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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 intent to adopt a Permanent Standard for Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19, 16VAC25-220 (otherwise further to as "the Regulations").

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 28th week of Virginia's State of Emergency related to containing the spread of COVID-19, Virginia's many small business owners have faced intense stress as their businesses were ordered to close or operate in an extremely limited capacity. The economic turmoil suffered by small businesses during the global pandemic has only somewhat abated as Virginia has gradually reopened. Many small business owners have watched helplessly as their revenue slowed to a trickle or dried up entirely. According to NFIB's monthly Small Business Optimism Index, optimism has dropped and reports of expected better business conditions in the next six months have deteriorated. Owners continue to temper their expectations of future economic conditions as the COVID-19 public health crisis is expected to continue.

Despite these challenging times, many small businesses adapted and implemented protocols to protect their employees and customers from exposure to the coronavirus by following the guidance issued from many federal and state government entities including the CDC, OSHA, and the Governor's executive orders. Now Virginia small business owners are doing their best to comply with the Emergency Temporary Standard (ETS). The last thing business owners need as they rebuild their businesses during this critical time is additional one-size-fits-all, static government regulations and red tape.

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.

Therefore, NFIB requests the Virginia Safety and Health Codes Board rejects a Permanent Standard. Adopting 16VAC25-220 as permanent regulations will be overly burdensome for small businesses. 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 small businesses to comply with outdated regulations and would 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.

Now is not the time to impose a permanent standard. The ETS will not even be fully implemented until September 25 (the due date for these public comments) so small businesses have had no time to voice the challenges they've encountered implementing the ETS. Nor has there been an effective evaluation of the ETS by DOLI on what impact the Regulations will have on small businesses in accordance with the Small Business Regulatory Flexibility Act/Small Business Regulatory Enforcement Fairness Act (SBREFA).

If the Board believes it should move forward with a Permanent Standard, it must include these important provisions:

1. The sunset clause from the ETS into the Permanent Standard so the Regulations will expire with the Governor's State of Emergency

2. The specific recommendations from the Business Coalition to ensure the implementation and enforcement of any Permanent Standard is reasonable, fair, and attainable. Here are several of NFIB's priorities for amendments to any Permanent Standard and you can review all 36 recommendations in the Addendum *(beginning on page 4 through page 9 of this letter)*

    - **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.

    - **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.

    - **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.

- **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.

- **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.

- **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.

- **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.

- **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.

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

Further, NFIB requests the Virginia Safety and Health Codes Board issue an additional sixty (60) day comment period on 16VAC25-220 requesting that employers provide recommended improvements to the Emergency Temporary Standard for consideration by the Board.

NFIB strongly asks the Board NOT to approve any amendments to the Regulations that would incorporate other infectious diseases. There is no one-size-fits-all plan to combat a wide variety of infectious illnesses.

Conclusion

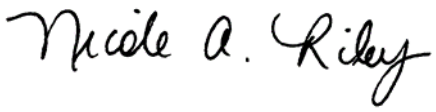
It is unreasonable to impose one-size-fits-all COVID-19 regulations on all employers when they reduce a business' flexibility to quickly alter workplace procedures to remain safe during the ever-changing circumstances of this pandemic especially when each industry has its own needs. By approving a Permanent Standard, the Commonwealth is freezing current scientific understanding into place which is unnecessary and poses more risk for our businesses and workers.

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 Regulations are being pursued when the Emergency Temporary Standard has not been fully implemented and has so many significant problems.

Therefore, it is NFIB's recommendation that the Board reject the regulations, establish a new sixty (60) day public comment period for a revised ETS or abandon the ETS entirely and rely upon the General Duty Clause and Federal, State, Industry guidance to protect workers as is being effectively done in 49 other states.

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. We hope the Board will see fit to give Virginia's small businesses an opportunity to rebuild their businesses, restore their customer base and rehire their employees without imposing additional costly regulations.

Best Regards,



Nicole Riley, Virginia State Director

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

ADDENDUM

Specific Recommendations for any Permanent Standard

1. The text of the Regulations does not itself contain findings that the all the major components of the final ETS are necessary to meet a "grave danger." The issue is not whether any ETS is necessary to meet the "grave danger" standard but whether all of the substantial elements of this proposed Regulation as applied across the scope of every employer in Virginia is necessary under the procedures of Va. Code§ 40.1-22(6a).

