

COMMENTS OF WASHINGTON GAS LIGHT COMPANY

PART 1

These comments are submitted in two parts because the Company was unable to upload the document although the Company was within the prescribed word limit.

Washington Gas Light Company (“Washington Gas” or “Company”) appreciates the opportunity to provide comments on the draft regulations issued on June 12, 2020 by the Virginia Department of Labor and Industry (“DOL”), proposed 16 VAC 25-220, Emergency Temporary Standard/Emergency Regulation Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19 (“proposed regulations”).

Washington Gas, a public service company, is committed to the vision of “Safe employees, safe service and a safe public, today, tomorrow and the future.” In response to the COVID-19 pandemic, Washington Gas has proactively implemented various safety measures and protocols to ensure the safety of its customers, contractors, employees and the public at large, and has complied with safety and health guidelines and recommendations from the Centers for Disease Control (“CDC”), as well as social distancing directives in Virginia, Maryland and the District of Columbia. In internal and external messaging, the Company has consistently stressed the importance of wearing appropriate Personal Protective Equipment (“PPE”) and the importance of social distancing. The Company has emphasized to employees that they are not to come to work if they are experiencing any symptoms consistent with COVID-19 and it utilizes a questionnaire when arranging in-home service calls to determine whether the customer’s premise presents any elevated risk of exposure for our crews.

1. §10

(a) To avoid misinterpretation and ensure specific guidance is followed, the proposed regulation should reference the specific CDC guidelines (with dates) in place of the language reflecting CDC publications generally. Also, the language in this section suggests that if an employer complied with CDC guidelines, it would also be in compliance with the proposed regulations. However, some of the standards included in the proposed regulations are different than those required by the CDC (*e.g.*, the requirement to clean between each shift).

(b) In §10D.2.a., the phrase “COVID-19 person” is undefined and therefore ambiguous. Does the phrase mean “COVID-19 infection of a person”?

(c) In §10 D. 2. b., the phrase “contaminated surfaces” is undefined and therefore ambiguous. Does this mean frequently touched or high touch point surfaces? Dirty? Contaminated with COVID-19?

(d) Section 10E includes “temporary employees and other joint employment relationships, as well as persons in supervisory or management positions with the employer,” and thus greatly expands the applicability of the regulation. It also creates ambiguity regarding who is responsible for executing the requirements in this standard. “Employees” should be limited to those who are employed by an employer.

2. Section 20

It is unclear why the time period in which the regulations are in effect exceed the time period for the standard. If the standard has expired, the regulations cannot be effective. This needs to be clarified.

3. Section 30

(a) This section addresses (in part) to barriers for employees in the Low risk category. Washington Gas notes that while the CDC calls for physical barriers, the requirement for floor to ceiling barriers is more restrictive and could negatively impact building air flow and the operation of commercial HVAC systems. Physical barriers can be helpful but this language does not account for the flexibility of different types and sizes of physical barriers.

(b) The sample list of “Medium” exposure risk hazards or job tasks of proposed referenced in §30 includes a wide range of jobs. However, the regulation does not take into account that the risk of exposure may differ within job tasks. For example, although listed as one category, indoor construction settings and outdoor construction settings would not present the same risk of exposure. The Company recommends that the DOL either consider either moving outside construction work to a lower risk exposure category, or stratifying the Medium risk job tasks based on risk.

(c) Definition of “Economic feasibility:” The financial impact of COVID-19 is not in dispute. Employers should have flexibility to demonstrate economic infeasibility that is specific to their own business and acknowledge the cost recovery afforded to regulated businesses by their regulators. This criterion is vague as to how one would determine whether an employer lags behind the industry.

(d) Definition of “High” exposure risk tasks or jobs. This category should be limited to healthcare, emergency and mortuary services. For example, it is unclear what “non-medical support services” includes and whether this goes beyond those in healthcare, emergency, and mortuary services.

(e) In the definition of “Known COVID-19,” the clause “with reasonable diligence” is ambiguous and should be deleted. There is no guidance on what would be considered reasonable diligence.

(f) In the definition of “May be infected with SARS-CoV-2,” the clause “with moderate or substantial SARS-CoV-2 ongoing community transmission” is ambiguous. How should employers determine if a locality, city, town or county has moderate or substantial SARS-CoV-2 ongoing community transmission?

(g) For the definition of “Personal Protective Equipment,” for greater clarity, based on the existing body of law on the federal PPE standard, DOL should incorporate 29 CFR 1910.132 instead of an OSHA website reference.

(h) For the definition of “Surgical/Medical procedure mask,” DOL should add common examples of the difference between “Surgical/medical procedure mask” and “face covering” (also defined in §30).

(i) The definition of “Symptomatic” includes a reference to the CDC website which—with respect to COVID-19 (definition and symptoms)—is frequently updated. DOL therefore should include dates and screenshots of CDC and other websites to ensure that the regulated community understands the exact guidance referenced. Otherwise, regulated companies are unable to provide notice and comment to future versions of the publications in the footnotes and would thus be potentially deprived of due process rights.

