



Virginia adopts nation's first COVID-19 workplace safety requirements.

Introduction

On July 15, Virginia adopted the nation's first state-level COVID-19 workplace safety requirements (available [here](#)) —formally §16VAC25-220, Emergency Temporary Standard (ETS).

In May, Gov. Ralph Northam directed the Virginia Department of Labor and Industry (DOLI) to promulgate workplace safety regulations given perceived inaction from the federal government — namely, the Occupational Safety and Health Administration within the U.S. Department of Labor — concerning workplace safety complaints related to the novel coronavirus. DOLI submitted a proposal to the state's Safety and Health Codes Board, which voted 9-2 in favor of the requirements.

According to a [news release](#) from the Office of the Governor, these rules “will protect Virginia workers by mandating appropriate personal protective equipment, sanitation, social distancing, infectious disease preparedness and response plans, record keeping, training, and hazard communications in workplaces across the Commonwealth. The actions come in the absence of federal guidelines.”

Many of the new rules are consistent with the Governor's executive orders and/or guidance from the Centers for Disease Control and Prevention (CDC). That means many ETS requirements will be familiar to VADA members, who have adhered to such practices for months. The ETS adds to and operates separate from those orders. Also, unlike CDC guidance, the ETS is binding regulatory law that, if violated, might result in significant civil penalty.

VADA staff created the following questions and answers to help its members understand what is required of them under the new ETS. **In addition to reviewing the following, it is important you thoroughly review with counsel [the full ETS](#) plus the materials DOLI has made available to employers to assist in compliance, including [the agency's frequently asked questions](#).**

***Disclaimer:** The following analysis does not provide, and is not intended to constitute, legal advice. All content is for general information purposes only. VADA members should consult legal counsel when making decisions relating to the §16VAC25-220, Emergency Temporary Standard.*

Questions & Answers

Will these new restrictions apply to my dealership(s)?

Yes, the ETS *will* apply to Virginia's franchised auto dealerships.

The ETS “*shall apply to every employer, employee, and place of employment in the Commonwealth of Virginia within the jurisdiction of the VOSH program as described in §§16VAC25-60-20 and 16VAC25-60-30.*” See **§16VAC25-220-10.C (p. 2)**.

The ETS supplements and enhances existing VOSH rules relating to SARS-CoV-2 and COVID-19.

When will the ETS take effect, and long will it last?

The restrictions take effect upon publication in a City of Richmond newspaper, which DOLI anticipates will occur the week of July 27 (next week); although, an exact date is not certain.

The requirements will last at least six months unless repealed by the Virginia Safety and Health Codes Board.

What about Phase Three? Are we still under the Governor's executive orders and guidelines?

Phase Three is still in effect.

§16VAC25-220-10.F (p. 4) makes clear the ETS works separately from and shall not conflict with the Governor's executive orders and corresponding guidelines. Said differently, the Phase Three requirements laid out in Executive Order 67 and the corresponding Guidelines for All Business Sectors for Phase Three still apply, as does the general face covering mandate under Executive Order 63.

The ETS will require several health practices already familiar to VADA members through the Governor's orders. But, they add several rules for Virginia employers, like requiring employers to notify employees within 24 hours of learning someone within the organization tested positive for COVID-19, and stipulating when employees can return to work, among other regulations.

What if I comply with CDC Guidelines already?

Simply put, that's fine, but make sure it's at least what's required under the ETS.

When the Safety and Health Codes Board was deliberating the workplace safety rules, a major point of discussion was whether compliance with recommendations from the CDC would deem one in compliance with Virginia's new ETS. The simple answer is "yes," *if* the given CDC recommendation provides equivalent or greater protection than what is stipulated in the ETS. See **§16VAC25-220-10.G.1 (p. 4)**.

The ETS provides, *"To the extent that an employer actually complies with a recommendation contained in CDC guidelines, whether mandatory or non-mandatory, to mitigate SARSCoV-2 virus and COVID-19 disease related hazards or job tasks addressed by this standard, and provided that the CDC recommendation provides equivalent or greater protection than provided by a provision of this standard, the employer's actions shall be considered in compliance with this standard."*

Actual compliance with CDC guidelines as contemplated in the ETS shall be considered evidence of good faith in any enforcement proceeding relating to the ETS.

Jobs are classified as having different risk levels—"very high," "high," "medium," and "lower." At what level are my employees, and what does that mean?

VADA members must determine what level of exposure their employees face.

The ETS states all employers *"shall assess their workplace for hazards and job tasks that can potentially expose employees to the SARS-CoV-2 virus or COVID-19 disease. Employers shall classify each job task according to the hazards employees are potentially exposed to and ensure compliance with the applicable sections of this standard for 'very high,' 'high,' 'medium,' or 'lower'"*

risk levels of exposure. Tasks that are similar in nature and expose employees to the same hazard may be grouped for classification purposes.” §16VAC25-220-40.B.1. (p. 18).

