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Submitted Electronically

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Safety and Health Codes Board

RE: Comments on Proposed VA Department of Labor and Industry, Safety and Health Codes Board
Proposed Permanent Standard Based on Emergency Temporary Standard for Infectious Disease
Prevention: SARS-CoV-2 Virus That Causes COVID-19, 16VAC25-220

To Whom It May Concern:

Thank you for the opportunity to comment on the proposed 16 VAC 25-220, Permanent Standard/Regulation, Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19. I am a concerned citizen and lawyer with extensive background in regulatory law and policy. I have worked on dozens of statutory programs for many years as Senior Counsel to the Energy and Commerce Committee in the U.S. House of Representatives and worked in the Office of General Counsel for the U.S. Environmental Protection Agency. I have substantial concerns with the procedure behind this proposed rule and the substance of the proposed rule. I strongly recommend the Board follow the full set of public participation procedures set out in the Virginia Administrative Process Act (VAPA) Va. Code § 2.2-4000 et seq., including the opportunity to comment on a regulatory impact analysis. I further recommend the Board reject or substantially modify the proposal published by the staff of the Department of Labor and Industry (DOLI) for the variety of reasons discussed below.

COMMENTS

1. The Board Committed to Follow the Virginia Administrative Process Act

Department of Labor and Industry (DOLI) staff has proposed this rule without proper legal authority to do so. Regardless, DOLI staff has followed and is further proposing an illegal process. The proposal further violates the commitment of the Board as specifically stated in the Emergency Temporary Standard (ETS). Section 16VAC25-220-10 in the ETS specifically states:

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This standard shall not be extended or amended without public participation in accordance with the Virginia Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia) and 16VAC25-60-170.

The Board has not revoked this requirement through a rulemaking or in any manner. Nonetheless, the proceedings for the proposed rule have violated numerous provisions of Virginia Administrative Process Act (VAPA) regarding the public participation process.

II. DOLI Staff Lacks Authority to Propose the Rule

VAPA defines “agency” to be any authority, instrumentality, officer, board or other unit of the state government empowered by basic laws to make regulations or decide cases. It is apparent from, Va. Code §40.1-22 that the Virginia Safety and Health Board (Board) is empowered by the basic laws to make regulations in this case and not DOLI staff. See also definition of “agency” under 16VAC25-11-20. The Board must propose regulations not DOLI staff. The Board may not delegate the authority to propose regulations that satisfy VAPA or form the basis for a final regulation. The Board has exclusive regulatory authority regarding any such standards and the Board did not provide and did not vote on this “proposal” before seeking comment or submitting to the Virginia Registrar. Accordingly, this proposal does not satisfy the requirement that it constitutes the necessary proposal from the Board.¹

III. The Proposed Rule Must Have the Economic Impact Statement and Regulatory Flexibility Analysis Available for a 60-day Public Comment Period

Va. Code §2.2-4007.05 styled Submission of proposed regulations to the Registrar states:

The summary; the statement of basis and purpose, substance, and issues; the economic impact analysis; and the agency’s response shall be published in the Virginia Register of Regulations and be available on the Virginia Regulatory Town Hall, together with the notice of opportunity for oral and written submittals on the proposed regulation.

It is clear the economic impact analysis must be available for public comment. The current plan of DOLI staff does not appear to provide this opportunity for the public. The Board must. It also not clear whether the economic impact analysis that is planned will include the effect on small businesses as set out in Va. Code §2.2-4007.04(A)(2).

¹ Va. Code §40.1-51.1 provides a structure where the State Health Commissioner provides advice and the Department of Labor and Industry staff provides drafting as proposals for the Board. This structure does not make DOLI the agency with delegated authority for the rules.

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The DOLI staff prepared proposed rule has significant impacts on small businesses. Thus, under Va. Code §2.2-4007.1(B), the agency proposing a regulation shall prepare a regulatory flexibility analysis in which the agency shall consider utilizing alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small businesses. The agency shall consider, at a minimum, each of the following methods of reducing the effects of the proposed regulations on small businesses:

1. The establishment of less stringent compliance or reporting requirements;
2. The establishment of less stringent schedules or deadlines for compliance or reporting requirements;
3. The consolidation or simplification of compliance or reporting requirements;
4. The establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and
5. The exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

The Board has considered none of these.

