



COMMONWEALTH of VIRGINIA
DEPARTMENT OF LABOR AND INDUSTRY

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DRAFT: January 10, 2021

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY
VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM
DRAFT FINAL PERMANENT STANDARD FOR INFECTIOUS DISEASE
PREVENTION OF THE SARS-COV-2 WHICH CAUSES COVID-19,
16VAC25-220

DEPARTMENT STANDARD RESPONSES TO ISSUES RAISED
BY PUBLIC COMMENTERS

Background

The Department received 238 written comments through the Virginia Regulatory Townhall for the 30 day written comment period from December 10, 2020 to January 9, 2021.

There were 21 written comments sent directly to the Department during the 30 day written comment period, although a number of those were also posted by the Commenter on the Virginia Regulatory Townhall.

There were 24 oral comments received during the public hearing on January 5, 2020.

Following are Department standard responses to issues raised by public commenters.

1. Pandemic Statistics.

The Department respectfully disagrees with the Commenter's assertion that the pandemic is much less impactful than originally feared. As of January 1, 2021, the pandemic 341,199 deaths have been attributed to COVID-19 in the U.S.¹ and 5,117 in Virginia.²

2. Notification to VDH – Reporting of Two or More Cases.

DOLI is recommending to the Board the following revision to 16VAC25-220-40.B.8.d [notification to VDH of positive cases] in the final standard:

“d. The Virginia Department of Health during a declaration of an emergency by the Governor pursuant to § 44-146.17. Every employer as defined by § 40.1-2 of the Code of Virginia shall report to the Virginia Department of Health (VDH) when the worksite has had **two or more confirmed cases of COVID-19 of its own employees present at the place of employment within a 14-day period testing positive for SARS-CoV-2 virus during that 14-day time period.** Employers shall make such a report in a manner specified by VDH, including name, date of birth, and contact information of each case, within 24 hours of becoming aware of such cases. Employers shall continue to report all cases until the local health department has closed the outbreak. After the outbreak is closed, subsequent identification of two or more confirmed cases of COVID-19 during a declared emergency shall be reported, as above. The following employers are exempt from this provision because of separate outbreak reporting requirements contained in 12VAC5-90-90: any residential or day program, service, or facility licensed or operated by any agency of the Commonwealth, school, child care center, or summer camp;” (Emphasis added).

3. Employer requirement to assess risk exposure for hazards and job tasks.

The Revised Proposed Standard, 16VAC25-220-40.B, provides that:

B. Exposure assessment and determination, notification requirements, and employee access to exposure and medical records.

1. Employers shall assess their workplace for hazards and job tasks that can potentially expose employees to the SARS-CoV-2 virus or COVID-19 disease. Employers shall classify each job task according to the hazards employees are potentially exposed to and ensure compliance with the applicable sections of this standard for very high, high, medium, or lower risk levels of exposure. Tasks that are similar in nature and expose employees to the same hazard may be grouped for classification purposes.

The Standard also provides in 16VAC25-220-10.D.1 provides in part:

¹ https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days

² <https://www.vdh.virginia.gov/coronavirus/covid-19-in-virginia/>

D. Application of this standard to a place of employment will be based on the exposure risk level presented by SARS-CoV-2 virus-related and COVID-19 disease-related hazards present or job tasks undertaken by employees at the place of employment as defined in this standard (i.e., very high, high, medium, and lower risk levels).

1. It is recognized that various hazards or job tasks at the same place of employment can be designated as very high, high, medium, or lower exposure risk for purposes of application of the requirements of this standard.

While employers are required to conduct the risk assessment, that determination is subject to review by the VOSH program as to whether the assessment was conducted in a reasonable fashion in accordance with the requirements of the standard.

4. Board Action in Response to Expiration of the Governor’s COVID-19 State of Emergency and Commissioner of Health’s COVID-19 Declaration of Public Emergency.

DOLI is recommending to the Board the following revision to 16VAC25-220-20.C in the final standard:

C. Within fourteen (14) days of the expiration of the Governor’s COVID-19 State of Emergency and Commissioner of Health’s COVID-19 Declaration of Public Emergency, the Virginia Safety and Health Codes Board shall notice a regular, special, or emergency meeting/conduct a regular, special, or emergency meeting to determine whether there is a continued need for the standard.

The new language in 16VAC25-220.C requires the Board to make a “determination” of whether there is continued need for the standard. The Department has identified three “determination” options:

- That there is no continued need for the standard;
- That there is a continued need for the standard with no changes; and
- That there is a continued need for a revised standard.

Regardless of the determination, the Department and Board will provide notice and comment opportunities on any changes to or revocation of the standard.

With regard to the phrase “notice a regular, special, or emergency meeting/conduct a regular, special, or emergency meeting to,” the intent of the language is to give the Board the maximum amount of flexibility to “notice” the Board meeting within 14 days even if the Board may not actually meet within 14 days

5. Alternative Diagnosis/Test Based Strategy.

Commenter 87847: The proposed standard requires employees known or to be infected with the SARS-CoV2 virus; not return to work until certain criteria are met, one of those criteria being a minimum of 10 days away from onset of symptoms. Unfortunately, COVID-19 virus signs and symptoms are consistent with several other common illness

or conditions; Flu, common Cold, sinus infections, migraine, allergies, food poisoning, etc.). This standard now eliminates the opportunity for an employee to prove they do not have COVID-19 and allow them return to work.

Department response: The Commenter is incorrect in stating that "This standard now eliminates the opportunity for an employee to prove they do not have COVID-19 and allow them return to work." 16VAC25-220-40.B.4 provides that "Employers shall develop and implement policies and procedures for employees to report when employees are experiencing symptoms consistent with COVID-19, and no alternative diagnosis has been made (e.g., tested positive for influenza).

In addition, §40, FAQ 30 provides some flexibility for employers to use COVID-19 testing in support of an "alternative diagnosis."

<https://www.doli.virginia.gov/cononavirus-covid-19-faqs/>

30. Can you provide some clarification on return to work and diagnosis requirements under the ETS? We want to isolate and test anyone with signs or symptoms of COVID-19 (defined under the ETS as "Suspected to be infected with SARS-CoV-2 virus"), but if the test comes back negative, we want to rule out COVID-19 as the diagnosis and treat the employee like they have a more common and less dangerous illness. The regulation is not clear on this and reads like we can only return them to work after two tests as if the initial presumption was correct.

16VAC25-220-20 defines the term "Suspected to be infected with SARS-CoV-2 virus" as:

“a person who has signs or symptoms of COVID-19 but has not tested positive for SARS-CoV-2, and no alternative diagnosis has been made (e.g., tested positive for influenza).”

If an employee HAS HAD “[close contact](#)” with a COVID-19 case and developed signs or symptoms, but tested negative for SARS-CoV-2, the employee should remain under quarantine for 14 days after last close contact with the COVID-19 case. Although not defined in the ETS, the Virginia Department of Health (VDH) and the CDC define “close contact” as meaning “you were within 6 feet of someone who has COVID-19 for a total of 15 minutes or more; you provided care at home to someone who is sick with COVID-19; you had direct physical contact with the person (hugged or kissed them); you shared eating or drinking utensils; or they sneezed, coughed, or somehow got respiratory droplets on you.”³

However, if the employee DID NOT have close contact with a COVID-19 case or an area with substantial COVID-19 transmission, but does have signs or symptoms and tested negative for SARS-CoV-2, the negative test can be considered as supporting an “alternative diagnosis”, and the person would not be considered suspected to be infected with SARS-CoV-2 virus. The employee must remain out of work until signs and symptoms have resolved and the employee has been fever-free for at least 24 hours

³ <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine.html>

without the use of fever-reducing medicine (unless symptoms are due to a known non-infectious cause, such as allergies).

NOTE: It is important to remember that a negative test for SARS-CoV-2 only means that the person wasn't infected at the time the test was taken. If the person is ill one week, tests negative for SARS-CoV-2, and recovers from their illness, only to become ill again soon after, there is always the potential that the repeat illness may be related to COVID. Each illness should be handled as a distinct situation, meaning, the employee should not always be considered to be COVID-19 negative because they tested negative previously.

6. Employees wearing face coverings with political statements.

Commenter 87852: If an employee continues to wear a political face covering and tries to cite this regulation as to why I can't fire him/her for doing so when political statements are not permitted in business attire, this will become a highly litigious situation.

Department response: The Department does not believe this Standard interferes with an employer's abilities to set workplace rules regarding the content of statements, designs, pictures, etc. on face coverings or any form of personal protective equipment or respirator required to provided and worn under VOSH laws, standards or regulations.

However, the Department is recommending the following language addition to 16VAC25-220-90.B: "Nothing in this subsection shall be construed to prohibit an employer from establishing and enforcing legally permissible dress code or similar requirements addressing the exterior appearance of personal protective equipment or face coverings."

7. Surgical masks versus face coverings.

Commenter 87876: The definitions of face covering and surgical mask in the proposed standard apparently aim to categorically disqualify, for reason unclear, use of surgical masks as face coverings. As an unintended result, the terminology has potential to increase employee risk, eliminate highly effective face covering options and thereby trigger a rush to buy compliant face coverings which may result in inadequate availability.

Department response: The Commenter is mistaken that the Standard disqualifies the use of surgical masks in favor of face coverings. Surgical masks are a form of personal protective equipment permitted under the standard. All employers in general industry (i.e., all companies not in construction, agriculture or maritime) are covered by the federal OSHA identical standard 1910.132, Personal Protective Equipment, and that standard requires covered employers in 1910.132(d):

1910.132(d)

Hazard assessment and equipment selection.

1910.132(d)(1)

The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE) [SUCH AS SURGICAL MASKS OR RESPIRATORS FOR POTENTIAL COVID-19 EXPOSURE]. If such hazards are present, or likely to be present, the employer shall:

1910.132(d)(1)(i)

Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment;

1910.132(d)(1)(ii)

Communicate selection decisions to each affected employee; and,

1910.132(d)(1)(iii)

Select PPE that properly fits each affected employee.

Note: Non-mandatory appendix B contains an example of procedures that would comply with the requirement for a hazard assessment.

1910.132(d)(2)

The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date(s) of the hazard assessment; and, which identifies the document as a certification of hazard assessment.

Requirements similar to 1910.132(d) also apply to employers in construction, agriculture and public sector maritime (federal OSHA has jurisdiction over private sector maritime) by virtue of 16VAC25-220-50.D and 16VAC25-220-60.D.

In addition, 16VAC25-220-50.D.5 (very high and high risk) specifically provides:

"5. Unless contraindicated by a hazard assessment and equipment selection requirements in subdivision 1 of this subsection, employees classified as very high or high exposure risk shall be provided with and wear gloves, a gown, a face shield or goggles, and a respirator when in contact with or inside six feet of patients or other persons known to be or suspected of being infected with SARS-CoV-2. Gowns shall be the correct size to assure protection."

Also, 16VAC220-60.C.1.j (medium risk) provides:

j. Employers shall provide and require employees to wear face coverings who, because of job tasks, cannot feasibly practice physical distancing from another employee or other person if the hazard assessment has determined that personal protective equipment, such as respirators or surgical/medical procedure masks, was not required for the job task.

8. Rapid Testing.

Commenter 87912: In addition, I urge VOSH and the DOLI to require all employers to test all workers frequently (e.g., using rapid tests) as an additional public-health tool to reduce the spread of COVID-19 throughout the state of Virginia. Too many people are dying daily. Virginia must protect all workers, their families, their friends, and their surrounding communities. I have included links to three articles about the importance of rapid testing during the COVID-19 pandemic.⁴

Department response: While the Department acknowledges the Commenter's request to require rapid testing, it does not plan to recommend to the Safety and Health Codes Board that such a requirement be added to the standard. As noted in the articles referenced by the Commenter, there are issues about widespread availability of the testing materials and costs associated with obtaining them in sufficient supply to conduct daily workplace testing, that are best suited to be addressed at the federal government level rather than at the state level.

9. VOSH Enforcement.

While VOSH is charged with assuring the protection of Virginia employees from occupational safety and health hazards, it has a long history of working cooperatively with employers to achieve that protection. It also has the legal authority to enforce applicable laws, standards, regulations and executive orders in situations where employers decide they do not want to take advantage of a cooperative working relationship.

COVID-19 related employee complaints received by the VOSH program that are within VOSH's jurisdiction are being addressed with employers. In an abundance of caution, at the beginning of the COVID-19 outbreak in Virginia the Department decided to modify its normal complaint processing procedures for both the safety and health of the employees at the work sites and its VOSH compliance officers by trying to limit exposure to the virus as much as possible while carrying out statutory enforcement mandates.

Rather than conducting a combination of onsite inspections and informal investigations as is the case under normal situations, COVID-19 complaints were initially handled through the VOSH program's complaint investigation process, which involves contacting the employer by phone, fax, email, or letter.

VOSH informed the employer of the complaint allegation and required a written response concerning the validity of the complaint allegation, any safety and health measures taken to date to protect employees against potential COVID-19 related hazards, and any measures to be taken in response to valid complaint allegations.

⁴ <https://www.harvardmagazine.com/2020/08/covid-19-test-for-public-health>
<https://www.wgbh.org/news/national-news/2020/11/23/harvard-epidemiologist-10-20-million-rapid-at-home-tests-per-day-would-be-enough-to-stop-the-outbreaks-across-the-united-states>
<https://time.com/5912705/covid-19-stop-spread-christmas/>

Employers were required to post a copy of VOSH’s correspondence where it would be readily accessible for review by employees; and provide a copy of the correspondence and the employer’s response to a representative of any recognized union or safety committee at the facility. Complainants were provided a copy of the employer’s response.

Depending on the specific facts of the employee’s alleged complaint, an employer’s failure to respond or inadequate response could result in additional contact by the VOSH program with the employer, a referral to local law enforcement officials, an onsite VOSH inspection, or other enforcement options available to the VOSH program.

COVID-19 “Inspections”

- Can result in violations and substantial penalties
- Inspections are opened for COVID-19 related employee deaths
- Inspections may be opened for COVID-19 related hospitalizations or handled through an investigation
- Inspection files with proposed violations will be reviewed by Headquarters and receive a legal review before a decision to issue or not issue is made

Since February, 2020, the Virginia Workers’ Compensation Commission received 9,773 COVID-19 related claims as of November 30, 2020 in a wide variety of industries and workplace settings.

Through January 1, 2021, VOSH has been notified of 2,823 work locations where 3 or more positive COVID-19 employee cases occurred within a 14 day period in a wide variety of industries and workplace settings.

Through January 1, 2021, VOSH has received 1,537 employee complaints and referrals from other government agencies. It has received notifications of 30 COVID-19 related employee deaths and 61 employee hospitalizations. To date, VOSH has opened 103 inspections, a number of which resulted from employers not taking advantage of either working cooperatively with the Virginia Department of Health, or not taking advantage of VOSH’s informal investigation process, which does not result in citations and penalties, provided the employer provides a satisfactory response.

