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Dear Members of the Virginia Safety and Health Codes Board:

On behalf of the Virginia small business members of the National Federation of Independent Business (NFIB), we are submitting the following comments related to your consideration of adopting an Emergency Temporary Standard/Emergency Regulation, Infectious Disease Prevention, SARS-CoV-2 Virus that causes COVID-19, §16 VAC 25-220, applicable to all employers and employees covered by Virginia Occupational Safety and Health (VOSH) program.

In totality, our organization represents approximately 6000 small businesses and 60,000 employees across a broad swath of industries from manufacturing, retail, restaurants, agricultural and forestry companies, healthcare, construction, to professional services.

As we enter the 15th week of Virginia's State of Emergency related to containing the spread of COVID-19, Virginia businesses are doing everything in their power to protect their employees and customers from exposure to the coronavirus by following the guidance issued by OSHA and the CDC. These existing safety standards already provide reasonable guidance and enforcement for businesses. The last thing business owners need as they are trying to reopen their businesses during this critical time is additional one-size-fits-all, static government regulations and red tape.

The current approach is working—and no more standards are needed. To the contrary, mandatory one-size-fits-all standards such as the ones proposed to the Board could harm workers. It could quickly become outdated and constrain employers from pursuing the adaptable, innovative, data-driven, and effective approach to protecting worker health and safety that is proving crucial during this pandemic.

Therefore, we respectfully request you reject the proposed emergency regulations. Instead we encourage the Department of Labor and Industry to continue their current approach to investigate claims, notify businesses of complaints, work with businesses to ensure they are following proper procedures and issue fair fines when appropriate.

Broad Issues with Proposed Emergency Regulations

This Issue has already been Adjudicated on the Federal Level

USDOL and US Court of Appeals for the District of Columbia Circuit have already provided direction on this issue. On April 28, 2020, AFL-CIO President, Richard Trumka, petitioned US Secretary of Labor Eugene Scalia to adopt a Department of Occupational Safety and Health Administration (OSHA) emergency temporary standard for COVID-19.

On April 30, 2020, US Secretary of Labor Eugene Scalia rejected the AFL-CIO petition from April 28, 2020, and stated, "Coronavirus is a hazard in the workplace. But it is not unique to the workplace or (with the exception of certain industries, like health care) caused by work tasks themselves. This by no means lessens the need for employers to address the virus. But it means that the virus cannot be viewed in the same way as other workplace hazards." Secretary Scalia went on to say that, "…the contents of the rule detailed in your letter add nothing to what is already known and recognized (and in many instances required by the general duty clause itself). Compared to that proposed rule, OSHA's industry-specific guidance is far more informative for workers and companies about the steps to be taken in their particular workplaces. That is one of the reasons OSHA has considered tailored guidance to be more valuable than the rule you describe" (see Addendum A).

On May 18, 2020, the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") petitioned this Court to issue a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a), compelling Respondent Occupational Safety and Health Administration, United States Department of Labor ("OSHA") to issue—within thirty (30) days of this Court's grant of the writ—an Emergency Temporary Standard for Infectious Diseases ("ETS") aimed at protecting workers from COVID-19 (see Addendum B).

On May 19, 2020, OSHA issued an "Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19)" that provided instructions and guidance to Area Offices and compliance safety and health officers (CSHOs) for handling COVID-19-related complaints, referrals, and severe illness reports (see Addendum C).

On May 29, 2020, The National Federation of Independent Business, US Chamber of Commerce, Restaurant Law Center, The Air Conditioning Contractors of America, Independent Electrical Contractors, The National Fisheries Institute, and National Association of Home Builders filed a brief of amici curiae in support of respondent occupational safety and health administration and denial of the emergency petition (see Addendum D).

On June 11, 2020, the US Court of Appeals for the District of Columbia Circuit denied the AFL-CIO May 18 petition.

Existing OSHA Standards are Enough and Enforceable.

Currently, Virginia businesses must follow existing OSHA statutes and regulations to assess their workplaces and determine the existence of hazards and provide necessary PPE to workers including respirators and eye and face protection. They must maintain proper sanitation for their facilities. And, most importantly, they have a general duty under the Occupational Safety and Health Act and Virginia law to keep their workplaces free from recognized hazards that cause or are likely to cause death or serious physical harm (the general duty clause).

These regulations and statutes are clear and enforceable even in these unprecedent times. In fact, on May 19, 2020, OSHA released updated guidance on enforcing workplace safety regulations pertaining to COVID-19. In the updated guidance, OSHA stated that it would be enforcing and applying several existing standards—including PPE, recordkeeping and reporting, sanitation, and access to medical records—as well as the general duty clause, in ensuring worker safety related to COVID-19.