Factors to consider in determining exposure risk levels include but are not limited to those stipulated in [§16VAC25-220-10.E.2 \(p. 3\)](#).

Significantly, *“Work performed in customer premises, such as homes or businesses” as well as “retail stores” are considered “medium” risk level.* See [§16VAC25-220-30 \(pp. 9-13\)](#) for more on the four risk levels.

DOLI Materials:

- [Hazard Assessment](#)

What requirements exist for all employers?

The ETS makes certain requirements of all employers. VADA members should carefully review such requirements found in [§16VAC25-220-40 \(pp. 18-29\)](#). They address:

- Exposure assessment and determination, notification requirements, and employee access to exposure and medical records.
- When employees can return to work after a positive or suspected case of COVID-19
- Physical distancing
- Closure or control of access to common areas, breakrooms, or lunchrooms
- Employees occupying vehicles on the job
- Compliance with Virginia executive orders and/or public health emergencies
- Respiratory protection and personal protective equipment (PPE) when physical distancing is not possible
- Health or religious exceptions to face coverings, respirators, and PPE
- Sanitation and disinfecting
- Employer provision of PPE

DOLI Materials:

- [Nine Steps to Achieve COVID-19 ETS Compliance](#)

If an employee tests positive for COVID-19, what are my responsibilities?

[§16VAC25-220-40.B.8 \(pp. 20-21\)](#) provides, *“To the extent permitted by law, including HIPAA, employers shall establish a system to receive reports of positive SARS-CoV-2 tests by employees, subcontractors, contract employees, and temporary employees (excluding patients hospitalized on the basis of being known or suspected to be infected with SARS-CoV-2 virus) present at the place of employment within the previous 14 days from the date of positive test.”*

Additionally, while keeping confidential the identity of any infected employee, the employer shall notify **within 24 hours**:

- **Other Employees** who may have been exposed, informing them of possible exposure
- **The Virginia Department of Health**

Employer must notify **Other Employers** whose employees were at the work site during the same time period and **Building/Facility Owners**, who then have requirements of notifying other tenants.

Employers must also notify the Virginia Department of Labor and Industry within 24 hours of discovering three or more employees present at the place of employment within a 14-day period tested positive for SARS-CoV-2 during a single 14-day window.

Nothing in the ETS requires employers to conduct contact tracing.

If an employee is self-isolating due to a positive or suspected case, when can they return to work?

§16VAC25-220-40.C (pp. 22-24) lays out the ETS requirements on return to work. **View that section for employer requirements on developing and implementing policies and procedures for known or suspected infections of SARS-CoV-2.**

Symptomatic employees with known or suspected cases of COVID-19 may return to work when:

1. Symptom-Based Strategy: Three days (72 hours) have passed since recovery, meaning fever resolution without the use of fever-reducing medications, AND improvement in respiratory symptoms (e.g. cough, shortness of breath), AND at least 10 days have passed since symptoms first appeared; **OR**
2. Test-Based Strategy: There's been resolution of fever without the use of fever-reducing medications, AND improvement in respiratory symptoms, AND two consecutive negative tests taken at least 24 hours apart.

Asymptomatic employees with known or suspected cases of COVID-19 may return to work when:

1. Time-Based Strategy: At least 10 days have passed since the date of their first positive COVID-19 diagnostic test, assuming they have not subsequently developed symptoms, which would necessitate the symptom-based strategy or test-based strategy (above); **OR**
2. Test-Based Strategy: Upon two consecutive negative tests taken at least 24 hours apart.

What requirements exist for employers having employees at the “medium” risk level?

In addition to the requirements for all employers, there are mandates for employers with employees at each risk level(s).

§16VAC25-220-60 (pp. 35-39) gives requirements for hazards or job tasks classified at “medium” exposure risk. It is critical you review these requirements in the full ETS. They involve:

- **Engineering Controls**, e.g., ensuring air-handling systems where installed are appropriate to address the virus and COVID-19 related hazards and job tasks that occur at the workplace.
- **Administrative and Work Practice Controls**, addressing surveying employees for signs or symptoms of COVID-19, face coverings, teleworking, staggered shifts, physical distancing, physical barriers, telephone and video conferencing, and service and product delivery.

- PPE, including employer responsibilities with SARS-CoV-2 virus and COVID-19 disease hazard assessment and PPE selection and more.

What about an Infectious Disease Preparedness and Response Plan?

Employers with hazards or job tasks classified at “very high,” “high,” or “medium” exposure (only “medium” if the employer has 11 or more employees) shall develop and implement a written Infectious Disease Preparedness and Response Plan.

