



VIRGINIA TRUCKING ASSOCIATION

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September 25, 2020

Submitted Electronically

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RE: Comments of the Virginia Trucking Association
VA Department of Labor and Industry, Safety and Health Codes Board
16VAC25-220, Proposed Permanent Standard: Infectious Disease Prevention: SARSCoV2
Virus That Causes COVID-19

To Whom It May Concern:

Thank you for the opportunity to comment on the consideration of 16VAC25-220, Proposed Permanent Standard: Infectious Disease Prevention: SARS-CoV2 Virus That Causes COVID-19 by the Virginia Safety and Health Codes Board (collectively, the "Regulations"). These comments are provided on behalf of the Virginia Trucking Association (VTA).

As background, the VTA is the statewide association of trucking companies, private fleet operators, industry suppliers, and other firms interested in the well-being of motor freight motor transportation at the local, state and national level. Our membership includes family-owned and corporate trucking businesses engaged in the transport of goods and services throughout the Commonwealth of Virginia and the United States. The VTA membership includes companies that are headquartered in Virginia as well as companies headquartered in other states that have locations in Virginia and/or operate commercial vehicle in and through the Commonwealth.

It is well known that throughout the COVID-19 pandemic, the trucking industry has continued to operate as an essential service, providing critical transportation of the essential goods and services needed to sustain the population and the economy. Professional truck drivers are the heroes who have kept moving to ensure everyone has the goods they need to get through these challenging times.

The trucking industry has been able to continue operating by making commonsense adjustments to its operations, both on the road and within its shops and offices necessary to continue daily operations. Safety and Human Resources professionals within the trucking industry have spent countless hours

poring over guidelines and recommendations from medical and industry experts to draft continuation plans that work best for their operations and provide the highest and most practical level of safeguards for their employees to protect them from COVID-19.

Our position on safety has never wavered: Safety is of paramount importance. Since the onset of the COVID-19 pandemic, the VTA's member companies have remained committed to this principle, and as the Commonwealth and our nation begin to enter the recovery phase, the safety and health of their employees will continue to guide their decision-making.

Trucking holds the keys to the economic recovery of Virginia and the nation, and as an industry, we are prepared to meet that challenge. However, to meet that challenge, the industry cannot be hindered with burdensome, impractical and unclear regulations such as the current Emergency Temporary Standard (ETS) that is being considered as a permanent standard.

Therefore, we respectfully request that Board not adopt the ETS as 16VAC25-220, Permanent Standard: Infectious Disease Prevention: SARS-CoV2 Virus That Causes COVID-19.

Support of Comments filed by the Virginia Business Coalition.

The VTA is a member of the Virginia Business Coalition. We strongly support the comments filed by the Business Coalition and incorporate the concerns and issues they raised as part of these comments filed on behalf of the VTA. The remainder of these comments address concerns and issues with adoption of the ETS as a permanent standard.

The "One Size Fits All" ETS is Impractical in Many Ways for Trucking

The "One Size Fits All" approach of the proposed permanent standard makes compliance impractical and difficult for a highly mobile workforce like the trucking industry.

The interstate nature of trucking requires a national regulatory scheme that provides certainty and uniformity needed to provide efficient transportation services. Virginia has mostly followed this approach by adopting Virginia regulations that mirror federal OSHA regulations. Thus, any trucking fleet or driver knows they are in compliance while operating or working in the Commonwealth if they comply with the federal OSHA standards.

The issue of a federal ETS for COVID-19 has already been adjudicated at the federal level, with the US Court of Appeals for the District of Columbia Circuit denying the the AFL-CIO's May 18 petition as explained in the Business Coalition's comments. Virginia's adoption of the ETS as its own permanent standard will continue an uncertain and non-uniform compliance situation for trucking fleets operating in and through Virginia.

Specific Compliance Concerns and Issues for Trucking

We believe the ETS was drafted based on application to employers and employees in fixed facilities and workplaces, with little consideration for the compliance challenges imposed on trucking fleets and truck drivers. We assume that all trucking employees would be classified as "lower" or "medium" risk and will address these comments to the requirements for all employers and employees classified in those two risk categories.

The VTA has previously submitted to the Department a series of questions about how the ETS would be applied and enforced against the trucking industry. We greatly appreciate Department staff responding to the some of the questions we submitted, however several of our questions have yet to be addressed and we are still unclear about some of the issues we raised.