Of the first 94 inspections conducted by VOSH, 43 remained under investigation as of January 4, 2021, 25 were closed with no violations issued, and 26 resulted in the issuance of violations (29 serious and 29 other-than-serious violations) and a total of \$226,780.00 in penalties.

10. Where Virginia Ranks in Controlling the Spread of the Virus.

Commenter 10004: “Indeed, while the agriculture industry continues to have success in controlling the virus on our operations, we have seen no similar correlation between decreased positivity or control of spread in the general population as a result of the ETS.”

Department response: The Department notes that the Commenter has not provided any data to support its contention that “the agriculture industry continues to have success in controlling the virus on our operations.”

The Department notes that a recent report by the U.S. Department of Agriculture found:

“On the health front, “The rural share of COVID-19 cases and deaths increased markedly during the fall of 2020. Rural areas have 14% of the population but accounted for 27% of COVID-19 deaths during the last three weeks of October 2020,” according to “Rural America at a Glance: 2020 Edition” from the U.S. Department of Agriculture's Economic Research Service, or ERS.”⁵

Study: More Than 125,000 Farmworkers Have Contracted Covid-19:⁶

“TUESDAY, SEPTEMBER 22, 2020

The Covid-19 virus has infected more than 125,000 U.S. farmworkers, according to the latest estimates in an ongoing study by Purdue University.

To arrive at their estimates, researchers applied the county-by-county rate of the infection’s spread to the number of farmworkers and farmers in those counties. As could be expected, the states with the most farmworkers – as estimated by farm labor spending in the U.S. Agricultural Census – top Purdue’s list. Three of the five states with the most farmworkers lead the list of infections. Texas has 15,410 farmworker infections, California has 10,640 and Florida has 6,380.

But after the top states, outliers pop up. The fourth through sixth highest number of farmworker infections are in Iowa (5,680), Tennessee (4,410) and Missouri (3,960). Each of those states ranked much higher in Covid-19 infections than in number of farmworkers.

What could account for the disparity?

Each of those states is notable for having no mandatory protections for farmworkers to fight Covid-19. Missouri and Tennessee have not even developed a set of voluntary guidelines for employers and employees to follow, and Iowa has recommended guidelines but no mandatory rules.”

The Department acknowledges that, as it predicted back in June and July of this year in its presentations to the Safety and Health Codes Board, that the COVID-19 pandemic could get much worse before it got better, which was a major reason for recommending adoption of an ETS. The Department notes the following statistics which are also highlighted in the January 4, 2021 Briefing Package for the Board⁷ beginning on page 36:

⁵ <https://www.agweek.com/business/agriculture/6819831-USDA-report-studies-pandemics-effect-on-rural-America>

⁶ <https://www.ewg.org/news-and-analysis/2020/09/study-more-125000-farmworkers-have-contracted-covid-19>

⁷ <https://www.doli.virginia.gov/wp-content/uploads/2021/01/BP-Final-Standard-for-SARS-CoV-2-that-Causes-COVID-19-DRAFT-1.4.2021.pdf>

As of December 22, 2020, Virginia ranked 45th in state rankings for total cases per 100K. The Virginia border states of Tennessee, Kentucky, North Carolina, Maryland, and West Virginia, none of which has an ETS, rank higher than Virginia:

7 - Tennessee

29 - Kentucky

39 - North Carolina

42 - Maryland

43 - West Virginia

45 – Virginia

As of December 26, 2020, Virginia ranked 30th in state rankings for average daily cases per 100K in last seven days. The Virginia border states of Tennessee, Kentucky, North Carolina, and West Virginia, none of which has an ETS, rank higher than Virginia. The only border state that outperformed Virginia in this metric was Maryland:

1 - Tennessee

6 - West Virginia

19 - North Carolina

25 - Kentucky

30 - Virginia

39 – Maryland

The Department is not suggesting that the ETS is the sole reason for Virginia's significantly better performance on key COVID-19 indicators than many other states. There are many factors that go into such an evaluation, not the least of which is the impact of Governor's Executive Orders and the commitment of Virginia's citizens, employers and employees to follow safe and health practices and implementing sound mitigation strategies.

11. Employee self-monitoring.

Commenter 20014: 16VAC25-220-40.B.2., page 22 - Employers to communicate to employees to self-monitor - is this meant to ensure reporting if suspect possible exposure? or just self-monitor? PLEASE CLARIFY.

Department Response: 16VAC25-220-40.B.2 provides:

"2. Employers shall inform employees of the methods of and encourage employees to self-monitor for signs and symptoms of COVID-19 if employees suspect possible exposure or are experiencing signs or symptoms of an illness.

16VAC25-220-40.B.2 is solely directed at self-monitoring of employees. It does not require employers to report "suspect possible exposure." Employee notification

requirements are contained in 16VAC25-220-40.B.8 and only apply to "positive SARS-CoV-2 tests."

12. Economic Impact Analysis.

An economic impact analysis (EIA) based on the requirements of Va. Code §2.2-4007.04⁸ will be issued no later than January 11, 2021. The EIA is being prepared by Chmura Economics & Analytics, a nationally recognized economic consulting firm.⁹

The Department does not intend to recommend that the Safety and Health Codes Board hold an additional comment period solely for the purpose of comment on the EIA.

Many of the requirements with associated costs related to the Commonwealth's response to the COVID-19 pandemic are contained in various Governor's Executive Orders, including most recently Executive Order 72. To the extent that a requirement is included in both Executive Orders and the standard, the Department does not consider the standard to impose any new cost burden on a covered locality.

In addition, many of the costs associated with dealing with workplace hazards associated with COVID-19 are the result of requirements contained in current federal OSHA or VOSH unique standards and regulations already applicable to local governments, and therefore the Department does not consider them to be new costs associated with adoption of the standard.

Following are federal OSHA identical and state unique standards and regulations applicable in the Construction Industry, Agriculture Industry, Maritime Industry (public sector employment only as OSHA retains jurisdiction over private sector employment in Virginia), and General Industry ("General Industry" covers all employers not otherwise classified as Construction, Agriculture, or Maritime) that can be used in certain situations to address COVID-19 hazards in the workplace:

General Industry

- 1910.132, Personal Protective Equipment in General Industry (including workplace assessment)
- 1910.133, Eye and Face Protection in General Industry
- 1910.134, Respiratory Protection in General Industry
- 1910.138, Hand Protection
- 1910.141, Sanitation in General Industry (including handwashing facilities)
- 1910.1030, Bloodborne pathogens in General Industry
- 1910.1450, Occupational exposure to hazardous chemicals in laboratories in General Industry

⁸ <https://law.lis.virginia.gov/vacode/title2.2/chapter40/section2.2-4007.04/>

⁹ <http://www.chmuraecon.com/>

Construction Industry

- 1926.95, Criteria for personal protective equipment in Construction
- 1926.102, Eye and Face Protection in Construction
- 1926.103, Respiratory Protection in Construction
- 16VAC25-160, Sanitation in Construction (including handwashing facilities)

Agriculture

- 16VAC25-190, Field Sanitation (including handwashing facilities) in Agriculture

Public Sector Maritime

- 1915.152, Shipyard Employment (Personal Protective Equipment)
- 1915.153, Shipyard Employment (Eye and Face Protection)
- 1915.154, Shipyard Employment (Respiratory Protection)
- 1915.157, Shipyard Employment (Hand and Body Protection)
- 1917.127, Marine Terminal Operations (Sanitation)
- 1917.92 and 1917.1(a)(2)(x), Marine Terminal Operations (Respiratory Protection, 1910.134)
- 1917.91, Marine Terminal Operations (Eye and Face Protection)
- 1917.95, Marine Terminal Operations (PPE, Other Protective Measures)
- 1918.95, Longshoring (Sanitation)
- 1918.102, Longshoring (Respiratory Protection)
- 1918.101, Longshoring (Eye and Face Protection)

Multiple Industries

- 16VAC25-220, Emergency Temporary Standard in General Industry, Construction, Agriculture and Public Sector Maritime
- 1904, Recording and Reporting Occupational Injuries and Illness in General Industry, Construction, Agriculture and Public Sector Maritime
- 1910.142, Temporary Labor Camps (including handwashing facilities) in Agriculture and General Industry
- 1910.1020, Access to employee exposure and medical records in General Industry, Construction, and Public Sector Maritime (excludes Agriculture)
- 1910.1200, Hazard Communication in General Industry, Construction, Agriculture and Public Sector Maritime
- 16VAC25-60-120 (General Industry), 16VAC25-60-130 (Construction Industry), 16VAC25-60-140 (Agriculture), and 16VAC25-60-150 (Public Sector Maritime), Manufacturer's specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment (can be used to apply to operation and

maintenance of air handling systems in accordance with manufacturer's instructions)

In addition, Va. Code §40.1-51.1.A, provides that:

“ A. It shall be the duty of every employer to furnish to each of his employees safe employment and a place of employment that is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees and to comply with all applicable occupational safety and health rules and regulations promulgated under this title.”

Otherwise known as the “general duty clause” (the Virginia equivalent to §5(a)(1) of the OSH Act of 1970), Va. Code §40.1-51.1.A can be used to address “serious” recognized hazards to which employees of the cited employer are exposed through reference to such things as national consensus standards, manufacturer's requirements, requirements of the Centers for Disease Control (CDC), or an employer's safety and health rules.

To the extent that the general duty clause could be used by the Department to address COVID-19 workplace hazards to the same extent as and in the same manner as the standard were the standard not in effect, the Department does not consider any of the costs associated with such use of the clause to be new costs associated with adoption of the standard.

13. Conflict Between Executive Orders and the ETS or final standard.

Commenter 20004: Conflict between EO and ETS: which to follow? Who has authority to enforce conflicts?

Department Response: Any conflicts identified between Governor's Executive Orders and the standard would be evaluated on a case by case basis depending on the fact of the situation. Employers can contact DOLI with such questions of interpretation by sending an email to webmaster@doli.virginia.gov.

Depending on the determination of whether the EO or ETS applied, enforcement authority would either be vested with VDH, VOSH, or other agencies having jurisdiction (e.g., Virginia Alcoholic Beverage Control Authority; Virginia Department of Agriculture and Consumer Services).

14. Changes in effective date for employee training.

Commenter 20015: Delayed effective date for training, etc. will leave gap in coverage. Especially since ETS currently has those requirements.

Department Response: The Department is recommending an expanded time for employee training from 30 days to 60 days in response to employer concerns expressed during multiple public comment opportunities about the ability to develop and provide effective training to management personnel and employees in 30 days. The Department does not believe the request is unreasonable in light of the unprecedented nature of the

pandemic and the need for employers to modify orientation and training materials for new hires and retraining materials for current employees. In addition, new businesses are being opened on a regular basis and should be afforded a sufficient time to develop and provide training. The Department does not intend to change its recommendation in response to the comment.

15. Outbreak notification changes.

Commenter 20015: "Outbreak" provision changes - we support current outbreak reporting as it is critical to report outbreaks to CDC/VDH.

Department Response: At the request of VDH, the Department proposed changing the COVID-19 case reporting requirement threshold from one case to two cases so that it aligned with current statutory/regulatory/procedural VDH reporting requirements. The lower reporting threshold was negatively impacting VDH's ability to effectively and efficiently use its limited employee resources and caused some confusion in the regulated community. The Department does not intend to change its recommendation in response to the comment.

16. Non-applicability of Administrative Process Act to adoption of a permanent standard under Va. Code §40.1-22(6a).

Commenter 20002: "I have substantial concerns with the proposed rule and strongly recommend the Board follow the full procedures of the Virginia Administrative Process Act (VAPA) (Va. Code 2.2-4000 et seq), as the Board committed to do."

Department Response: It is the position of the Department based on consultation with the Attorney General that by virtue of Va. Code §40.1-22(6a), the Administrative Process Act does not apply to adoption of either an ETS or permanent replacement standard adopted under the specific procedures outlined in that statute. As noted on page 180 of the June 23, 2020 Briefing Package to the Board regarding proposed adoption of an ETS/emergency regulation, the OAG noted: The clear intent of 40.1-22(6a) and 29 USC Section 655(c) in the OSH Act – is to create an alternative path to a temporary and permanent standard outside of the rigors and processes of the APA."

The Commenter is incorrect in stating that the Board committed to follow the full procedures of the Virginia Administrative Process Act (VAPA) (Va. Code 2.2-4000 et seq). The Board did make clear its intent during the adoption process for the ETS that during any process to adopt a permanent replacement standard it would attempt to substantially comply with the core requirements in the APA within the time constraints of the requirements of Va. Code §40.1-22(6a) by holding a 60 day written comment period and a public hearing along with obtaining an Economic Impact Analysis and holding a meeting to consider a final standard. All four of those conditions have or will be met by January 11, 2021.

17. PPE Shortages.

Commenter 20016:

Department Response: The Department respectfully disagrees with the Commenter's statement that "Proposed permanent standard rolls back on those protections by allowing "face coverings" when respirators are needed in certain circumstances. Current ETS was more appropriate and maintained respirator requirement when determined to be necessary."

16VAC25-220-10.C clearly states that:

"This standard is designed to supplement and enhance existing VOSH laws, rules, regulations, and standards applicable directly or indirectly to SARS-CoV-2 virus or COVID-19 disease-related hazards such as, but not limited to, those dealing with personal protective equipment, respiratory protective equipment, sanitation, access to employee exposure and medical records, occupational exposure to hazardous chemicals in laboratories, hazard communication, § 40.1-51.1 A of the Code of Virginia, etc. Should this standard conflict with an existing VOSH rule, regulation, or standard, the more stringent requirement from an occupational safety and health hazard prevention standpoint shall apply."

The standard does recognize the practical effects of the persistent shortage of certain types of PPE, including respirators in 16VAC25-220-10.C

"Notwithstanding anything to the contrary in this standard, no enforcement action shall be brought against an employer or institution for failure to provide PPE required by this standard, if (i) such PPE is not readily available on commercially reasonable terms, and (ii) the employer or institution makes a good faith effort to acquire or provide such PPE as is readily available on commercially reasonable terms. The Department of Labor and Industry shall consult with the Virginia Department of Health as to the ready availability of PPE on commercially reasonable terms and, in the event there are limited supplies of PPE, whether such supplies are being allocated to high risk or very high risk workplaces."

The Department interprets the phrase "no enforcement action" to mean that either no citation shall issue, or if a citation has already been issued it shall be vacated, "if such PPE is not readily available on commercially reasonable terms, and the employer or institution makes a good faith effort to acquire or provide such PPE as is readily available on commercially reasonable terms." The Department will still retain the right to carry out its statutory authority to conduct informal investigations or onsite inspections and verify employer compliance with this provision.

