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**Submitted Electronically**

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RE: Comments of the Virginia Manufacturers Association  
VA Department of Labor and Industry, Safety and Health Codes Board (“Board”)  
Permanent Standard for Infectious Disease Prevention: SARS-CoV-2 Virus That Causes  
COVID-19, 16VAC25-220

To Whom It May Concern:

Thank you for the opportunity to comment on the Virginia Department of Labor and Industry’s announced intent to Adopt a Permanent Standard for Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19, 16VAC25-220 (collectively, the “Regulations”). These comments are provided on behalf of the Virginia Manufacturers Association (“VMA”).

Virginia’s manufacturing sector includes more than 6,750 manufacturing facilities that employ over 230,000 individuals, contribute \$43 billion to the gross state product, and account for 80% of the Commonwealth’s goods exports to the global economy. VMA advocates for science-based, practical health and safety regulations. VMA’s members will be directly affected by the Regulations, which apply “one size fits all” COVID-19 Regulations across all business sectors in the Commonwealth.

VMA members are heavily regulated under multiple federal and state occupational health and safety programs, and, as a result, participate actively in the development of Regulations and the implementation of related safety programs. As the delegated occupational health and safety agency in Virginia, the Department of Labor and Industry (“DOLI”) is responsible for most, but not all, of those safety programs, and VMA believes that DOLI’s regulatory activities should be deliberative, transparent, and consistent with Federal guidance. VMA members are interested in a uniform and coordinated approach to Federally delegated health and safety regulations. As such, our members participate in national trade groups, and have worked to develop best management

practices and implemented hierarchy of controls to protect their workforce from COVID-19 infections as proscribed by all Federal regulatory agencies. VMA Members have also historically addressed and mitigated the potential risks of prior infectious outbreaks, such as H1N1, under existing Federal and State regulation and guidance. Further, VMA and its Members have taken aggressive action in complying with the VA COVID-19 Emergency Temporary Standard (ETS), 16VAC25-220, including but not limited to establishing its own VA COVID-19 ETS compliance training program<sup>1</sup>. Accordingly, the VMA and VMA members are uniquely positioned to participate in the public process associated with the development of the Regulations.

The VMA and its member companies are committed to protecting employees, contractors, suppliers, and communities from COVID-19 infection. We have led the development of industry best-practices, provided ETS compliance training, instituted a COVID-19 Model Action Plan, implemented COVID-19 pandemic protection training, developed a rapid response decontamination service, assisted with increasing testing sites, maintained a [COVID-19 Resource Center](#), commercialized a [PPE Sourcing Center](#), distributed over 4,000 cloth masks from the U.S. Department of Health & Human Services to chemical and allied product essential workers, assisted the Virginia Department of Emergency Management (VDEM) increase domestic supplies, donations and production of PPE (including over 100,000 bottles of hand sanitizer, 1,250 Tyvek® 400 hooded coveralls, and a UV-C sanitation cabinet for public health workers), contributed to the Governor's COVID-19 Business Task Force, and implemented the [MFG Makes Virginia Safer Pledge](#).

The VMA asserts that the proposed permanent Regulations are unnecessary primarily because: 1) The Board cannot demonstrate the validity of the current Emergency Temporary Standard (ETS) on which the proposed permanent Regulations are designed; 2) Vaccinations are already being implemented; and 3) the “General Duty Requirements” of employers along with Federal, State, and Industry guidance is effectively protecting workers. As such, **the VMA requests that the Board withdraw its “Intent to Adopt a Permanent Standard for Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19, 16VAC25-220.”**

The VMA also requests that the Board do the following: 1) Issue an additional thirty (30) day public comment period on the January 4, 2021 version of the permanent Regulations; 2) Issue a sixty (60) day public comment period on the final Economic Impact Statement and Regulatory Flexibility Analysis; and 3) Convene a working group of stakeholders to develop a new Emergency Temporary Standard (ETS) for the Board's consideration.

However, should the Board proceed with permanent Regulations, the Board should not consider any amendments to the Regulations that would incorporate other infectious diseases and there must be a sunset on the Regulations coincident with the State of Emergency.

## VMA COMMENTS

1. **Regulations should sunset based upon an event not a date such as the end of the State of Emergency.**
2. **It is unreasonable to apply “one size fits all” 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.

### VMA Questions:

- What are the verified COVID-19 infections, hospitalizations, and deaths by workplace type (low to very high risk)?
  - Why has the Board not directed DOLI to complete an assessment of verified COVID-19 infections, hospitalizations, and deaths by workplace type (low to very high risk) for public comment?
  - Why has the Board not revisited its “grave danger” determination for all workplaces?
  - Are all the substantial elements of this proposed Regulations, as applied across the scope of every employer in Virginia, necessary under the procedures of Va. Code § 40.1-22(6a)?
  - What is the tracing protocol to determine that the workplace was the source of COVID-19 infection?
  - Can employers, based on these Regulations, place restrictions on their employees’ interactions outside of work? Since an employer is now responsible for COVID-19 illnesses, regardless of the source of the infection, then would it not be reasonable to enable employers to restrict the activity of their employees outside of work?
3. **The Board 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 infections have been reduced entirely by employer compliance with the general duty requirements of § 40.1-51.1 (a) of the Code of Virginia, CDC guidance, OSHA guidance, and Governor’s Executive Orders – not the COVID-19 ETS.

