

## **VCBG BULLETIN & ALERT**

### **16VAC25-220: Final Permanent Standard (FPS) for Infectious Disease Prevention of the SARS-CoV-2 Virus That Causes COVID-19**

and

### **US OSHA: COVID-19 Emergency Temporary Standard**

#### **OVERVIEW**

##### Revised Virginia Final Permanent Standard

The Virginia Safety & Health Codes Board adopted revisions to 16VAC25-220 on June 29, 2021, and August 26, 2021. The FPS was published in the [Richmond Times Dispatch](#) and became effective September 8, 2021. This report is provided to VCBG members for the purpose of highlighting significant amendments and remaining challenges with the 16VAC25-220 FPS.

The highlighted amendments in the next section do not detail every change to the FPS. To review every change, please [click here](#). To access the FPS, please [click here](#).

##### US OSHA Emergency Temporary Standard & Executive Order

OSHA will issue a new national Emergency Temporary Standard (ETS) as announced by President Joe Biden. It will mandate all workplaces with 100+ employees to require employee vaccination or conduct weekly testing of those not fully vaccinated. Employees must also be paid for time-off to test. President Biden also issued an Executive Order requiring Federal contractors to vaccinate their employees. Full details of “President Biden’s COVID-19 Action Plan” are [here](#).

##### VCBG Compliance Training

VCBG’s [COVID-19 Compliance Certification Program](#) will be updated to provide aligned online, classroom, mobile, and blended training and assessments by November 1, 2021.

#### **COMPLIANCE DATES**

- September 8, 2021 16VAC25-220: Final Permanent Standard (FPS) in effect
- October 8, 2021 Infectious disease preparedness and response plan deadline
- November 7, 2021 Training completion deadline

#### **16VAC25-220 FINAL PERMANENT STANDARD AMENDMENT HIGHLIGHTS**

##### 16VAC25-220-10. Purpose, scope, and applicability.

- Section D was struck. This removes the categorization of employers into “exposure risk levels.”

- Section E was amended to provide a “safe harbor” for employers that comply with CDC guidance. [This was the most significant win in 18 months of legal and regulatory battles over this FPS. This was entirely the work of over 35 trade association partners working together in the Coalition for a Strong Virginia Economy. It is also largely due to the persistent support and advice of Virginia Safety & Health Codes Board member Courtney Malveaux (Jackson Lewis LLP).]

The new standard now states:

*E. To the extent that an employer actually complies with a recommendation contained in current CDC guidelines, whether mandatory or non-mandatory, to mitigate SARS-CoV-2 virus and COVID-19 disease related hazards or job tasks addressed by this standard, the employer's actions shall be considered in compliance with this chapter. An employer's actual compliance with a recommendation contained in current CDC guidelines, whether mandatory or non-mandatory, to mitigate SARS-CoV-2 and COVID-19 related hazards or job tasks addressed by a provision of this chapter shall be considered evidence of good faith in any enforcement proceeding related to this chapter. The Commissioner of Labor and Industry shall consult with the State Health Commissioner for advice and technical aid before making a determination related to compliance with current CDC guidelines.*

This will now allow for more uniform compliance, especially for multi-state companies. For example, compliance with [CDC guidance for fully vaccinated people](#).

#### 16 VAC25-220-30. Definitions

- "Cleaning," "Community Transmission," "COVID-19 test," "Duration and frequency of employee exposure," "Face covering," "Facemask," "Face shield," "Personal protective equipment," "Respirator," and "Surgical mask" definitions were changed.
- "Community transmission" definition was added.
- "COVID positive" definition was added.
- "COVID test" definition was added.
- "Fully vaccinated" definition was added.
- "Otherwise at-risk" definition was added.
- "Respirator" was redefined.
- "Suspected COVID-19" definition was significantly amended to read:

...a person who has been told by a licensed health care provider that they are suspected to have COVID-19; or is experiencing recent loss of taste and/or smell with no other explanation; or is experiencing both fever (greater than or equal to 100.4° F) and new unexplained cough associated with shortness of breath; or has symptoms consistent with the clinical criteria in the CDC national case definition and no other explanation for symptoms exist.

- "Vaccine" definition was added.

16VAC25-220-40. Mandatory requirements for all employers.

- Section A requires employers to have a COVID-19 policy and a way of taking anonymous complaints of violations. It states:

*A. Employers shall have a policy in place to ensure compliance with the requirements in this section to protect employees from workplace exposure to the SARS-CoV-2 virus that causes the COVID-19 disease. Such policy shall have a method to receive anonymous complaints of violations. An employer that enforces its policy in good faith and resolves filed complaints shall be considered in compliance with this subsection.*

- Section B. 1 no longer requires that “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.”

- Section B. 1 also now allows employers to rely upon employees to report their immunization status without proof, but they may also mandate it.