18. Reuse of Respirators.

The VOSH Program follows OSHA's April 3, 2020 Memorandum entitled "Enforcement Guidance for Respiratory Protection and the N95 Shortage Due to the Coronavirus Disease 2019 (COVID-19) Pandemic" which "outlines enforcement discretion to permit

the extended use and reuse of respirators, as well as the use of respirators that are beyond their manufacturer’s recommended shelf life (sometimes referred to as “expired”).”¹⁰

The VOSH Program also follows OSHA’s April 24, 2020 Memorandum entitled “Enforcement Guidance on Decontamination of Filtering Facepiece Respirators in Healthcare During the Coronavirus Disease 2019 (COVID-19) Pandemic.”¹¹

19. Impact of Vaccines.

Impact of Vaccines. “Community immunity [or herd immunity]: A situation in which a sufficient proportion of a population is immune to an infectious disease (through vaccination and/or prior illness) to make its spread from person to person unlikely. Current estimates for achieving community immunity in the U.S. range from 70% to 90%. There are over 329,000,000 people living in the United States, which means that between 230,000,000 and 296,000,000 people would have to develop immunity through either infection or vaccination. Vaccine manufacturing and deployment will take many months to reach the necessary number of people.

According to the CDC, “The protection someone gains from having an infection (called natural immunity) varies depending on the disease, and it varies from person to person. Since this virus is new, we don’t know how long natural immunity might last. Current evidence suggests that reinfection with the virus that causes COVID-19 is uncommon in the 90 days after initial infection. Regarding vaccination, we won’t know how long immunity lasts until we have a vaccine and more data on how well it works.”¹²

Virus mutations are also a known concern: “A new, highly contagious coronavirus variant that was first identified in Britain has reached the United States, officials in Colorado confirmed Tuesday, reporting the first known U.S. case of the strain more than two weeks after it was discovered — a worrying development as Covid-19 infections and deaths climb nationwide.

....

Researchers believe this new coronavirus variant — which U.K. officials disclosed earlier this month — is about 56% more contagious than other versions of the virus, an alarming figure even though it doesn’t appear to lead to deadlier infections. As of last week, the variant was already responsible for the majority of London’s Covid-19 infections, and officials have partly blamed it for a recent spike in U.K. Covid-19 cases that has forced much of the country back into strict lockdowns. Dozens of countries have banned or restricted travel from the United Kingdom in response, including the United States, which began requiring all U.K. travelers to show a negative coronavirus test before flying to the U.S. this week.

....

¹⁰ <https://www.osha.gov/memos/2020-04-03/enforcement-guidance-respiratory-protection-and-n95-shortage-due-coronavirus>

¹¹ <https://www.osha.gov/memos/2020-04-24/enforcement-guidance-decontamination-filtering-facepiece-respirators-healthcare>

¹² <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html>

Most infectious disease experts aren't surprised to see the new variant arrive in the United States. Last week, Dr. Anthony Fauci told ABC News it's "certainly possible" the mutation was already present in the country. But experts fear a more transmissible form of Covid-19 could make controlling the virus' spread even more difficult, adding to an already-dire surge in cases throughout the United States." (Emphasis added).

13

As of December 29, 2020, the CDC says: "While experts learn more about the protection that COVID-19 vaccines provide under real-life conditions, it will be important for everyone to continue using all the tools available to us to help stop this pandemic, like covering your mouth and nose with a mask, washing hands often, and staying at least 6 feet away from others. Together, COVID-19 vaccination and following CDC's recommendations for how to protect yourself and others will offer the best protection from getting and spreading COVID-19. Experts need to understand more about the protection that COVID-19 vaccines provide before deciding to change recommendations on steps everyone should take to slow the spread of the virus that causes COVID-19. Other factors, including how many people get vaccinated and how the virus is spreading in communities, will also affect this decision.

...

There is not enough information currently available to say if or when CDC will stop recommending that people wear masks and avoid close contact with others to help prevent the spread of the virus that causes COVID-19. Experts need to understand more about the protection that COVID-19 vaccines provide before making that decision. Other factors, including how many people get vaccinated and how the virus is spreading in communities, will also affect this decision."¹⁴

20. Removal of references to Executive Orders and Orders of Public Health Emergency.

The Department is recommending removal of the following provisions from the standard:

16VAC25-220-10.F:

F. This standard shall not conflict with requirements and guidelines applicable to businesses set out in any applicable Virginia executive order or order of public health emergency.

16VAC25-220-40.G:

G. Employers shall also ensure compliance with mandatory requirements of any applicable Virginia executive order or order of public health emergency.

16VAC25-220-70.C.9:

¹³ <https://www.forbes.com/sites/joewalsh/2021/12/29/first-us-case-of-new-covid-mutation-discovered-in-colorado/?sh=5560175e1d79>

¹⁴ <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html>

9. Ensure compliance with mandatory requirements of any applicable Virginia executive order or order of public health emergency related to the SARS-CoV-2 virus or COVID-19 disease.

Department Response: After discussions with legal counsel, the Department is recommending removal of the above language.

In addition, the language is considered redundant in light of Executive Order 72, Order of Public Health Emergency, Commonsense Surge Restrictions, Certain Temporary Restrictions Due to Novel Coronavirus (COVID-19), adopted on December 14, 2020, which provides as follows:

IV. ADDITIONAL PROVISIONS

A. Construction with the Emergency Temporary Standard “Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19”

Where the Emergency Temporary Standard “Infectious Disease Prevention: SARS-CoV2 Virus That Causes COVID-19” adopted by the Safety and Health Codes Board of the Virginia Department of Labor and Industry pursuant to 16 Va. Admin. Code §§ 25-60-20 and 25-60-30 conflicts with requirements and guidelines applicable to businesses in this Order, this Order shall govern.

21. Sick leave issue.

The Department does not plan to recommend changes to sick leave provisions in the Final Standard.

The Standard does not require employers to provide sick leave to employees. It does reference the Families First Coronavirus Response Act (FFCRA) at 16VAC25-220-40.B.6:

6. To the extent feasible and permitted by law, including but not limited to the Families First Coronavirus Response Act, employers shall ensure that sick leave policies are flexible and consistent with public health guidance and that employees are aware of these policies.

Further information about the FFCRA and sick leave policies can be found at: <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>

The Consolidated Appropriations Act (CAA 2021) was signed into law on December 27, 2020. “The CAA 2021 allows FFCRA-covered employers to voluntarily extend two types of emergency paid leaves through March 31, 2021 that were originally mandated between April 1, 2020 and December 31, 2020 by the Families First Coronavirus Response Act (FFCRA). These FFCRA leaves are Emergency Paid Sick Leave (EPSL) and Emergency Family and Medical Leave (EFMLA).

The FFCRA provided up to 10 days of EPSL, with varying levels of pay, for any of six COVID-19 qualifying reasons between April 1, 2020 and December 31, 2020. Carryover

of unused EPSL into 2021 was not allowed under the FFCRA—at least not as originally written.

The CAA 2021, however, amends the carryover provision of EPSL. Employers may now voluntarily choose to permit the carryover of unused 2020 EPSL into the first quarter of 2021. If they do, EPSL tax credits associated with this paid leave can be taken through March 31, 2021. The tax credits are an incentive for FFCRA-covered employers to choose to carryover unused EPSL.

It is important to note that the CAA 2021 does not provide employees with additional EPSL. Employees who emptied their EPSL tank of 10 days in 2020 have nothing to carry over into the first quarter of 2021 should their employers decide to allow EPSL carryover. The CAA 2021 merely extends the tax credit available to private employers under the FFCRA, and does not create new EPSL leave.

<https://www.jdsupra.com/legalnews/extension-of-emergency-ffcra-leaves-21991/>

22. Online Complaint Reporting to VDH.

Commenter 89272: I've been to many places where owners, employees, and customers alike all basically say 'screw it' and either wear a mask ineffectively (under the nose, or just all the way down the chin exposing nose and mouth) or don't wear them at all. I see offenders everywhere. Start writing tickets for not wearing masks/wearing them incorrectly. Check in on restaurants, gas stations, etc., without warning and fine the business for employees not masked.

Department Response: The Department does not have the legal authority to issue violations and penalties to members of the general public or employees, only to employers. See Va. Code §40.1-49.4. VDH has an online complaint system where you can file complaints about customers not wearing face coverings:

<https://redcap.vdh.virginia.gov/redcap/surveys/?s=Y4P9H7DTWA>

23. Return to work requirements for asymptomatic persons.

With regard to the Commenter's request to clarify asymptomatic [return to work] issues, the standard provides in 16VAC25-220-40.C.1.b provides:

b. Employees known to be infected with SARS-CoV-2 who never develop signs or symptoms [IN OTHERWORDS, THEY ARE ASYMPTOMATIC] are excluded from returning to work until 10 days after the date of their first positive RT-PCR test for SARS-CoV-2 RNA.

24. Enforcement responsibility for face covering requirements of the general public.

Commenter 87857: We have mask mandates, curfews and limits on social gatherings... and who is enforcing that? I don't mean who is supposed to enforce it, I want to know who is actually enforcing that? They're great ideas and people ought to follow them. But at least in my town, no one is enforcing these rules. Customers do whatever they want and employees keep their mouths shut because their crummy minimum wage job isn't

worth getting screamed at or assaulted....And who gets cited? The business is cited because the Commonwealth isn't standing up to the individual people outright defying the law. Yes, workers need to be protected and some standard should be in place... but can we level the playing field a little?

Department Response: The Department recognizes and understands the frustrations expressed by the Commenter about the unwillingness of some people to wear face coverings; however, please note that some people do have legitimate health concerns with wearing face coverings that are excused from having to wear them.

The Standard does not address the rights or protections of the general public, and more specifically, it does not contain a face covering mandate for the general public. That issue is the purview of the Virginia Department of Health and Governor's Executive Orders (e.g., Executive Order 72). VDH has legal authority under Executive Order 72 to enforce requirements (e.g., face covering mandates, curfews and limits on social gatherings) contained in that order.

[https://www.governor.virginia.gov/media/governorviriniagov/executive-actions/EO-72-and-Order-of-Public-Health-Emergency-Nine-Common-Sense-Surge-Restrictions-Certain-Temporary-Restrictions-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorviriniagov/executive-actions/EO-72-and-Order-of-Public-Health-Emergency-Nine-Common-Sense-Surge-Restrictions-Certain-Temporary-Restrictions-Due-to-Novel-Coronavirus-(COVID-19).pdf)

VDH also has an online complaint form that can be filled out by anyone to report violations of EO 72.

<https://redcap.vdh.virginia.gov/redcap/surveys/?s=Y4P9H7DTWA>

While the Virginia Department of Health (VDH) has some statutory and regulatory responsibilities in certain industries (restaurant permitting, temporary labor camp permitting, nursing home licensing, etc.), its primary focus is public safety, customer safety and patient safety. VDH has very limited and in some cases no enforcement options when it comes to requiring many of Virginia's industries to limit the spread of SARS-CoV-2 among employees and employers in the workplace.

In such cases where VDH does intervene in a workplace setting that does not fall under its jurisdiction, it will attempt to obtain the employer's agreement with Governor's Executive Orders, but it does not attempt to obtain the employer's agreement to comply with VOSH laws, standards, and regulations, such as VOSH's COVID-19 ETS or other applicable VOSH standards and regulations (e.g., personal protective equipment, respiratory protective equipment, etc.).

In cases where either an employer refuses to comply with Governor's Executive Orders or VDH suspects potential violations of VOSH laws, standards and regulations, it will make a referral to VOSH for either an informal investigation or an onsite inspection. Accordingly, it is neither legal nor appropriate from a policy standpoint for VOSH to cede jurisdiction to VDH to handle all COVID-19 issues.

25. Contact Tracing.

Commenter 88954: Reporting cases to VDH and/or VDL should only be required when workplace transmission of the virus has been established during contact tracing. Employees confirmed cases of COVID-19 that are attributable to exposures outside of the workplace, where contact tracing establishes no other employees have been in routine close contact in the workplace, should not be reportable. These are cases which are not the result of, or cause of, outbreaks in the workplace and therefore should not be reportable.

Department Response: The Department notes that 16VAC25-220-10.H. provides:

"Nothing in the standard shall be construed to require employers to conduct contact tracing of the SARS-CoV-2 virus or COVID-19 disease."

The Department does not intend to make the Commenter's suggested change that would require employers to conduct contact tracing in order to determine whether an employee's positive COVID-19 test was the result of exposure at work or outside of work, as that would add a significant new compliance burden for employers. VDH already has responsibility to conduct contact tracing and the expertise and resources to do so.

26. Return to work issues for employees who have had close contact with a positive COVID-19 person.

The CDC defines "close contact" as "Close contact" means you were within 6 feet of someone who has COVID-19 for a total of 15 minutes or more; you provided care at home to someone who is sick with COVID-19; you had direct physical contact with the person (hugged or kissed them); you shared eating or drinking utensils; or they sneezed, coughed, or somehow got respiratory droplets on you."

Close contact is used by the CDC and VDH for contact tracing purposes. The standard provides in 16VAC25-220-10.H:

H. Nothing in the standard shall be construed to require employers to conduct contact tracing of the SARS-CoV-2 virus or COVID-19 disease.

Close contact is also used for quarantine purposes. "Quarantine" is separation of people who were in "close contact" with a person with COVID-19 from others. The Standard does not address the issue of "quarantine."

Requirements for returning to work from "quarantine" is NOT covered by the ETS. Instead, Virginia Department of Health (VDH) guidelines apply (see §40, FAQs 26, 27, 28, 29, 30). <https://www.doli.virginia.gov/cononavirus-covid-19-faqs/>

VDH has responsibility for quarantine issues by statute and regulation.

27. Working age population exposure to virus.

The Department respectfully disagrees with the Commenter's statement that "The COVID-19 data for the working age population does not support a direct and immediate danger." There is overwhelming evidence to the contrary. The January 4, 2021 Briefing

Package for the Safety and Health Codes Board contains information in section V.C on the aging of the workforce and the high percentages of the American populace that are in COVID-19 high risk health categories:

“Older adults make up a large percentage of many of the jobs in these industries. For example, nearly half of bus drivers are older than 55, while almost 1 in 5 ticket takers and ushers are 65 or older. And although the BLS didn’t specifically call them out, farmers have also been impacted by the toll of the virus, with both prices of commodities and consumption declining. The median age of farmers and ranchers in the U.S. is 56.1 years old.” <https://www.seniorliving.org/research/senior-employment-outlook-covid/>

The CDC conducted a study of “Selected health conditions and risk factors, by age: United States, selected years 1988–1994 through 2015–2016” of the general population. Although the working population of the country is only a subset of the totals for the table, the data nonetheless demonstrates the significant risk that SARS-CoV-2 and COVID-19 related hazards pose to the U.S. and Virginia workers. Using the age adjusted statistical totals:

- 14.7% of the population suffer from diabetes,
- 12.2% from high cholesterol
- 30.2% suffer from hypertension
- 39.7% suffer from obesity

<https://www.cdc.gov/nchs/data/hus/2018/021.pdf>

The Briefing package also contains Virginia specific information on COVID-19 related workers' compensation claims, employee hospitalizations and employee deaths in section IV.E:

Since February, 2020, the Virginia Workers’ Compensation Commission received 9,773 COVID-19 related claims as of November 30, 2020.