Under the § 40.1-51.1 (a) of the Code of Virginia “general duty” requirements, it states 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...”*

Therefore, mandating permanent Regulations built upon the COVID-19 ETS is unsupported especially since empirical evidence has proven that employers have protected employees in 46 other states without a COVID-19 ETS or permanent Regulations.

VMA Questions:

- Why does VOSH have difficulty enforcing Federal OSHA and CDC guidance through the “General Duty” requirements on an employer that willfully violates basic COVID-19 safety guidance?
- Why has the Board not directed DOLI to assess employer compliance with the COVID-19 ETS vs. CDC guidance, OSHA guidance, and Executive Orders to validate or invalidate its regulatory efficacy?
- Why did the Board not 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?

4. **The Board has not complied with the Virginia Administrative Process Act (VAPA). DOLI has proposed this rule without proper legal authority to do so.** DOLI has followed and is proposing an illegal process. It violates the commitment of the Board as specifically stated in Section 16VAC25-220-10 of the ETS:

*This standard shall not be extended or amended without public participation in accordance with the Virginia Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia) and 16VAC25-60-170.*

VAPA defines “agency” to be any authority, instrumentality, officer, board, or other unit of the state government empowered by basic laws to make regulations or decide cases. It is apparent from, Va. Code §40.1-22 that the Virginia Safety and Health Board (Board) is empowered by the basic laws to make regulations in this case and not DOLI staff. See also definition of “agency” under 16VAC25-11-20. The Board must propose regulations not DOLI staff. The Board may not delegate the authority to propose regulations that satisfy VAPA or to adopt regulations. The Board has exclusive regulatory authority regarding any such standard and the Board did not provide and did not vote on this “proposal” before seeking comment or submitting to the Virginia Registrar. Accordingly, this proposal does not satisfy the requirement that it constitutes the necessary proposal from the Board.<sup>1</sup>

DOLI issued a draft permanent Regulations in December 2020 for 30 days of public comments but changed the draft permanent Regulations on January 4, 2021. The public comment period must be reset.

The draft permanent Regulations must have the Economic Impact Statement and Regulatory Flexibility Analysis available for a 60-day public comment period. Va. Code §2.2-4007.05 styled Submission of proposed regulations to the Registrar states:

*The summary; the statement of basis and purpose, substance, and issues; the economic impact analysis; and the agency’s response shall be published in the Virginia Register of Regulations and be available on the Virginia Regulatory Town Hall, together with the notice of opportunity for oral and written submittals on the proposed regulation.*

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<sup>1</sup> Va. Code §40.1-51.1 provides a structure where the State Health Commissioner provides advice, and the Department of Labor and Industry staff provides drafting as proposals for the Board. This structure does not make DOLI the agency with delegated authority for the rules.

It also appears that the Board is violating the requirements of Va. Code §2.2-4007.1 concerning a regulatory flexibility analysis. Under Va. Code §2.2-4007.1(B), the agency proposing a regulation shall prepare a regulatory flexibility analysis in which the agency shall consider utilizing alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small businesses. The agency shall consider, at a minimum, each of the following methods of reducing the effects of the proposed regulations on small businesses:

1. The establishment of less stringent compliance or reporting requirements;
2. The establishment of less stringent schedules or deadlines for compliance or reporting requirements;
3. The consolidation or simplification of compliance or reporting requirements;
4. The establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and
5. The exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

The current process is further in violation of 16VAC-11-50 which requires that the agency shall accept public comments in writing for a minimum of 60 calendar days following the publication of a proposed regulation. The comment period of July 27, 2020 to September 25, 2020 did not qualify both because there was no regulatory impact statement and because the Board did not vote on the ETS as a proposed permanent regulation. Commenters need 60 days to comment on the regulatory impact analysis and the regulatory flexibility analysis.

DOLI seeks to substitute a non-statutory adoption section that conflicts with VAPA on process and effective dates. Proposed 16VAC25-220-20(A) fails on numerous fronts and it is novel to include an adoption process as a part of a rule since rulemaking is governed by a standard process. First, under proposed 16VAC25-220-20(A)(3) and (4) the Board proposes to have the standard take effect upon filing with the Registrar of Regulations and publication in a newspaper of general circulation published in the City of Richmond, Virginia. Under Va. Code §2.2-4013(D) and §2.2-4015(A) the effective date can be no earlier than 30-days after publication of the final regulation in the Register.

VMA Questions:

- Why has the Board not provided an economic impact analysis that will include the effect on small businesses as set out in Va. Code §2.2-4007.04(A)(2)?
  - Why has the Board not provided a regulatory flexibility analysis as set out in Va. Code §2.2-4007.1(B)?
  - Under what authority can the Board violate 16VAC25-220-20(A), 16VAC25-220-20(A)(3) and (4), §2.2-4013(D), and §2.2-4015(A)?
5. **The Board, the Governor and the Health Commissioner must eliminate the conflicts between the Safer at Home document and the Regulations.** DOLI is proposing to eliminate the cross-references to the Executive Orders to avoid judicially review of those Orders in the context of the permanent Regulations. Regardless, Executive Order 72 and Order of Public Health Emergency 9 specifically identify the effort to accomplish the same illegal objective. This illustrates the same lack of concern for the confusion caused by a matrix of