1. A very important question that we are still not clear about is whether the Department intends to follow the federal interpretation of jurisdictional issues between federal OSHA and the U.S. DOT. Federal OSHA states, “While traveling on public highways, the [U.S.] Department of Transportation (DOT) has jurisdiction. However, while loading and unloading trucks, OSHA regulations govern the safety and health of the workers and the responsibilities of employers to ensure their safety at the warehouse, at the dock, at the rig, at the construction site, at the airport terminal and in all places truckers go to deliver and pick up loads.”

Without clear guidance from the Department on this question, trucking fleets operating in Virginia are uncertain about exactly when their drivers are subject to the ETS and when they are not.

Additionally, in its answer to a question we posed about “industry standards” for PPE in regular trucking operations, the Department stated that “All federal OSHA identical standards and regulations enforced by VOSH in General Industry (29 CFR Part 1910) apply to general industry employers like the trucking industry, except where otherwise exempted by §4(b)(1) of the OSH Act of 1970. Two such standards are the Personal Protective Equipment (PPE) (1910.132[1]) and Respiratory Protection (1910.134[2]) standards. COVID-19 is a respiratory disease that spreads easily through airborne transmission between persons in contact with each other inside six feet, so the PPE and Respirator Standards are considered applicable.”

Does the Department’s response mean that any PPE and/or face coverings requirements in the ETS do not apply to two truck drivers operating subject to U.S. DOT regulations in a “team operation” on the highways of the Commonwealth occupying the same truck cab where a six-foot distance is impossible to achieve?

2. Another important, unresolved question involves “Exposure risk level.” We believe the vast majority of employees in the trucking industry, especially truck drivers, would be considered to have “Lower” exposure risk hazards or job tasks. However, if a truck driver is performing loading or unloading activities at a facility or business listed in the definition of “Medium” exposure risk hazards or job tasks, would that driver then be considered to be at a “medium” exposure risk level and subject to the requirements of the ETS for that exposure risk level?

3. The prescreening or surveying requirement in § 60.B.1.b is very difficult, if not impossible, for employers of truck drivers to comply with. Long-haul truck drivers are on the road working for weeks at a time. They change shifts after taking off-duty rest periods mandated by the federal government while they are on the road. Because such drivers do not regularly return to their employer’s physical facility between every shift, we are not sure how their employers would conduct this prescreening or surveying. Does the phrase “to the extent feasible” in B.1. mean that trucking employers in the situation described above will not be considered in violation of § 60.B.1.b?

4. We continue to strongly object to the whistleblower protection for employee complaints published to the news media and on social media in § 90.C. OSHA already provides whistleblower protection for truck drivers under the Surface Transportation Assistance Act (STAA). Under STAA, an employer may not

discharge or in any manner retaliate against truck drivers for refusing to operate a vehicle because they have a reasonable apprehension of serious injury to themselves. We believe this widely-known whistleblower protection for truck drivers is adequate for truck drivers to report any infectious disease safety concerns they may have.

Additionally, we strongly oppose any protections for workers that allow them to post any derogatory or disparaging comments about former or current employers to the public such as through print, online, social, or any other media. Whistleblower protection should be provided for employees to file complaints with government agencies where they can be fully investigated and acted on and not for public posts on social and other media where there is no accountability for the accuracy of the content, other than expensive legal action by the employer.

Conclusion

It is unreasonable to apply these “one size fits all” COVID-19 regulations to all employers and employees, especially an interstate business like trucking with a highly mobile workforce that does not work in brick and mortar facilities. Regulations written to address fixed facilities and businesses are impractical and difficult to comply with for the trucking industry as illustrated in the questions we have asked.

Safety is of paramount importance to the trucking industry as we continue to provide essential transportation service as we begin to reopen the economy. We will continue to provide the highest and most practical level of safeguards for our employees to protect them from COVID-19 as freight demand increases as our economy recovers. However, to efficiently meet that challenge, the industry cannot be hindered with the burdensome, impractical and unnecessary ETS as a permanent standard.

There are flaws in the ETS that need to be addressed and there is still confusion and uncertainty about application and enforcement of the ETS on trucking fleet employers. Therefore, we respectfully request that the Board reject adoption of the ETS as a permanent standard utilize the sufficient authority and enforcement powers it already has to address the concerns of unsafe work environments.

Please contact me if you need any additional information or have any questions regarding these comments or the trucking industry.

Sincerely,



P. Dale Bennett
President & CEO