2. The engineering controls proposed in the Emergency Temporary Standard (ETS) from Virginia's Department of Labor and Industry, effective July 27, 2020, stipulate compliance with the 2019 version of ASHRAE Standard 62.1 and 62.2, Ventilation for Acceptable Indoor Air Quality. These engineering controls represent an overreach of the regulatory process since it is impractical for Owners of existing buildings, absent of any pending major renovations, to comply with standards that precede the time when the facilities were designed and constructed. Building HVAC systems in use have been designed,

constructed, and commissioned in accordance with strict building code requirements in effect at the time of issuing the Certificate of Occupancy. The engineering controls in the ETS should only require systems to be maintained and operated in accordance with their system design and related manufacturer requirements as of the date of the Certificate of Occupancy or subsequent upgrade to the system. Although the Department of Labor and Industry utilized the language of the ETS as a basis for the proposed regulation, it is imperative to tailor any permanent regulation for a magnitude and duration commensurate to the risk presented. The COVID-19 pandemic methods of transmission are not fully understood, yet regulations are being proposed to significantly change large components of buildings to address those methods of transmission. Requiring retroactive compliance with a 2019 ASHRAE HVAC standard without fully understanding the real risk from the HVAC system on the building occupants for virus dispersion is premature at best. It should be left to the industry trade groups to determine the most effective design and performance requirements for existing and new HVAC systems and any permanent regulations should follow existing processes contained in the Virginia Uniform Statewide Building Code (USBC) which utilize appropriate industry investigation and recommendations.

3. The hand sanitizer definition is imprecise and should be expanded to more than “60% alcohol” because it will result in hazards for certain pharmaceutical manufacturing operations. Clarifications issued by DOLI in its ETS FAQ document should be incorporated into an amended ETS or Regulations
4. The Regulations’ employee risk assessment review process conflicts with current OSHA Guidance (Guidance on Preparing Workplace for COVID-19, OSHA 3990-03 2020) since it confuses job tasks with employee job classifications.

5. Requiring that the “…common spaces…[to be] cleaned and disinfected at the end of each shift” is impractical for 24/7 operations with multiple and overlapping shifts. This type of standard does not fit all businesses, specifically those that already have FDA cleaning standards. The ETS should be amended to provide for a time-based alternative such as every 8, 12, or 24 hours, exempt FDA regulated facilities, and any Regulations should reflect the same.

6. The Regulations state under the definition of physical distancing pursuant to § 16VAC25-220-30 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." 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, particularly when coupled with PPE or face masks. To complicate matters further, § 16VAC25-220-50 (applicable to hazards or job tasks classified as very high or high exposure risk) specifically states that “physical barriers” are “e.g., clear plastic sneeze guards, etc.). How can physical barriers be permanent solid walls for “low” or “medium” risks, but plastic

sneeze guards are allowable for “high” or “very high” risks? These references should be removed from the ETS and consideration for Regulations.

7. The Safety and Health Codes Board does not have authority over organizational sick leave policies, telework policies, flexible worksites, flexible work hours, flexible meeting and travel, the delivery of services or the delivery of products. Therefore, its § 16VAC25-220-60 statements regarding such policies exceeds its authority and should be removed from the ETS and consideration for Regulations. Also, if left to the discretion of each VOSH inspector, will failure to satisfy of an inspector constitute a citable offense?

8. The Regulations frequently refer to the standards applicable to the “industry” which is language that may be appropriate for guidance but is too vague to be meaningful and should be removed from the ETS and consideration for Regulations.

9. It is unclear about which version of CDC guidance an employer may reference for purposes of compliance with the Regulations found in 16VAC25-220-10(G) since guidance is changing so rapidly. It is also unclear who determines that the “CDC recommendation provides equivalent or greater protection than provided by this standard.”

10. Requiring “respiratory protection” and “personal protective equipment standards applicable to the employer’s industry” in vehicles with more than 1 person is impractical and vague. Does “vehicle” include golf carts, planes, heavy equipment, boats/barges/ships, trucks, and trains? There are other controls, when used together, that should be considered and the ETS should be amended to reflect so. Why not allow administrative controls (e.g., social distancing) in low-hazard situations, such as two or three employees riding several rows apart on a large bus or employees seated at a distance in an uncovered vehicle? The Regulations should not incorporate this provision.

11. Requiring “Access to common areas…” to be controlled by “limiting the occupancy of the space, and requirements for physical distancing” is too imprecise. FEMA recommends a calculation of 113 square feet per person. The ETS should be amended to recognize this measurement and Regulations should do the same. There should also be accommodating language inserted in both for “closed or controlled” restroom access to ensure ADA compliance.

12. Regulations should sunset based upon an event not a date.

13. Employers should have more time to update their COVID-19 infectious disease preparedness and response plans. There should also be a threshold for mandating change to a COVID-19 infectious disease preparedness and response plan.

14. All employers should not have to complete a COVID-19 infections disease preparedness and response plan. This mandate is overly burdensome and “medium” risk facilities should not be regulated at this level.

15. Employers should have more time to train their employees and communicate with their contractors. The current timetable is unachievable. The ETS should be amended to provide employers another sixty (60) days to comply.

16. The definition of "duration and frequency of employee exposure" is to imprecise and inconsistent with CDC guidance. This will also change the definition of "physical distancing" or "social distancing" as well as "occupational exposure." For example, is the proper duration and frequency 15 minutes of exposure less than 6 feet to another person in an 8-hour shift? Does the use of face coverings and/or surgical/medical procedure masks and/or respirators extend the allowable duration of exposure?

17. The definition of "technical feasibility" requires the "existence of technical 'know-how'…" which is an imperceptible standard of knowledge Further, disqualifying an employer from invoking "technical feasibility" arguments because the employer's "level of compliance lags significantly behind that of the employer's industry" assumes a great deal of industry knowledge within DOLI and that employers lagging behind their peers choose to do so – every company has different economic realities. This is an unachievable standard and should be removed from the ETS and any consideration for Regulations.