Regulations on the regulated community. Specifically, under new enforcement sections of E072, the Governor and the Health Commissioner claim that DOLI can enforce the Orders. In addition, E072 has a new rule of construction which states:

*Construction with the Emergency Temporary Standard “Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19” Where the Emergency Temporary Standard “Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19” adopted by the Safety and Health Codes Board of the Virginia Department of Labor and Industry pursuant to 16 Va. Admin. Code §§ 25-60-20 and 25-60-30 conflicts with requirements and guidelines applicable to businesses in this Order, this Order shall govern.*

Guidelines applicable to businesses refer to the Safer at Home: Phase Three Guidelines for All Business Sectors (“Safer at Home” document). The Safer at Home document has mandatory sections as does E072, the ETS and the draft Regulations. The combined sections of E072, the Safer at Home document, and the Regulations are complex, overlapping, and confusing.

6. **The Regulations confuse guidance and regulations.** Guidance is not regulation. Codifying guidance as regulation bypasses public scrutiny. If any agency or Executive can simply change Regulations by issuing guidance, then the statutory basis for VOSH regulation will cease to exist as will public notice and comment. The VMA objects to including any reference to compliance with the Governor’s Executive Orders in Regulations.
  
7. **Requiring “Low” and “Medium” risk facilities to maintain HVAC systems in accordance with manufacturers’ instructions does not address the potential hazard (if any) as it relates to ventilation.** Requiring ASHRAE standards 62.1, 62.2 and 170 should be struck entirely from the ETS and consideration for Regulations. In addition, the language does not account for older facilities, as upgrading the ventilation in those facilities may be infeasible. The VMA also asserts that the Safety and Health Codes Board does not have the authority to require such a physical alteration to all business facilities, especially without a Small Business Regulatory Flexibility Act/Small Business Regulatory Enforcement Fairness Act (SBREFA) assessment.

The VMA recommends that the Board adopt the CDC guidelines listed below (where feasible) to adequately address the issue:

- Increase ventilation rates.
- Ensure ventilation systems operate properly and provide acceptable indoor air quality for the current occupancy level for each space.
- Increase outdoor air ventilation, using caution in highly polluted areas. With a lower occupancy level in the building, this increases the effective dilution ventilation per person.
- Disable demand-controlled ventilation (DCV).
- Further open minimum outdoor air dampers (as high as 100%) to reduce or eliminate recirculation. Provide for flexibility to accommodate thermal comfort or humidity needs in cold or hot weather.
- Improve central air filtration to the MERV-13 or the highest compatible with the filter rack, and seal edges of the filter to limit bypass.
- Check filters to ensure they are within service life and appropriately installed.
- Keep systems running longer hours, 24/7 if possible, to enhance air exchanges in the building space.

8. **The hand sanitizer definition is imprecise and should be expanded to more than “60% alcohol” because it will result in hazards for certain pharmaceutical manufacturing operations.** Clarifications issued by DOLI in its ETS FAQ document should be incorporated into the Regulations.
9. **The Regulations’ employee risk assessment review process conflicts with current OSHA Guidance** (Guidance on Preparing Workplace for COVID-19, OSHA 3990-03 2020) since it confuses job tasks with employee job classifications.
10. **Requiring that the “...common spaces... [to be] cleaned and disinfected at the end of each shift” is impractical for 24/7 operations with multiple and overlapping shifts.** This type of standard does not fit all businesses, specifically those that already have FDA cleaning standards. The Regulation should provide for a time-based alternative such as every 8, 12, or 24 hours and exempt FDA regulated facilities.
11. **Physical separation does not have to be achieved by permanent or floor to ceiling walls.** The Regulations state under the definition of physical distancing pursuant to § 16VAC25-220-30 that "physical separation of an employee from other employees or persons by a permanent, solid floor to ceiling wall constitutes physical distancing from an employee or other person stationed on the other side of the wall." Temporary plexiglass and other hard surface barriers are regularly used to retrofit workstations, counters, seating, and cubicles as physical separation "shields" or barriers for employees, particularly when coupled with PPE or face coverings. To complicate matters further, § 16VAC25-220-50 (applicable to hazards or job tasks classified as very high or high exposure risk) specifically states that “physical barriers” are “e.g., clear plastic sneeze guards, etc.). These conflicting references should be removed from the Regulations along with any reference to “permanent or floor to ceiling walls.”

VMA Questions:

- How can physical barriers be permanent solid walls for “low” or “medium” risks, but plastic sneeze guards are allowable for “high” or “very high” risks?
- What study or report on “permanent or floor to ceiling wall” physical barriers was used to establish this standard?

12. **The Board does not have authority over organizational sick leave policies, flexible worksites, flexible work hours, flexible meeting and travel, teleworking, the delivery of services or the delivery of products.** Therefore, its § 16VAC25-220-60 statements regarding such policies exceeds its authority and should be removed from the Regulations.

VMA Question:

- If left to the discretion of each VOSH inspector, will failure to satisfy an inspector constitute a citable offense?

