MSV℠ MEDICAL SOCIETY OF VIRGINIA

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Email to: jay.withrow@doli.virginia.gov
Jay Withrow, Director
Division of Legal Support, ORA, OPPPI, and OWP
Virginia Department of Labor and Industry
600 E. Main Street, Suite 207
Richmond, VA 23219

RE: Comments on 16 VAC 25-220, Permanent Standard for Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19

Dear Mr. Withrow:

On behalf of the Medical Society of Virginia (MSV), I am providing the following comments on 16 VAC 25-220, the permanent standard for COVID-19 prevention and mitigation in the workplace. Physicians and physician assistants have been on the front lines fighting the spread of COVID-19 in Virginia for more than six months. Medical practices have implemented extensive measures and follow detailed requirements and guidelines set forth by the Department of Health and Human Services (HHS), Centers for Disease Control and Prevention (CDC), Virginia Department of Health (VDH), and the Virginia Department of Labor and Industry (DOLI) to prevent, mitigate, and control the spread of COVID-19 in communities across the Commonwealth. We are grateful for the work put in by the Safety and Health Codes Board on the Emergency Temporary Standard, but we have several concerns with the draft permanent standard as written and the potential burden in could put on MSV members beyond the emergency period. Accordingly, as it considers the implementation of a permanent standard, we respectfully request that the Safety and Health Codes Board: 1) eliminate the requirement for employers to report positive SARS-CoV-2 test results to VDH; 2) clarify the return to work requirements regarding the test-based strategy; and 3) clarify the applicability of the permanent standard so that it is only in effect during a declared public health emergency related to COVID-19.

First, under the CARES Act, all clinical laboratories and testing providers in Virginia, many of which are physician practices, are required to report the results of any test to detect SARS-CoV-2 to VDH. As such, all positive tests are already being reported to VDH by the testing provider. Requiring an employer to report the test result to VDH in addition to that is duplicative and unnecessarily burdensome. We respectfully request this requirement be removed from the permanent standard.

Second, the draft permanent standard's test-based strategy for "Return to Work" is in conflict with recommendations from VDH and CDC. The draft permanent standard requires employers to select either a test-based strategy or a non-test-based strategy for determining whether employees known to be infected with SARS-CoV-2 can return to work. The test-based strategy would require the employee to have obtained two negative test results more than 24 hours apart. The problem is that a person may test positive for the virus for up to 120 days after being infected, even though the person is no longer infectious and the virus contagious after 10-20 days, depending on the severity.[1]

[1] Duration of Isolation and Precautions for Adults with COVID-19, Centers for Disease Control and Prevention (

Therefore, VDH and CDC recommend that a person who tests positive for SARS-CoV-2 not be tested again within three months. However, if an employer chooses to use the test-based strategy to determine whether employees can return to work, those employees could be absent from work unnecessarily for up to three months. In such a case, the employee would be forced to take unpaid leave if they do not have enough paid time off to cover the period beyond that which is required under the Families First Coronavirus Response Act and the Family and Medical Leave Act. Although the draft permanent standard would allow employers to select the non-test-based strategy for compliance, the option for a test-based strategy creates confusion for health care providers and employers already under a significant amount of pressure complying with other laws, regulations, and guidelines. Accordingly, we respectfully request the test-based strategy for known SARS-CoV-2 cases be eliminated or clarified in the permanent standard.

Lastly, the permanent standard, as currently written, will apply to Virginia businesses indefinitely, including at such a foreseeable time at which COVID-19 is no longer a critical public health emergency. Consequently, health care providers will still be required to comply with the strict requirements in this standard three years from now when most people have been immunized and effective treatments have been developed.

Most public health experts agree that the SARS-CoV-2 virus will never fully disappear. Over time, however, more effective treatments and vaccines will be developed to eliminate effectively the emergent public health threat. Accordingly, it is foreseeable that current prevention measures like those contained in this draft permanent standard will no longer be necessary in that instance.

We understand that such a time might not occur for another year or more and therefore appreciate the need for a permanent standard to be in place. However, we request that language be included to the effect that specifically limits application of these measures to a period of declared public health emergency due to COVID-19. That way businesses can operate without the burden of complying with regulations that are no longer necessary to protect public health once the public health emergency is over. And if there is a future outbreak of COVID-19 in Virginia that necessitates a declaration of public health emergency, this regulation could then become effective again.

We respectfully request the above changes to the draft permanent standard to provide clarity and certainty for health care providers and employers in the Commonwealth.

Sincerely,

Melina Davis
EVP and CEO, Medical Society of Virginia

cc: Clark Barrineau, AVP of Government Affairs, Medical Society of Virginia
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