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January 8, 2021

Dear Members of the Virginia Safety and Health Codes Board:

On behalf of the Virginia small business members of the National Federation of Independent Business (NFIB), we are submitting the following comments related to your intent to adopt a Permanent Standard for Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19, 16VAC25-220 (otherwise further to as "the Regulations").

Our organization represents approximately 6000 small businesses and 60,000 employees across a broad swath of industries from manufacturing, retail, restaurants, agricultural and forestry companies, healthcare, construction, to professional services.

As we enter the 44th week of Virginia's State of Emergency related to containing the spread of COVID-19, safety for their employees and customers has been the top priority for Virginia's many small business owners. Yet small business owners have faced intense stress as their businesses were ordered to close or operate in an extremely limited capacity. The economic turmoil suffered by small businesses during the global pandemic has only somewhat abated as Virginia has gradually reopened. Many small business owners have watched helplessly as their revenue slowed to a trickle or dried up entirely.

According to NFIB's 14th Small Business Covid-19 Survey which was released on December 11th, 2020, One-in-four (25%) of small business owners report that they will have to close their doors if current economic conditions do not improve over the next six months, up from 20% a month ago. Sales levels are still 50% or less than they were pre-crisis for one-in-five (20%) small businesses with another 29% at sales levels of 51%-75% of pre-crisis. Even those small businesses that received a PPP loan, 22% of them have or anticipate having to lay off employees in the next six months, a slight increase from one month ago when it was 19%. And about half (53%) of borrowers anticipate needing additional financial support over the next 12 months, about the same as last month.

Despite these challenging times, small businesses quickly adapted and implemented protocols to protect their employees and customers from exposure to the coronavirus by following the guidance issued from the CDC, OSHA, and the Governor's executive orders. Now Virginia small

business owners are doing their best to comply with the Emergency Temporary Standard (ETS). The last thing business owners need as they rebuild their businesses during this critical time is a permanent one-size-fits-all government regulation.

Virginia businesses need certainty and consistency in any regulatory program. This ensures that the regulated community understands the requirements of the program, and that all parties can work together to satisfy the regulatory requirements.

Therefore, NFIB requests the Virginia Safety and Health Codes Board REJECTS a Permanent Standard for several reasons.

First, adopting 16VAC25-220 as permanent regulations will be overly burdensome for small businesses. The science of COVID-19 is continuously being updated. Therefore, the CDC and OSHA guidelines are frequently updated to reflect this. If the ETS were to become permanent, it would continue to require businesses to comply with outdated regulations. Now is not the time to impose a permanent standard. More importantly, why adopt a permanent standard when we're beginning to see the rollout of vaccinations?

Second, there is no sunset date for the Standard. The proposed permanent standard does not contain a true sunset date. Rather, all it does is reiterate the Board's authority to come back at a later date to determine the necessity of a continued permanent standard after the Governor's State of Emergency is lifted. The Board was clear during its July deliberations; the temporary nature of this pandemic requires any regulations put in place related to COVID-19 should be sunset with the Governor's State of Emergency order. If the Board intends to move forward with a standard after expiration of the current ETS, we expect the Board to stick by its decision to end these regulations at the end of the COVID-19 pandemic.

Third, there is no economic impact analysis to determine cost to small businesses. There is still no economic impact statement to evaluate the cost on small businesses as required with the Small Business Regulatory Flexibility Act/Small Business Regulatory Enforcement Fairness Act. Because this impact statement was not available at the time written comments were due, businesses have had no opportunity to address any findings from that analysis.

Fourth, the proposed permanent regulations are confusing especially in light of overlapping regulations and guidance with the "Safer at Home" guidance, Executive Order 72, and the proposed rule. Businesses are already incurring expensive costs to comply with the ETS from hiring consultants and attorneys, taking workers out of production to do additional training, etc.

Fifth, the Board has not proven a "grave danger for ALL workplaces necessitating a permanent regulation. It is unreasonable to apply a "one size fits all" approach to COVID-19 regulations to all employers and employees. The Board's determination of "grave danger" in relation to the COVID-19 ETS has not materialized for ALL workplaces. In fact, we argue that the lack of verifiable data on infections, hospitalizations, and deaths by workplaces (categorized by low to very high risk) is effectively non-existent. In fact, VDH data indicates that COVID-19 confirmed deaths are primarily with citizens over 70 years old and with individuals in long term care

facilities. The “grave danger” determination for ALL workplaces must be reconsidered especially when it is still unclear how many infections by type of workplace have been documented and the number of resulting hospitalizations and deaths have been confirmed by type of workplace (low to very high risk).

VDOLI also cannot demonstrate employer compliance with the COVID-19 ETS. We contend that most Virginia employers are not in compliance with the COVID-19 ETS and yet infections have been reduced entirely by employer compliance with CDC guidance, OSHA guidance, and Governor’s Executive Orders – not the COVID-19 ETS.

Therefore, the Board cannot simply assume and apply its prior “grave danger” determination and COVID-19 ETS efficacy as the basis for permanent regulations. Further, since 46 other states have neither a COVID-19 ETS or permanent regulation, the Board has not proven the necessity for such a permanent regulation.