13. **The Regulations frequently refer to the standards applicable to the “industry” which is language that may be appropriate for guidance but is too vague to be meaningful and should be removed from the Regulations.**

14. **It is unclear about which version of CDC guidance an employer may reference for purposes of compliance with the Regulations since guidance is changing so rapidly.** It is also unclear who determines that the “CDC recommendation provides equivalent or greater protection than provided by this standard.”

VMA Questions:

- Which version of CDC guidance should an employer reference for purposes of compliance?
- Who makes CDC equivalent or greater protection compliance determinations?

15. **Requiring “respiratory protection” and “personal protective equipment standards applicable to the employer’s industry” in vehicles with more than 1 person is impractical and vague.** There are other controls, when used together, that should be considered, and the Regulations should reflect so. The Regulations should not incorporate this provision. Employers should be allowed to only require face coverings while in the vehicle provided the occupants follow CDC guidelines.

VMA Questions:

- Does “vehicle” include golf carts, planes, heavy equipment, boats/barges/ships, trucks, and trains?
- Why not allow administrative controls (e.g., social distancing) in low-hazard situations, such as two or three employees riding several rows apart on a large bus or employees seated at a distance in an uncovered vehicle?
- Is it the Board’s determination that the language is consistent with CDC guidance for rideshares and other public vehicles (<https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/using-transportation.html>)?

16. **§16VAC25-220-40 F & H require “respiratory protection” but “face covering or mask” is effective - especially when in conjunction with other controls such as prescreening and temperature checking.** Further, surgical and N95 masks are still not readily available, and imported alternatives have been found to have extensive quality issues. Additionally, N95 masks require fit testing, which is unrealistic for this application. Delete “respiratory protection” and replace it with “face covering or mask” in the Regulations.

17. **Requiring “Access to common areas...” to be controlled by “limiting the occupancy of the space, and requirements for physical distancing” is too imprecise.** [FEMA](#) recommends a calculation of 113 square feet per person. The Regulations should recognize this measurement. There should also be accommodating language inserted in both for “closed or controlled” restroom access to ensure ADA compliance.

18. **Employers should have more time to update their COVID-19 infectious disease preparedness and response plans.** There should also be a threshold for mandating change to a COVID-19 infectious disease preparedness and response plan such as annual updates only.



19. **All employers should not have to complete a COVID-19 infections disease preparedness and response plan.** This mandate is overly burdensome, and “low and medium” risk facilities should not be regulated at this level.
20. **Employers should have more time to train their employees and communicate with their contractors.** The current timetable is unachievable. The Regulations should provide employers a minimum of ninety (90) days to comply.
21. **The definitions of “duration and frequency of employee exposure” and “minimal occupational contact inside six feet...” are too imprecise and inconsistent with CDC guidance.** This will also change the definition of “physical distancing” or “social distancing” as well as “occupational exposure.”

VMA Questions:

- Is the proper duration and frequency 15 minutes of exposure less than 6 feet to another person in an 8-hour shift?
  - Does the use of face coverings and/or surgical/medical procedure masks and/or respirators extend the allowable duration of exposure?
22. **The definition of “technical feasibility” requires the “existence of technical ‘know-how’...” which is an imperceptible standard of knowledge.** Further, disqualifying an employer from invoking “technical feasibility” arguments because the employer’s “level of compliance lags significantly behind that of the employer’s industry” assumes a great deal of industry knowledge within DOLI and that employers lagging behind their peers choose to do so – every company has different economic realities. This is an unachievable standard and should be removed from the Regulations.
  23. **The Regulations define "economic feasibility" to mean the employer is financially able.** The Regulations should accommodate whether the employer could stay in business or avoid releasing employees to pay for the costs of the Regulations.
  24. **“Feasible” cannot be defined as both “technical” and “economic.”** Something can be technically feasible but not economically feasible at the same time. This should be referenced against OSHA guidelines and clarified.
  25. **16VAC25-220-10 creates a new definition of “Joint Employment Relationship” that is not acceptable and in conflict with USDOL definitions.**

VMA Question:

- Why is the definition of “Joint Employment Relationship” not the same as the USDOL definition?
26. **The “Known to be infected with SARS-CoV-2 virus” definition establishes an impossible standard because the employer “...knew or with reasonable diligence should have known that the person has tested positive...” and a plaintiff only has to argue that the employer**

**did not employ “reasonable diligence” which is undefined.** This appears to be a litigation trap rather than a health and safety standard.

27. **The “May be infected with SARS-CoV-2 virus” definition should have the words “or suspected to be infected with SARS-CoV-2 virus...” removed.** An employer has no way to determine if someone is “suspected” of COVID-19 exposure.

Few people “suspected” of SARS-CoV-2 infection are initially being tested for influenza. This is resulting in missed work with paid FFCRA leave. The impact on employers from slow lead times, low employee morale, privacy issues, paid leave costs, and first-level supervisor burdens is immense.

VMA Question:

- How can businesses operate if they must wait days for a negative SARS-CoV-2 test only to find out that the employee could have immediately been tested for influenza?
- Can VDH change its testing protocol to always test for influenza first?

28. **The definition of “Symptomatic” in Sections 30 and 40 are problematic for three reasons:** 1) Data regarding the incubation period is still uncertain (reports suggest 5 days, 11.5 days or 14 days<sup>ii</sup>); 2) The symptoms listed are not uniformly listed in all CDC, OSHA and VDH guidance documents; and 3) Employers will have to send thousands of employees home due to allergy, cold or regular flu symptoms as well as potentially quarantining them pending two successive negative COVID-19 tests (which are still not readily available).