(j) The concerns with the definition of “technical feasibility” is similar to that for the definition of “economic feasibility.” It is vague and unclear how could one demonstrate that an employer lags behind an industry. There are also due process concerns that make it difficult, if not impossible, to assert this defense/affirmative defense.

4. §40

(a) §40. A. 3. This section should be deleted in its entirety. Based on recent Equal Employment Opportunity Commission (“EEOC”) guidance, the Americans with Disabilities Act (“ADA”) prohibits employers from asking employees about results of antibody tests. See <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> at A.7. Antibody test results are confidential medical information, and 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.”

(b) §40A. 4. This provision should include the qualification “if confirmed to have symptoms of COVID-19” for “employee” used in the second sentence. Otherwise, this category could include reports that do not reflect COVID-19 symptoms.

(c) For §40 A.5., to avoid ambiguity, the definition of Section 40.B should be incorporated rather than simply referenced. The Company recommends: “...the job site as defined in see §40.B.” Written as is, the definition implies the need for a return to work clearance from a healthcare provider.

(d) The provision “To the extent feasible..... aware of these policies” in §40 A.5, if broadly interpreted, could have far reaching implications. In other jurisdictions, employers are merely

encouraged to provide flexible leave. “To the extent feasible,” creates vague requirements with respect to leave that must be provided.

(e) In §40 A.6., “contract” should be replaced with “contractor” (also in §40 A.7.), and the phrase “until cleared for return to work” should include the additional language “by their employer as defined in §40.B.”

(f) In §40A.7, DOL should consider that the 24-hour notification requirement would be difficult to meet for companies—such as Washington Gas—whose employees work different, potentially overlapping, shifts. Once Washington Gas is informed of a positive COVID-19 test, the Company immediately initiates an investigation—often within 24 hours—to determine other employees potentially exposed to the individual who tested positive. Despite these best efforts, there may be circumstances out of Washington Gas’ control when a potentially affected employee may not be notified within 24 hours (*e.g.*, if the potentially affected employee is on leave or does not answer their phone). Washington Gas makes purposeful notifications to appropriate employees based on CDC guidelines for contact tracing.

(g) In §40A.7 a, the phrase “its own employees” is overly broad. Does this require company-wide disclosure for all employees throughout the Commonwealth, or to employees who are close contacts (defined by CDC as 6 feet for 15 minutes or more)? Or to all other employees who worked at the same jobsite?

(h) §40A. 8, should be revised to include the underlined language: Each employer... exposure and medical records, if anyits specific industry. DOL should add a reference to OSHA’s June 18, 2020 guidance on this topic (<https://www.osha.gov/Publications/OSHA4045.pdf>), which clarifies that “If employers do not record workers’ temperatures, or if workers’ temperatures are recorded but not made or maintained by a physician, nurse, or other health care personnel or technician, the mere taking of a temperature would not amount to a record that must be retained.”

(i) In §40B, DOL should clarify whether protocols for testing prior to coming to work would be based on a checklist provided to employees and the use of the honor system by each employee complying, or whether there is there an expectation of the employer to validate this has been completed by each employee prior to coming to work. Although Washington Gas does not currently require antibody testing protocols and return to work stipulation, the Company would not oppose this if the regulations are established around the Health Insurance Portability and Accountability Act (“HIPAA”), EEOC, and ADA guidance.

(j) The phrase “refuses to be tested” in Sections 40.B. 1.b. (i) and 40 B. 2. B. (i) is problematic because it implies employers are inherently involved in the employee’s decision to use the symptom- or test-based strategy, and/or that tests must be offered as a first step. If this is true, it would be a departure from other jurisdictions passing similar standards and significant burden to the regulated community. It also poses practical issues—what if tests are not available?

(k) In Section 40.B. 1.b (ii), are employers required to offer and pay for COVID19 tests to everyone who leaves work with a headache (a symptom of COVID19)?

- (l) Washington Gas recommends the following additional language for §40 C.:

Unless otherwise provided in this standard/regulation, for example where the nature of an employee’s work or the work area does not allow them to observe physical distancing requirements....

(m) The proposed regulations in §40D.1.a. and b. do not include a definition of “common area,” leaving uncertain whether it would include areas such as hallways, conference rooms, or stairwells.

(n) Sections 40.D. 1.c., and 40. I. 5 require cleaning between or at the end of shifts. Washington Gas is concerned about the feasibility and practicality of these requirements, as worded because they do not appear to take in to account that the scenario of multiple or even overlapping shifts at a location, as explained above regarding Sections 10.A and 40.F. The DOL could require employees to clean and disinfect areas throughout the day, generally, rather than mandating a prescriptive regime that may not be practical.

(o) It is unclear whether face coverings (as defined in the regulation) could satisfy the standard in §40.E and F.

(p) In §40 I. 6., Washington Gas recommends the following additional language: “[W]here disinfecting is required, employers shallviral pathogens.”

