



**VMA** 2108 W. Laburnum Ave., Suite 230, Richmond, VA 23227

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August 23, 2021

**Submitted Electronically**

Jay Withrow, Director  
Division of Legal Support, ORA, OPPPI, and OWP  
Virginia Department of Labor and Industry  
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Richmond, VA 23219  
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RE: Safety and Health Codes Board intent to amend Permanent Standard for Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19, 16VAC25-220

Dear Jay:

The VMA thanks you for the opportunity to comment on the Virginia Department of Labor and Industry's proposed amendments to the Final Permanent Standard for Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19, 16VAC25-220.

Virginia manufacturers and suppliers have protected their employees, contractors, suppliers, customers, and communities from COVID-19 infection by continually updating their COVID-19 protocols to ensure compliance with the latest regulations and guidance imposed by federal, state, and local governments. Despite the additional stress, costs, and time related to compliance, **manufacturing leaders accepted their role in reducing the risk of exposure and spread of the virus as well as continuing operations to produce medicine, PPE, food, and invent new products to meet public health needs such as UV sanitation devices and vaccines.**

However, the permanent standard is a static regulation for a temporary pandemic. There is no evidence that employers are in full compliance with this standard, nor is their evidence that compliance with OSHA Guidance, CDC Guidance, and Governor's Executive Orders are not protective. 45 states are proof that the Board is over-regulating. As such, we respectfully ask the Board to repeal the permanent standard.

**We would like to reiterate our relevant complaints stated in prior formal comments filed on [January 8, 2021](#) and in January and August 5 of this year. Many questions posed in**

those comments have still not been answered. However, for today's purposes, we have three principal comments that we would like to reiterate:

1. **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. This section should be struck entirely from Regulations. In addition, the language does not account for older facilities, as upgrading the ventilation in those facilities may be infeasible.**

NOTE: Governor proposed \$250 million for HVAC compliance costs for only 197 schools. The VDOLI economic impact assessment of this cost to industry is completely inaccurate and inadequate.

Instead, 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.

2. **Requiring “respiratory protection” in vehicles with more than 1 person is impractical.** 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. Our recommended amendments are below:

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4. When an employee who is not fully vaccinated must share a work vehicles or other transportation with one or more employees or other persons because no other alternatives are available, such employees shall be provided with and wear ~~respiratory protection, such as an N95 filtering face piece respirator, or~~ a face covering ~~at the option of the employee.~~ When an employee who is fully vaccinated must share work vehicles or other transportation with one or more employees or other persons in areas of substantial or high community transmission because no other alternatives are available, such employees shall be provided with and wear face coverings.

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6. Until adequate supplies of respiratory protection and/or personal protective equipment become readily available for non-medical and non-first responder employers and employees, employers shall provide and employees shall wear face coverings while occupying a work vehicle or other transportation with other employees or persons

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M. Unless otherwise provided in this standard, when engineering, work practice, and administrative controls are not feasible or do not provide sufficient protection, employers shall provide personal protective equipment to their employees and ensure the equipment's proper use in accordance with VOSH laws, standards, and regulations applicable to personal protective equipment, including respiratory protection equipment.

3. **§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. Our recommended amendments are below:

*C. No person shall discharge or in any way discriminate against an employee who raises a reasonable concern about infection control related to the SARS-CoV-2 virus and COVID-19 disease to the employer, the employer's agent, other employees, a government agency, or to the public such as through print, online, social, or any other media.*

**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.

4. The [Economic Impact Analysis \(EIA\)](#) was provided to stakeholders at 5:20 pm on August 20, 2021. There was inadequate time given to the public to review the document and make comments in time for the August 23, 2021 deadline. Considering the significant errors involving the estimated impact on employers for the HVAC regulations

in the last EIA, the VMA recommends that the timeline for consideration and comment be extended two weeks.

5. Finally, we strongly encourage the Board to adopt Governor Northam’s recommendation to amend Section 16VAC25-220-10. E to provide employers with a CDC compliance “safe harbor.” We hope the Board will adopt the following language change.

*E. To the extent that an employer actually complies with a recommendation contained in CDC guidelines, whether mandatory or nonmandatory, 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 the related provisions of this standard. An employer's actual compliance with a recommendation contained in 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 standard shall be considered evidence of good faith in any enforcement proceeding related to this standard. 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 CDC guidelines.*

**Thank you for your consideration.**

**Sincerely,**

**Brett A. Vassey  
President & CEO**

CC: VMA Board of Directors; Coalition for a Strong Virginia Economy