Additionally, OSHA stated that if an existing regulation does not address a specific deficiency related to COVID-19, OSHA compliance officers are to consider whether the employer has violated the general duty clause. Also, OSHA clarified an employer's failure to follow CDC guidance may result in a general duty clause violation.

If one of our members failed to take action to protect its workers from COVID-19, as recommended by OSHA or the CDC, DOLI's Occupational Safety and Health Compliance Program (VOSH) could cite the company for violation of the general duty clause or another existing regulation.

The lack of additional regulations does not hamper the Commonwealth's ability to enforce COVID-19 related safety measures; the Commonwealth already possesses the power to take action against non-compliance businesses.

"One Size Fits All" Regulations Reduce Flexibility to Respond to Pandemic

"One Size Fits All" regulations proposed by the Department reduces businesses' the flexibility they need to quickly alter workplace procedures to remain safe during the ever-changing circumstances of this pandemic especially when each industry has its own needs.

OSHA and the CDC have issued new guidance on preparing workplaces for COVID-19 for a number of industries including retail, package delivery, manufacturing, construction, restaurants, dental, rideshare, pharmacies, nursing homes, and meatpacking. These guidance documents reflect the vastly different working environments in each of these industries and provide the most effective safety measures depending on workplace setting, industry, location, and other factors. What works for a manufacturing facility or agricultural business may be inappropriate for nursing homes.

Also, these proposed emergency regulations don't consider how businesses are using innovation to protect workers during this pandemic. Businesses and workers are benefiting from OSHA and the CDC's flexible and targeted approach to protecting workers' health and safety from the novel coronavirus. The private sector has issued their own guidelines to help businesses reopen safely while protecting workers from the coronavirus based on their industry specific needs. For example, the National Retail Federation issued a reopening guidance that includes information concerning cleaning and sanitation, personal hygiene, social distancing and health monitoring for the retail community. The American Society of Heating, Refrigerating and Air-Conditioning Engineers issued guidance on infectious aerosols and building
reopening guidance.

Evolving Environment and Guidance

We are all facing unprecedented times. COVID-19 is a novel coronavirus that was identified by the World Health Organization just 5 months ago as a new virus. As the virus has spread, scientists and health care specialists continue to increase their knowledge of the virus' symptoms, how it's transmitted, what measures prevent transmission, how to treat it and develop a vaccine.

It's not surprising that as the current situation evolves so does the guidance provided by OSHA, CDC, and VDH to employers related to workplace safety. We've seen both OSHA and the CDC continually issue updates to their guidance documents. In fact, OSHA updated their guidance for employers are recent as May 19, 2020 and the CDC on May 27, 2020.

By setting these emergency standards, the Commonwealth is freezing current scientific understanding into place which is unnecessary and poses more risk for our businesses and workers.

Proposal Creates Uncertainty and Goes Beyond OSHA Recommendations

The proposed emergency regulations in several instances create uncertainty with the terms used in the proposal and go beyond OSHA recommendations. For example:

1. On page 13, "Feasible" cannot be defined as both "technical" and "economic." Something can be technically feasible but not economically feasible at the same time.

2. On page 13, the "Known COVID-19" definition establishes an impossible standard because the employer "should have known that the person has tested positive for COVID-19" and a plaintiff only has to argue that the employer did not employ "reasonable diligence" which is undefined. This appears to be a litigation trap rather than a health and safety standard.

3. One page 13, the "May be infected with SARS-CoV-2" definition should have the words "or suspected COVID-19 person," removed. An employer has no way to determine if someone is "suspected" of COVID-19 exposure.

4. On page 13, #2 should be removed. An employer has no way to determine if someone is "suspected" of COVID-19 exposure.

5. On page 13, #3 should be removed. "Being a resident of a locality, city, town, or county with moderate or substantial SARSCoV-2 ongoing community transmission" is an unreasonable standard and could render the entire workforce of thousands of businesses unable to report to work. Also, who determines what is "moderate" and how do employers know when their business or employees are located in communities of "moderate or substantial transmission"? Finally, this could leave a significant number of "low risk" businesses in a "moderate" community transmission area with implementing costly measures that might not be necessary.

6. On page 13, #4 should have the words "moderate or" removed. In fact, the entire section could have civil liberties and interstate commerce implications that require further evaluation.