(q) In §40 I. 8., replace “and” with “or” in the first sentence, so hand sanitizer is an option if soap and water is not available. Also, the provision for mobile crews to have “transportation immediately available.....” is vague, and the DOL should clarify. For example, what if the mobile crew drive themselves to the site? Will this run the risk of exposure via transportation requirements?

WASHINGTON GAS LIGHT COMMENTS – PART 2

5. §60

(a) Washington Gas recommends adding flexibility to all recommendations in Section 60 for medium risk employers to better align with national reopening standards. These should be suggested best practices rather than mandates. For example, OSHA’s June 18, 2020 publication on reopening states that in Phase 2 “non-essential business travel can resume.” <https://www.osha.gov/Publications/OSHA4045.pdf>. However, the proposed regulation prescribes postponing non-essential travel (See §50.11 and §60 B. 1.i.). Medium risk employers should have the flexibility to make these decisions depending on community spread in relevant jurisdictions per recent OSHA guidance.

(b) Washington Gas recommends including the phrase “To the extent feasible” at the beginning of §60 A. 1.

(c) The fact that the standards in §60.A are third-party publications and not publicly available regulations raises due process concerns. Not all employers will have access to these standards. Employers should be given the flexibility to determine whether their air-handling systems provide for increased ventilation in response to COVID-19 without the need to analyze these third-party standards. Furthermore, regulations may not be feasible at some sites due to existing infrastructure capabilities. CDC guidance regarding ventilation provides more flexibility for a greater range of infrastructure design, e.g. utilization of portable HEPA filtration equipment.

(d) Section 60 B.1.a. is ambiguous. For example, can employees prescreen or survey remotely before coming to work? Must this be done at the entrance to work? Must this include temperature screens? Similarly, the proposed regulation in Section 60 B. 1. b. is unclear because the phrase “non-employees” is not defined. Furthermore, there is no rationale for why this proposal applies only to non-employees.

(e) For §60. B. 1. f. and §60 B.1. g, respectively, Washington Gas recommends additional language:

f. Increase physical distancing between employees at the worksite to six feet (unless otherwise provided in this standard/regulation, for example where the nature of an employee’s work or the work area does not allow them to observe physical distancing requirements).

g. Increase physical distancing between employees and other persons (unless otherwise provided in this standard/regulation, for example where the nature of an employee’s work or the work area does not allow them observe physical distancing requirements)

The rationale for the additional language is that there are times when service employees may have to come within 6 feet of a customer. For example, when accepting cash.

(f) Washington Gas proposes the following addition to §60 C. 1. a. (i): “Except The types of PPE if any that ...” The vast majority of worksites outside of healthcare industry will not utilize PPE to protect employees from COVID19, because face coverings are explicitly defined to not be PPE. This concept should be made clearer in the standard/regulation.

(g) With respect to §60 C.2, Washington Gas notes that Global PPE Hazard Assessments should be allowed where the employer certifies that assessment was performed on representative and typical locations.

6. §70

(a) §70 C. 2. (iii) would require employers to ask employees about their other jobs and behavior outside of the workplace. Additional guidance is necessary on this point.

(b) The Company recommends deleting the language in §70 C. 2. (iii). B. (note: there is no subsection (“a”). Under the Americans with Disabilities Act, employers are required to engage in

an interactive process to accommodate disability requests. This language puts the onus on employers to guess job restrictions; instead, (1) employees should be educated on CDC high risk categories, and (2) employees who fall in a vulnerable category should be encouraged to request an accommodation. Treating these employees differently without their first making a request may violate federal law.

(c) DOL should clarify whether §70 C. 2 (iii) c. requires employers to list the referenced controls.

(d) Washington Gas recommends the following revised language for §70 C. 3:

~~Consider~~ Employers may include contingency plans for situations that may arise ~~as a result of outbreaks~~ due to the COVID-19 pandemic, such as....

Replacing “outbreak” is appropriate as this term is not defined. It appears that DOL is asking employers to create contingency plans where an outbreak occurs that go beyond the required administrative and work practice controls already required. If so, employers should be given great discretion as to how to incorporate this into a plan, if at all. These are business judgments, and employers will have to react to specific facts on these topics as issues raise.

(e) In §70 C. 6, the phrase “provide or contract or temporary employees” is ambiguous and should be clarified.

(f) §70 C.7. is repetitive of next section.

7. §80

Given the relatively lower risk exposure associated with medium exposure levels compared to very high or high, the DOL should consider requiring employers remove “medium” exposure level from this certification requirement provided that the required communications are provided to medium risk employees. In §80 C., DOL should clarify that §80 training does not apply to employers with jobs at medium exposure risk levels (at most).

8. §90

First, the Company recommends revising §90 C as follows: “No person shall discharge or in any way discriminate against an employee ~~who~~ because the employee raises.....” Second, the Company’s primary concern with §90 is that the scope of the regulation which includes “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” is overly expansive and should be limited to the employer or a government agency.

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