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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
Emergency Temporary Standard/Emergency Regulation, Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19

To Whom It May Concern:

Thank you for the opportunity to comment on the Virginia Department of Labor and Industry's recommended 16 VAC 25-220, Emergency Temporary Standard/Emergency Regulation, Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19 (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 appear to 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 implementing those 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 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 regulatory developments that apply to COVID-19. 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. Accordingly, VMA members are uniquely positioned to participate in the public process associated with the development of the Regulations.

I. Regulated Businesses in Virginia Need Certainty.

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 ensure the regulatory requirements are satisfied. As drafted, the Regulations do not provide certainty or consistency. For example, there is no detail on the best management practices that will be required, and no standard for the development of compliance plans, mitigation plans or timeline to react to the everchanging Federal guidance from OSHA and CDC. Accordingly, it is difficult to assess the potential impacts of the Regulations. However, all of this must be developed and resolved before these Regulations are finalized.

It should also be noted that the VMA is committed to protecting employees, contractors, suppliers, and communities from COVID-19 infection. We have led the development of industry best-practices, 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.

We have serious and legitimate concerns with the Regulations and the process whereby they are being promulgated.

II. Emergency Temporary Standard/Emergency Regulation Should Not be Applied Here.

DOLI is proposing a wholly new regulatory and enforcement program that, based on the Regulations, will impact every business in the Commonwealth. The public participation and stakeholder involvement procedures outlined in the VAPA are designed to ensure that the impacts of a proposal such as this are fully understood. This is particularly important here, where DOLI is proposing to develop industry-specific or occupation-specific categories of risk. DOLI does not have information to assess or understand the implications this proposal will have on manufacturers or its supply chain which should be assessed in accordance with the Small Business Regulatory Flexibility Act/Small Business Regulatory Enforcement Fairness Act (SBREFA). As a result, stakeholder involvement is especially critical to inform the development of this program and the ten (10) days to review and comment on over 225 pages of dense Regulations and briefing

materials, as well as the utilization of an electronic meeting where no public comments will be permitted, is inadequate public transparency and participation. Further, the practical matter of fact is that employers, now three months into the COVID-19 pandemic, have already put into place procedures and controls that may be entirely undone by these Regulations, thus, creating additional regulatory uncertainty that is impractical.

The VMA is also aware that the proposed Regulations 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. It is unacceptable that organized labor had months to advocate for the Regulations, but the business community was only afforded ten (10) calendar days or six (6) workdays to respond without any opportunity to testify before the Board.

Finally, the VMA questions whether the Safety and Health Codes Board meeting was properly noticed. The "Meeting Scope" was identified as "General business of the Board" rather than "Public hearing…" or "Discuss particular regulations…" Thus, the purpose of the meeting and the meeting scope are in conflict. Our concern is that many businesses and business organizations may not have participated because of this confusion.

III. 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[i].

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[ii].

On June 11, 2020, the US Court of Appeals for the District of Columbia Circuit denied the AFL-CIO May 18 petition[iii].

IV. Specific Concerns About Regulations.

In addition to the expressed concerns about irregularities with this regulatory process, and actions already taken by OSHA and the US Court of Appeals for the District of Columbia Circuit, the VMA has identified the following specific concerns about the Regulations.

A. Guidance is not Regulation

The draft Regulations confuse guidance and regulations. Codifying guidance as regulation bypasses public scrutiny. If any agency can simply change Regulations by issuing guidance, then the statutory basis for VOSH regulation will cease to exist as will public notice and comment. Further, there is no mechanism for DOLI to communicate regulatory or guidance changes to all employers with 11 or more employees with "medium risk."

It should also be noted that the Regulations regularly refer to "standard/regulation" but these are not interchangeable or synonymous words. They have different meanings throughout the Administrative Code of Virginia.

B. Conflicting Language

1. On page 5, is the definition of Joint Employment the same as the USDOL definition? It is unclear and creating a new definition would not be acceptable.

2. At the top of page 17, the language in § 40.A(3)(c) appears to mean that an employee who has tested positive for COVID-19 may return to work ***without delay or any other precautions***, provided the employee follows ordinary practices common to all employees (handwashing, covering coughs/sneezes, social distancing, cleaning/disinfecting). This seems to contradict the return-to-work prerequisites that follow in § 40.B.