The Regulations also reference employees’ reporting of symptoms but there is no clear definition of the number or combination of symptoms an individual must have to be deemed symptomatic.

VMA Question:

- Why has the Board not investigated this ambiguity, which is equally ambiguous in CDC guidance, and seek clarification prior to perpetuating it through the permanent Regulations?

29. **The Regulations would require employers to classify each employee for risk level of exposure and this review process conflicts with current OSHA Guidance** (Guidance on Preparing Workplace for COVID-19, OSHA 3990-03 2020), since it confuses job tasks with employee job classifications. Guidance requires assessing employees by hazards *and* tasks. Risk assessments should be done by tasks not job titles. This would be a massive burden for employers – imagine individual assessments for an employer with 2,000 employees. Further, OSHA Guidance is predicated on the use of a risk management process to determine appropriate control measures. The Regulations deviate to mandate specific control measures in workplace situations, regardless of potential exposures or other mitigating circumstances arising from the required risk assessment process.

30. **The return-to-work Regulations referencing “an employer may rely on... a policy that involves consultation with appropriate healthcare professionals concerning when an**

**employee has satisfied the symptoms based strategy requirements...will constitute compliance with the requirements of this subsection” must be clarified** because someone with a diagnosed sinus infection or allergic reaction (same symptoms as COVID-19) must be allowed to return to work faster than 72 hours plus 10 days if cleared by a physician. This section of the Regulations should align with the new CDC guidelines.

It is effectively impossible to protect employee confidentiality in small businesses when reporting. This is resulting in anxiety, workplace stress, and suspicion amongst coworkers when the unnamed but surely known person returns to work.

31. **The return-to-work test-based strategy is problematic because of the lack of testing availability.** The regulation also requires compliance with symptom-based strategy if a known *asymptomatic* employee refuses to be tested. The test-based strategy does not consider recent national and public health findings that COVID-19 can leave behind residual RNA in people that have otherwise recovered from the virus and are no longer contagious. In other words, a person may test positive long after they have recovered from the virus and are no longer contagious because the test picks up on the residual RNA left behind. We need to defer to the most recent guidance of public health officials and medical providers. Allow employers to defer to public health officials and medical providers when determining return-to-work. The language as written is a serious problem because it memorializes a strategy when the experts are still in the process of learning more about the virus.
32. **§16VAC25-220-40 K.8 requires that employers provide mobile crews with “transportation immediately available to nearby toilet facilities and handwashing facilities...” but has nothing to do with COVID-19 infections and should be removed from the Regulations.**
33. **It is unclear whether the general contractor or owner is exposed to potential citation if the subcontractor violates any of the provisions of the Regulations without providing required information to the employer.**

VMA Questions:

- Why is this liability being shifted to the employer?
- Does this now set a precedent for other regulatory issues?

34. **The Regulations require both handwashing facilities and hand sanitizer, but CDC and OSHA guidance requires only one.** Both should not be required in all workplaces in the Regulations.
35. **The Regulations require a certified hazard assessment for each workplace but provides no timeline for completion.**

VMA Questions:

- Is a new certified hazard assessment required after every change in guidance?
- How long do employers have after the Regulations are implemented to certify hazard assessments?

- How long will it take for employers to get the proper consultants to certify these hazard assessments?
- Is employer liability increased during this waiting period?

36. **§16VAC25-220-90 unreasonably expands protections for employee complaints to the news media and social media without due process for the employer.** The Regulations exceed federal OSHA protections. Some employers have policies restricting statements to the press or statements reflecting poorly on their employers. Whistleblower protection is intended to protect employee complaints to the responsible government regulatory agency. The language “or to the public such as through print, online, social, or any other media” should be struck from the Regulations and protections should be limited only to notification to the responsible government regulatory agency. Further, if a person is proven to have provided false statements on social media and never raised the concerns with the responsible government regulatory agency or management of the company, they should not be insulated from action.

VMA Question:

- On what basis did the Board determine that the OSHA “whistleblower” protections were inadequate and had to be expanded in Virginia?

37. **There should be no enforcement without prior notice to and “due process” for an employer.** The Regulations have no identifiable “due process” for employers involving a “whistleblower,” and no requirement that complaints filed with DOLI require identification of the plaintiff. Anonymous complaints should not be allowed in cases involving these Regulations – disgruntled employees, punitive customers, and unethical competitors could use complaints for destructive purposes. The employer should be afforded due process to defend themselves against accusations of safety violations and this should be included in the Regulations.

38. **§16VAC25-220-80 includes a training mandate for “Heat-related illness prevention...” that has no connection to COVID-19 infection protection.** In addition, it cannot be a coincidence that the agency issued a Notice of Intended Regulatory Action (NOIRA) on Heat Illness Prevention<sup>iii</sup> on 4/2/20 and that document has been with the Secretary of Commerce and Trade for 200+ days but a heat-related illness prevention training mandate was inserted into the Regulations. This should be removed from the Regulations.

VMA Questions:

- There are standards for proper use and fit of PPE, so why do employers need to also train on a separate “heat-related illness prevention” standard?
- Why has the Board or DOLI not provided a determination letter verifying the necessity of such training based upon empirical evidence of worker injury?