If the Board can demonstrate the validity and necessity of the current Emergency Temporary Standard (ETS) on which the proposed rule is designed, and proceeds with a Permanent Standard, it must include these important provisions:

1. The sunset clause whereby the Regulations will expire with the Governor’s State of Emergency.
2. The specific recommendations from the Business Coalition to ensure the implementation and enforcement of any Permanent Standard is reasonable, fair, and attainable. Here are several of NFIB’s priorities for amendments to any Permanent Standard
 - **Amend § 10G to the agency’s original language with clarification on providing “safe harbor” for employers who follow CDC and OSHA guidance.** It is unclear who determines which version of CDC guidance an employer may reference for purposes of compliance.
 - **Eliminate requirements for physical separation of employees at low and medium risk businesses by a permanent, solid floor to ceiling wall.** Higher risk businesses have more flexibility to use smaller temporary barriers like Plexiglas sneeze guards.
 - **Eliminate all human resource policies from the Regulations such sick leave, telework, flexible worksites, flexible work hours, flexible meeting and travel, the delivery of services or the delivery of products.** These policies exceed the Board’s authority as it relates to workplace hazards.
 - **Amend common space sanitation requirements.** Requiring common spaces to be cleaned and disinfected at the end of each shift” is impractical for 24/7 operations with multiple and overlapping shifts. The Regulations should be amended to provide for a time-based alternative such as every 8, 12, or 24 hours exempting FDA regulated facilities.

- **Eliminate HVAC requirements for medium risk businesses (16VAC25-220-60(B)).** Requiring retroactive compliance with a 2019 ASHRAE HVAC standard is premature at best. Any permanent regulations should follow existing processes contained in the Virginia Uniform Statewide Building Code (USBC) which utilize appropriate industry investigation and recommendations.
- **Eliminate the requirement that medium risk employers should complete a COVID-19 infectious disease preparedness and response plan.** This mandate is overly burdensome and not necessary at this risk level.
- **Increase the amount of time employers must train their employees. The current timetable is unachievable.** The ETS should be amended to provide employers another sixty (60) days to comply.
- **Eliminate language protecting employees who report to news media or social media (16VAC25-220-90).** Whistleblower protection is intended to protect employee complaints to the responsible government regulatory agency.
- **Revise requirements related to transportation of employees who travel in the same vehicle.** This standard is impractical and vague.
- **Eliminate the conflicts and overlaps between the “Safer at Home” guidance, Executive Order 72, and the proposed rule.** The regulation should govern, and this should be explicitly stated in the permanent regulation. Otherwise, the regulation must be inadequate to protect worker safety.
- **Reject any amendments to the Regulations that would incorporate other infectious diseases.** Infectious diseases are not all the same. Therefore, the Board should not expand these regulations to other infectious diseases. We have no idea what protocols will be necessary to mitigate the risks of future diseases, so it doesn't make sense to create a permanent standard for all infectious diseases.

Therefore, NFIB recommends the Board withdraws its “Intent to Adopt a Permanent Standard for Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19, 16VAC25-220.”

Instead NFIB encourages the Board, upon a determination that it's a necessity to pursue regulations, it should do the following:

1. The Board must have the Economic Impact Statement and Regulatory Flexibility Analysis available for a 60-day public comment period.
2. The Board must make the January 4, 2021 proposed rule available for a new 30-day public comment period.
3. Convene a working group of stakeholders to revise and recommend a second COVID-19 Emergency Temporary Standard (ETS) that expires within 6 months of adoption or when the State of Emergency expires.

Conclusion

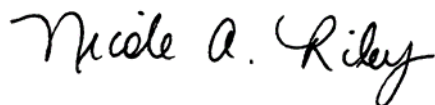
It is unreasonable to impose one-size-fits-all COVID-19 regulations on all employers when they reduce a business' flexibility to quickly alter workplace procedures to remain safe during the ever-changing circumstances of this pandemic especially when each industry has its own needs. By approving a Permanent Standard, the Commonwealth is freezing current scientific understanding into place which is unnecessary and poses more risk for our businesses and workers.

It is also profoundly inappropriate to bypass the formal regulation process altogether by attempting to codify guidance and Executive Orders as a reasonable replacement. Further, it is confusing why the Board would pursue permanent regulations that are in conflict with previously issued Executive Orders and in light of the beginnings of vaccine availability.

Therefore, it is NFIB's recommendation that the Board reject the Regulations, provide additional public comment related to the newly revised January 4th proposal and anticipated economic analysis, and convene a workgroup of stakeholders to revise and recommend a second COVID-19 Emergency Temporary Standard (ETS) that expires within 6 months of adoption or when the State of Emergency expires.

While facing devastating economic conditions Virginia's businesses continue to keep the safety and health of their employees as their top priority as they reopen and increase their business operations. We hope the Board will see fit to give Virginia's small businesses an opportunity to rebuild their businesses, restore their customer base and rehire their employees without imposing additional costly regulations.

Best Regards,

A handwritten signature in black ink that reads "Nicole A. Riley". The signature is written in a cursive, flowing style.

Nicole Riley, Virginia State Director

Cc: Governor Ralph Northam
Clark Mercer, Chief of Staff
Brian Ball, Secretary of Commerce and Trade
Megan Healey, Chief Workforce Advisor to the Governor
Ray Davenport, Commissioner of the Department of Labor and Industry
Members, Virginia General Assembly