

September 13, 2021

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

1. If federal OSHA adopts an Emergency Temporary Standard (ETS) with a COVID-19 vaccine mandate for employers with 100 or more employees, what will happen in Virginia?

The Department of Labor and Industry's Virginia Occupational Safety and Health (VOSH) program is charged under Va. Code §40.1-1¹ with ensuring the protection of Virginia employees and employers under its jurisdiction in the private and public sectors from occupational safety and health hazards.

VOSH standards and regulations are adopted by the Virginia Safety and Health Codes Board ("Board") in accordance with Va. Code §40.1-22(5) and -22(6a).²

Standards adopted by Virginia's State Plan for Occupational Safety and Health (VOSH) are required to be "at least as effective" as those adopted by OSHA in accordance with 29 USC 667(c)(2) of the OSH Act of 1970.³

OSHA's process for adopting its current Emergency Temporary Standard (ETS) for COVID-19 in the health care industry⁴ included submitting a draft ETS to the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA).⁵ The OIRA held a series of stakeholder meetings from April 28, 2021 to June 9, 2021, prior to OSHA's publication of the ETS on June 21, 2021.⁶

As of September 13, 2021, VOSH has not received any detailed information on the content of OSHA's proposed vaccine mandate ETS, the federal process for adopting it, nor has a vaccine mandate ETS been submitted to the OIRA for review.⁷

If federal OSHA adopts a vaccine mandate ETS for employers with 100 or more employees, the Board will meet to consider the ETS in accordance with the procedures outlined below in Code of Federal Regulations (CFR) Parts 1953(b)(1) and (b)(2):⁸

1953.5(b). Emergency temporary standards.

¹ <https://law.lis.virginia.gov/vacode/40.1-1/>

² <https://law.lis.virginia.gov/vacode/40.1-22/>

³ https://www.osha.gov/laws-regs/oshact/section_18

⁴ <https://www.osha.gov/coronavirus/ets>

⁵ <https://www.reginfo.gov/public/jsp/Utilities/index.myjsp>

⁶ <https://www.reginfo.gov/public/do/eom12866SearchResults?view=yes&pagenum=0>

⁷ <https://www.reginfo.gov/public/jsp/EO/eoDashboard.myjsp>

The Department is assuming any proposed ETS will be submitted to OIRA for review, but does not know for certain that such a review will be required.

⁸ <https://www.osha.gov/laws-regs/regulations/standardnumber/1953/1953.5>

1953.5(b)(1). Immediately upon publication of an emergency temporary standard in the Federal Register, OSHA shall advise the States of the standard and that a Federal program change supplement shall be required. **This notification must also provide that the State has 30 days after the date of promulgation of the Federal standard to adopt a State emergency temporary standard if the State plan covers that issue.** The State may demonstrate that promulgation of an emergency temporary standard is not necessary because the State standard is already the same as or at least as effective as the Federal standard change. The State standard must remain in effect for the duration of the Federal emergency temporary standard which may not exceed six (6) months.

1953.5(b)(2). Within 15 days after receipt of the notice of a Federal emergency temporary standard, the State shall advise OSHA of the action it will take. State standards shall be submitted in accordance with the applicable procedures in § 1953.4(b) -- Federal Program Changes, except that the required documentation or plan supplement must be submitted within 5 days of State promulgation. (Emphasis added).

While the Virginia Standard for Infectious Disease Prevention of the SARS-CoV-2 Virus That Causes COVID-19, 16VAC25-220,⁹ addresses workplace hazards associated with COVID-19, it does not contain a vaccine mandate.

2. If federal OSHA adopts an Emergency Temporary Standard (ETS) with a COVID-19 vaccine mandate for employers with 100 or more employees and the Virginia Safety and Health Codes Board adopts it for Virginia, will the ETS apply to Virginia public sector employers and employees?

16VAC25-60-30.A. provides that "All occupational safety and health standards adopted by the board shall apply to public employers and their employees in the same manner as to private employers."¹⁰

As of September 13, 2021, VOSH has not received any detailed information on the content of OSHA's proposed vaccine mandate ETS, the federal process for adopting it, nor has a vaccine mandate ETS been submitted to the OIRA for review.¹¹

16VAC25-60-10 provides that the term " "Public employer" means the Commonwealth of Virginia, including its agencies, authorities, or instrumentalities or any political subdivision or public body."

⁹ <https://www.doli.virginia.gov/proposed-changes-to-fps/>

¹⁰ <http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+16VAC25-60-30>

¹¹ <https://www.reginfo.gov/public/jsp/EO/eoDashboard.myjsp>

The Department is assuming any proposed ETS will be submitted to OIRA for review, but does not know for certain that such a review will be required.

NOTE:

In counting the number of employees for a specific employer, VOSH will use the number of employees at the highest level of the legal entity. For instance, all state employees would be covered by the ETS because the Commonwealth of Virginia has 100 or more employees, as would employees of similarly situated city or county governments, public school systems, universities, public sector authorities and instrumentalities, etc.