39. **§16VAC25-220-40 requires employers to notify VDH within 24 hours of the discovery of a positive case.** This is a redundant activity, healthcare professionals already notify VDH, and it should be struck from the Regulations.

40. **§16VAC25-220-40 requires employers to notify DOLI within 24 hours of the discovery of 3 or more employees “present at the place of employment” within a 14-day period testing positive.** The January 4, 2021 version of the Regulations reduces that further to 2 or more employees. Both numbers are arbitrary and is certainly less meaningful the larger the facility. This regulatory requirement is not relevant if VDH is properly managing its contract tracing responsibilities and should be removed from the Regulations. Another alternative could be requiring notice only if 3 or more employees are verified to have been infected at work and the incidents are recordable.

Further, VDH is still directing employers to email them directly on any new cases, as they claim they do not have access to the information from the VOSH portal. As recently as 12/7/20, manufacturers were asked by VDH to change the emailing address to [VBEpi@vdh.virginia.gov](mailto:VBEpi@vdh.virginia.gov). If the data is not being analyzed, requiring employers to file these case reports within 24 hours is burdensome and detracts from ensuring employee safety.

To give practical context to this mandate, the private information required for this reporting necessitates coordination between three groups within a company: Health Services, Human Resources, and Environmental Health & Safety. Few facilities staff these functions 24/7, whereas most production functions run 24/7. This makes reporting for compliance with these regulations over weekends and holiday periods impossible. It is not clear that VDH or DOLI are using this information in any way that necessitates a 24-hour reporting requirement.

#### VMA Questions:

- Is the reporting portal inoperable?
  - Why are employers being required to email notices instead of using the portal?
  - How is VDH using the data for analytics to make workers safer at their workplace?
  - How frequently does VDH act within 24 hours of receiving a report?
  - What happens if VDH considers a business an outbreak location?
  - If the employer can demonstrate that the employee did not contract the SARS-CoV-2 virus at work, can the outbreak designation be removed?
  - Will the employer be reimbursed for any costs associated with proving they were not responsible for the outbreak?
  - If an employer is following all measures in this Regulation, how can the workplace be considered a place of spread?
41. **§16VAC25-220-40 states that “nothing in this standard shall require the use of a respirator, surgical/medical procedure mask, or face covering by an employee for whom doing so would be contrary to the employee’s health or safety because of a medical condition...” but there is no accommodation process like the ADA identified for employers to follow.** This should be incorporated into the Regulations.
42. **§16VAC25-220-40 has new requirements for face shield wearers that mandates they wash their hands before and after removing the face shield and avoid touching their eyes, nose and mouth when removing it.** This standard is arbitrary and inconsistent with donning other coverings and PPE.

VMA Questions:

- What data can the Board produce to support the premise that face shields are more susceptible to viral particulates than a cloth mask?
- Why is the removal or donning of such a shield any different of a requirement than the removal or donning of a mask with ear straps?

43. **§16VAC25-220-30 “PPE” definition should include “face coverings,” but not limit their materials to washable fabrics only.** Washable fabric masks are not appropriate for many FDA regulated factory areas. These facilities use disposable sterile masks, and they should be accommodated in any “face covering” or “PPE” definition.

VMA Questions:

- For an employee to be exempted from face covering requirements for health reasons, do they need to provide documentation to the employer?
- May an employer require documentation from a medical professional?
- Some studies <https://pubmed.ncbi.nlm.nih.gov/32787926/> discuss the issue of negative impacts on employee health from wearing face coverings. If negative health-related impacts on employees are verified from mandates to wear face coverings, is the employer liable?

44. **The decontamination requirements when an infected person has been within the facility within the past 7 days are not based upon empirical science.** According to the [CDC](#) and [US Department of Homeland Security](#), the SARS-CoV-2 Virus is predominantly transmitted through inhalation of airborne droplets and surface transmission has been verified to be eliminated within 70 hours<sup>iv</sup>.

VMA Questions:

- How was a seven (7) day lookback determined?
- What data or study supports this determination?

45. **§16VAC25-220-40 references a “Declared Emergency,” but it is not defined.** This section is also missing language to end the reporting requirement based on need. Language should clarify that this is not a perpetual requirement.

VMA Questions:

- Who implements a “Declared Emergency” in the future?
- How is the “Declared Emergency” defined and communicated?
- Does this establish a codified permanent reporting requirement that is predicated on other defined language in the Code of Virginia?

46. **Requiring training how to extend the life of PPE is inadvisable.** If it is not safe to do so, the PPE should be discarded rather than re-used. There should be a statement of “encouragement” within the limitations of the PPE manufacturers’ recommendations.

47. **§16VAC25-220 C involving the determination if there is a continued need for the Regulations is vague.** After nearly a year in a State of Emergency, a more defined set of metrics to determine when Regulations should be lifted must be enumerated in the Regulations.

VMA Questions:

- Are these acceptable metrics to end State of Emergency determination?
  - i. Verified infections dropping to a certain level?
  - ii. Reaching hospital capacity at pre-pandemic levels?
  - iii. Weekly deaths at influenza levels?

**CONCLUSION**

The VMA asserts that adopting 16VAC25-220 as permanent Regulations is overly burdensome and unnecessary.