3. On page 13, the policy implications effectively put employers into a position of liability for COVID-19 contact tracing. The CDC, OSHA, VOSH and Virginia

Department of Health (VDH) guidance on this particular activity are unclear to employers. VDH is currently guiding employers to leave contact tracing up to the department. Notice to employers of contact tracing activities is often without any specific detail. This area of COVID-19 regulation cannot be forced upon employers until the government harmonizes its own activities, engagement strategy for employers and communication plan with employers.

4. Definitions of hand sanitizer are inconsistent within the draft regulation.

5. Does this regulation redefine OSHA's PPE definition https://www.osha.gov/SLTC/personalprotectiveequipment/?

6. As proposed this 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.

C. Other

1. On Page 6, Section G 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.

2. On Page 6, § 20 references 6 months and 18 months. Why? The sunset of regulations is usually based upon an event not a date. Further, how much time do employers have to update their COVID-19 infectious disease preparedness and response plans? Further, why is there no threshold for changing COVID-19 infectious disease preparedness and response plans?

3. On page 13, "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.

4. On page 13, the "Known COVID-19" definition establishes an impossible standard because the employer "should have known that the person has tested positive for COVID-19" 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.

5. One page 13, the "May be infected with SARS-CoV-2" definition should have the words "or suspected COVID-19 person," removed. An employer has no way to determine if someone is "suspected" of COVID-19 exposure.

6. On page 13, #2 should be removed. An employer has no way to determine if someone is "suspected" of COVID-19 exposure.

7. On page 13, #3 should be removed. "Being a resident of a locality, city, town, or county with moderate or substantial SARSCoV-2 ongoing community transmission" is an unreasonable standard and could render the entire workforce of thousands of businesses unable to report to work.

8. On page 13, #4 should have the words "moderate or" removed. In fact, the entire section could have civil liberties and interstate commerce implications that require further evaluation.

9. On page 13, "Face coverings" should be added to the "PPE" definition to reflect CDC guidance. However, is this redefining "PPE" in a way that will create conflicts with other enforcement regulations?

10. On page 14, the statement 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" is impractical and inconsistent with other practices and current COVID-19 guidance. Physical separation does not have to be achieved by permanent or floor to ceiling walls. Temporary plexiglass and other hard surface barriers are regularly used to retrofit workstations, counters and cubicles as physical separation "shields" or barriers for employees.

11. On page 15, the definition of "Symptomatic" is problematic for three reasons: 1) Data regarding the incubation period is still uncertain. Reports are now being published that suggest 5 days, 11.5 days or 14 days[iv]; 2) The symptoms listed here are not uniformly listed in all CDC, OSHA and VDH guidance documents; and 3) Employers will be sending 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).

12. On page 15, "Technical feasibility" is defined as the existence of "technical know-how…" "Know-how" is too imprecise to be used as a definition.

13. On page 16, at § 40.A.#1, the standard would require employers to classify each employee for risk level of exposure. As proposed 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 draft Regulation deviates to mandate specific control measures in workplace situations, regardless of potential exposures or other mitigating circumstances arising from the required risk assessment process. Also, will VOSH expect each employer to reduce these determinations into a written document? VOSH should allow hazards

assessments to be conducted based on common tasks and work environments but not based on individual employees.

14. On page 16, at § 40.A.#3, has no bearing on risk assessments or employee health and safety protections. Serologic testing is a public health policy issue and not an employer issue. Employers do not have medical record access and this provision has no clarification about HIPAA obligations and liabilities. Further, CDC said in its Interim Guidelines that antibody test results "should not be used to make decisions about returning persons to the workplace." Therefore, requiring an antibody test at this time does not meet the ADA's "job related and consistent with business necessity" standard for medical examinations or inquiries for current employees. Requiring antibody testing before allowing employees to re-enter the workplace is not allowed under the ADA. Finally, The EEOC will continue to closely monitor CDC's recommendations, and could update this discussion in response to changes in CDC's recommendations https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

15. On page 17, § 40.A.#4, references employee reporting of symptoms but there is no clear definition of the number or combination of symptoms an individual must have to be deemed symptomatic. That ambiguity, which is equally ambiguous in CDC guidance, is what VOSH could seek to clarify with a standard.

16. On page 17, at the second § 40.A.#5, (the numbering for subsection 5 repeats), does the agency intend to require sick leave policy flexibility that exceeds FFCRA requirements? Employers may ask what these requirements are, or if they are left to the discretion of each VOSH inspector, therefore, will failure to perform either function to the satisfaction of an inspector constitute a citable offense?

