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Via E-mail jay.withrow@doli.virginia.gov
Jay Withrow
Director, Legal Support
Virginia Department of Labor and Industry
600 East Main Street, Suite 207
Richmond, VA 23219

Re: Virginia Dep't of Labor and Industry Safety and Health Codes Board Emergency Temporary Standard/Emergency Regulation §16 VAC 25-220

Dear Mr. Withrow:

I write in response to the proposed emergency regulation to be presented to the Safety and Health Codes Board in an electronic emergency meeting on June 24, 2020. I understand that this emergency regulation will be applicable to all employers and employees covered by Virginia Occupational Safety and Health (VOSH) program jurisdiction. I encourage the Department to reconsider the need for additional regulation before adopting additional burdensome mandatory requirements on employers.

If after review, the Department wishes to proceed, I note some areas in the proposed regulation that would benefit from further clarification or revision. The comments below are especially relevant to the healthcare providers I represent.

Definition of Economic Feasibility (Section 30)

Section 30's definition of "economic feasibility" is unclear. The definition should provide standards by which employers can determine if they are "financially able" to undertake the measures necessary to comply with the new regulation. Employers will not be readily capable of complying with the rule without further clarification on the measurement of economic feasibility, nor will they be able to comply with those sections which reference an employer's economic feasibility (such as Section 50.A.3). An employer cannot be expected to comply with the open-ended drafting of this provision.

Employee Exposure Risk Assessment (Section 40.A)

The process of assessing the exposure risk of employees in Section 40.A requires more clarity. The regulation appears to require an employer to assign a one-time risk assessment of "very high," "high," "medium," or "low" to each employee, while recognizing that employees at the same

location might have different exposure risk levels. The regulation does not, however, recognize that such assessment requires the consideration of confirmed and/or suspected cases, which could change daily – especially in healthcare facilities that not only have employees to assess, but patients as well.

For example, the rule should consider an employment setting with no confirmed or suspected cases and only a few employees who are able to safely distance as "low-risk." However, if one of those employees tests positive for COVID-19, the risk assessment for each employee would increase. The regulation as currently presented does not specifically contemplate the process of assessing employees on a continuous basis and adjusting the risk exposure assessment. If the rule requires a daily assessment, employers need that information to implement the necessary protocols for all risk levels. Employers will likely need guidance over a phase-in period on how to perform the workplace assessments for each employee, as well as how to properly document that these assessments were completed in accordance with the Department's expectations. An obligation without a clear standard is susceptible to abuse or arbitrary treatment.

The rule as written should include guidance on how long an employee will remain at an increased risk level following a confirmed or suspected case in the workplace. Would the employee return to a lower risk assessment after fourteen days of no new cases, or would the employee remain at a higher-risk until the positive employee returns to work after two negative tests? In order to carry out the intent of this regulation and ensure that employees are properly protected based on their exposure risk level, employers need more definitive guidelines on the period of time that more restrictive protocols must be kept in place following a confirmed or suspected COVID-19 case.

Employers as Contact Tracers (Section 40.A.7)

Section 40.A.7(b) and (c) place additional burden on employers with little added benefit. As written, the rule increases the risk of unintended disclosure of employees' protected health information (PHI). Instead of placing a burdensome reporting requirement on employers, employees should be directed to provide information regarding potential contacts to the local health department, which will then have the responsibility for informing other individuals who may have had contact with the positive individual through contact tracing. Requiring employees to individually report their health status to the local health authorities will accomplish the same goal of alerting individuals to potential exposure without requiring employers to disclose sensitive information about their employees.

New Employee Benefit Mandate (Section 50.B.8)

As written, Section 50.B.8 requires that employers ensure that psychological and behavioral support is available to address employee stress. While this type of support is important and should be part of all healthcare providers' benefits, it should not be a Department requirement that employers ensure such availability. If adopted at all, the rule should be phased in, especially as employers are likely not in a position to renegotiate employee insurance plans.

Infectious Disease Plan and Training Obligations (Sections 70 and 80)

Many employers continue to operate and provide services to patrons and patients and develop protocols and procedures in accordance with federal and state guidance. These new regulations are burdensome, as they implement many additional requirements and may require time for employers to develop applicable policies. Thus, to the extent that the Department adopts them at all, Sections 70 and 80 should have a phase-in period for employers to have their infectious disease preparedness and response plans in place and to meet training obligations. The Department likewise should delay or phase in any associated Department penalties for non-compliance.

Whistleblower Provisions (Section 90)

Section 90 of the regulation as written erodes Virginia's employment-at-will doctrine in that it provides full immunity to employees who might publicly raise concerns regarding the employer's infection control policies rather than reporting concerns to the employer. If necessary at all, a more appropriate provision would mirror the public policy applicable to whistleblowers, in that most whistleblower claims first require that the concern be raised through the employer's typical reporting chain before the employee can raise any concerns to an outside body.

Public policy protections already exist for employees who have legitimate concerns regarding an employer's handling of the COVID-19 pandemic and employee safety precautions. If the Board believes that additional regulation is necessary, it should instead specify in paragraph C that an employee will not be retaliated against if he or she raises a concern to the employer or then escalates the concern to a government agency or the public *after* raising the concern to the employer and the employer fails to take any action within a reasonable timeframe. As currently written, the employee has the power to determine what actions and infection controls are sufficient. An employee should not be able to circumvent an employer's internal complaint system and make adverse statements about the employer to the media without impunity.

Thank you for your consideration of these additional comments. Please feel free to contact me if you have any questions.

Sincerely,

Peter M Mellette

Peter M. Mellette

PMM/edc