18. The Regulations define "economic feasibility" to mean the employer is financially able. The standard does not ask whether the employer could stay in business or avoid releasing employees to pay for the costs of the Regulations. The ETS and Regulations should be amended as such.

19. "Feasible" cannot be defined as both "technical" and "economic." Something can be technically feasible but not economically feasible at the same time. This should be referenced against OSHA guidelines and clarified.

20. Is the definition of "Joint Employment Relationship" the same as the USDOL definition? It is unclear and creating a new definition would not be acceptable.

21. The "Known to be infected with SARS-CoV-2 virus" definition establishes an impossible standard because the employer "…knew or with reasonable diligence should have known that the person has tested positive…" 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.

22. The "May be infected with SARS-CoV-2 virus" definition should have the words "or suspected to be infected with SARS-CoV-2 virus…" removed. An employer has no way to determine if someone is "suspected" of COVID-19 exposure.

23. The definition of "Symptomatic" is problematic for three reasons: 1) Data regarding the incubation period is still uncertain. Reports are now being published that suggest 5

days, 11.5 days or 14 days ; 2) The symptoms listed here are not uniformly listed in all CDC, OSHA and VDH guidance documents; and 3) Employers will be sending thousands of employees home due to allergy, cold or regular flu symptoms as well as potentially quarantining them pending two successive negative COVID-19 tests (which are still not readily available).

24. The Regulations would require employers to classify each employee for risk level of exposure. As proposed this review process conflicts with current OSHA Guidance (Guidance on Preparing Workplace for COVID-19, OSHA 3990-03 2020), since it confuses job tasks with employee job classifications. Guidance requires assessing employees by hazards and tasks. Risk assessments should be done by tasks not job titles. This would be a massive burden for employers – imagine individual assessments for an employer with 2,000 employees. Further, OSHA Guidance is predicated on the use of a risk management process to determine appropriate control measures. The draft Regulation deviates to mandate specific control measures in workplace situations, regardless of potential exposures or other mitigating circumstances arising from the required risk assessment process.

25. The Regulations reference employees reporting of symptoms but there is no clear definition of the number or combination of symptoms an individual must have to be deemed symptomatic. That ambiguity, which is equally ambiguous in CDC guidance, is what VOSH could seek to clarify in the ETS.

26. The Return to Work" Regulations referencing "an employer may rely on… a policy that involves consultation with appropriate healthcare professionals concerning when an employee has satisfied the symptoms based strategy requirements…will constitute compliance with the requirements of this subsection" must be clarified because someone with a diagnosed sinus infection or allergic reaction must be allowed to return to work faster than 72 hours plus 10 days if cleared by a physician. Also, the time-based return-to-work rule requiring three days of being symptom-free (following the ten-day period since the onset of symptoms) should be changed to one, making it consistent with the new CDC standard.

27. § 16VAC25-220-40 K.8 requires that employers provide mobile crews with "transportation immediately available to nearby toilet facilities and handwashing facilities…" This mandate has nothing to do with COVID-19 infections and should be removed from the ETS and consideration for Regulations.

28. Is the general contractor or owner exposed to potential citation if the subcontractor violates any of the provisions of the ETS or Regulations without providing this information to the employer? Why is this liability being shifted to the employer? Does this now set a precedent for other regulatory issues?

29. The return-to-work test-based strategy is problematic because of the lack of testing availability. The regulation also requires compliance with symptom-based strategy if a known asymptomatic employee refuses to be tested.

30. The ETS and Regulations require both handwashing facilities and hand sanitizer. CDC and OSHA guidance requires one, but not both, which makes sense given recent hand sanitizer shortages. One or the other, but not necessarily both in all workplaces should be considered for amending the ETS and any consideration for Regulations.

31. The Regulations require a certified hazard assessment for each workplace but provides no timeline for completion. Is a new certified hazard assessment required after every change in guidance? How long do employers have after the Regulations are implemented to certify hazard assessments? How long will it take for employers to get the proper consultants to certify these hazard assessments? Is employer liability increased during this waiting period?

32. § 16VAC25-220-90 provides protection for employee complaints published by the news media and social media. Some employers have policies restricting statements to the press or statements reflecting poorly on their employers. Whistleblower protection is 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 from the ETS and from consideration for Regulations.

33. § 16VAC25-220-80 includes a training mandate for "Heat-related illness prevention…" that has no connection to COVID-19 infection protection.

34. Eliminate the requirement to report positive cases to the Department of Health. Health care providers are already doing this according to inquiries to the Virginia Health Department when asked how to make such reports.

35. Eliminate language protecting employees who refuse to work because they "feel" unsafe. The criteria for protected work refusals are already in the Administrative Regulatory Manual.

36. Strike requirements of owners of buildings and facilities to report COVID cases to employer tenants. It exceeds the intent of OSHA rules to require employers to provide employment and a place of employment that is free of recognized hazards.