The current process is further in violation of 16VAC-11-50 which requires that the agency shall accept public comments in writing for a minimum of 60 calendar days following the publication of a proposed regulation. The comment period of July 27, 2020 to September 25, 2020 did not qualify both because there was no regulatory impact statement and because the Board did not vote on the ETS as a proposed permanent regulation. Commenters need 60 days to comment on the regulatory impact analysis and the regulatory flexibility analysis. The regulatory flexibility analysis, and the basic standard to determine whether a provision is necessary to protect against a grave danger, must be component by component.

IV. DOLI Staff Seeks to Substitute a Non-statutory Adoption Section that Conflicts with VAPA on Process and Effective Dates

Proposed 16VAC25-220-20(A) fails on numerous fronts and it is novel to include an adoption process as a part of a rule since rulemaking is governed by a standard process. First, under proposed 16VAC25-220-20(A)(3) and (4) DOLI staff proposes to have the standard take effect upon filing with the Registrar of Regulations and publication in a newspaper of general circulation published in the City of Richmond, Virginia. Under Va. Code §2.2-4013(D) and §2.2-4015(A) the effective date can be no earlier

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than 30-days after publication of the final regulation in the Register. Moreover, the DOLI staff adoption proposal pays homage to the Governor but not to the potential review of the legislative branch under Va. Code §2.2-4014 which would be thwarted by the DOLI staff proposal on adoption. To the extent, DOLI staff is pursuing a hybrid approach there is a fundamental question as to which businesses are aware of the ETS let alone the permanent standard. It would not provide for fundamental procedural due process unless businesses are aware of this novel approach. What efforts will be made to inform businesses before the effective date. Even if the Board provides some hybrid approach it must satisfy proper public notice that would satisfy due process.

V. DOLI Staff Refusal to Consider and Relay Responses Because Commenters Are Challenging the ETS In Court Is Inappropriate

DOLI staff has failed to include response to my comments from the earlier comment period and the earlier comments of the Virginia Manufacturers Association and the Board has failed also. I took a great deal of effort to provide those comments and assume VMA did as well. It does not matter that VMA is a plaintiff in a lawsuit regarding the ETS or than I am an attorney in that case. VMA's right and my right to have its comments fully considered by the Board is not affected by that litigation. Nor does the fact that some of the same comments are relevant to the legal proceeding make those comments out of bounds for consideration by the Board. Quite the opposite. The litigation and the public process concerning the proposed rule are public proceedings. And the Board should consider all arguments, including legal arguments, as part of its consideration.

This is particularly important given that DOLI staff is attempting so many novel mechanisms for a rulemaking that belongs to the Board. The DOLI staff approach to discarding portions of my comments and VMA comments appear to be an illegal and inappropriate filter. In as much as DOLI staff has taken the role of preparing a response to comments document, that document should include responses to the full reach of my comments and the VMA comments. Importantly, the Board should be made aware of these comments. At this juncture, we are unclear whether the Board will consider our comments in their entirety. There was no discussion of my prior significant comments in the meeting of the Board which had at least some discussion of prior public comments.

VI. The Board Should Ensure That No One Can Apply Sanctions Under the Illegal Incorporation of the Orders of the Governor and Health Commissioner Under the ETS

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DOLI staff has proposed to remove the illegal incorporation of Executive Orders and Orders of Public Health Emergency into the proposed permanent COVID rules. Those Orders themselves are illegal – failing to comply with procedures required by law, in excess of a permissible grant of rulemaking authority, and impermissibly infringing on fundamental rights. The incorporation was doubly illegal as it was an unlawful delegation of the Boards authority to create rules that DOLI can enforce through the DOLI enforcement authorities. Since DOLI may enforce the ETS for up to sixth months later based on the statute of limitations, the Board should provide a specific provision prohibiting any DOLI enforcement of those portions of the ETS.

VII. The Board, the Governor and the Health Commissioner Must Eliminate the Confusing Conflicts and Overlaps Between the Safer at Home Document and the Proposed Rule

Executive Order 72 and Order of Public Health Emergency 9, (collectively “EO72” or the “Orders”) tries to accomplish the same illegal objectives as the cross-references to the Orders in the ETS. This approach illustrates the same lack of concern for the confusion caused by this matrix of rules to the regulated community. Specifically, under new enforcement sections or EO72, the Governor and the Health Commissioner claim that DOLI can enforce the Orders when DOLI is supposed to enforce the regulations of the Board. In addition, EO72 has a new rule of construction which states:

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-CoV-2 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.

The terms guidelines applicable to businesses refer to the document incorporated by reference in the Orders is styled Safer at Home: Phase Three Guidelines for All Business Sectors (“Safer at Home” document). The Safer at Home document has mandatory sections and sections that ultimately appear mandatory in additional circumstances due to certain statements in EO72 and by cross-reference from the mandatory sections. The combined sections of EO72, the Safer at Home document, and the ETS form a complex matrix of overlapping and confusing rules.

