

June 22, 2020

Mr. Jay Withrow
Director
Division of Legal Support, ORA, OPPPI, and OWP
Virginia Department of Labor and Industry
600 East Main Street, Suite 207
Richmond, VA 23219

Re: Emergency Temporary Standard/Emergency Regulation, Infectious Disease Prevention, SARS-CoV-2 Virus That Causes COVID-19, §16 VAC 25-220

Director Withrow,

The Virginia Forestry Association (VFA) and Virginia Forest Products Association (VFPA) represent the Commonwealth's third largest industry. Virginia's working forests provide an overall economic value of more than \$21 billion annually, employing more than 108,000 Virginians in forestry, forest products and related industries.

Both VFA and VFPA generally support the public comments and conclusions offered by the Virginia Business Coalition. We appreciate the opportunity to offer additional comments on the referenced emergency temporary standard/regulation before the Virginia Safety and Health Codes Board.

Our industry is proud to have been recognized as critical to our nation's infrastructure, continuing to operate since the arrival of SARS-CoV-2 in Virginia and manufacturing the essential forest products needed to combat COVID-19. Our members have made workforce and customer safety a priority, voluntarily integrating distancing and sanitization recommendations from the U.S. Occupational Safety and Health Administration (OSHA) and the U.S. Centers for Disease Control and Prevention (CDC) into their operations.

Unfortunately, §16 VAC 25-220 shifts from voluntary adoption of common-sense measures that businesses can adapt to their own operating procedures to one-size-fits-all requirements that create regulatory uncertainty and threaten our industry's small businesses. As currently drafted, the emergency standard/regulation creates unworkable protocols, imposes unreasonable burdens of compliance on small businesses, and may reduce the operational safety of forest industry businesses.

In the absence of liability protections for employers that have continued to operate for months in good faith and/or without public health data supporting the applicability of these measures across all business sectors, we firmly believe that these regulations are unwarranted and unnecessary. We encourage the Board to reject these regulations.

However, should the Board choose to proceed with enacting §16 VAC 25-220, VFA and VFPA respectfully offer the following recommendations for the Board's consideration.

OSHA's COVID-19 Guidance and Other Federal Recommendations Do Not Support Basis for Enforcement

The draft emergency standard/regulation incorporates language and concepts from guidance offered by CDC and OSHA, most notably OSHA Document 3990-03 2020, *Guidance on Preparing Workplaces for COVID-19* (OSHA 3990). The preface of OSHA 3990 states that this guidance “*is not a standard or regulation, and it creates no new legal obligations.*” It continues, “*the recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace.*” There are three primary reasons for this:

First, as noted in the Virginia Business Coalition's public comment, U.S. Secretary of Labor Eugene Scalia has rightly held that while the SARS-CoV-2 is a hazard in the workplace, it is not unique to the workplace or caused by work itself. COVID-19 is a public health crisis with significant community spread and does not represent a failing of any employer's workplace safety protocols. Specifically, in addressing recommendations for a one-size-fits-all rule at the federal level, Secretary Scalia wrote: “OSHA's industry-specific guidance is far more informative for workers and companies about the steps to be taken in their particular workplaces.” It is this approach that has allowed operations and working conditions as diverse as ours to adapt guidance and successfully prevent widespread COVID-19 outbreaks.

Second, given the novelty of this coronavirus, the efficacy of measures recommended in OSHA 3990 and other federal guidance cited have not been scientifically-validated as the most effective means of preventing the spread of SARS-CoV-2 in the workplace. Though these recommendations represent the scientific community's best current hypotheses on mitigation, they are offered as suggestions without the force of law.

We are encouraged that our industry has successfully continued to adopt and fit the latest guidance and recommendations into their individual operations. Indeed, scientific discovery has driven the evolution of federal guidance for the last three months. Unfortunately, with respect to COVID-19, we still do not know what we do not know. It is likely that the enactment of §16 VAC 25-220 would stop the evolution of best practices to mitigate the spread of SARS-CoV-2 in the workplace, or require such frequent revisions as to create significant regulatory uncertainty for businesses in the Commonwealth.

Finally, as a guidance document that makes recommendations and does not carry the weight of law, OSHA 3990 has not gone through the federal Small Business Regulatory Enforcement Fairness Act (SBREFA) process. Other existing OSHA regulations cited in the emergency standard/regulation have also not undergone a SBREFA review with respect to their application to mitigating the spread of SARS-CoV-2. Prior to promulgating any enforceable regulation,

under the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996, OSHA must first:

- Produce Small Entity Compliance Guides for OSHA rules with a significant impact on a substantial number of small businesses;
- Be responsive to small business inquiries about compliance with regulations;
- Submit final rules to the Congress for review;
- Have a penalty reduction policy for small businesses, and;
- Involve small businesses in the development of some proposed rules through Small Business Advocacy Review Panels.