VOSH has failed to demonstrate an inability to enforce CDC, OSHA, or other agency COVID-19 safety guidance through the general duty requirements of § 40.1-51.1 (a) of the Code of Virginia.

As such, the VMA requests that the Virginia Safety and Health Codes Board withdraw its “Intent to Adopt a Permanent Standard for Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19, 16VAC25-220.”

Should the Board demonstrate a necessity to pursue regulation, it should convene a working group to develop a second COVID-19 ETS that expires with a State of Emergency.

Finally, should the Board ignore the necessity to demonstrate a need for regulations and proceed, the Board should not consider any amendments to the Regulations that would incorporate other infectious diseases and the Regulations should have a sunset coincident with the end of the State of Emergency.

Sincerely,

VIRGINIA MANUFACTURERS ASSOCIATION

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## BACKGROUND

### **Federal Complaint: USDOL and US Court of Appeals for the District of Columbia Circuit Have Already Provided Direction.**

On April 28, 2020, AFL-CIO President, Richard Trumka, petitioned US Secretary of Labor Eugene Scalia to adopt a Department of Occupational Safety and Health Administration (OSHA) emergency temporary standard for COVID-19.

On April 30, 2020, US Secretary of Labor Eugene Scalia rejected the AFL-CIO petition from April 28, 2020, and stated, “Coronavirus is a hazard in the workplace. But it is not unique to the workplace or (except for certain industries, like health care) caused by work tasks themselves. This by no means lessens the need for employers to address the virus. But it means that the virus cannot be viewed in the same way as other workplace hazards.” Secretary Scalia went on to say that, “...the contents of the rule detailed in your letter add nothing to what is already known and recognized (and in many instances required by the general duty clause itself). Compared to that proposed rule, OSHA’s industry-specific guidance is far more informative for workers and companies about the steps to be taken in their particular workplaces. That is one of the reasons OSHA has considered tailored guidance to be more valuable than the rule you describe” (see Addendum).

On May 18, 2020, the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”) petitioned this Court to issue a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a), compelling Respondent Occupational Safety and Health Administration, United States Department of Labor (“OSHA”) to issue—within thirty (30) days of this Court’s grant of the writ—an [Emergency Temporary Standard for Infectious Diseases](#) (“ETS”) aimed at protecting workers from COVID-19<sup>v</sup>.

On May 19, 2020, OSHA issued an “Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19)” that provided instructions and guidance to Area Offices and compliance safety and health officers (CSHOs) for handling COVID-19-related complaints, referrals, and severe illness reports (see Addendum).

On May 29, 2020, the Chamber of Commerce of the United States, The National Federation of Independent Business, Restaurant Law Center, The Air Conditioning Contractors of America, Independent Electrical Contractors, The National Fisheries Institute, and National Association of Home Builders filed a brief of amici curiae in support of respondent occupational safety and health administration and denial of the emergency petition<sup>vi</sup>.

On June 11, 2020, the US Court of Appeals for the District of Columbia Circuit denied the AFL-CIO May 18 petition<sup>vii</sup>.



## **State Process & Transparency Complaint: Emergency Temporary Standard (ETS) Cannot be Adopted as Regulation.**

The VMA is aware that the ETS originated on April 23, 2020 from a petition and model language provided by the Legal Aid Justice Center, Virginia Organizing, and Community Solidarity with the Poultry Workers to Governor Northam, Commissioner Oliver, Attorney General Herring, Commissioner Davenport, and Director Graham. On June 12, 2020, the Administration posted the ETS for ten (10) calendar days or six (6) workdays for public comment and then barred public testimony before the Board during its multiple hearings over four weeks. The Board also violated its own bylaws on several occasions including allowing representatives of the DEQ Director and Virginia Health Commissioner to both vote, not posting agenda properly, not providing public notice properly, and barring public testimony at hearings. The result was an ETS with significant problems that resulted in litigation which is still pending in Richmond Circuit Court.

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. **The VMA asserts that the Administration did not comply with the Virginia Administrative Process Act (VAPA)** requirements for the adoption of the ETS or the proposed permanent Regulations (e.g., *“The Board shall notify its members of all meetings or public hearings of the Board not less than 30 calendar days prior to the scheduled date of such meeting or hearing and have a notice to the public regarding the meeting posted on the Department’s website<sup>viii</sup>”*), nor has there been an effective evaluation of the ETS including but not limited to an analysis of how many organizations are out of compliance because of the Administration’s failure to notify affected businesses or the economic impact on small businesses.

Title 44, as the original source of emergency authority, speaks to the Governor's powers related to communicable diseases (such as COVID-19). Specifically, Va. Code § 44-146.17 (1) permits the Governor to "address exceptional circumstances that exist relating to an order of quarantine or an order of isolation ... for an affected area of the Commonwealth pursuant to ... Va. Code § 32.1-48.05, et seq." To date, no such orders of quarantine or isolation under Title 32.1 have been issued. It is our assertion that when there are no orders of quarantine or isolation, the Governor cannot create his own regulatory structure - untethered to the Code and ungoverned by VAPA.