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First, the ETS and a permanent rule should have more legal standing than the Orders. The purported basis for the Health Commissioner under the Orders is Va. Code §§ 32.1-13 and 32.1-20.

Va. Code §32.1-13 states:

The Board may make separate orders and regulations to meet any emergency, not provided for by general regulations, for the purpose of suppressing nuisances dangerous to the public health and communicable, contagious and infectious diseases and other dangers to the public life and health. (Emphasis added).

The ETS and a permanent COVID rule would be general regulations. If the ETS or permanent rule and an Order of Public Health Emergency cover the same subject matter the ETS, or permanent COVID rule, then there should be no Orders on the same subject under Va. Code § 32.1-13.

Separately, E072 and Order of Public Health Emergency 9 claims the source of authority for DOLI enforcement over the Orders is §40.1-51.1—the general duty clause. Specific regulations of the Board supercede the general duty clause. If an employer is following regulations on a topic, the general duty clause cannot add more and anything in conflict. Moreover, §40.1-51.1(C) sets out the universe of enforcement as Title 40 or standards, rules, and regulations promulgated thereunder. This is not a source of enforcement authority for Orders of Public Health Emergency or Executive Orders. DOLI has a role administering and enforcing occupational safety and occupational health activities as required by the Federal Occupational Safety and Health Act of 1970 and rules under Virginia Code Title 40. The provisions of Title 32 and Title 44 have separate enforcement structures and do not include DOLI.

Regardless, this structure of overlap and confusion poses substantial questions as to the point and status of the permanent rule. The Safer at Home document covers numerous areas that overlap with the permanent rule including with respect to employee monitoring, requirements that employees with symptoms of COVID must not stay at the work site, with respect to return to work protocols. While the Safer at Home document and the permanent rule overlap on this subject matter, they use different language. According to E072, the Safer at Home document would apply, and the permanent rule would not, although that is based on whether one is a conflict. This overlap creates substantial confusion in an area that is separately substantially confusing in both documents.

The Board should not force conflicting rules which are needlessly confusing, basically redundant and, therefore, not necessary or appropriate. Accordingly, it is the obligation of the Governor, the Commissioner of Health and the Board not to create conflicting, confusing rules. Under the Safer at

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Home document, many businesses and business types must, as mandatory requirements, strictly adhere to the physical distancing guidelines, enhanced cleaning and disinfection practices, and enhanced workplace safety practices of the Safer at Home document. In addition to businesses, the following sentence in the Safer at Home document is ambiguous with respect to other businesses, but one interpretation is that the sentence creates mandatory and enforceable requirements:

Any business not listed in Section II, subsections A or C below must adhere to the Guidelines for All Business Sectors expressly incorporated by reference here in as best practices.

Accordingly, there is a substantial scope of employers both subject to the Safer at Home document and the ETS and, potentially, the proposed rule.

While there are conflicts on multiple issues, the following focuses on the enhanced workplace safety practices in the Safer at Home Document. The Safer at Home document requires employers to instruct employees to stay home who are “sick”. One could either assume this means sick with COVID or it could mean sick with a cold or allergy or other condition. The COVID-19 screening protocols for employee self-checks suggest a structure with a check list if the symptom “cannot be attributed to another health condition”. This is a different standard than the “alternate diagnosis” language of the ETS and proposed rule at 16VAC25-220-40(B)(4). The language “sick” is different than “suspected COVID.” Those provisions of the Orders may be more rationale as potential rules, at some level, than the language of the proposed rule. The Orders may allow some flexibility to employees to consider whether a symptom is more likely a cold or flu or allergy. The bottom line is the risk of being infected with COVID involves numerous factors and symptoms like a cough or sneeze or runny nose or headache are not very dispositive.

There are more conflicts. 16VAC25-220-40(B)(6) states:

“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”.

The Safer at Home Document is more specific:

Develop or adopt flexible sick leave policies to ensure that sick employees do not report to work. Policies should allow employees to stay home if they are sick with COVID-19, if they have a positive diagnostic test for the virus that causes COVID-19, if they need to self-quarantine due to exposure, and if they need to care for a sick family member.

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The provisions are similar but not the same.

The proposed rule at 16VAC25-220-40(B)(2) states:

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 and/or symptoms of an oncoming illness.

The Safer at Home document has an affirmative obligation to:

[i]mplement practices such as those described in the VDH Interim Guidance for COVID-18 Daily Screening of Employees for examples of screening questionnaire.