The appropriation of guidance that was not intended to be legally-binding as the basis for legal enforcement, without scientific validation and in the midst of a continuously evolving understanding of the virus, is inappropriate and dangerous. Further, small businesses in the forest products industry will be unduly burdened with costs of compliance, and further threatened by a subjective standards of “economic” and “technical” feasibility in an attempt to meet arbitrary “industry standards” that do not currently exist.

We believe that employers should be encouraged, even incentivized, to continue voluntarily adoption of federal guidance and adapting this evolving guidance to fit their specific operations without fear of prosecution. We recommend that this standard/regulation could be improved and become more dynamic if it were struck in its entirety and replaced with an amendment of the language contained in §10(G):

“To the extent that an employer makes reasonable attempts to comply with the most recent requirements contained in CDC and OSHA publications to mitigate SARS-CoV-2 and COVID-19 related hazards, the employer’s actions shall be considered in compliance with this standard/regulation. Any employer who knowingly and willfully violates such guidance will be subject to penalties under VOSH enforcement standards upon investigation. Such an investigation shall not presume that employee illnesses are work-related.”

§16 VAC 25-220 Misapplies OSHA 3990 Classification of Exposure Risk to Industries, Not Tasks

The definition of “Exposure Risk Level” contained in §16 VAC 25-220 is adapted from OSHA 3990, “*Classifying Worker Exposure to SARS-CoV-2.*” Unfortunately, the emergency standard/regulation does not fully incorporate OSHA guidance, arbitrarily creating differences in compliance requirements by business type without scientific measure or reasonable justification.

To classify worker exposure, OSHA 3990 recommends dividing specific job tasks into four categories based primarily on type and length of exposure to individuals that are infected with SARS-CoV-2. The performance of aerosol-generating procedures by health care workers, laboratory technicians, and mortuary workers on COVID-19 patients and victims are considered “very high risk.” Non-aerosol-generating tasks performed by the same employees are

characterized as at “high risk,” as these professionals are subject to repeated exposure to COVID-19 patients and victims. Generally, §16 VAC 25-220 reflects that guidance.

However, in the “medium” risk exposure category, OSHA 3990 establishes general circumstances and conditions that exist to warrant an employer’s consideration of employee risk in performing a task¹. Whereas OSHA 3990 does not identify specific industries or business types in these task categories, §16 VAC 25-220 attempts to assign risk to certain types of businesses in addition to tasks. On page 11 of the emergency regulation/standard, the regulation further blurs the scope of applicability with the language: “*may include, but are not limited to operations and services in.*”

As drafted, employers with hazards or job tasks classified as “medium” exposure risk are subject to additional regulatory requirements under §16 VAC 25-220. Section §60 of the emergency standard/regulation outlines specific requirements, while “medium” risk employers with 11 or more employees are required to develop and implement a written Infections Disease Preparedness and Response plan under section §70 of the draft. It is therefore vital to provide clear, bright lines of compliance so that employers may understand what is required of them. However, the draft emergency standard/regulation conflates business type with the performance of a certain job task and applies an arbitrary standard of risk without scientific measure or reasonable justification. This is unacceptable.

The Commonwealth’s own public health data supports neither the definition of most industries as “medium,” or the need for a regulation at all. For example, correctional facilities, long term care facilities, and certain types of health care settings are all identified as medium risk in §16 VAC 25-220. The Virginia Department of Health tracks the number of COVID-19 outbreaks, defined as “at least two (2) confirmed lab cases,” on its website². Specifically, VDH tracks “Cases and Deaths by Outbreak Facility Type,” breaking out correctional facilities, long term care facilities and health care settings. Through June 22, 2020 at 11:00 AM ET, these three facility types combined for 294 outbreak events, totaling 8,672 cases (approximately 14.8% of total cases in Commonwealth) and 1,022 deaths (approximately 63.1% of all deaths in Commonwealth) due to COVID-19.

¹ From OSHA 3990-03 2020, Page 20:

“Medium Exposure Risk

Medium exposure risk jobs include those that require frequent and/or close contact with (i.e., within 6 feet of) people who may be infected with SARS-CoV-2, but who are not known or suspected COVID-19 patients. In areas without ongoing community transmission, workers in this risk group may have frequent contact with travelers who may return from international locations with widespread COVID-19 transmission. In areas where there is ongoing community transmission, workers in this category may have contact with the general public (e.g., schools, high-population-density work environments, some high-volume retail settings).

