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Submitted Electronically

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Virginia Department of Labor and Industry
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RE: Comments of the Virginia Business Coalition re: Safety and Health Codes Board intent to adopt Permanent Standard for Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19, 16VAC25-220

Dear Safety and Health Codes Board Members:

On behalf of the Business Coalition (“Coalition”) which is comprised of 33 leading business associations across the Commonwealth, we thank you for the opportunity to comment on the Virginia Department of Labor and Industry’s announced intent to Adopt a Permanent Standard for Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19, 16VAC25-220 (collectively, the “Regulations”). The Business Coalition is committed to protecting employees, contractors, suppliers, and communities from COVID-19 infection.

Our members are already heavily regulated under multiple federal and state occupational health and safety programs. Coalition members are interested in a uniform and coordinated approach to Federally delegated health and safety regulations. As such, our members participate in national trade groups, and have worked to develop best management practices and implemented a hierarchy of controls to protect their workforce from COVID-19 infections as proscribed by all Federal regulatory agencies. Accordingly, the Coalition is uniquely positioned to participate in the public process associated with the development of the Regulations.

I. Summation of Business Coalition’s Comments

Virginia businesses need certainty and consistency in any regulatory program. This ensures that the regulated community understands the requirements of the program, and that all parties can work together to satisfy the regulatory requirements.

A. The Virginia Safety and Health Codes Board should not adopt a Permanent Standard.

The Coalition asserts that adopting 16VAC25-220 as permanent regulations is overly burdensome, unnecessary, and violates existing law. The science of COVID-19 is continuously being updated. Therefore, the CDC and OSHA guidelines are frequently updated to reflect this. If the ETS were to become permanent, it would continue to require businesses to comply with outdated regulations.

Now is not the time to impose a permanent standard. Why adopt a permanent standard when we're beginning to see the rollout of vaccinations?

B. There is no sunset date for the Standard

The proposed permanent standard does not contain a true sunset date. Rather, all it does is reiterate the Board's authority to come back at a later date to determine the necessity of a continued permanent standard after the Governor's State of Emergency is lifted. The Board was clear during its July deliberations; the temporary nature of this pandemic requires any regulations put in place related to COVID-19 should be sunset with the Governor's State of Emergency order. If the Board intends to move forward with a standard after expiration of the current ETS, we expect the Board to stick by its decision to end these regulations at the end of the COVID-19 pandemic.

C. There is no economic impact analysis to determine cost to small businesses

There is still no economic impact statement to evaluate the cost on small businesses as required with the Small Business Regulatory Flexibility Act/Small Business Regulatory Enforcement Fairness Act. Because this impact statement was not available at the time written comments were due, businesses have had no opportunity to address any findings from that analysis.

D. The Standard is burdensome for businesses to comply with

Permanent regulations would be overly burdensome, costly and confusing especially in light of overlapping regulations and guidance with the "Safer at Home" guidance, Executive Order 72, and the proposed rule. Businesses are already incurring expensive costs to comply with the ETS from hiring consultants and attorneys, taking workers out of production to do additional training, etc.

E. The Board has not proven a "grave danger for ALL workplaces necessitating a permanent regulation"

It is unreasonable to apply a "one size fits all" approach to COVID-19 regulations to all employers and employees. The Board's determination of "grave danger" in relation to the COVID-19 ETS has not materialized for ALL workplaces. In fact, we argue that the lack of verifiable data on infections, hospitalizations, and deaths by workplaces (categorized by low to very high risk) is effectively non-existent. In fact, VDH data indicates that COVID-19 confirmed deaths are primarily with citizens over 70 years old and with individuals in long term care facilities. The "grave danger" determination for ALL workplaces must be reconsidered especially when it is still unclear how many infections by type of workplace have been documented and the number of resulting hospitalizations and deaths have been confirmed by type of workplace (low to very high risk).

VDOLI also cannot demonstrate employer compliance with the COVID-19 ETS. We contend that most Virginia employers are not in compliance with the COVID-19 ETS and yet infections have been reduced entirely by employer compliance with CDC guidance, OSHA guidance, and Governor’s Executive Orders – not the COVID-19 ETS.

Therefore, the Board cannot simply assume and apply its prior “grave danger” determination and COVID-19 ETS efficacy as the basis for permanent regulations. Further, since 46 other states have neither a COVID-19 ETS or permanent regulation, the Board has not proven the necessity for such a permanent regulation.

F. Regulations should not be expanded to other infectious diseases

Infectious diseases are not all the same. Therefore, the Board should not expand these regulations to other infectious diseases. We have no idea what protocols will be necessary to mitigate the risks of future diseases, so it doesn’t make sense to create a permanent standard for all infectious diseases.