*Employers may rely on an employee’s representation of being fully vaccinated, as defined herein, without requiring proof of vaccination; however, nothing in this standard shall be construed to preclude an employer from requiring proof that an employee is fully vaccinated.*

- Section B. 7. c now only requires building owners to “clean” vs “sanitize” common areas of buildings where a positive COVID-19 infection has occurred.
- Section B. 7. d expands the Virginia Department of Health’s (VDH) regulation over all employers without a state of emergency declaration. Now, all employers with “two or more confirmed cases of COVID-19 of its own employees present at the place of employment within a 14-day period testing positive for COVID-19” must report “within 24 hours” to VDH and continue until the VDH “investigation” is closed.
- Section B. 7. e now requires employers to report to “The Virginia Department of Labor and Industry within 24 hours of the discovery of two or more of its own employees present at the place of employment within a 14-day period” are positive for COVID-19.

- Section C. return to work standards were substantially amended. This standard now reads:

*1. If the employer knows an employee is COVID-19 positive, regardless of vaccination status then the employer must immediately remove that employee from the work site and keep the employee removed until they meet the return to work criteria in subdivision C 3 of this section.*

*2. If the employer knows an employee is suspected COVID-19, regardless of vaccination status then the employer must immediately remove that employee from the work site and either:*

*a. Keep the employee removed until they meet the return to work criteria in subdivision C 3 of this section; or*

*b. Keep the employee removed and provide a COVID-19 polymerase chain reaction (PCR) test at no cost to the employee. (1) If the test results are negative, the employee may return to work immediately. (2) If the test results are positive, the employer must*

*comply with subdivision C 1 of this section. (3) If the employee refuses to take the test, the employer must continue to keep the employee removed from the workplace consistent with subdivision C 1 of this section. Absent undue hardship, employers must make reasonable accommodations for employees who cannot take the test for religious or disability-related medical reasons.*

*3. The employer must make decisions regarding an employee's return to work after a COVID-19-related workplace removal in accordance with guidance from a licensed health care provider, a VDH public health professional, or CDC's "Isolation Guidance" (hereby incorporated by reference); and CDC's "Return to Work Health care Guidance" (hereby 21 incorporated by reference). If an employee has a known exposure to someone with COVID-19, the employee must follow any testing or quarantine guidance provided by a VDH public health professional.*

- Section D requires employees “...that are not fully vaccinated and otherwise at-risk employees observe physical distancing while on the job and during paid breaks on the employer's property...”
- Section E. requires that “Access to common areas, breakrooms, or lunchrooms shall be closed or controlled. This subsection does not apply to fully vaccinated employees.”
- Section E. 3 requires that “When no suspected or confirmed COVID-19 persons are known to have been in a space, the employer shall clean the common area, breakroom, or lunchroom once per shift.” [No disinfection required.]
- Section F significantly amended the requirements for employees in vehicles. [The regulation no longer requires “respiratory protection” for those that are fully vaccinated in areas of low to moderate community transmission. Those not fully vaccinated can also now opt to use a face covering. However, vaccinated employees traveling with employees not fully vaccinated must wear a face covering. This section also does not apply to single commercial drivers and team drivers that live in the same household.]  
[This section also moves adequate respiratory protection and/or personal protective equipment determinations from the Secretary of Commerce and Trade to the newly created Secretary of Labor.]
- Section G creates a substantial new standard for face coverings, face shields, and facemasks for vaccinated and unvaccinated employees. The standard states:

*G. Employers shall provide and require employees that are not fully vaccinated, fully vaccinated employees in areas of substantial or high community transmission, and otherwise at risk employees (because of a prior transplant or other medical condition) to wear face coverings or surgical masks while indoors, unless their work task requires a respirator or other PPE. Such employees shall wear a face covering or surgical mask that covers the nose and mouth to contain the wearer's respiratory droplets and help protect others and potentially themselves. This subsection does not apply to fully vaccinated employees in areas of low to moderate community transmission, and except as otherwise noted. The following are exceptions to the requirements for face coverings or surgical masks for employees that are not fully vaccinated:*