Lower Exposure Risk (Caution)

Lower exposure risk (caution) jobs are those that do not require contact with people known to be, or suspected of being, infected with SARS-CoV-2 nor frequent close contact with (i.e., within 6 feet of) the general public. Workers in this category have minimal occupational contact with the public and other coworkers.”

² <https://www.vdh.virginia.gov/coronavirus/>

VDH also tracks outbreak data for “congregate settings,” defined by VDH to include: adult daycare program, apartment complex, business/workplace, camp/campground, church, event venue, gym/spa, independent living/retirement home, labor/migrant camp, military base, neighborhood street, private home, and shelter. This presumably includes all medium risk business types identified in the regulation. It then combines with low risk business types while adding a multitude of non-commercial public, private and government settings.

Even within VDH’s broadly defined congregate settings, data simply does not justify the identification of medium risk business types found in §16 VAC 25-220 as presenting the same risk as long term care facilities, correctional facilities, and health care settings. Through June 22, 2020 at 11:00 AM ET, VDH has tracked 122 outbreak events in “congregate settings,” totaling 2,026 cases (approximately 3.5% of total cases in Commonwealth) and 25 deaths (approximately 1.5% of all deaths in Commonwealth).

We reiterate our recommendation that this standard/regulation be struck in its entirety and replaced with an amendment of the language contained in the above section. In the event the Board does not adopt that recommendation, we suggest limiting the scope of the regulation to “very high” and “high” risk exposure categories by:

- 1) Striking subsections 1 and 2, identifying specific business types and settings, under the definition of “medium risk exposure” on Page 11 of §16 VAC 25-220;
- 2) The removal of Section §60 in its entirety, and;
- 3) Striking Section §70(A)(2)

§16 VAC 25-220 Misapplies Existing OSHA Regulations, Creating Standards That Cannot Be Met

For example, under Section §60 (C), medium risk employers that are not subject to an industry specific standards for Personal Protective Equipment (PPE) will be subject to the requirements of OSHA Standard 1910.132 for general requirements and 1910.134 for respiratory protection. On November 11, 1998, OSHA issued standard interpretation of guidance under OSHA 1910.132 for assessing respiratory hazards. Specifically, OSHA states that under 1910.132, employers are:

“Required to assess the exposures in the workplace (by way of personnel air sampling, or mathematical modeling, or some other means) to determine what hazardous exposure exist, what the exposures levels are, and what level of respiratory protection is necessary. All of the unique conditions at the site must be considered, i.e., existing ventilation controls, work practices, and duration of exposure, just to name a few.”

SARS-CoV-2 is not measurable in a way that particulate matter might be, for example. There are no known means by which employers can determine the presence or prevalence of SARS-CoV-2 as they would with the *“hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical*

contact” as intended in OSHA’s regulation at 1910.132. The regulation simply does not contemplate a virus as a workplace hazard.

This is an impossible standard for any business to meet, further illustrating the challenge of applying regulations designed to eliminate workplace hazards for unintended purposes. We encourage the Board to conduct a thorough review of all citations to existing OSHA regulations to ensure their applicability to the intent of §16 VAC 25-220 prior to adoption.

One-Size-Fits-All Regulation Create Safety Issues, Compliance Challenges for Virginia’s Forestry and Forest Products Industry

Virginia’s forest products supply chain takes place in numerous settings and amid circumstances that underscore the difficulty in a one-size-fits-all regulation such as §16 VAC 25-220. It begins in Virginia’s 16.1 million acres of forest land, constituting more than 60% of the Commonwealth’s total land mass. Consultant foresters advise landowners prior to harvest, cruising tracts by vehicle to perform assessments. Once a stand is ready, loggers work outdoors on uneven terrain in a variety of weather conditions to safely harvest and manufacture a tree into logs. Logs are then transported to various mill types, operating in both in open air and indoors, to subsequently convert into paper, lumber, panels, biomass, and other wood products. Finally, finished forest products are transported to the customers or end-users.