Thirty employee deaths and 61 employee hospitalizations have been reported to VOSH as of January 1, 2021.

NOTE: The VOSH Program has investigated an average of 37 annual work-related employee deaths over the last five calendar years. The 30 COVID-19 death notifications so far in 2020 would represent 81% of the deaths investigated by VOSH in an average year.

November 4, 2020

**VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY
VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM
PROPOSED PERMANENT STANDARD FOR INFECTIOUS DISEASE
PREVENTION OF SARS-COV-2 WHICH CAUSES COVID-19, 16VAC25-220**

**DEPARTMENT STANDARD RESPONSES TO ISSUES RAISED
BY PUBLIC COMMENTERS**

Background

The Department received 993 written comments through the Virginia Regulatory Townhall for the 60 day written comment period from August 27, 2020 to September 25, 2020.

There were 33 written comments sent directly to the Department during the 60 day written comment period, although a number of those were also posted by the Commenter on the Virginia Regulatory Townhall.

There were 29 oral comments received during the public hearing on September 30, 2020.

Following are Department standard responses to issues raised by public commenters.

1. “No Mask Only” comments.

Over 200 comments were received in response to the Proposed Permanent Standard for Infectious Disease Prevention of the SARS-CoV-2 Virus That Causes COVID-19, 16VAC25-220 (“Standard”), solely opposed to any form of face covering (or “face mask”) requirement. The following responses are provided by VOSH in response to face covering issues raised by the comments:

The standard does not contain a public face covering mandate

16VAC25-220-10.C provides that the Standard applies “to every employer, employee, and place of employment in the Commonwealth of Virginia within the jurisdiction of the VOSH program....” The Standard does not contain a face covering mandate for the general public. That issue is the purview of the Virginia Department of Health and Governor’s Executive Orders (e.g., Executive Order 63¹⁵).

The Standard does require employees to wear either personal protective equipment, respiratory protection equipment, or face coverings in situations where physical distancing of six feet from other persons cannot be maintained.

Face covering requirements are not unconstitutional

For those commenters who argued that that certain gubernatorial mandates (e.g., “face mask” mandate) are unconstitutional, according to the Office of the Attorney General on at least twelve occasions the Governor’s COVID-19 restrictions have been upheld by circuit courts throughout the Commonwealth.¹⁶ Two of these specifically challenged the face covering requirements. *Schilling et al. v. Northam*, CL20-799 (Albemarle Co. Cir. Ct. July 20, 2020)¹⁷; *Strother, et al. v. Northam*, CL20-260 (Fauquier Co. Cir. Ct. June 29, 2020).¹⁸

Regulation versus legislation

Some commenters were under the impression that the Standard was being proposed as legislation to the General Assembly. That is incorrect. The Standard is being considered for adoption by the Virginia Safety and Health Codes Board pursuant to Va. Code §40.1-22(6a)¹⁹ and would be enforced by the Department of Labor and Industry’s (DOLI) Virginia Occupational Safety and Health (VOSH) Program.

Permanence of the standard

Some commenters raised concerns about a face covering mandate being “permanent”. The use of the word “permanent” in reference to the Standard reflects the fact that, if adopted, the Standard does not currently have a date on which it would expire.

¹⁵ <https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-63-and-Order-Of-Public-Health-Emergency-Five---Requirement-To-Wear-Face-Covering-While-Inside-Buildings.pdf>

¹⁶ <https://oag.state.va.us/media-center/news-releases/1769-july-21-2020-herring-again-successfully-defends-mask-requirement> (July 21, 2020, accessed Aug. 3, 2020).

¹⁷ Accessible at <https://oag.state.va.us/files/2020/Schilling-et-al-v-Northam.pdf>.

¹⁸ Accessible at <https://www.oag.state.va.us/files/2020/maskRequirementsCase.pdf>.

¹⁹ <https://law.lis.virginia.gov/vacode/40.1-22/>

However, the Board has the authority to amend or repeal the Standard as the workplace hazards associated with the SARS-CoV-2 virus and COVID-19 disease evolve and eventually lessen.

A medical exemption is provided for face coverings

Some commenters expressed concern about any face covering requirement that could present medical problems for a person with a pre-existing medical condition, such as asthma, etc. 16VAC25-220-40.I provides that:

“I. Nothing in this standard shall require the use of a respirator, surgical/medical procedure mask, or face covering by any employee for whom doing so would be contrary to the employee's health or safety because of a medical condition....”

Situations involving employers with an employee with a medical condition that does not allow them to wear a face covering when required while performing job tasks where physical distancing of six feet cannot be maintained are subject to requirements of the Americans With Disabilities Act (ADA). The ADA is enforced by the federal Equal Employment Opportunity Commission (EEOC).

The following link to the EEOC webpage with guidance on the ADA and COVID-19 issues can be used to research the core issue of whether the “high risk” category that the employee falls into is a “medical condition” that meets the definition of a “disability” under the ADA or not. Section D contains FAQs on “reasonable accommodations” that are provided to employees with a disability. The term “undue hardship” is referenced, and should be researched to see if it applies to the employer’s situation.

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

Commenters suggesting that sick people stay home instead of requiring the wearing of face coverings

Some commenters suggested that sick people stay home instead of requiring the wearing of face coverings. 16VAC25-220.B.5 specifically requires employers to assure that employees either known or suspected of being infected with SARS-CoV-2 not report to or remain at the work site or engage in work at a customer or client location until cleared for return to work.

However, it is well-documented in scientific literature that an estimated 20%²⁰ or more of persons infected with SARS-CoV-2 have no symptoms (are “asymptomatic”), while others may be infected and not show symptoms for several days (presymptomatic). Accordingly, simply telling sick people to stay home does not address the problem of potential asymptomatic and presymptomatic spread of SARS-CoV-2.

“Epidemiologic studies have documented SARS-CoV-2 transmission during the pre-

²⁰ <https://www.healthline.com/health-news/20-percent-of-people-with-covid-19-are-asymptomatic-but-can-spread-the-disease#Only-20%-remained-asymptomatic>

symptomatic incubation period, and asymptomatic transmission has been suggested in other reports. Virologic studies have also detected SARS-CoV-2 with RT-PCR low cycle thresholds, indicating larger quantities of viral RNA, and cultured viable virus among persons with asymptomatic and pre-symptomatic SARS-CoV-2 infection.

The exact degree of SARS-CoV-2 viral RNA shedding that confers risk of transmission is not yet clear. Risk of transmission is thought to be greatest when patients are symptomatic since viral shedding is greatest at the time of symptom onset and declines over the course of several days to weeks. However, the proportion of SARS-CoV-2 transmission in the population due to asymptomatic or pre-symptomatic infection compared to symptomatic infection is unclear.”²¹

Face coverings help in protecting against infection spread in the community and at work

“During a pandemic, cloth masks may be the only option available; however, they should be used as a last resort when medical masks and respirators are not available.”²²

....

The general public can use cloth masks to protect against infection spread in the community. In community settings, masks may be used in 2 ways. First, they may be used by sick persons to prevent spread of infection (source control), and most health organizations (including WHO and CDC) recommend such use. In fact, a recent CDC policy change with regard to community use of cloth masks²³ is also based on high risk for transmission from asymptomatic or presymptomatic persons.²⁴ According to some studies, ~25%–50% of persons with COVID-19 have mild cases or are asymptomatic and potentially can transmit infection to others. So in areas of high transmission, mask use as source control may prevent spread of infection from persons with asymptomatic, presymptomatic, or mild infections. If medical masks are prioritized for healthcare workers, the general public can use cloth masks as an alternative. Second, masks may be used by healthy persons to protect them from acquiring respiratory infections; some randomized controlled trials have shown masks to be efficacious in closed community settings, with and without the practice of hand hygiene.²⁵ Moreover, in a widespread pandemic, differentiating asymptomatic from healthy persons in the community is very difficult, so at least in high-transmission areas, universal face mask use may be beneficial. The general public should be educated about mask use because cloth masks may give users a false sense of protection because of their limited protection against acquiring infection.²⁶ Correctly putting on and taking off cloth masks improves

²¹ <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html>

²² <http://www.ijic.info/article/view/11366>

²³ <https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/face-masks.html>

²⁴ <https://bmcinfectdis.biomedcentral.com/articles/10.1186/s12879-019-4109-x>

²⁵ MacIntyre CR, Chughtai AA. Facemasks for the prevention of infection in healthcare and community settings. *BMJ*. 2015;350(apr09 1):h694.

²⁶ Institute of Medicine. Reusability of facemasks during an influenza pandemic: facing the flu. Washington (DC): The National Academies Press; 2006.

protection.²⁷ Taking a mask off is a high-risk process²⁸ because pathogens may be present on the outer surface of the mask and may result in self-contamination during removal.²⁹

Commenter's statements expressing a refusal to wear face coverings

To the extent that the commenters who opposed a mandatory face covering requirement can be considered to represent any significant percentage of people living, working or traveling through Virginia, their views expressing a refusal to wear masks in public or business settings, unintentionally strengthens the case for a face covering (or other personal protective equipment and respiratory protection equipment) requirement in the Standard.

The stated commenters bolster the credibility of research presented to the Board by the VOSH during the adoption process for the Emergency Temporary Standard (ETS),³⁰ that employees will face a higher risk of virus exposure in the coming months because a certain segment of the population will refuse to wear face coverings or observe physical distancing of at least 6 feet when interacting with employees.

2. Commenter's suggestion that a permanent standard is not needed.

The use of the word "permanent" in reference to the Standard reflects the fact that, if adopted, the Standard does not currently have a date on which it would expire. However, the Board has the authority to amend or repeal the Standard as the workplace hazards associated with the SARS-CoV-2 virus and COVID-19 disease evolve and eventually lessen.

3. Commenter's suggestion that it is not VOSH's job to "police" infections likely caused outside the workplace.

While many people become infected with SARS-CoV-2 in community settings that are not work-related, every person that becomes infected who is also an employee becomes a potential workplace source and transmitter of the virus if they report to work while still capable of transmitting the disease. There are numerous documented examples of the workplace spread SARS-CoV-2, which is also considered to be highly contagious. The introduction of an infectious disease into a workplace setting, regardless of the source, constitutes a workplace health hazard subject to regulation and enforcement by VOSH.

4. Commenter's suggestion that COVID-19 protections are better left to the Virginia Department of Health and Local Health Departments.

The VOSH program has clear statutory and regulatory jurisdiction over workplace safety and health issues in the Commonwealth, including the potential for spread of infectious diseases among employees and employers, and when those employees and employers

²⁷ <https://wwwnc.cdc.gov/eid/article/26/10/20-0948-t1>

²⁸ <https://www.sciencedirect.com/science/article/pii/S0196655318306801?via%3Dihub>

²⁹ <https://bmcinfectdis.biomedcentral.com/articles/10.1186/s12879-019-4109-x>

³⁰ <https://www.doli.virginia.gov/wp-content/uploads/2020/07/RIS-filed-RTD-Final-ETS-7.24.2020.pdf>

are potentially exposed to other persons who may be carriers of the infectious diseases (patients, customers, independent contractors, etc.).

While the Virginia Department of Health (VDH) has some statutory and regulatory responsibilities in certain industries (restaurant permitting, temporary labor camp permitting, nursing home licensing, etc.), its primary focus is public safety, customer safety and patient safety. VDH has very limited and in some cases no enforcement options when it comes to requiring many of Virginia's industries to limit the spread of SARS-CoV-2 among employees and employers in the workplace.

In such cases where VDH does intervene in a workplace setting that does not fall under its jurisdiction, it will attempt to obtain the employer's agreement with Governor's Executive Orders, but it does not attempt to obtain the employer's agreement to comply with VOSH laws, standards, and regulations, such as VOSH's COVID-19 ETS or other applicable VOSH standards and regulations (e.g., personal protective equipment, respiratory protective equipment, etc.).

In cases where either an employer refuses to comply with Governor's Executive Orders or VDH suspects potential violations of VOSH laws, standards and regulations, it will make a referral to VOSH for either an informal investigation or an onsite inspection. Accordingly, it is neither legal nor appropriate from a policy standpoint for VOSH to cede jurisdiction to VDH to handle all COVID-19 issues.

5. Definition of “suspected to be infected with sars-cov-2 virus” and the option for an alternative diagnosis.

16VAC25-220-40.B.4 of the COVID-19 Emergency Temporary Standard (ETS), provides that “Employers shall develop and implement policies and procedures for employees to report when employees are experiencing symptoms consistent with COVID-19, and no alternative diagnosis has been made (e.g., tested positive for influenza)...” Such employees are then classified as “Suspected to be infected with SARS-CoV-2 virus” and may not report to the workplace until they have been cleared for return to work in accordance with ETS requirements. In situations where there is the possibility for an alternative diagnosis (such as allergies, the common cold, the flu, an ear infection, etc.) the employer has a number of options, including but not limited to, a positive test for influenza or the employee obtaining an alternative diagnosis from a medical authority.

In addition, the Virginia Department of Health provides the following guidance:

If the employee DID NOT have close contact with a COVID-19 case or an area with substantial COVID-19 transmission, but does have signs or symptoms and tested negative for SARS-CoV-2, the negative test can be considered as supporting an “alternative diagnosis”, and the person would not be considered suspected to be infected with SARS-CoV-2 virus. The employee must remain out of work until signs and symptoms have resolved and the employee has been fever-free for at least 24 hours without the use of fever-reducing medicine (unless symptoms are due to a known non-infectious cause, such as allergies).

NOTE: It is important to remember that a negative test for SARS-CoV-2 only means that the person wasn't infected at the time the test was taken. If the person is ill one week, tests negative for SARS-CoV-2, and recovers from their illness, only to become ill again soon after, there is always the potential that the repeat illness may be related to COVID. Each illness should be handled as a distinct situation, meaning, the employee should not always be considered to be COVID-19 negative because they tested negative previously.

6. Commenter's suggestion that businesses are already subject to too many regulations.

There is substantial scientific evidence and infection, hospitalization and death statistics that support the conclusion that SARS-CoV-2 presents a danger to employees in the workplace.

It is the Department's position that the danger posed to employees and employers by the SARS-CoV-2 virus and COVID-19 disease are necessary and appropriate to regulate after the expiration of the current COVID-19 Emergency Temporary Standard (ETS) on January 26, 2021. The number of COVID-19 daily infections in Virginia and the United States continue to support the conclusion of ongoing widespread community transmission and the continuing possibility of the introduction of SARS-CoV-2 into Virginia's workplaces for many months to come. It is well recognized that one or more vaccines will not be widely available to the public and employees until well after January 26, 2021.