Employers shall designate a person to be responsible for implementing the plan, which comes with several requirements found in [§16VAC25-220-70 \(pp. 39-43\)](#) of the ETS.

Employers will have 60 days from the ETS effective date to implement an Infectious Disease Preparedness and Response Plan.

DOLI Materials:

- [Infectious Disease Plan Template](#)

What about the training requirements?

In addition to implementing an Infectious Disease Preparedness and Response Plan, employers must train their employees about the ETS. See [§16VAC25-220-80 \(pp. 43-46\)](#) for a full explanation of those training requirements.

Employers with hazards or job tasks classified as “very high,” “high,” or “medium” exposure risk at a place of employment shall provide training to all employee(s) working at the place of employment, *regardless* of employee risk classification, on the hazards and characteristics of the SARS-CoV-2 virus and COVID-19 disease.

Training programs shall enable each employee to recognize the hazards of the virus and symptoms of COVID-19 and shall train employees in the procedures employees must follow to minimize such hazards.

[§16VAC25-220-80.B \(p. 43\)](#) makes clear what training must entail.

[§16VAC25-220-80.C \(pp. 44-45\)](#) provides employers must keep a training log to verify compliance with the ETS training provisions. [§16VAC25-220-80.E \(p. 45\)](#) describes situations in which “retraining” is necessary.

Employers will have 30 days after the ETS effective date to train employees on the ETS. VADA is working to provide members additional material to assist with training.

DOLI Materials:

- [PowerPoint Presentation on the ETS](#) (full, 110 pages)
- [Training Certification Form](#)

What other materials will VOSH provide to help dealers comply with the ETS?

- [Emergency Temporary Standard](#) (full text)
- [Training Certification Form](#)

- [Nine Steps to Achieve COVID-19 ETS Compliance](#)
- [Frequently Asked Questions](#)
- [PowerPoint Presentation on the ETS](#) (full, 110 pages)
- [Hazard Assessment](#)
- [Infectious Disease Plan Template](#)
- [Infographic](#)
- [Lower Risk Training](#)

VADA staff understands other material may be forthcoming. We will share that if and when available.

Also consider [DOLI On-Site Consultation Services](#). DOLI offers On-Site Consultation Services to help businesses understand and comply with VOSH standards. For the ETS, priority will be given to “high” hazard workplaces with 250 or fewer employees. (VADA dealer members seem likely to fall under the “medium” hazard category.) All such services are offered to employers at no cost. For more on consultations, contact DOLI Consultation Program Manager Tracy Fitzpatrick at (804) 786-8707 or Tracy.fitzpatrick@doli.virginia.gov.

An employee has exercised their rights pursuant to the ETS. Are they protected?

Yes. The ETS, as stipulated in **§16VAC25-220-90 (pp. 46-47)**, protects employees against discrimination for exercising their rights under the standard. Employers cannot:

- o Discharge or in any way discriminate against an employee because an employee exercised their rights under the ETS;
- o Discharge or in any way discriminate against an employee who opts to provide and wear their own PPE or face covering if the employer doesn’t provide it, provided it doesn’t cause greater hazard to the employee or create a serious hazard for other employees; or
- o Discharge or in any way discriminate against an employee **“who raises a reasonable concern about infection control related to the SARS-CoV-2 virus and COVID-19 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.”**
 - (Example: Employee goes on Facebook, decrying the dealership’s COVID-19 infection control. The ETS protects the employee from discharge or discrimination.)

Employees are also protected in their refusal to do work or enter a location they feel is unsafe. Separate from the ETS, [§16VAC25-60-110](#) provides requirements on discharging or disciplining employees who refused to complete their work because of a reasonable fear of injury or death.

What happens if my business does not comply with the ETS?

The ETS will be a VOSH standard, so a violation will be treated like any other violation of VOSH rules that would normally come with a serious or willful violation—and that can be significant.

This table reflects the maximum penalty amounts that VOSH may assess as of January 15, 2020.

Type of Violation	2020 Penalty Amount
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Serious Other-Than-Serious Posting Requirements	\$13,494 per violation (up from \$13,260 in 2019)
Failure to Abate	\$13,494 per day beyond the abatement date (up from \$13,260 in 2019)
Willful or Repeated	\$134,937 per violation (up from \$132,598 in 2019)

Again, the ETS works separately from Governor Northam’s executive orders. An action that may violate the ETS and result in civil penalty from VOSH may also constitute a violation of an executive order, which could result in a Class 1 misdemeanor and up to one year in jail *plus* closure of the dealership(s). **In sum, compliance with both the ETS and the Governor’s executive orders is paramount.**