*1. When an employee is alone in a room.*

2. *While an employee is eating and drinking at the workplace, provided each employee is at least six feet away from any other person, or separated from other people by a physical barrier.*
3. *When employees are wearing respiratory protection in accordance with 16VAC25-90-1910.134 or this chapter.*
4. *When it is important to see a person's mouth (e.g., communicating with an individual who is deaf or hard of hearing) and the conditions do not permit a facemask that is constructed of clear plastic or includes a clear plastic window. In such situations, the employer must ensure that each employee wears an alternative to protect the employee, such as a face shield, if the conditions permit it. The employer may determine that the use of face shields without facemasks in certain settings is not appropriate due to other infection control concerns.*
5. *When employees cannot wear facemasks due to a medical necessity, medical condition, or disability as defined in the Americans with Disabilities Act (ADA) (42 USC § 12101 et seq.), or due to a religious belief. Exceptions must be provided for a narrow subset of persons with a disability who cannot wear a facemask or cannot safely wear a facemask, because of the disability, as defined in the ADA, including a person who cannot independently remove the facemask. The remaining portion of the subset who cannot wear a facemask may be exempted on a case-by-case basis as required by the ADA and other applicable laws. In all such situations, the employer must ensure that any such employee wears a face shield for the protection of the employee, if their condition or disability permits it. Accommodations may also need to be made for religious beliefs consistent with Title VII of the Civil Rights Act (42 USC § 2000e et seq.). The employer may determine that the use of face shields without facemasks in certain settings is not appropriate due to other infection control concerns.*
6. *When the employer can demonstrate that the use of a facemask presents a hazard to an employee of serious injury or death (e.g., arc flash, heat stress, interfering with the safe operation of equipment). In such situations, the employer must ensure that each employee wears an alternative to protect the employee, such as a face shield, if the conditions permit it. Any employee not wearing a facemask must remain at least six feet away from all other people unless the employer can demonstrate it is not feasible. The employee must resume wearing a facemask when not engaged in the activity where the facemask presents a hazard. The employer may determine that the use of face shields without facemasks in certain settings is not appropriate due to other infection control concerns.*
7. *Where a face shield is required to comply with this paragraph or is otherwise required by the employer, the employer must ensure that face shields are cleaned at least daily and are not damaged. When an employee provides a face shield that meets the definition of that term in 16VAC25-220-30, the employer may allow the employee to use it and is not required to reimburse the employee for that face shield. Notwithstanding anything to the contrary in this chapter, the Secretary of Labor may exercise discretion in the enforcement of an employer's failure to provide PPE required by this chapter if the employer demonstrates that the employer:*
  - a. *Is exercising due diligence to come into compliance with such requirement;*
  - and
  - b. *Is implementing alternative methods and measures to protect employees that are satisfactory to the Secretary of Labor after consultation with the Commissioner of Labor and Industry and the Secretary of Health and Human Services.*

- Section L sanitation and disinfecting standards have been completely changed for “operators of facilities such as food and agricultural production or processing workplace settings, manufacturing workplace settings, or food preparation and food service areas where specific regulations or practices for cleaning and disinfection may apply.” [This includes changes that allow for cleaning vs. disinfecting once per shift or in some cases every 12 hours.]

Further, “All shared tools, equipment, workspaces, and vehicles shall be cleaned [sanitation no longer required] prior to transfer from one employee to another. [BUT] “This subsection does not apply when the transfer is from one fully vaccinated employee to another fully vaccinated employee.”

#### 16VAC25-220-60. Requirements for higher-risk workplaces [\*NEW DESIGNATION].

- Sections A-C require specific engineering and administrative controls for factory and retail environments where all employees are NOT vaccinated or any employee working “in a place of employment with substantial or high community transmission, and otherwise at-risk employees in workplaces.”

One of the new standards states:

*3. In workplaces (or well-defined work areas) with processing or assembly lines where there are employees who are not fully vaccinated or otherwise at-risk employees, working on food processing or assembly lines can result in virus exposure because these workplaces have often been designed for a number of employees to stand next to or across from each other to maximize productivity. Employers shall ensure proper spacing of employee who are not fully vaccinated or otherwise at-risk employees (or if not possible, appropriate use of barriers).*

16VAC25-220-60.B 1 standards regulating “air handling systems” was not changed.

- Section D provides for hazard assessment and PPE exemptions in workplaces where employees are fully vaccinated.

#### 16VAC25-220-70. Infectious disease preparedness and response plan.

- Sections A-B require a written Infectious Disease Preparedness and Response Plan but only for businesses “with 11 or more employees” and “In counting the number of employees, the employer may exclude fully vaccinated employees.”

#### 16VAC25-220-80. Training.

- Section A effectively exempts fully vaccinated employees from training requirements. It states:

*Employers may provide fully vaccinated employees with written information meeting the requirements of subsection F of this section in lieu of training. Where applicable, the*

*training program shall enable each employee to recognize the hazards of the SARS-CoV-2 virus and 48 signs and symptoms of COVID-19 disease and shall train each employee in the procedures to be followed in order to minimize these hazards.*

- Section B training requirements for NOT fully vaccinated employees remain unchanged.

## MAJOR REMAINING CHALLENGES

1. **General Duty Clause.** The Virginia Department of Labor & Industry (VDOLI) has argued for 18 months that the 16VAC25-220 final permanent standard, its preceding final permanent standard, and its preceding Emergency Temporary Standard were necessary to protect human health because the General Duty Clause is inadequate. The VMA, the Coalition for a Strong Virginia Economy, and 45 other states that used a combination of Executive Orders and the General Duty Clause disagree.