Our members are committed to improving employee safety, including continued investments in company-wide and individual training, improving the supervision of work performed, and requiring the use of personal protective equipment on the job. Since March, forest products businesses have incorporated federal guidance from CDC and OSHA to protect workers and mitigate the public health threat of SARS-CoV-2 to the extent possible in the workplace. Unfortunately, §16 VAC 25-220 as drafted and without the ability to modify to circumstance presents significant challenges for the forest products industry:

- Most forest products business, including mills and logging operations, are required by OSHA regulation to wear hard hats and eye protection. Requiring a mask or face covering in addition to these other items could be very problematic. Fogging of eyewear/safety glasses commonly occurs when wearing a mask along with eye protection. For employees operating or working in close proximity to saws/belts, visual acuity is a necessity. The constant fogging of eye protection while wearing a mask in these situations present a significant safety risk to employees.

The operation of saws and other machines in forestry and forest products manufacturing often require the use of earmuffs, ear plugs and other PPE to protect an employee’s hearing. In order to communicate with coworkers onsite, workers will utilize both hand and mouth signals. The introduction of a mask or face covering may disrupt these methods of communication, potentially reducing safety on-site.

- §40(E) requires respiratory protection when multiple employees are occupying a vehicle for work purposes. The regulation does not define what is meant by "vehicle" in the regulation. The forest products industry is dependent on a number of on- and off- road "vehicles," ranging from tractor trailers to crew trucks to log skidders and feller bunchers. Further clarification regarding vehicle type is required.

Additionally, how will employers ensure compliance that their crew, in a truck moving from one job to another, is wearing face masks? Forest-based operations are not on a controlled employer's job site, making it impossible for an employer to monitor their employees' actions or behavior relative to PPE.

- §90(B) prohibits employers from protecting employees who *“voluntarily provide and wear their own personal protective equipment, including but not limited to a respirator, face mask, face shield, or gloves if such equipment is not provided by the employer, provided that the PPE does not create a greater hazard to the employee, or create a serious hazard for other employees.”*

Employees cannot be permitted to make hazard determinations that are to the detriment of themselves or their coworkers. This provision could have catastrophic consequences.

In sawmill and forest harvesting operations, non-approved gloves worn in proximity to fast moving saws or belts pose a real danger to employees. Gloves other than those approved for use as PPE in industry can easily get caught in machinery, with outcomes resulting in severe injury or death. Unfortunately, the regulation's attempt to provide non-discrimination protections does not allow employers to protect employees who voluntarily wish to wear non-approved gloves, but cannot do so safely due to the nature of their job.

In a similar vein, masks may make it more difficult to breathe and cool down. For employees working in warm or high heat environments, there is a real concern that requiring masks - especially in the summer months - could cause overheating and/or fainting. Again, fainting in close proximity to moving saws or belts could have a fatal outcome. The proposed regulations do not provide sufficient guidance or flexibility to employers in situations where requiring wearing of employee-provided PPE is a significant risk.

- Finally, the regulation makes numerous references to either “disinfecting” or “wiping down” of workspaces. Federal guidance is clear that these are two different standards of cleaning, though they are used interchangeably in the regulation. For many forest product industry employees, their workspace is vehicular and/or mechanical equipment, or trees/logs/lumber, where spraying disinfecting chemicals is not practical or may be detrimental to the equipment or product itself.

Conclusion

We appreciate the opportunity to provide input and the perspective of the forest products industry on §16 VAC 25-220. We encourage the Board to reject these regulations. The voluntary adoption and adaptation of the latest federal guidance from OSHA and CDC has been the most effective means of mitigating the spread of SARS-CoV-2 in our members' operations. Neither Virginia's public health data, nor the potential impacts described above, warrant enactment of the emergency regulation/standard as drafted.

If the Board feels it must proceed with regulations, we hope you will adopt the alternatives suggested in these comments. We further hope that these regulations may be delayed and addressed within the scope of the normal rulemaking process, providing an opportunity for the Board to more fully evaluate the impact of any approved regulations to businesses that have continued to operate in accordance with government-issued guidance throughout this public health crisis.

Sincerely,

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Virginia Forestry Association

Susan Seward
Director of Government Affairs
Virginia Forest Products Association

Founded in 1947, the Virginia Forestry Association (VFA) represents Virginia's diverse forestry community and promotes the sustainable use and conservation of forest resources to ensure their long-term social benefits for all Virginians. VFA members are forest landowners, foresters, forest products businesses, loggers, forestry consultants, and a variety of individuals and groups who are concerned about the future well-being of Virginia's forest resource.

The Virginia Forest Products Association is a non-profit, non-governmental, privately supported association of individuals, companies, and affiliate businesses involved in the production of lumber and wood products. Founded in 1956, VFPA represents the Commonwealth's saw mill industry through legislative advocacy, member communications, and the biennial Expo Richmond, one of the largest forest industry trade shows in North America.