17. On page 17, I see that § 40.A.#6, requires contractors to encourage subcontractors to develop non-punitive sick leave policies, and that subcontractors with known or suspected cases of COVID-19 shall not return to work. Is the general contractor or owner exposed to potential citation if the subcontractor violates this provision without providing this information to the employer? Why is this liability being shifted to the employer? Does this now set a precedent for other regulatory issues?

18. On page 18, it appears § 40.A.#7 (a) requires employers to inform its entire workforce of a COVID-19 positive test. This appears to be a more expansive requirement than federal OSHA and CDC guidelines, which we understand to require an employer to make a more limited disclosure to the employees who may have been exposed. The draft standard may be read to require reporting to employees who were on vacation, working great distances away or otherwise could not reasonably be suspected of exposure. Similarly, subsection (b) may require reporting to other employers whose employees may have been present at the worksite but segregated by distance from the infected employee. This section is

also inconsistent with guidance being provided to employers by VDH regarding employer contact tracing responsibilities. The entire #7 should be struck.

19. On page 18, isn't the medical record access requirement in § 40.A.#8 already incorporated by reference into the Virginia Administrative Regulatory Manual. Does this provision include a new protection not already required? Also, the Regulations do not explicitly limit "employee access" to these medical records to the employee's *own* records.

20. On page 20, § 40.B.#2 (a) regarding time-based strategy for return to work is inconsistent with current CDC guidance. For persons recovered from COVID-19 illness, CDC recommends that isolation be maintained for at least 10 days after illness onset and at least 3 days (72 hours) after recovery. Illness onset is defined as the date symptoms begin. Recovery is defined as resolution of fever without the use of fever-reducing medications with progressive improvement or resolution of other symptoms. Ideally, isolation should be maintained for this full period to the extent that it is practicable under rapidly changing circumstances https://www.cdc.gov/coronavirus/2019-ncov/community/strategy-discontinue-isolation.html.

21. On page 20, § 40.B.#2 (b) regarding test-based strategy for return to work 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.

22. On page 21, § 40.D.#1 (c) is impractical because many employers have multiple shifts during the same 24-hour period (8-hour, 12-hour, etc.). Further, why are the only choices to "wipe down their area prior to leaving, or the employer may provide for disinfecting of the area at regular intervals throughout the day, and between shifts of employees using the same work area." "Disinfecting the area" and "wipe down the area" appear to be fundamentally different standards that are inconsistent. Finally, what is meant by "area"? Is this an individual employee's workstation? Is it an entire office? Is it an entire factory?

23. On page 21, § 40.D.#1 (d) requires both handwashing facilities and hand sanitizer. CDC and OSHA guidance requires one, but not both, which makes sense given recent hand sanitizer shortages. Would the agency consider requiring one or the other, but not necessarily both in all workplaces? § 40.I(6) does the same. Also, the Regulations require "closed or controlled" access to a common area, however, regulations on occasion use this to refer to restrooms. With no definition as to what "closed or controlled" means, controlled restroom access may not be ADA compliant.

24. On page 21, § 40.E and F replace "respiratory protection and personal protective equipment" with "respiratory protection, personal protective equipment or face coverings."

25. On page 21, § 40.E requires respiratory protection or PPE for workers in shared vehicles. 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? This is the only place where "for work purposes" is used regarding occupying a vehicle. This is vague.

26. On page 21, § 40.G strike "however, nothing in this standard/regulation shall negate an employer's obligations to comply with personal protective equipment and respiratory protection standards applicable to its industry." There are no standards applicable to industry.

27. On page 21, § 40.H requires private sector employers to consult with the Attorney General of Virginia when making determinations in accordance with their obligations under federal civil rights law. The Attorney General advises and represents the Commonwealth of Virginia. He is not equipped to advise private sector employers. Employers must be able to rely on their own counsel. The EEOC has jurisdiction in these matters. Strike this section.

28. On page 22, does § 40.I.#2 require a cashier to clean a checkout counter between every single customer? It is unclear whether it must be used between each separate interaction or how frequently other than "immediately."

29. On page 22, § 40.I.#5 requires cleaning and disinfecting between every shift. This is impractical due to variable shifts and a cleaning standard every 24 hours is all that should be required for most employers unless there is a confirmed COVID-19 infection. This type of standard does not fit all businesses, specifically those that already have FDA cleaning standards.

30. On page 22, why is § 40.I.#6 more restrictive than the EPA standard it cites? EPA List N provides for unlisted chemicals that are still effective against coronaviruses.

