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## MEMORANDUM

**From:** Elizabeth Barr Fawell  
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**Date:** July 22, 2020

**Re: COVID-19 Update: Virginia Passes First-in-Nation Workplace Protection Requirements**

On July 15, 2020, the Virginia Safety and Health Codes Board passed first-in-the-nation codified emergency temporary standards (the Standards) establishing requirements for employers to control, prevent, and mitigate the spread of SARS-CoV-2 (COVID-19) in the workplace.<sup>1</sup> The Standards were issued at the direction of the Governor to create enforceable regulations. With these Standards, the Virginia Occupational Safety and Health (VOSH) Program will enforce requirements similar in many ways to guidance issued by the U.S. Centers for Disease Control and Prevention (CDC) and Occupational Safety and Health Administration (OSHA).<sup>2</sup>

The new Standard applies to all employers (including food facilities) in the Commonwealth, and will take **immediate** effect upon publication, which the Virginia Department of Labor and Industry (DOLI) anticipates will occur during the week of July 27, 2020.<sup>3</sup> Employers operating in Virginia should carefully review the Standards and update, as appropriate, their processes, policies, and procedures in light of the Virginia Standards becoming effective immediately. Although the Standards are primarily relevant to food companies operating in Virginia, they may also provide a template for how other states might consider their own regulatory approaches to controlling COVID-19 spread in the workplace. Thus, food companies not operating in Virginia also may find them informative.

In issuing the Standards, Virginia joins several other states that have implemented mandatory worker safety precautions related to COVID-19. To date, state requirements have come in the form of executive action and emergency orders, generally issued by the governor.<sup>4</sup> Thus, Virginia

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<sup>1</sup> See 16 Va. Admin. Code §§ 25-220 *et seq.*, Emergency Temporary Standard, Infectious Disease Prevention, available at <https://bit.ly/39fdK3m>; see also Executive Order No. 63, Section E. (May 2020), available at <https://bit.ly/393FiIM>; see also Office of the Governor Press Release (July 15, 2020), available at <https://www.governor.virginia.gov/newsroom/all-releases/2020/july/headline-859234-en.html>

<sup>2</sup> This memorandum is offered for general information and educational purposes. It is not offered as, intended as, and does not constitute legal advice. It is not intended to create, and receipt of it does not constitute, a lawyer-client relationship.

<sup>3</sup> The standards will become effective when published in a newspaper of general circulation in Richmond, Virginia. The exact timing of publication is uncertain.

<sup>4</sup> See, e.g., Pennsylvania Order of the Secretary of the Pennsylvania Department of Health Directing Public Health Safety Measures for Businesses Permitted to Maintain In-person Operations (April 2020). Hogan Lovells US LLP is a limited liability partnership registered in the District of Columbia. "Hogan Lovells" is an international legal practice that includes Hogan Lovells US LLP and Hogan Lovells International LLP, with offices in: Alicante Amsterdam Baltimore Beijing Birmingham Boston Brussels Colorado Springs Denver Dubai Dusseldorf Frankfurt Hamburg Hanoi Ho Chi Minh City Hong Kong Houston Johannesburg London Los Angeles Luxembourg Madrid Mexico City Miami Milan Minneapolis Monterrey Moscow Munich New York Northern Virginia Paris Perth Philadelphia Rome San Francisco São Paulo Shanghai Silicon Valley Singapore Sydney Tokyo Warsaw Washington, D.C. Associated Offices: Budapest Jakarta Riyadh Shanghai FTZ Ulaanbaatar Zagreb. Business Service Centers: Johannesburg Louisville. Legal Services Center: Berlin. For more information see [www.hoganlovells.com](http://www.hoganlovells.com)

appears to be the first state to have developed and implemented mandatory regulations. In issuing the Standards, the Governor specifically stated that Virginia’s “actions come in the absence of federal guidelines.” The Standards are set to expire within six months, upon expiration of the Governor’s State of Emergency, or the enactment of a permanent standard.

### **Key Observations from the Standards**

Companies operating in Virginia should review the Standards closely in their entirety. The following are key observations that may be of interest to food companies generally:

- Virginia groups potential workplace exposures into four categories, based on the risk level: “Very High,” “High,” “Medium,” and “Lower.” According to the Standards, most food companies (including food processors, food retailers, and foodservice operators) are likely to be “Medium” risk exposure settings.
- Although the Standards provide likely risk categories for various operations, employers are expected to conduct risk assessments to determine which risk level applies to their operations and may need to implement different controls depending on the exposure assessment of each type of employee.
- The varying requirements address personal protective equipment (PPE), sanitation, social distancing, infectious disease preparedness and response plans, record keeping, training, and hazard communications in workplaces.
- There are return-to-work requirements, including time and testing strategies for confirmed or suspected and asymptomatic workers.
- No part of the Standards requires contact tracing, nor do the Standards require testing (although the Standards impose various requirements around testing if testing is conducted).
- The Standards require physical distancing but appear to provide allowances when physical distancing is not possible. The Standards do not provide guidance on how an employer should determine whether physical distancing is possible.
- Most employers must develop and implement written Infectious Disease Preparedness and Response Plans.
- Employers must conduct detailed training requirements on plans and control strategies in the workplace.
- Employers must observe the anti-discrimination requirements against employees for exercising their rights in the workplace related to COVID-19.
- Virginia will consider an employer’s “actual compliance” with CDC guidance as “evidence of good faith” in any enforcement proceeding.

These standards will be enforceable by VOSH, which can inspect workplaces and impose financial penalties for violation, including up to \$130,463 for each willful or repeated violation (with smaller penalties for lesser violations), as well as criminal penalties in certain circumstances.

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We will continue to monitor the impacts on the food industry from COVID-19. Should you have any questions or if we can be of assistance with your COVID-19 response strategy, please do not hesitate to contact us.

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15, 2020), available at <https://www.governor.pa.gov/wp-content/uploads/2020/04/20200415-SOH-worker-safety-order.pdf>.