7. On page 17, #d5, the proposal does not expressly limit the requirement on employers of paid sick leave to the federal Families First Coronavirus Response Act. Instead it creates confusion on how much sick leave must be given *(. . . to the extent feasible and permitted by law, including but not limited to the Families First Coronavirus Response Act . . .)*

8. On page 14, the statement that "Physical separation of an employee from other employees or persons by a permanent, solid floor to ceiling wall constitutes physical distancing from an employee or other person stationed on the other side of the wall" is impractical and inconsistent with other practices and current COVID-19 guidance. Physical separation does not have to be achieved by permanent or floor to ceiling walls. Temporary plexiglass and other hard surface barriers are regularly used to retrofit workstations, counters and cubicles as physical separation "shields" or barriers for employees.

9. At the bottom of page 21, § 40.H requires private sector employers to consult not with their own counsel, but with the Attorney General of Virginia when making determinations in accordance with their obligations under federal civil rights law. This seems beyond the duties of the Attorney General which is to advise and represent the Commonwealth of Virginia. The Attorney General is not equipped to advise private sector employers. Employers must be able to rely on their own counsel.

10. On page 22, does §§ 40.I(2) require a cashier to clean a checkout counter between every single customer?

11. On page 23, item #6 - the EPA List N provides for unlisted chemicals that are still effective against coronaviruses and the standard here in § 40.I(6) is more restrictive than the EPA standard it cites.

12. At the top of page 26, § 50.B(8) seems to introduce psychological stress as a novel workplace hazard. The purpose of the OSH Act and its Virginia Occupational Safety and Health Act is to prevent injuries and illnesses arising from workplace hazards.

13. On page 28, § 60.A.#1 assumes that HVAC systems are in the control of all employers – they are not. Leased spaces provide employers with no control over the HVAC systems other than operability.

14. On page 35, § 90.C provides whistleblower protection for employee complaints published to the news media and on social media. Some employers have policies restricting statements to the press or statements reflecting poorly on their employers. Isn't whistleblower protection intended to protect employee complaints to the responsible government regulatory agency? The language "or to the public such as through print, online, social, or any other media" should be struck.

Additional Amendments That Go Beyond Proposal

Based on the petition previously submitted to the Department from the Legal Aid Justice Center, Virginia Organizing, and Community Solidarity with the Poultry Workers, there are a number of requests they made that are not part of the proposal. Many of those requests we believe are beyond the scope of the Board's authority and are more appropriate to be considered by the General Assembly and Governor as part of the legislative process.

We ask the Board to reject any proposed amendments presented at the meeting on June 24th that do the following:

a) Change Virginia's unemployment insurance laws to clarify that workers have good cause to quit -- and therefore should be eligible for unemployment insurance benefits -- if their employer requires them to work under conditions that they believe would threaten their health and safety.
b) Change Virginia's Workers Compensation laws to create a presumption that a worker who contracts COVID-19 is presumed to have an occupational disease arising out of and in the course of employment.
c) Impose additional enforcement mechanisms beyond what is currently available to the Department or claimants such stop-work orders or business closures, enhanced fines, filing a private civil action, and awarding attorney fees.

Process Moving Forward

The Regulations lack a clear timeline for when employers must be in compliance and how long they have to react to regulatory changes.

Before Virginia's small business owners must be in compliance, VOSH needs to provide online consultative services for helping employers develop COVID-19 infectious disease preparedness and response plans. Also, VOSH should prepare a standard curriculum for all employers to use in training employees.

Finally, should the Board approve emergency regulations, we believe any extension beyond 6 months needs to be addressed with the normal rulemaking process and provide an opportunity for the Board to evaluate the implementation of the emergency regulations and consider any new guidance issued by OSHA or CDC because of the changing science. This ensures the targets of the rulemaking receive due process and there's an opportunity to review the implementation and impact of any approved emergency regulations.

While facing devastating economic conditions Virginia's businesses continue to keep the safety and health of their employees as their top priority as they reopen and increase their business operations. ***Again, we respectfully request you reject the proposed emergency regulations.*** We believe the Department has sufficient authority and enforcement powers to address the concerns of unsafe work environments. This action will give Virginia's small businesses an opportunity to rebuild their businesses, restore their customer base and rehire their employees.

Best Regards,

Nicole Riley, Virginia State Director

Cc: Brian Ball, Secretary of Commerce and Trade
Megan Healey, Chief Workforce Advisor to the Governor
Clark Mercer, Chief of Staff
Ray Davenport, Commissioner of the Department of Labor and Industry
Members, Virginia General Assembly