31. On page 23, § 40.K should include "face coverings" as provided for in CDC guidance.

32. On page 25, § 50.A.#6 references "Biosafety Level 3 (BSL-3)." Is this the correct level and why?

33. On page 25, § 50.B.#6 requires "enhanced medical monitoring" but this is not defined, justified, or explained within the context of increased employer liability. This should be struck.

34. On page 25, § 50.B.#7 requires "job-specific education and training on preventing transmission of COVID-19, including initial and routine/refresher training in accordance with § 80" but does not specify how often, in what format or from whom

the training curriculum should be provided. It is also unclear whether training is required of all employees regardless of risk category. Further, considering the lessons of the last three months, all training should be allowed to be performed and certified online.

35. On page 26, § 50.B.#8 seems to introduce psychological stress as a novel workplace hazard. The purpose of the OSH Act and its Virginia Occupational Safety and Health Act is to prevent injuries and illnesses arising from workplace hazards. As referenced earlier in these comments, US Secretary of Labor Eugene Scalia stated that, "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." How can the Regulations introduce psychological stress as a novel workplace hazard?

36. On page 26, § 50.B.#9 definition of hand sanitizer is inconsistent with the other section of this draft regulation.

37. On page 27, § 50.C.#1 replace "hazard assessment" with "job task assessment." Also, conform #1 (a) and #1 (a)(i) to "job task assessment" not "hazard assessment" because if there is no exposure to COVID-19, there is no risk.

38. On page 28, § 60.A.#1 assumes that HVAC systems are in the control of all employers – they are not. Leased spaces provide employers with no control over the HVAC systems other than operability.

39. On page 28, § 60.A.#1 (a) (the numbering for subsection 1 repeats) should be replaced to recommend "physical barriers" based upon a "hazard assessment." Also, see comment #10 on physical barriers.

40. On page 30, § 60.C.#2 requires a certified hazard assessment for each workplace but provides no timeline for completion. 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?

41. On page 32, § 70.C.#2 (b) is inconsistent with existing law. Employers cannot consider individual health concerns. Instead, a self-reporting option and employer "accommodation" language should replace this section.

42. On page 33, § 70.C.#7 does not define the training curriculum, the format (online or classroom) or the frequency of training. VOSH should be tasked with developing a standard curriculum that all employers can modify and employ in their businesses rather than expect 200,000+ Virginia businesses to simply guess.

43. On page 35, § 70.C provides whistleblower protection for employee complaints published to the news media and on social media. 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, correct? The language "or to the public such as through print, online, social, or any other media" should be struck.

V. General Questions Regarding Regulations.

A. Need for Regulations

Is there a need for the Regulations or simply an enhanced penalty for employers that knowingly violate basic COVID-19 safety guidance?

B. General Duty Clause

Is the agency aware of any enforcement of CDC, OSHA, or other agency COVID-19 safety guidance through the General Duty Clause? Why does VOSH have difficulty enforcing guidance through the General Duty Clause on an employer that knowingly violates basic COVID-19 safety guidance?

C. Timeline

The Regulations are lacking a clear timeline for when employers must be in compliance and how long they have to react to regulatory changes.

VI. Recommendations.

A. Voluntary Compliance Assistance

VOSH must provide online and consultative services for helping employers develop COVID-19 infectious disease preparedness and response plans.

VOSH must prepare a standard curriculum for all employers to use in training employees.

VII. Conclusion.

It is unreasonable to apply "one size fits all" COVID-19 regulations to all employers and employees. It is also profoundly inappropriate to bypass the formal regulation process altogether by attempting to codify guidance as a reasonable replacement. Further, it is confusing why the Regulations are being pursued through an emergency procedure now that the Commonwealth is poised to enter Phase 3 and the principal issue at hand has already been addressed at the Federal level. Therefore, it is the VMA's recommendation that the Board reject the Regulations.

Sincerely,

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

Addendum

See attached.

[i] https://actionnetwork.org/user_files/user_files/000/042/993/original/final_OSHA_ETS_petition_5-18_filing.pdf.
[ii] https://strgnfibcom.blob.core.windows.net/nfibcom/NFIB-As-Filed-Chamber-OSHA-Amicus-Brief.pdf.
[iii] https://www.osha.gov/news/newsreleases/national/06112020.
[iv] The Incubation Period of Coronavirus Disease 2019 (COVID-19) From Publicly Reported Confirmed Cases: Estimation and Application. *Ann Intern Med* 2020; 172:577-582.