The Governor specifically directed the DOLI to issue regulations with the parameters set by the Governor instead of those set out in law. He demanded that such rules be done in an emergency fashion outside ordinary procedures under VAPA. In demanding these "Emergency Temporary Standard" (ETS) regulations that govern every employer in Virginia, they must necessarily claim that every employment context in Virginia poses a "grave danger" and that all such mandates are supported by "substantial evidence" and are "necessary" to adequately address the public health threat. The Board not only acquiesced to the Governor's demand, but it went even further by incorporating the Governor's current (and constantly changing) Executive Orders (and any subsequent Executive Orders) into their rules to which all Virginia employers are now subject. **The VMA objected to including any reference to compliance with the Governor’s Executive Orders in the ETS or the Regulations (see § 16VAC25-220-10 & 40).**

The VMA also asserts that The Board ignored language that limits what constitutes an emergency for purposes of a rule under that chapter. An "Emergency" is defined as:

*any occurrence, or threat thereof, whether natural or manmade, which results or may result in substantial injury or harm to the population ... and may involve governmental action beyond that authorized or contemplated by existing law because governmental inaction for the period required to amend the law to meet the exigency would work immediate and irrevocable harm upon the citizens or the environment of the Commonwealth or some clearly defined portion or portions thereof Va. Code§ 44-146.16 (emphasis added).*

Thus, for purposes of the emergency authority, "emergency" is a period of time during which the Chief Executive must act because there is not time to "amend the law" through legislative means. This is a legislative restriction consistent, in part, with concerns over Separation of Powers. See also *Wisconsin Legislature v. Palm*, 2020 Wisc. LEXIS 121 ("Constitutional law has generally permitted the Governor to respond to emergencies without the need for legislative approval ... But the Governor 's emergency powers are premised on the inability to gain legislative approval given the nature of the emergency.").

Regarding COVID-19, the state of emergency was declared on March 12, 2020 – the same day that the Virginia General Assembly adjourned its regular session, but the Governor could have issued a contemporaneous request for the legislature to remain in session to address this emergency. Further, the Governor convened a Special Session of the Virginia General Assembly on August 18 and they are still in session. Yet, the Governor has not sought legislative authorization to implement either the ETS or permanent Regulations. In fact, the text of the final ETS (Regulations) or the proposed permanent Regulations do not contain findings that all the major components are necessary to meet a "grave danger." The issue is not whether any ETS (Regulations) or permanent Regulations are necessary to meet the "grave danger" standard but whether all the substantial elements of the ETS, as applied across the scope of every employer in Virginia, is necessary under the procedures of Va. Code§ 40.1-22(6a). Therefore, logically, the Board cannot justify how it can simultaneously designate parties to be a "low" or "medium" risk while still regulating those same parties on the basis that they face "grave danger."

### **Health & Safety Board [Bylaws](#) Excerpts:**

IX. DESIGNATED REPRESENTATIVES. The Commissioner of Health **or** the Executive Director of the Department of Environmental Quality may authorize a representative to sit in his or her place on the Board. Such authorization shall be made in writing to the Chair of the Board. The designation shall state the name of the authorized representative, and the letter of appointment shall be made a part of the permanent minutes of the Board. The authorized representative for the Commissioner of Health **or** Executive Director of the Department of Environmental Quality will have full membership status. Any other members may authorize a representative to sit in his or her place in the same manner as is provided for the Commissioner of Health and Executive Director of the Department of Environmental Quality except that such

authorized representative is not entitled to vote on matters before the Board or be counted as part of a quorum.

MEETINGS. Except for closed meetings conducted in accordance with the Virginia Freedom of Information Act, all meetings and hearings of the Board shall constitute business of the citizens of the Commonwealth and shall be open to the public. At all such open meetings of the Board, there shall be a designated time when members of the public may address the Board on any subject or issue under the jurisdiction of the Board.

The Board shall notify its members of all meetings or public hearings of the Board not less than 30 calendar days prior to the scheduled date of such meeting or hearing and have a notice to the public regarding the meeting posted on the Department's website.

AGENDA. Unless circumstances otherwise dictate, a proposed agenda shall be sent to each member of the Board at least two weeks prior to the time for meeting.

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<sup>i</sup> MSI, COVID-19 Certification Program, <http://manufacturingskillsinstitute.org/covid-19-certification-program/>.

<sup>ii</sup> [The Incubation Period of Coronavirus Disease 2019 \(COVID-19\) From Publicly Reported Confirmed Cases: Estimation and Application. \*Ann Intern Med\* 2020; 172:577-582.](#)

<sup>iii</sup> <https://townhall.virginia.gov/l/ViewStage.cfm?stageid=8926>

<sup>iv</sup> <https://www.dhs.gov/science-and-technology/sars-calculator>

<sup>v</sup> [https://actionnetwork.org/user\\_files/user\\_files/000/042/993/original/final\\_OSHA\\_ETS\\_petition\\_5-18\\_filing.pdf](https://actionnetwork.org/user_files/user_files/000/042/993/original/final_OSHA_ETS_petition_5-18_filing.pdf).

<sup>vi</sup> <https://strgnfibcom.blob.core.windows.net/nfibcom/NFIB-As-Filed-Chamber-OSHA-Amicus-Brief.pdf>.

<sup>vii</sup> <https://www.osha.gov/news/newsreleases/national/06112020>.

<sup>viii</sup> Virginia Health & Safety Board, Bylaws, Section IV. Meetings, 2014.