The Department also believes that the Standard will ultimately help businesses to grow and bring customers back when those customers see that employers are providing employees with appropriate protections required by the Standard from SARS-CoV-2. If customers don't feel safe because employees don't feel safe, it will be hard for a business to prosper in a situation where there is ongoing community spread.

7. Commenter's suggestion that employers should just have to comply with CDC and Virginia Department of Health requirements.

The Department notes that the Standard provides flexibility to business through 16VAC25-220-10.G.1 which provides that "To the extent that an employer actually complies with a recommendation contained in CDC guidelines, whether mandatory or non-mandatory, to mitigate SARS-CoV-2 virus and COVID-19 disease related hazards or job tasks addressed by this standard, and provided that the CDC recommendation provides equivalent or greater protection than provided by a provision of this standard, the employer's actions shall be considered in compliance with this standard. An employer's actual compliance with a recommendation contained in CDC guidelines, whether mandatory or non-mandatory, to mitigate SARS-COV-2 and COVID19 related hazards or job tasks addressed by this standard shall be considered evidence of good faith in any enforcement proceeding related to this standard."

The Department does not intend to recommend any change to 16VAC25-220-10.G.1. A specific reference to "hospitals, health systems, and other facilities under their control" is unnecessary as the above provision applies to all employers wishing to take advantage of its provisions.

8. Commenter’s suggestion that public and private institutions of higher education and public and private schools should just have to comply with CDC, Virginia Department of Health and/or SCHEV requirements.

The Department notes that the Standard provides flexibility to schools through 16VAC25-220-10.G.2 which provides that “Public and private institutions of higher education that have received certification from the State Council of Higher Education of Virginia that the institution’s re-opening plans are in compliance with guidance documents, whether mandatory or non-mandatory, developed by the Governor’s Office in conjunction with the Virginia Department of Health, shall be considered in compliance with this standard, provided the institution operates in compliance with their certified reopening plans and the certified reopening plans provide equivalent or greater levels of employee protection than this standard.”

The Department notes that the Standard provides flexibility to schools through 16VAC25-220-10.G.2 “A public school division or private school that submits its plans to the Virginia Department of Education to move to Phase II and Phase III that are aligned with CDC guidance for reopening of schools that provide equivalent or greater levels of employee protection than a provision of this standard and who operate in compliance with the public school division’s or private school’s submitted plans shall be considered in compliance with this standard. An institution’s actual compliance with recommendations contained in CDC guidelines or the Virginia Department of Education guidance, whether mandatory or non-mandatory, to mitigate SARS-CoV-2 and COVID-19 related hazards or job tasks addressed by this standard shall be considered evidence of good faith in any enforcement proceeding related to this standard.”

9. Return to work requirements in the standard are different from the CDC requirements.

The issue of the differences between the Standard's return to work requirement and those of the CDC will be addressed in the revised proposed permanent standard. A Frequently Asked Question (FAQ) provided by DOLI addresses the issue as it pertains to the current Emergency Temporary Standard (ETS).

On July 22, 2020, the CDC changed its guidance with regard to symptoms-based strategies from exclusion for 10 days after symptom onset and resolution of fever for at least 3 days to exclusion for 10 days after symptom onset and resolution of fever for at least 24 hours (i.e., the change was from 72 hours to 24 hours). For persons who never develop symptoms (i.e., asymptomatic), isolation and other precautions can be discontinued 10 days after the date of their first positive RT-PCR test for SARS-CoV-2 RNA.

16VAC25-220-10.G.1 provides in part that:

To the extent that an employer actually complies with a recommendation contained in CDC guidelines, whether mandatory or non-mandatory, to mitigate SARS-CoV-2 virus and COVID-19 disease related hazards or job tasks addressed by this standard, and provided that the CDC recommendation provides equivalent or greater protection than provided by a provision of this standard, the employer's actions shall be considered in compliance with this standard.... (Emphasis added).

Employers who comply with the above-referenced change in CDC guidance issued July 22, 2020, will be considered to be providing protection equivalent to protection provided by complying with the requirements in the ETS.

However, nothing in the FAQ shall be construed to prohibit an employer from complying with the symptom-based or time-based strategies for return to work determinations in the ETS. (See §40 FAQ 18, <https://www.doli.virginia.gov/cononavirus-covid-19-faqs/>)

10. Commenter's suggestion that if workers aren't willing to take responsibility for themselves out in public then employers should not be forced to take the responsibility for them.

The Commenter asks why employers should provide strong workplace protections to prevent the spread of SARS-CoV-2, when employees can get infected anyway by not maintaining the same kind of protections in their private life, and then apparently bring that infection back into the workplace. It is exactly because there currently is a real possibility that infections obtained outside of work – whether by an employee, or a customer, or a patient, or a subcontractor – that employers need to maintain workplace COVID-19 protections for those employees who do act responsibly away from work.

11. Political commentary.

The Department has no response to the Commenter's political commentary.

12. Notice and comment procedures followed on the Standard.

The proposed permanent standard has been subject to the following notice and comment procedures. The Virginia Safety and Health Codes Board held a 60 day written comment period for the Proposed Permanent Standard, with the comment period running from August 27, 2020 to September 25, 2020. The Board held a Public Hearing on September 30, 2020. A revised draft of the Proposed Permanent Standard will be published with an additional 30 day comment period prior to any Board action. A public hearing will also be held.

13. The Department does not anticipate a large increase in litigation with regard to the Emergency Temporary Standard or any permanent standard.

Review of all COVID-19 related inspections under the Emergency Temporary Standard is conducted centrally by the Department with both a programmatic and legal review prior to a decision to issue or not issue violations/penalties to assure consistent

enforcement across the Commonwealth. The Department does not anticipate any significant increase in litigation with regard to the Emergency Temporary Standard or any permanent standard.

14. No substantive issues raised.

The Department acknowledges the Comment and has no additional response as the Commenter did not raise any substantive issues.

15. Travel regulations.

The Standard does not contain travel regulations.

16. Six foot separation at all times.

If your employees are able to maintain physical distancing of 6 feet from other persons (employees, customers, etc.) at all times, than it is appropriate for their job tasks to be classified as “lower risk.” Please note that the definition for “lower risk” also provides that “when it is necessary for an employee to have brief contact with others inside the six feet distance a face covering is required”, and still allows the job tasks to remain classified as lower risk.

Employers that are able to modify job tasks and mitigate potential exposure to SARS-CoV-2 to the extent that they can classify their employees as lower risk greatly reduce their compliance burden under the Standard. Such employers will not have to comply with the additional requirements contained in 16VAC25-220-60 for medium risk hazards and job tasks; nor will they have to develop an infectious disease preparedness and response plan under 16VAC25-220-70.

Finally, such employers will be able avoid the large majority of the training requirements under 16VAC25-220-80, with the exception that employees have to be provided with written or oral information on the hazards and characteristics of SARS-COV-2 and the symptoms of COVID-19 and measures to minimize exposure. The Department has developed an information sheet which satisfies this requirement which can be found at: <https://www.doli.virginia.gov/wp-content/uploads/2020/07/Lower-Risk-Training-1.pdf>.

17. Greater hazard issues.

The Standard requires employers to provide and employees in customer facing positions to wear a face covering. If the employer is concerned that employee use of a face covering may present a greater safety or health hazard to employees than compliance with the Standard (e.g., the inability to communicate coherently with another employee during a potentially hazardous job task) the issue needs to be assessed during the personal protective equipment (PPE) hazard assessment process required either under the Standard (see 16VAC25-220-50.D for very high and high risk situations, and 16VAC25-220.60.D for medium risk situations) or 1910.132(d) for general industry employers. The PPE hazard assessment process will allow the employer to identify any

potential situations where there may be a greater hazard presented and develop alternative protections for employees.

PPE

16VAC25-220-40.F provides: "F. When multiple employees are occupying a vehicle for work purposes, the employer shall ensure compliance with respiratory protection and personal protective equipment standards applicable to the employer's industry. If the employer is concerned that employee use of a face covering may present a greater safety or health hazard to employees than compliance with the Standard (e.g., the inability to communicate coherently with another employee during a potentially hazardous job task) the issue needs to be assessed during the personal protective equipment (PPE) hazard assessment process required either under the Standard (see 16VAC25-220-50.D for very high and high risk situations, and 16VAC25-220.60.D for medium risk situations) or 1910.132(d) for general industry employers. The PPE hazard assessment process will allow the employer to identify any potential situations where there may be a greater hazard presented and develop alternative protections for employees.

Heat Illness

If the employer is concerned that employee use of a face covering may present a greater safety or health hazard to employees to employees exposed to hot environments than compliance with the Standard (e.g., the inability to communicate coherently with another employee during a potentially hazardous job task) the issue needs to be assessed during the personal protective equipment (PPE) hazard assessment process required either under the Standard (see 16VAC25-220-50.D for very high and high risk situations, and 16VAC25-220.60.D for medium risk situations) or 1910.132(d) for general industry employers. The PPE hazard assessment process will allow the employer to identify any potential situations where there may be a greater hazard presented due to hot environments and develop alternative protections for employees.

In addition, 16VAC25-220-80.B.8.f provides that training on the standard provided to employees shall include with regard to PPE: "Heat-related illness prevention including the signs and symptoms of heat-related illness...."

18. Regulation versus legislation.

This Standard is not being proposed as legislation to the General Assembly. The Standard is being considered for adoption by the Virginia Safety and Health Codes Board pursuant to Va. Code §40.1-22(6a) and would be enforced by the Department of Labor and Industry's (DOLI) Virginia Occupational Safety and Health (VOSH) Program.

19. Similarly situated employees should be provided the same level of protection (request for healthcare industry exemption from the standard).

Employees and employers in the healthcare industry are exposed to the same and even greater COVID-19 related hazards and job tasks as employees in other industries. It is the Department's position that similarly situated employees and employers exposed to the same or even more serious hazards or job task should all be provided the same basic level of safety and health protections.

An exemption from the Standard for employers and employees in the healthcare industry is therefore inappropriate.

20. The Standard does not address the rights of the general public.

16VAC25-220-10.C provides that the Standard applies “to every employer, employee, and place of employment in the Commonwealth of Virginia within the jurisdiction of the VOSH program....” The Standard does not address the rights or protections of the general public.

21. Small business resources.

The Department acknowledges that all of its VOSH laws, standards and regulations can serve to place compliance burdens on employers and employees, particularly in the small business sector. The Department also believes that employers that embrace providing sound and comprehensive workplace safety and health protections can make their business more efficient and profitable through such benefits as reduced injuries, illnesses and fatalities, reduced workers’ compensation costs, reduced insurance costs, improvements in morale and innovation, and increased productivity.

The Department strongly encourages Virginia’s small business owners to take advantage of free and confidential occupational safety and health onsite and virtual consultation and training services to address COVID-19 compliance issues. More information about the VOSH Consultation Services can be found at: <https://www.doli.virginia.gov/vosh-programs/consultation/>

In addition, free Outreach, Training, and Educational materials to assure compliance with COVID-19 requirements can be found at: <https://www.doli.virginia.gov/covid-19-outreach-education-and-training/>

22. “At will employment”.

The Department has no response concerning the Commenter's reference to "at will employment" in Virginia other than to note that employers within the jurisdiction of the VOSH program are required to provide safe and health workplaces for their employees.

23. Other States that have adopted COVID-19 related workplace safety and health regulations.

The states of Virginia, Washington, Michigan, Oregon and California have adopted COVID-19 related workplace safety and health regulations.

24. Whistleblower provision in 16VAC25-220-90.C does not provide protection for unsubstantiated or false claims against an employer.

The Department does not intend to recommend any change to 16VAC25-220-90.C as it is the position of the Department that it reflects the current state of case law on the subject.

Pursuant to Va. Code §40.1-51.2:1, employees are protected from discrimination when they engage in activities protected by Title 40.1 of the Code of Virginia (“because the employee has filed a safety or health complaint or has testified or otherwise acted to exercise rights under the safety and health provisions of this title for themselves or others.”).

Whether an employee engaged in a “protected activity” under Title 40.1 is very fact specific, but can include occupational safety and health information shared by an employee about their employer on a social media or other public platform in certain situations.

16VAC25-220-90.C provides that:

No person shall discharge or in any way discriminate against an employee who raises a reasonable concern about infection control related to the SARS-CoV-2 virus and COVID-19 disease to 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.

If an employee raises an unsubstantiated COVID-19 related claim or makes a false COVID-19 related claim against their employer through print, online, social, or any other media, such an act by an employee would not be considered “reasonable” under the ETS and disciplinary action taken against the employee in accordance with the employer’s human resource policies would not be considered “discrimination” under the ETS/ER or Va. Code §40.1-51.2:1.

25. ASHRAE air handling requirements.

The Department acknowledges the comment and notes that the ASHRAE air handling requirements issue raised by the Commenter is undergoing a legal review.

25. Quarantine and isolation explained.

The Standard does not address the issue of "quarantine". “Quarantine” is separation of people who were in “close contact” with a person with COVID-19 from others. The Standard does address the issue of "isolation".

“Isolation” is the separation of people with COVID-19 from others. People in isolation need to stay home and separate themselves from others in the home as much as possible. Requirements for returning to work from isolation is covered by the ETS in 16VAC25-220-40.C. However, please note that in lieu of complying with 16VAC25-220-40.C, employers may comply with recently updated CDC guidelines (see §40 FAQ 18, <https://www.doli.virginia.gov/cononavirus-covid-19-faqs/>).

26. Economic impact analysis/cost analysis.

An economic impact analysis/cost analysis will be prepared for the revised proposed permanent standard.

27. VOSH penalties.

Any penalties collected by the Commonwealth in response to VOSH COVID-19 related inspections is deposited in the General Fund of the Commonwealth and not the Department of Labor and Industry's budget.

28. The Standard does not cover other infectious diseases.

The Standard does not cover other infectious diseases like influenza, tuberculosis, etc.

29. Employee temperature checks are not specifically required during prescreening.

Although it is a generally accepted practice, the Standard does not specifically require that employers check the temperatures of employees. 16VAC25-220-50.C.1 provides that "Prior to the commencement of each work shift, prescreening or surveying shall be required to verify each covered employee does not have signs or symptoms of COVID-19." Employers are provided the flexibility to determine what form of prescreening they will use to determine that "each covered employee does not have signs or symptoms of COVID-19."

30. Safe harbor issue.

With regard to the "safe harbor" issue, the Department notes that the Standard provides flexibility to business through 16VAC25-220-10.G.1 which provides that "To the extent that an employer actually complies with a recommendation contained in CDC guidelines, whether mandatory or non-mandatory, to mitigate SARS-CoV-2 virus and COVID-19 disease related hazards or job tasks addressed by this standard, and provided that the CDC recommendation provides equivalent or greater protection than provided by a provision of this standard, the employer's actions shall be considered in compliance with this standard."

