. Situations not involving exposure to known or suspected sources of SARS-CoV-2: hospitals, other healthcare (physical and mental) delivery and support services in a non-hospital setting, wellness services, physical assistance, etc.; skilled nursing facilities; outpatient medical facilities; clinics, drug treatment programs, and medical outreach services; non-medical support services; mental health facilities; home health care, nursing homes, assisted living facilities, memory care facilities, and hospice care; rehabilitation centers, doctors’ offices, dentists’ offices, and chiropractors’ offices; first responders services provided by police, fire, paramedic and emergency medical services providers, medical transport; contact tracers, etc.”

16VAC25-220-60 sets forth requirements for jobs or tasks classified as “medium exposure risk,” including:

- The proper installation and use of air-handling systems;
- Administrative and work practice controls, including:

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- prescreening at the beginning of work shifts; provision of face coverings to non-employees suspected of COVID-19 infection;
 - Flexible worksites;
 - Flexible work hours;
 - Six-feet separation between workers;
 - Physical barriers where feasible;
 - Flexible meeting and travel options;
 - Remote delivery of services;
 - Curbside delivery of products;
 - Provision of face coverings where social distancing is infeasible and where Personal Protective Equipment has not been otherwise required.
 - Require employees to wear face coverings when in customer facing jobs.
- Assessment of the necessity for the use of Personal Protective Equipment (PPE), certified in writing, and the enforcement of PPE use as applicable.

The Temporary Standard defines “High” and “Very High” exposure risk employers or jobs as follows:

“High” exposure risk hazards or job tasks are those in places of employment with high potential for employee exposure inside six feet with known or suspected sources of SARS-CoV-2, or with persons known or suspected to be infected with the SARS-CoV-2 virus that are not otherwise classified as very high exposure risk, including, but not limited to: 1) Healthcare (physical and mental health) delivery and support services provided to a patient known or suspected to be infected with the SARS-CoV-2 virus, including field hospitals (e.g., doctors, nurses, cleaners, and other hospital staff who must enter patient rooms or areas); 2) Healthcare (physical and mental) delivery, care, and support services, wellness services, non-medical support services, physical assistance, etc., provided to a patient, resident, or other person known or suspected to be infected with the SARS-CoV-2 virus involving skilled nursing services, outpatient medical services, clinical services, drug treatment programs, medical outreach services, mental health services, home health care, nursing home care, assisted living care, memory care support and services, hospice care, rehabilitation services, primary and specialty medical care, dental care, COVID-19 testing services, blood donation services, contact tracer services, and chiropractic services; 3) First responder services provided to a patient, resident, or other person known or suspected to be infected with the SARS-CoV-2 virus; 4) Medical transport services (loading, transporting, unloading, etc.) provided to patients known or suspected to be infected with the SARS-CoV-2 virus (e.g., ground or air emergency transport, staff, operators, drivers,

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pilots, etc.); and 5) Mortuary services involved in preparing (e.g., for burial or cremation) the bodies of persons who are known or suspected to be infected with the SARS-CoV-2 virus at the time of their death.”

“Very high” exposure risk hazards or job tasks are those in places of employment with high potential for employee exposure to known or suspected sources of the SARS-CoV-2 virus (e.g., laboratory samples) or persons known or suspected to be infected with the SARS-CoV-2 virus, including, but not limited to, during specific medical, postmortem, or laboratory procedures: 1) Aerosol-generating procedures (e.g., intubation, cough induction procedures, bronchoscopies, some dental procedures and exams, or invasive specimen collection) on a patient or person known or suspected to be infected with the SARS-CoV-2 virus; 2) Collecting or handling specimens from a patient or person known or suspected to be infected with the SARS-CoV-2 virus (e.g., manipulating cultures from patients known or suspected to be infected with the SARS-CoV-2 virus); and 3) Performing an autopsy that involves aerosol-generating procedures on the body of a person known or suspected to be infected with the SARS-CoV-2 virus at the time of their death.”

In addition to the foregoing, requirements for “High” and “Very High” risk employers or jobs include:

- Proper installation and use of air-handling systems;
- Use of airborne infection isolation rooms (AIIR) for persons known or suspected of COVID-19 infection who are hospitalized or receiving certain types of treatment;
- Use of autopsy suites or similar facilities for post-mortem activities;
- Use of Biosafety Level 3 (BSL-3) precautions;
- Installation of physical barriers where feasible;
- Administrative controls, including:
 - Prescreening at the beginning of workshifts;
 - Isolation of infected persons;
 - Limitations on non-employee access;
 - Signage requiring immediate reporting of COVID-19 symptoms and use of face coverings;
 - Enhanced medical monitoring of employees;
 - Provision of job-specific education and training on COVID-19 transmission;

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- Provision of psychological support to employees;
- Use of hand sanitizers;
- Provision of face coverings to non-employees suspected of infection;
- Implement flexible worksites, working hours, meeting and travel options, remote delivery of services, curbside pickup, and social distancing to six feet.