Va. Code §40.1-51.1.A, provides that:

*It shall be the duty of every employer to furnish to each of his employees safe employment and a place of employment that is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees and to comply with all applicable occupational safety and health rules and regulations promulgated under this title.*

Otherwise known as the “General Duty Clause” (the Virginia equivalent to §5(a)(1) of the OSH Act of 1970), Va. Code §40.1-51.1.A can be used to address “serious” recognized hazards to which employees of the cited employer are exposed through reference to such things as national consensus standards, manufacturer’s requirements, requirements of the Centers for Disease Control (CDC), or an employer’s safety and health rules.

Further, VDOLI now argues in their Economic Impact Analysis that because the “General Duty Clause” is applicable to the latest final permanent standard, there are no costs associated with the regulation. It is completely circular logic. [See VDOLI supplemental EIA – <https://www.doli.virginia.gov/wp-content/uploads/2021/08/DOLI-ADDENDUM-TO-2nd-EIA-Final-For-Publication-8.20.2021.pdf>.]

The bottom line is that the General Duty Clause, CDC Guidance, and prudent Executive Orders along with pragmatic employer leadership has kept workplaces safe not the regulatory “merry-go-round” of Virginia ETS, final permanent standard #1, final permanent standard #2, and Federal ETS. 16VAC25-220 should be repealed.

2. **16VAC25-220-60 B 1 (HVAC system standards).** The VMA asserts that the Virginia Safety & Health Codes Board does not have authority to regulate non-medical HVAC systems. They claim that 16VAC25-60-120, 130, 140, and 150 give them authority. But they are mistakenly citing, “machinery, vehicles, tools, materials and equipment” standard references that are not applicable to building codes or HVAC controls.

Every building is a living, breathing facility and owners adapt HVAC controls to fit their production/operational needs. The manufacturer's recommended operational standards may not work for every facility and to be tied to those standards is a conflict. For example, if a company retrofits an existing HVAC system with an aftermarket UV light sanitation device, why should the company be bound to the manufacturer's recommended settings on that HVAC system or filter replacement standards? The threat of air-borne virus infection is neutralized with the installation of the UV light sanitation device.

3. **16VAC25-220-50.B.7 Physical Barriers.** This standard is still unclear to most employers when combined with the social distancing requirements in Section 50 C.9 (six-foot distance). Even the Virginia Senate conducted business with a modified physical barrier system that does not appear to meet this standard (see August 5, 2021 session photo).



## Senate of Virginia



4. **16VAC25-220-50.B.9 a & b Flexible Work Hours and Shifts.** The VMA disputes the authority of the Board to regulate work hours or shifts.
5. **Virginia Administrative Process Act & Executive Orders.** The VMA still contends that the Board did not comply with VAPA and improperly incorporated Executive Orders into its regulation throughout the ETS, Final Permanent Standard #1, and Final Permanent Standard #2. This is largely the subject of a Court of Appeals of Virginia



case (VIRGINIA MANUFACTURERS ASSOCIATION, ET AL.v. RALPH S. NORTHAM, ET.AL - Record No. 0316-21-2).

6. **Economic Impact Analysis (EIA).** To the extent that the general duty clause could be used by the Department to address COVID-19 workplace hazards to the same extent as and in the same manner as the final permanent standard were the standard not in effect, the Department does not consider any of the costs associated with such use of the clause to be new costs associated with adoption of the standard.

The Virginia Safety & Health Codes Board completed an EIA that was not in compliance with the Virginia Administrative Process Act and provided inadequate time for public comment. Regardless, the EIA contained no relevant cost estimates. In fact, VDOLI stated that, “To the extent that a requirement is included in both executive orders and the standard, DOLI does not consider the standard to impose any new cost burden on a covered locality or employer.” This is a tactic to avoid cost allocations to the standard because the executive orders are exempt from an EIA.

To illustrate the point, the Governor included over \$200 million in ARPA Funds in the latest budget negotiations just to ensure that less than 100 schools can comply with the HVAC standards in this rule. Further, conducting hazard assessments and training employees is a significant cost. VMA estimates true hazard assessments would cost a small employer over \$2,000 in direct and indirect costs. Employee training can cost \$50+ per person. PPE and testing costs are astronomical for employers. The EIA notes that there 4,131,345 affected employees in 285,486 businesses which is 96.6% of all establishments. To claim no economic impact is simply ludicrous.

Go to <https://www.doli.virginia.gov/wp-content/uploads/2021/01/VDOLI-COVID-Regulation-Economic-Impact-Analysis-EIA-20210111.pdf> to review the full EIA.