The Standard is clear that employer's wishing to take advantage of 16VAC25-220-10.G.1 must comply with both mandatory and non-mandatory provisions in the specific CDC guidelines, and those provisions must provide equivalent or greater protection than provided by a provision of the Standard.

The Department does not plan to recommend that 16VAC25-220-10.G be returned to its original language. It is the Department's position that similarly situated employees and employers exposed to the same or even more serious hazards or job task should all be provided the same basic level of safety and health protections. The Standard's language in 16VAC25-220-10.G assures such protections.

31. FAQs.

Frequently Asked Questions (FAQs) are available at:
<https://www.doli.virginia.gov/cononavirus-covid-19-faqs/>

32. Price gouging for PPE.

Price gouging complaints during a state of emergency in Virginia can be filed with the Office of the Attorney General (OAG): https://www.oag.state.va.us/consumer-protection/index.php?option=com_content&view=article&id=181#:~:text=File%20a%20Price%20Gouging%20complaint,Office%20of%20Weights%20and%20Measures.

33. Face covering definition.

The Department intends to recommend a change to the definition of face covering.

34. Commenter's suggestion that only Virginia citizens should be able to file comments.

The Department does not have any control over who can file comments to standards and regulations. That is within the purview of the General Assembly.

35. Commenter's suggestion that the Standard is "one size fits all".

The Department disagrees that the Standard is a "one size fits all" regulatory approach.

At its core the Standard is a risk management system to prevent or limit the spread in the workplace of the SARS-CoV-2 virus which causes COVID-19.

It is designed to provide basic protections for all employees and employers within the jurisdiction of the Virginia Occupational Safety and Health program.

It provides certain mandatory requirements for all employers and specific additional requirements for Very High, High, and Medium risk job tasks centered around mitigation of hazards.

The Standard is also designed to incentivize employers to make changes in the workplace that will enable employees in certain situations to be classified to a reduced level of risk (e.g., from high to medium or from medium to lower), thereby also reducing the employer's compliance and cost burdens.

36. Vaccinations.

COVID-19 vaccines will be an important part of the Commonwealth's and the country's ability to significantly reduce the ongoing spread of the SARS-CoV-2 virus in the workplace and in the community. However, with the projected population-level efficacy of COVID-19 vaccine to be 50-70%, no one can definitively state that someone vaccinated will not subsequently be free from infection.

There is also anecdotal information and scientific surveys that appear to indicate that a certain sector of the American population will refuse to be vaccinated. Accordingly, it is anticipated that SARS-CoV-2 will continue to infect a certain sector of the populace and be present in the workplace for months and years to come.

The Department does not intend to include a requirement in the Standard for employees to be vaccinated; however, the Standard is designed to incentivize employers to implement mitigation strategies against the spread of SARS-CoV-2, and vaccinations are one such strategy.

37. Physical separation of employees at low-risk businesses by a permanent, solid floor to ceiling wall.

The language referenced by the Commenter (physical separation of employees at low-risk businesses by a permanent, solid floor to ceiling wall) is one method described in the Standard for mitigating the spread of SARS-CoV2; however, employers are not required to do so.

The Department intends to recommend a language change to the Standard that makes this clear.

38. Risk classification by job task and hazard.

The language referenced by the Commenter (Requiring employers to determine the risk of each employee instead of basing that on their job tasks) is not accurate. The Standard specifically provides in 16VAC25-220-40.B.1 that “Employers shall assess their workplace for hazards and job tasks that can potentially expose employees to the SARS-CoV-2 virus or COVID-19 disease. Employers shall classify each job task according to the hazards employees are potentially exposed....”

39. Cleaning and disinfecting at the same intervals.

The language referenced by the Commenter (All businesses must clean and disinfect at the same intervals whether it’s a 9 to 5 office setting or a factory with round-the-clock shifts. Again, imposing burdens without any rationale.) is assumed by the Department to refer to 16VAC25-220-40.K.5 which provides “All common spaces, including bathrooms, frequently touched surfaces, and doors, shall at a minimum be cleaned and disinfected at the end of each shift.”

The Department disagrees that there is no rationale for the requirement. The provision states that the cleaning will take place “at the end of each shift”, the rationale being to prevent the spread of the SARS-CoV-2 virus from one group of employees to another (employers with multiple shifts); or from the same group of employees from one day to another when they have been away from work during the time in between shifts and potentially exposed to SARS-CoV-2 in the interim, or for locations where customers enter, for the same reason.

40. Comprehensive infectious disease standard.

The Safety and Health Codes Board has the option to begin consideration of a comprehensive infectious disease standard at any time; however the Department recommends that the focus for now remain on addressing SARS-CoV-2 and COVID-19 workplace hazards.

41. Privacy issues.

With regard to the privacy issue raised, the Standard specifically references the Health Insurance Portability and Accountability Act (HIPAA) in two places when dealing with potential employee and employer privacy concerns (16VAC25-220-40.B.8 and 16VAC25-220-70.C.3.b).

42. Exemption from the Standard for hospitals and healthcare providers.

The issue of an exemption from the Emergency Temporary Standard for hospitals and healthcare providers was previously considered by the Safety and Health Codes Board and not adopted.

43. Commenter's suggestion that the ETS conflicts with federal regulations.

The Department is not aware of any conflicts of the Standard with federal regulations. Federal OSHA does not have an infectious disease regulation that applies to SARS-CoV-2 and COVID-19.

44. Commenter's comparison of COVID-19 with influenza and common cold.

With regard to the issue of comparing SARS-CoV-2 and Covid-19 to influenza and the common cold, there are a number of significant differences which are discussed in detail in the Department's Briefing Package on the Emergency Temporary Standard dated June 23, 2020, which can be found at: <https://www.doli.virginia.gov/wp-content/uploads/2020/06/BP-Emergency-Regulation-Under-2.2-4011-SARS-CoV-2-That-Causes-COVID-19-FINAL-6.23.2020.pdf> (e.g., lack of a vaccine, limited treatment options, infection fatality rate; there is currently no vaccine; treatment options are still limited; superspreader transmission, etc.).

45. The ETS cannot be extended.

Va. Code §40.1-22(6a) under which the Emergency Temporary Standard (ETS) was adopted does not permit the ETS to be extended beyond 6 months.

46. The framework of the Standard is based on an OSHA document.

The Department notes that the basic framework for the Standard (classifying COVID-19 hazards and job tasks by risk classification - very high, high, medium and lower - is based on a document prepared by federal OSHA which can be found at: <https://www.osha.gov/Publications/OSHA3990.pdf>

At its core the Standard is a risk management system to prevent or limit the spread in the workplace of the SARS-CoV-2 virus which causes COVID-19.

It is designed to provide basic protections for all employees and employers within the jurisdiction of the Virginia Occupational Safety and Health program.

It provides certain mandatory requirements for all employers and specific additional requirements for Very High, High, and Medium risk job tasks centered around mitigation of hazards.

The Standard is also designed to incentivize employers to make changes in the workplace that will enable employees in certain situations to be classified to a reduced level of risk (e.g., from high to medium or from medium to lower), thereby also reducing the employer's compliance and cost burdens.

47. VOSH Anti-discrimination jurisdiction.

The Department of Labor and Industry's (DOLI) Virginia Occupational Safety and Health (VOSH) program only has jurisdiction when there is an employer - employee relationship. It has no legal authority to investigate discrimination against members of the general public.

48. VOSH jurisdiction to enforce Executive Orders.

The Department of Labor and Industry's (DOLI) Virginia Occupational Safety and Health (VOSH) program only has jurisdiction when there is an employer - employee relationship. It has no legal authority to enforce provisions of Executive Orders against members of the general public.

49. COVID-19 U.S. Death toll.

The United States Census Bureau as of October 28, 2020, estimates the current population of the U. S. to be approximately 330,513,000, <https://www.census.gov/popclock/>. If 1% of the U. S. Population dies from SARS-CoV-2 or complications involving COVID-19, the number of deaths would be 330,513. The current U.S. death toll is calculated to be 212,328 by the CDC as of October 28, 2020, approximately two-thirds of the 1% figure cited by the Commenter, and that only over a 7 month period, <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm>.

50. Potential language change recommendations to the Standard (Examples).

The Department acknowledges the issues raised by the Commenter (training time period and contact tracers), and will consider potential language changes in the revised proposed Standard.

The Department intends to recommend a definition of "minimal occupational contact" be added to the revised proposed standard.

The Department intends to recommend language changes to the "business consideration" language in 16VAC25-220-70.C.5 referenced by the Commenter to make clear that the language is related to occupational safety and health concerns.

The Department intends to recommend that the return to work provisions of the standard be updated to reflect current CDC and VDH guidance.

The Department intends to recommend revisions to 16VAC25-220-40.F, which currently provides: "F. When multiple employees are occupying a vehicle for work purposes, the employer shall ensure compliance with respiratory protection and personal protective equipment standards applicable to the employer's industry.

The Department intends to recommend a language change to 16VAC25-220-40.D.

The Department intends to recommend a language change to 16VAC25-220-50.B.6.

The Department intends to recommend revisions to 16VAC25-220-40.K.5 which currently provides: "5. All common spaces, including bathrooms, frequently touched surfaces, and doors, shall at a minimum be cleaned and disinfected at the end of each shift. All shared tools, equipment, workspaces, and vehicles shall be cleaned and disinfected prior to transfer from one employee to another."

The Department intends to recommend a language change to the amount of time permitted to train employees under the Standard.

The Commenter referenced the fact that 16VAC25-220-80.B.8.f provides that training on the standard provided to employees shall include with regard to PPE: "Heat-related illness prevention including the signs and symptoms of heat-related illness...." The Department intends to recommend a revision to this requirement to make clear that it relates COVID-19 related hazards specifically (e.g., impact of wearing a respirator in a hot environment).

51. Work-relatedness of COVID-19 employee infection.

16VAC25-220-40.B.8.e requires employers to notify the Department within 24 hours of the discovery of three or more employees present at the place of employment within a 14-day period testing positive for SARS-CoV-2 virus during that 14-day time period.

DOLI and the Virginia Department of Health (VDH) have collaborated on a Notification Portal for employers to report COVID-19 cases in accordance with Emergency Temporary Standard (ETS) Sections 16VAC25-220-40.B.8.d and -40.B.8.e that satisfies COVID-19 reporting requirements for both agencies. The portal went live on September 28, 2020. Here is a link:

<https://www.doli.virginia.gov/report-a-workplace-fatality-or-severe-injury-or-covid-19-case/>

If an employer is contacted by VOSH either through an informal investigation (phone/fax/email/letter) or as a result of an onsite inspection, it will be provided the opportunity to present information on whether it believes the employee's infection occurred as a result of a workplace exposure or was contracted away from work.

52. Request for exposure log and requirements for managing cases.

The Standard contains a framework for managing cases:

1. Identify cases.

16VAC25-220-40.B.4 provides that “Employers shall develop and implement policies and procedures for employees to report when employees are experiencing symptoms consistent with COVID-19, and no alternative diagnosis has been made (e.g., tested positive for influenza). Such employees shall be designated by the employer as “suspected to be infected with SARS-CoV-2 virus.”

2. Remove from work known cases and those “suspected to be infected with SARS-CoV-2 virus.”

16VAC25-220-40.B.5 provides that “Employers shall not permit employees or other persons known or suspected to be infected with SARS-CoV-2 virus to report to or remain at the work site or engage in work at a customer or client location until cleared for return to work.”

3. Notify employees and others of known cases.

16VAC25-220-40.B.8 provides “To the extent permitted by law, including HIPAA, employers shall establish a system to receive reports of positive SARS-CoV-2 tests by employees, subcontractors, contract employees, and temporary employees (excluding patients hospitalized on the basis of being known or suspected to be infected with SARS-CoV-2 virus) present at the place of employment within the previous 14 days from the date of positive test....”

4. Provide for return to work.

16VAC25-220-40.C.1 provides that “The employer shall develop and implement policies and procedures for employees known or suspected to be infected with the SARS-CoV-2 virus to return to work....”

Federal OSHA’s Recordkeeping regulation contains requirements for employer maintenance of injury and illness logs in part 1904. <https://www.osha.gov/laws-regs/regulations/standardnumber/1904/>. Section 1904 contains recording criteria, <https://www.osha.gov/laws-regs/regulations/standardnumber/1904/1904.4>. OSHA provides further guidance at: <https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>

The VOSH program is prohibited from requiring or allowing recordkeeping requirements contrary to those set by federal OSHA so that a consistent, statistically reliable national data collection system can be maintained. See 16VAC25-60-190.A.2, <http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+16VAC25-60-190>, “2. No variances on record keeping requirements required by the U.S. Department of Labor shall be granted by the commissioner....”

53. How does an employer determine employee exposure in the context of 16VAC25-220-40.B.8.a ([notify:] The employer's own employees who may have been exposed, within 24 hours of discovery of the employees possible exposure....”)

16VAC25-220-40.B.8.a provides in part:

8. To the extent permitted by law, including HIPAA, employers shall establish a system to receive reports of positive SARS-CoV-2 tests by employees, subcontractors, contract employees, and temporary employees (excluding patients hospitalized on the basis of being known or suspected to be infected with SARS-CoV-2 virus) present at the place of employment within the previous 14 days from the date of positive test, and the employer shall notify:

a. The employer's own employees who may have been exposed, within 24 hours of discovery of the employees possible exposure,...

The following Frequently Asked Question was developed by the Department on this issue (§40, FAQ 24, <https://www.doli.virginia.gov/cononavirus-covid-19-faqs/>

24. The owners of a salon have a question about alerting the employees at their workplace when an employee tests positive for COVID-19. They are under the impression that only employees in “close contact” (as defined by the CDC) with the positive employee must be alerted. The salon has a strict physical distancing requirement of six feet or more for employees, so they alerted no one at the workplace of the positive case. Is this correct?

No. Employees were required to be notified. The term “close contact” is not used in the ETS. The term “close contact” is used by the CDC for determining when contact tracing should be conducted and is defined as “any individual within 6 feet of an infected person for at least 15 minutes.” 16VAC25-220-10.H specifically provides that:

H. Nothing in the standard shall be construed to require employers to conduct contact tracing of the SARS-CoV-2 virus or COVID-19 disease.

16VAC25-220.40.B.8.a requires employers to notify their “own employees who may have been exposed, within 24 hours of discovery of the employees’ possible exposure....”

Just because an employer has a strict policy of physical distancing as the company alleges does not mean that all employees, customers or persons complied at all times. The intent of the notification requirement is to provide employees information of a “possible” exposure so that employees can make decisions for themselves on the appropriate course of action to take.