- Assessment of the necessity for the use of Personal Protective Equipment (PPE), certified in writing, and the enforcement of PPE use as applicable.

- Implementation of a respiratory protection program per 16VAC25-90-1910.134.

- Unless contraindicated by a hazard assessment and equipment selection requirements in subdivision 1 of this subsection, employees classified as very high or high exposure risk shall be provided with and wear gloves, a gown, a face shield or goggles, and a respirator when in contact with or inside six feet of patients or other persons known to be or suspected of being infected with SARS-CoV-2. Where indicated by the hazard assessment and equipment selection requirements in subsection D of this section, such employees shall also be provided with and wear a surgical/medical procedure mask. Gowns shall be large enough to cover the areas requiring protection.

In addition to the foregoing, 16VAC25-220-70 requires High and Very High Risk employers, and Medium Risk employers with 11 or more employees, to prepare a written Infectious disease preparedness and response plan that addresses risks associated with COVID-19, including, among other things,

- Sources of COVID-19 exposure for employees;
- Subject to HIPAA and other laws, individual employee risk factors;
- Engineering, administrative, work practice, and PPE controls necessary to address those risks;
- Contingency plans to deal with outbreaks;
- Basic infection prevention measures to be implemented;
- Identification and isolation of known or suspected infected individuals;
- Interactions with outside businesses;
- CDC and Commonwealth of Virginia Guidelines; and
- Compliance with mandatory Commonwealth of Virginia requirements.

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16VAC25-220-80 imposes training requirements on medium, high, and very high risk employers on COVID-19 risks to all employees, including instruction on

- The Temporary Standard;
- CDC and Virginia guidelines;
- Characteristics and transmission of COVID-19;
- Symptoms of COVID-19;
- COVID-19 risk factors;
- Ability of pre- or asymptomatic persons to transmit COVID-19;
- Safe workplace practices;
- PPE requirements;
- Heat injury symptoms and prevention;
- Anti-discrimination provisions of the Temporary Standard;
- Certification requirements.

Lower Risk employers must provide “written or oral information to employees exposed to such hazards or engaged in such job tasks on the hazards and characteristics of SARS-COV-2 and the symptoms of COVID-19 and measures to minimize exposure,” including:

- The requirements of this standard;
- The characteristics and methods of transmission of the SARS-CoV-2 virus;
- The symptoms of the COVID-19 disease;
- The ability of pre-symptomatic and asymptomatic COVID-19 persons to transmit the SARS-CoV-2 virus;
- Safe and healthy work practices and control measures, including but not limited to, physical distancing, sanitation and disinfection practices; and
- The anti-discrimination provisions of this standard in 16VAC25-220-90.

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Finally, 16VAC25-220-90 prohibits discrimination against employees for exercising the rights provided under the Temporary Standard or other applicable law or regulations, including for

- Voluntary wear of personally owned PPE;
- Raising reasonable concerns about COVID-19 to the employer, other employees, the public, or government authorities;
- Refusing to work due to feeling unsafe, subject to 16VAC25-60-110.

Additional comments

1. **As noted, this is not legal advice, because such advice depends on the specific facts in your situation. You were sent this because of an existing or pre-existing relationship with McGeehan Pascale, PLC.**
2. In a recent conference with Mark Herring, the Virginia Attorney General, in which Mr. McGeehan participated, Attorney General Herring was asked what advice would he give to businesses affected by these regulations. Although not explicitly stated in the above regulations, his answer was to create and maintain records of what you do. His office is not the one to enforce these regulations, but based on our experience with numerous regulatory agencies, we concur. For example, when doing training, have a list of those who attended and have printed copies of what was covered at that meeting. Post in places open to employees, advisories regarding masks, hand washing, social distancing (when applicable) and non-retaliation.
3. Have an affirmative plan. In particular, a plan as to how you determine that your business is low, medium, high or very high risk. And what steps you will, accordingly, follow.
4. If you have questions, please contact **McGeehan Pascale, PLC**.

The primary author of this overview is Dennis P. Chapman, of McGeehan Pascale, PLC. It has been reviewed and augmented also by John P. McGeehan, the principle of McGeehan Pascale, PLC