G. If the Board can demonstrate the validity and necessity of the current Emergency Temporary Standard (ETS) on which the proposed rule is designed, and proceeds with a Permanent Standard, it must include these important provisions:

- 1. The sunset clause whereby the Regulations will expire with the Governor’s State of Emergency.**
- 2. Amend § 10G to the agency’s original language with clarification on providing “safe harbor” for employers who follow CDC and OSHA guidance.** It is unclear who determines which version of CDC guidance an employer may reference for purposes of compliance.
- 3. Eliminate requirements for physical separation of employees at low and medium risk businesses by a permanent, solid floor to ceiling wall.** Higher risk businesses have more flexibility to use smaller temporary barriers like Plexiglas sneeze guards.
- 4. Eliminate all human resource policies from the Regulations such sick leave, telework, flexible worksites, flexible work hours, flexible meeting and travel, the delivery of services or the delivery of products.** These policies exceed the Board’s authority as it relates to workplace hazards.
- 5. Amend common space sanitation requirements.** Requiring common spaces to be cleaned and disinfected at the end of each shift” is impractical for 24/7 operations with multiple and overlapping shifts. The Regulations should be amended to provide for a time-based alternative such as every 8, 12, or 24 hours exempting FDA regulated facilities.
- 6. Eliminate HVAC requirements for medium risk businesses (16VAC25-220-60(B)).** Requiring retroactive compliance with a 2019 ASHRAE HVAC standard is

premature at best. Any permanent regulations should follow existing processes contained in the Virginia Uniform Statewide Building Code (USBC) which utilize appropriate industry investigation and recommendations.

7. Eliminate the requirement that medium risk employers should complete a COVID-19 infections disease preparedness and response plan. This mandate is overly burdensome and not necessary at this risk level.

8. Increase the amount of time employers must train their employees. The current timetable is unachievable. The ETS should be amended to provide employers another sixty (60) days to comply.

9. Eliminate language protecting employees who report to news media or social media (16VAC25-220-90). Whistleblower protection is intended to protect employee complaints to the responsible government regulatory agency.

10. Revise requirements related to transportation of employees who travel in the same vehicle. This standard is impractical and vague.

11. Eliminate the conflicts and overlaps between the “Safer at Home” guidance, Executive Order 72, and the proposed rule. The regulation should govern, and this should be explicitly stated in the permanent regulation. Otherwise, the regulation must be inadequate to protect worker safety.

II. Recommendations

As such, the Coalition respectfully requests that the Virginia Safety and Health Codes Board withdraw its “Intent to Adopt a Permanent Standard for Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19, 16VAC25-220.”

Instead, if the Board can demonstrate a necessity to pursue regulation, it should do the following:

1. The Board must have the Economic Impact Statement and Regulatory Flexibility Analysis available for a 60-day public comment period.
2. The Board must make the January 4, 2021 proposed rule available for a new 30-day public comment period.
3. Convene a working group of stakeholders to revise and recommend a second COVID-19 Emergency Temporary Standard (ETS) that expires within 6 months of adoption or when the State of Emergency expires.

III. Conclusion

It is unreasonable to apply one-size-fits-all COVID-19 Regulations to all employers and employees. It is also profoundly inappropriate to bypass the formal regulation process altogether by attempting to codify guidance and Executive Orders as a reasonable replacement. Further, it is confusing why the Board would pursue permanent regulations that are in conflict with previously issued Executive Orders.

Therefore, it is the Coalition’s recommendation that the Board reject the Regulations, provides additional public comment related to the newly revised January 4th proposal and anticipated economic analysis, and convene a workgroup of stakeholders to revise and recommend a second COVID-19 ETS that expires within 6 months of adoption or when the State of Emergency expires.

Sincerely,

VIRGINIA BUSINESS COALITION

Apartment and Office Building Association Associated Builders and Contractors -Virginia Associated General Contractors of Virginia Delmarva Chicken Association Hampton Roads Chamber of Commerce Harrisonburg – Rockingham Chamber of Commerce Heavy Construction Contractors Association National Federation of Independent Business Northern Virginia Chamber of Commerce Northern Virginia Transportation Alliance Precast Concrete Association of Virginia Richmond Area Municipal Contractors Association Shellfish Growers of Virginia Thomas Jefferson Institute for Public Policy Virginia Agribusiness Council Virginia Assisted Living Association Virginia Association of Roofing Professionals Virginia Association of Surveyors	Virginia Association for Home Care & Hospice Virginia Automatic Merchandising Association Virginia Forestry Association Virginia Forest Products Association Virginia Loggers Association Virginia Manufactured & Modular Housing Association Virginia Manufacturers Association Virginia Peninsula Chamber of Commerce Virginia Poultry Federation Virginia Retail Federation Virginia Seafood Council Virginia Trucking Association Virginia Veterinary Medical Association Virginia Wholesalers & Distributors Association Virginia Wineries Association <i>Coalition Contacts: Nicole Riley, NFIB; Brett Vassey, VMA; and Jodi Roth, VRF.</i>
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cc: Virginia General Assembly; Secretary of Commerce and Trade Brian Ball; Chief Workforce Advisor to the Governor Megan Healey; Chief of Staff Clark Mercer; and Commissioner of the Department of Labor and Industry Ray Davenport