In a situation such as a typical beauty salon where the “footprint” of the floor space would not be considered large, and all employees work in the same work space on the same floor, the employer must notify all employees that were “present at the place of employment within the previous 14 days from the date of positive test.”

54. Commenter suggests its industry should be “classified” as lower instead of medium.

While the Standard lists a number of industries under the definition of “medium” exposure risk level, the language specifically states that “Medium exposure risk hazards or job tasks **may include**, but are not limited to, operations and services in....(Emphasis added). The definition of “medium” exposure risk level does not classify

the listed industries as medium risk, but instead when read in conjunction with other portions of the Standard, indicates that the listed industries “may” fall into that category, depending on how the employer assesses and classifies the types of hazards employees are exposed to and the type of job tasks they undertake, in accordance with the requirements in 16VAC25-220-40.B, which provides that:

B. Exposure assessment and determination, notification requirements, and employee access to exposure and medical records.

1. Employers shall assess their workplace for hazards and job tasks that can potentially expose employees to the SARS-CoV-2 virus or COVID-19 disease. Employers shall classify each job task according to the hazards employees are potentially exposed to and ensure compliance with the applicable sections of this standard for very high, high, medium, or lower risk levels of exposure. Tasks that are similar in nature and expose employees to the same hazard may be grouped for classification purposes.

The Standard also provides in 16VAC25-220-10.E.1 provides in part:

E. Application of this standard to a place of employment will be based on the exposure risk level presented by SARS-CoV-2 virus-related and COVID-19 disease-related hazards present or job tasks undertaken by employees at the place of employment as defined in this standard (i.e., very high, high, medium, and lower risk levels).

1. It is recognized that various hazards or job tasks at the same place of employment can be designated as very high, high, medium, or lower exposure risk for purposes of application of the requirements of this standard.

55. Employer’s responsibility to establish screening procedures.

The Department respectfully disagrees with the Commenter’s suggestion that the Standard “establishes company "Health officers" to become de facto certified, accredited, licensed doctors to diagnose symptoms and the health of employees.” No such language is included in the Standard.

For instance, although it is a generally accepted practice, the Standard does not specifically require that employers check the temperatures of employees. 16VAC25-220-50.C.1 provides that "Prior to the commencement of each work shift, prescreening or surveying shall be required to verify each covered employee does not have signs or symptoms of COVID-19." Employers are provided the flexibility to determine what form of prescreening they will use to determine that "each covered employee does not have signs or symptoms of COVID-19."

OSHA provides guidance on screening employees in the construction industry that can be used by non-medical personnel at: <https://www.osha.gov/SLTC/covid-19/construction.html>.

56. Sick leave issue.

The Department does not plan to recommend changes to sick leave provisions in the Final Standard.

The Standard does not require employers to provide sick leave to employees. It does reference the Families First Coronavirus Response Act (FFCRA) at 16VAC25-220-40.B.6:

6. To the extent feasible and permitted by law, including but not limited to the Families First Coronavirus Response Act, employers shall ensure that sick leave policies are flexible and consistent with public health guidance and that employees are aware of these policies.

Further information about the FFCRA and sick leave policies can be found at:

<https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>

57. Notification requirement for tenants.

The Standard does not apply to non-business tenants in an apartment building.

The Department does not plan to recommend that the notification requirements to tenants be removed from the Standard. The Department notes that the Standard does not apply to non-business tenants in an apartment building. The intent of the notification requirement is to provide employees information of a “possible” exposure so that employees can make decisions for themselves on the appropriate course of action to take.

58. Hand sanitizers.

The Department does not intend to recommend the removal of hand sanitizers from the Standard. Use of hand sanitizers is well-recognized method to mitigate the spread of SARS-CoV-2. Also see DOLI Frequently Asked Questions §40, FAQ 9 and §40, FAQ 17 at: <https://www.doli.virginia.gov/cononavirus-covid-19-faqs/> Handwashing facilities, which are required in OSHA and VOSH standards and regulations, are not always immediately or readily accessible for employees who need to disinfect their hands without leaving their immediate work area.

59. Notification to Department of Health.

The Department does not plan to recommend the elimination of reporting requirements to the Department of Health, although it does intend to recommend a change to the trigger number of positive cases.

DOLI and the Virginia Department of Health (VDH) have collaborated on a Notification Portal for employers to report COVID-19 cases in accordance with Emergency Temporary Standard (ETS) Sections 16VAC25-220-40.B.8.d and -40.B.8.e that satisfies COVID-19 reporting requirements for both agencies. The portal went live on September 28, 2020. Here is a link:

<https://www.doli.virginia.gov/report-a-workplace-fatality-or-severe-injury-or-covid-19-case/>

60. Whistleblower refusal to work provision.

The Department does not plan to recommend eliminating the Whistleblower provision regarding refusal to work referenced by the Commenter.

16VAC25-220-90.D was added by the Safety and Health Codes Board, not by DOLI. It is a restatement of current regulatory requirements in 16VAC25-60-110 and specifically refers to that section, and is considered by the Board to be a restatement of employee rights consistent with current law.

61. Classification of hazards and job tasks.

The Standard already requires that employers assess and classify the types of hazards employees are exposed to and the type of job tasks they undertake, in accordance with the requirements in 16VAC25-220-40.B.

62. PPE hazard assessments under 1910.132 and the ETS.

16VAC25.60.D.1 provides that "Employers covered by this section and not otherwise covered by the VOSH Standards for General Industry (16VAC25-90-1910)...." which means it applies to those employers not in general industry. If, as the Commenter notes, they have already completed a hazard assessment under 1910.132 that addressed SARS-CoV-2 and COVID-19 related hazards and job tasks, then they do not have to complete another one.

It is the Department's position that general industry employers are required to update their pre-COVID-19 PPE hazard assessments.

63. Notification to employers about the ETS.

While the Department constantly strives to improve information dissemination about its programs, and will continue to look for new ways to do so, it feels that there was widespread notice to the business community and the general public about the adoption of the Emergency Temporary Standard through print, television, and social media.

64. PPE and Respirators in Prison and Jail Environments.

It is the Department's position that general industry employers, such as prisons and jails, are required to update their pre-COVID-19 PPE hazard assessments and take into account SARS-CoV-2 and COVID-19 related hazards and job tasks, particularly where known COVID-19 persons are housed. In such situations, it is the Department's position that enhanced personal protective equipment beyond face coverings, up to and including respirators, would be a minimum requirement under 1910.132 and 1910.134 in certain situations.

65. COVID-19 Employee Deaths.

The Department notes that in recent years, VOSH has investigated an average of approximately 35 to 40 occupationally related fatalities per year. As of October 30, 2020, VOSH has investigated over 30 employee deaths attributable to COVID-19 alone. The large majority of those cases remain under investigation to determine if they were occupationally related or not, and if occupationally related, whether violations of the Emergency Temporary Standard or mandatory requirements in Governor's Executive Orders should be cited or not.

66. PPE supply and cost; insurance reimbursement.

The Department does not have legal authority to regulate supply chains for items such as personal protective equipment (PPE) and other products, but is well aware of the shortages of such items at various times as N-95 respirators, cleaning and disinfecting chemicals, hand sanitizer and other medical products to provide safety and health protections to employees.

The Standard was designed to provide employers with flexibility and takes into account the "feasibility" of an employer to comply with certain requirements, particularly in areas involving PPE that is not readily commercially available at this time.

See Federal OSHA's "Enforcement Guidance for Respiratory Protection and the N95 Shortage Due to the Coronavirus Disease 2019 (COVID-19) Pandemic" (which employers in Virginia can rely on) for further information and guidance on respiratory protection. <https://www.osha.gov/memos/2020-04-03/enforcement-guidance-respiratory-protection-and-n95-shortage-due-coronavirus>

Please note that price gouging complaints during a state of emergency in Virginia can be filed with the Office of the Attorney General (OAG):

https://www.oag.state.va.us/consumer-protection/index.php?option=com_content&view=article&id=181#:~:text=File%20a%20Price%20Gouging%20complaint,Office%20of%20Weights%20and%20Measures.

The Department does not have legal authority to regulate the rate at which insurance companies reimburse medical practices.

67. Technical feasibility definition.

The Standard's definition of "technical feasibility" is based on a longstanding definition contained in the VOSH Field Operations Manual (FOM) and federal OSHA's FOM. The Department does not intend to recommend any change to the definition.

68. Infeasibility defense.

Feasibility is defined (based on longstanding definitions of OSHA and VOSH in their respective Field Operations Manuals) and referenced numerous times in the Standard to provide a level of flexibility to employers to achieve compliance with the requirements of the Standard and to mitigate the spread of SARS-CoV-2 to employees while at work.

Here is a summary of the defense:

Infeasibility Defense (previously known as the “impossibility” defense)

A citation may be vacated if the employer proves that:

1. The means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that either:
 - a. Its implementation would have been technologically or economically infeasible or
 - b. Necessary work operations would have been technologically or economically infeasible after its implementation; and
2. Either:
 - a. An alternative method of protection was used or
 - b. There was no feasible alternative means of protection.

NOTE: Evidence as to the unreasonable economic impact of compliance with a standard may be relevant to the infeasibility defense.

Source: Occupational Safety and Health Law, Randy S. Rabinowitz, 2nd Edition (2002)

69. Signs and symptoms.

The Department intends to recommend changes to the Standard to update references to signs, symptoms and symptomatic.

70. Human resource policies.

The Department respectfully disagrees with the Commenter's assertion that mitigation strategies (referred to by the Commenter as "human resource policies") to prevent the spread of SARS-CoV-2 in the workplace, exceeds the authority of the Board.

The Department intends to recommend some language changes to the provisions referenced by the Commenter.

71. Infectious disease preparedness and response plan.

The Department does not intend to recommend any change to which employers are required to develop and implement an Infectious disease preparedness and response plan under 16VAC25-220-70. The current requirement exempts employers with 10 or fewer employees which eases the burden on the smallest employers with the most limited resources. The Department notes that a free template for a plan is provided on the Department's website at: <https://www.doli.virginia.gov/covid-19-outreach-education-and-training/>

In addition, the Department strongly encourages Virginia's small business owners to take advantage of free and confidential occupational safety and health onsite and virtual

consultation and training services to address COVID-19 compliance issues. More information about the VOSH Consultation Services can be found at: <https://www.doli.virginia.gov/vosh-programs/consultation/>

72. Definition of employee.

The Department does not intend to recommend a change to the definition of “employee” in the Standard, which reflects current statutory, regulatory and case law.

73. Definition of medium.

The Department does not intend to change the definition of medium risk exposure. That definition applies to SARS-CoV-2 and COVID-19 related hazards and job tasks, not "jobs."

74. Surgical/medical procedure mask definition.

The Department does not intend to change the definition of surgical/medical procedure mask as that definition is consistent with Food and Drug Administration (FDA) guidance. The FDA regulates surgical/medical procedure masks.

75. Multi-employer worksites where there is no contractual relationship between the employers.

The Department does not plan to recommend that the notification requirements to subcontractors, etc., referenced by the Commenter, be removed from the Standard.

The intent of the notification requirement is to provide employees information of a “possible” exposure so that employees can make decisions for themselves on the appropriate course of action to take. The Department notes that the notification provision in the Standard referenced by the Commenter would only require notification by the employer to one of its own subcontractors. So in the situation described by the Commenter, vendor number one with a known to be infected employee would only be required to notify another vendor number two at the site, if vendor number two was a subcontractor to the vendor number one.

76. Physical distancing in construction.

The Department agrees with the Commenter that when physical distancing can be maintained - either indoors or outdoors - that is a preferred method of mitigating the spread of the SARS-CoV-2 virus. Conversely, when physical distancing cannot be observed – whether inside or outside – the Standard requires the employer consider other mitigation strategies.

77. OSHA and DOT jurisdiction issues for trucking companies.

The Commenter notes that 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.” <https://www.osha.gov/trucking-industry/other-federal-agencies>

However, the above statement is not as straightforward as it seems. Congress, in section 4(b)(1) of the OSH Act of 1970, took into account the other Federal agencies which in the exercise of their statutory responsibilities may issue regulations or standards which affect occupational safety and health issues. Section 4(b)(1) provides, in pertinent part:

Nothing in this Act shall apply to working conditions with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.

The various federal Circuits across the United States have interpreted section 4(b)(1) and its application differently. For instance, a discussion by OSHA of how the 4th Circuit, which includes Virginia, has ruled states:

“The most common type of circumstances involving section 4(b)(1) of the OSH Act is where there is a statute whose primary purpose is to protect the public and transportation equipment but which also protects employees in the sense that in the effort to protect the public, the employees are also protected. Examples of this type of legislation are most of the statutes administered and enforced by the Department of Transportation (DOT). A practical example is the Federal Aviation Administration (FAA) In FAA's efforts to protect the flying public and air transport cargo, the crew of the aircraft are necessarily protected at the same time by the same FAA regulations.

Whenever a Section 4(b)(1) issue is presented in the context of a DOT statute which is designed to protect the public, transportation equipment, or cargo, the issue is usually of the type that is known popularly as the "gap theory," or "hazard-by-hazard" approach. That is, the question is whether the other agency has an enforceable regulation which, if that agency chooses to enforce that regulation, would reduce or eliminate the workplace hazard in question. If the other agency has no such regulation applicable to the hazard, then there exists a "gap" in worker protection which is filled by the residual jurisdiction of the OSH Act with its very broad coverage intended by Congress as the means for assuring ". . . every working man and woman in the Nation safe and healthful working conditions." Sec. 2(b), OSH Act, P.L. 91-596; see also, Northwest Airlines, Inc., 8 OSHC 1982, 1980 OSHD 24,751 (1980), petition for review dismissed, Nos. 80-4218, 80-4222 (2d Cir. 1981).

The so called "gap theory" has also been upheld by the courts. In the courts' decision, however, this same issue is cast in terms of the Section 4(b)(1) term "working conditions." In general, it can be stated that the following line of appellate court decisions affirm the "hazard-by-hazard" approach even though the courts sometimes have chosen different words which have to be explained and understood in context. For example, in Southern Railway v. OSHRC, 539 F.2d 335 (4th Cir. 1976) cert. denied 429 U.S. 999, 97 S.Ct. 525, the Fourth Circuit defined the term "working conditions" in Section 4(b)(1) as meaning "the

environmental area in which an employee customarily goes about his daily tasks." That phrase of the court's decision seems to extend the term "working conditions" beyond hazards, but the phrase is not clear because while geographically, so to speak, the environmental area is broad under that decision, the "area" has no meaning if not viewed in terms of the regulations and hazards present in that area."

A far better articulation of the "hazard-by-hazard" approach is found in a Fifth Circuit case; that is, in *Southern Pacific v. Usery*, 539 F.2d 386 (5th Cir. 1976), cert. denied 434 U.S. 874, 98 S.Ct. 222. In this case, the Fifth Circuit defined the term "working conditions" in Section 4(b)(1) to mean to include "surroundings" or "hazards" which the court stated could be a location, a grouping of items, or a single item. In *Southern Railway* in the Fourth Circuit and the Fifth Circuit's *Southern Pacific* definitions, we see, when viewed together, a narrowing of the term "working conditions." The most recent decisions even more clearly articulate the scope of Section 4(b)(1); that is, if the other agency's regulation (or the lack of one) does not cover the hazard in question, then the OSH Act's requirements are not preempted. For example, in *Donovan v. Red Star Marine Services Inc.*, 739 F.2d 774 (2d Cir. 1984), cert. denied 470 U.S. 1003, 105 S.Ct. 1355, the Second Circuit did not preempt OSHA's regulation of noise aboard an inspected vessel because, while the Coast Guard generally covered such vessels, the Coast Guard confined its regulation to life saving and fire-fighting equipment and had issued no noise abatement regulation. The Eleventh Circuit also analyzed a Section 4(b)(1) issue in the same way. In *re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526 (11th Cir. 1986), reh. denied, 790 F.2d 88 (11th Cir. 1986), cert. denied 107 S.Ct. 271 (1986), the Eleventh Circuit did not preempt OSHA application to crane operations because the Coast Guard simply did not have regulations addressing crane hazards. The Eleventh Circuit in *Norfolk Dredging* stated that, "the effect of Section 4(b)(1) turns upon the precise working conditions at issue . . ."

....

There is no industry-wide exemption for motor vehicle common carriers, *Greyhound Lines. Inc.*, 5 OSHC 1132, 1977-78 OSHD 21,610 (1977), nor is there any industry-wide exemption for over-the-road truckers, *Lee way Motor Freight. Inc.*, 4 OSHC 1968, 1976-77 OSHD 21,464 (1977).

However, as discussed previously in the analysis of the term "working conditions" or the "gap theory," if OMCS has a regulation addressing a certain working condition (or hazard), then OSHA would be preempted from applying its standards to that hazard. The lead OSHA case on this issue under Section 4(b)(1) in the context of OMCS' jurisdiction is *Mushroom Transportation Co.*, Docket No. 1588, 1973-74, CCH OSHD 16,881 (R.C. 1973). *Mushroom* involved the hazard of possible movement of trucks while they were being loaded or unloaded with the use of powered industrial trucks. Both OSHA and OMCS had regulations dealing with brakes as well as other methods of preventing unwanted movement of a

truck during loading and unloading operations. The Commission held that because the OMCS had such a regulation covering the same hazard as the OSHA standard, the OSH Act's standard was held inapplicable pursuant to the provisions of section 4(b)(1) of the OSH Act.(1)

....

Mushroom also stands for the proposition that the other agency's regulation need not be as stringent as the OSHA standard to effectuate preemption of the OSH standard. The Review Commission stated:

Once another Federal agency exercises its authority over specific working conditions, OSHA cannot enforce its own regulations covering the same conditions. Section 4(b)(1) does not require that another agency exercise its authority in the same manner or in an equally stringent manner. [Footnote omitted; emphasis supplied.] Mushroom, supra, 16,881 at 21,491.

To our knowledge, there have been no decisions of OSHRC or the courts since Mushroom specifically involving truck or bus operators. Citations have been issued, but these were mainly for alleged violations in loading areas and maintenance and repair shops.

....

In conclusion, as we can see from the cases, there are three main principles in 4(b)(1) situations: (1) OSHA cannot enforce its authority with respect to working conditions over which another Federal agency has exercised its authority even if the other agency's standards are not as stringent or as stringently enforced as OSHA's; (2) if a Federal agency fails to exercise its authority with respect to working conditions, OSHA has jurisdiction to inspect and to cite for violations of standards; and (3) a negative exercise of authority can oust OSHA from jurisdiction. It must be noted, however, that 4(b)(1) situations must be considered on a case by case basis and deference given to a sister agency's interpretation of its authority. (Emphasis added).

<https://www.osha.gov/laws-regs/standardinterpretations/1989-07-10>

78. Serologic testing.

The serologic testing language in the Standard is consistent with CDC guidance.

<https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests-guidelines.html>

79. Applicable industry standards.

OSHA and VOSH standards and regulations fall into the following categories: Construction Industry, Agricultural Industry, Maritime Industry and General Industry

(all employers not covered by Construction, Agricultural or Maritime Industry Standards are covered by the General Industry Standards.

80. Briefing package for ETS.

The Department's Briefing Package on the Emergency Temporary Standard with background and legal justifications can be found at: <https://www.doli.virginia.gov/wp-content/uploads/2020/06/BP-Emergency-Regulation-Under-2.2-4011-SARS-CoV-2-That-Causes-COVID-19-FINAL-6.23.2020.pdf>

81. Occupancy limit.

The current "occupancy limit" language in the Standard provides flexibility for employer to decide how best to mitigate the spread of SARS-CoV-2. While the Commenter's suggestion to incorporate a FEMA recommendation of 113 square feet per person could serve as one method for an employer to determine occupancy limits, it would increase the compliance burden on employers generally and is not recommended by the Department.

82. Training period for Infectious disease preparedness and response plan.

The Department does not intend to recommend any change to train employees on the Infectious disease preparedness and response plan under 16VAC25-220-70, currently set at 60 days. In addition, the Department strongly encourages Virginia's small business owners to take advantage of free and confidential occupational safety and health onsite and virtual consultation and training services to address COVID-19 compliance issues. More information about the VOSH Consultation Services can be found at: <https://www.doli.virginia.gov/vosh-programs/consultation/>

83. Multi-employer worksite situations.

In situations involving multi-employer worksites, the Department has a regulation on the subject multi-employer worksite responsibilities and the multi-employer worksite defense, which can be found at 16VAC25-60-260.F and -260.G. <http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+16VAC25-60-260>. Additional information can also be found on the topic in the VOSH Field Operations Manual at <https://townhall.virginia.gov/L/ViewGDoc.cfm?gdid=5354>.

84. General duty clause uses and limitations.

The Department's Briefing Package on the Emergency Temporary Standard with background on the use and limitations of the general duty clause: <https://www.doli.virginia.gov/wp-content/uploads/2020/06/BP-Emergency-Regulation-Under-2.2-4011-SARS-CoV-2-That-Causes-COVID-19-FINAL-6.23.2020.pdf>

85. Six foot physical distancing requirement.

The Department does not intend to revise the definition of physical distancing or to eliminate physical distancing as a recognized mitigation strategy. The six foot physical distancing requirement remains a best practice recognized by the CDC and VDH.

86. Medical removal.

The Department does not intend to recommend the addition of medical removal protections to the Standard.

[OPTION 2: The Department does not intend to recommend the addition to the standard of medical removal protections or guaranteed compensation requirements for employees who are away from work due to COVID-19 issues.]

Some employees will be able to use sick leave during the time they are away from work. While the Standard does not require employers to provide sick leave to employees, it does reference the Families First Coronavirus Response Act (FFCRA) at 16VAC25-220-40.B.6:

6. To the extent feasible and permitted by law, including but not limited to the Families First Coronavirus Response Act, employers shall ensure that sick leave policies are flexible and consistent with public health guidance and that employees are aware of these policies.

Further information about the FFCRA and sick leave policies can be found at: <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>

Some employees will be able to receive workers' compensation while they are away from work. http://www.vwc.state.va.us/sites/default/files/documents/COVID-19-Statistics-FAQs_o.pdf

87. Employee involvement.

The Department does not intend to recommend any additional employee involvement language to the Standard. Such involvement is currently required in 16VAC25-220-50.D.1.a, 16VAC25-220-60.D.1.a, and 16VAC25-220-70.C.2.

88. Records of PPE stockpile (inventory) and availability.

The Department does not intend to recommend adding a requirement for employer to maintain records of PPE stockpile (inventory) and availability; however, the Department does intend to recommend revised language to 16VAC25-220-70.C.4.d that employers required to maintain an Infectious disease preparedness and response plan address contingency plans for situations where supply chains for safety and health related products and services may be impacted by the pandemic.

89. Mobile employees working at private homes.

The Commenter references the difficulties with providing employee safety and health protections for mobile employees that work at private homes.

First, it should be noted that the Standard does not address the rights or protections of the general public, and more specifically, it does not contain a face covering mandate for the general public. That issue is the purview of the Virginia Department of Health and Governor's Executive Orders (e.g., Executive Order 63).

The Commenter represents an industry that has always been covered by 1910.132, Personal Protective Equipment Standard, which requires employers to conduct hazard assessments of the workplace to determine what PPE is required. This includes an assessment of what kind of infectious disease hazards employees might encounter, pre- and post-COVID19, when visiting a private home. The Standard does not change this basic requirement for the Commenter's industry, so there should be no confusion about what protections such employer's need to provide. If pre-COVID-19, such an employer rightly considered the potential for its employees to be exposed to, for instance, tuberculosis at a private home, conducting the same type of assessment for COVID-19 should not present any substantial difficulties.

90. ASHRAE legal issue and air handling issues.

The Department notes that the ASHRAE air handling requirements are undergoing a legal review which may result in recommended changes that could address some of air handling issues raised by the Commenter.

91. N-95 respirator determinations.

The issue of N-95 respirators raised by the Commenter is appropriate to address during the personal protective equipment (PPE) hazard assessment process required in General Industry under 1910.132.

92. Employee Involvement.

The Department does not intend to recommend any additional employee involvement language to the Standard. Such involvement is currently required in 16VAC25-220-50.D.1.a, 16VAC25-220-60.D.1.a, and 16VAC25-220-70.C.2.

93. Paid time for cleaning.

The Department does not intend to recommend adding requirements that employers be required to provide pay for cleaning activities by employees. Payment of wage issues fall under Va. Code §40.1-29, <https://law.lis.virginia.gov/vacode/40.1-29/>, and not within the enabling statutes of the VOSH program.

94. Disinfectant selection.

The Department does not intend to recommend revising the standard to address the Commenter's concern about those disinfectants containing substances known to cause adverse health effects, such as those containing quaternary ammonia that is a known respiratory irritant. That issue is more appropriately dealt with under the requirements of the Hazard Communication Standard applicable to the employer's industry.

95. Face shield.

The Department intends to recommend revisions to the Standard dealing with face shield issues.

96. Jail and correctional facility issues.

The Department does not intend to recommend revising the Standard to address access and egress issues at jails and correctional facilities. Control over access and egress issues at jails and correctional facilities falls under the purview of either the controlling authority and/or the Virginia Department of Health.

The Department does not intend to recommend any changes to the pre-screening requirements in the Standard. 16VAC25-220-50.C.1 provides that "Prior to the commencement of each work shift, prescreening or surveying shall be required to verify each covered employee does not have signs or symptoms of COVID-19." Employers are provided the flexibility to determine what form of prescreening they will use to determine that "each covered employee does not have signs or symptoms of COVID-19."

The Commenter references industries that have always been covered by 1910.132, Personal Protective Equipment Standard, which requires employers to conduct hazard assessments of the workplace to determine what PPE is required. This includes an assessment of what kind of infectious disease hazards employees might encounter, pre- and post-COVID19, when visiting a private home. The Standard does not change this basic requirement for the Commenter's industry, so there should be no confusion about what protections such employer's need to provide. If pre-COVID-19, such an employer rightly considered the potential for its employees to be exposed to, for instance, tuberculosis at a private home, conducting the same type of assessment for COVID-19 should not present any substantial difficulties. The proper assessment will determine whether and what kind of PPE and/or respiratory protection equipment is required.

The Department notes that the Standard that employee involvement is currently required for hazard assessment determinations in 16VAC25-220-50.D.1.a and 16VAC25-220-60.D.1.a.

97. Definition of "May be infected with SARS-CoV-2 virus".

The Department does not intend to recommend that the definition of "May be infected with SARS-CoV-2 virus" be removed from the Standard. While many people become infected with SARS-CoV-2 in community settings that are not work-related, every person that becomes infected who is also an employee becomes a potential workplace source and transmitter of the virus if they report to work while still capable of transmitting the disease. There are numerous documented examples of the workplace spread SARS-CoV-2, which is also considered to be highly contagious. The introduction of an infectious disease into a workplace setting, regardless of the source, constitutes a workplace health hazard subject to regulation and enforcement by VOSH. The VOSH program has clear statutory and regulatory jurisdiction over workplace safety and health issues in the Commonwealth, including the potential for spread of infectious diseases

among employees and employers, and when those employees and employers are potentially exposed to other persons who may be carriers of the infectious diseases (patients, customers, independent contractors, etc.).

98. Occupational exposure definition.

The Department does not intend to recommend that the definition of “occupational exposure” be revised. It is based on a longstanding definition contained the VOSH Field Operations Manual (FOM) and federal OSHA's FOM.

99. Definition of "Suspected to be infected with SARS-CoV-2 virus".

The Department does not intend to recommend that the definition of "Suspected to be infected with SARS-CoV-2 virus." The definition includes persons who have not yet been tested for SARS-CoV-2.

100. Second jobs.

The Department does not intend to recommend changes to 16VAC25-220-70 based on the Commenter's suggestions. The Department is not aware of any legal restrictions against an employer establishing a policy that employees inform them about outside jobs.

101. Railroads.

The Commenter contends that Virginia's unique COVID-19 standard would present compliance burdens for its Railroad members because it differs from federal OSHA requirements that apply in states covered by federal OSHA jurisdiction. Virginia currently has nine other unique standards and regulations in addition to the proposed COVID-19 Standard that apply to the Commenter's members.

<https://www.doli.virginia.gov/vosh-programs/virginia-unique/>. The Department sees no reason to treat the situation of its COVID-19 Standard any differently than the application of its other unique standards. We respectfully disagree that the act of comparing a particular CDC guideline that an employer wants to rely on to the language in Virginia's COVID-19 standard is an "impossible" task.

The Commenter also suggests that its members would have difficulty in "figuring out how to apply a different set of rules once a state border is crossed." The same argument could be made with regard to Virginia's other unique standards. Again, the Department sees no reason to treat the situation of its COVID-19 Standard any differently than the application of its other unique standards.

When Congress established the OSH Act of 1970, it had the opportunity to establish a system that would suit the needs of the Commenter's members, but it chose to allow states, such as Virginia, to apply for state plan status under §18 of the OSH Act. Virginia has such a state plan, and as a sovereign Commonwealth has the legal right to establish standards and regulations that are at least as effective as that of federal OSHA in providing protections for Virginia employees and employers, This includes the ability to adopt standards and regulations that are more stringent than federal OSHA's or cover a

hazard or industry that OSHA has yet to provide protective standards and regulations for.

The Department does not plan to recommend that 16VAC25-220-10.G be changed as suggested by the Commenter. It is the Department's position that similarly situated employees and employers exposed to the same or even more serious hazards or job task should all be provided the same basic level of safety and health protections. The Standard's language in 16VAC25-220-10.G assures such protections.