One standard in the proposed rule is informational. The standard in the Safer at Home document appears to be more than that.

Possibly, compliance with either the Orders or the ETS/proposed rule should be considered full compliance in order to provide flexibility. The Orders seek to apply one or the other or both through some complex “conflict” standard between two separate documents. Moreover, neither DOLI nor the Board appear to interpret the Safer at Home document. The Virginia Department of Health (VDH) appears to assume this task, although, everything about the matrix of rules that Governor, the Health Commissioner, DOLI staff, and the Board have spun out is filled with ambiguities. What we do know is VDH is not the Board. The matrix is even more complex as each portion of the matrix of rules cross-references numerous guidance documents either implying or requiring that those guidance documents are rules. Those documents were not written to be rules.

VIII. The Board Should Not Support DOLI Enforcement or Any Enforcement on Portions of the Executive Orders, Orders of Public Health Emergency, or the Safer at Home Document that Force or Enlist Employers to Impermissibly Infringe on Fundamental Rights of Assembly and Association

The Board’s prior support for incorporation of the Orders in the ETS was a problem. The authority of DOLI under §40.1-49.4 is to enforce Title 40, not the Orders. EO72 suggests there is a bridge through the general duty clause. The Board has the authority for regulations in the area. Between DOLI, the Board, the Health Commissioner and the Governor, businesses should not be enlisted to infringing on fundamental rights.

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VA. Const., Art. I, § 12 states: "the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble" By definition, a numerical limitation by the state on the size of assemblies is an infringement on the right to peaceably assemble. A statewide limitation on the size of assemblies in Virginia is unprecedented. Moreover, the infringement on the right of assembly has uneven application under the rules of the orders. For months, there was a 10-person, and then a 50-person, restriction on assembly, including for weddings, celebrations, sporting events, family reunions, and Easter church services. Now the restriction has a higher limit (but includes a restriction on occupancy in certain settings that are lower limits). However, these same restrictions did not and do not now apply to a large meeting of lawyers at a law firm. Countless individuals performing functions together through their employment is not a "gathering" under the Order. Crowds are allowed at a Walmart, Lowes, or other large "essential" stores without those restrictions.

The numerical limits of 10 persons currently under EO72 and the Safer at Home Document apply in some situations related to employers in certain circumstances. The limits on assembly apply in certain circumstances, but not in others, without apparent reasons being given to attempt to justify the distinctions.

EO72, Order of Public Health Emergency 9, and the Safer at Home document have many inconsistent exceptions on distancing. Where EO72 has a "family" exception for distancing, the "mandatory requirements" provisions employ the term "members of the same household" and the term "at all times" in various sections. Curiously, the definition of "Family members" in EO72 would not even include a married couple who are not currently "residing in the same household."

For Farmers markets, "non-essential" brick and mortar retail establishments, indoor and outdoor swimming pools, and horse and other livestock shows, the Guidelines use the narrower terms "household," whereas EO72 uses the term "family." For purposes of the right of assembly in innumerable situations, and especially given that such rules apply to all Virginians, distinctions like this have major implications, particularly when violating them carries a criminal penalty. This regulatory inconsistency also deprives every Virginian of due process because it makes it impossible for anyone to know with whom they may gather and when without risking committing a criminal offense.

Notably, the Safer at Home document for performing arts venues, concert venues, movie theaters, drive in entertainment, sports venues, botanical gardens, zoos, fairs, carnivals, amusement

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parks, museums, aquariums, historic horse racing facilities, bowling alleys, skating rinks, arcades, amusement parks, trampoline parks, fairs, carnivals, arts and craft facilities, escape rooms, trampoline parks, public and private social clubs, and all other entertainment centers and places of public amusement all use the term “members of the same household” as an exception. However, that term is not used in EO72 itself. For Horse Racing Racetracks, the Mandatory Guidelines say all must observe distancing, but exceptions-- whether household or family-- are not included.

A government scheme that prohibits every instance of physical proximity among individuals within six feet of one another, based on nothing more than the government’s arbitrary and unilateral classification of their relationship statuses, is an infringement of fundamental rights under the Virginia Constitution. The right of association is both an integral part of the right of assembly and a separate fundamental right. Ordinary conversations at a distance much closer than 6 or 10 feet is also important to the right of free speech. It is the kind of speech that can, and in many instances, must occur among two people or a few people to maintain their right to privacy without others intruding or overhearing. At issue is nothing less than the right of a free people to determine, apart from government rules or coercion, with whom they can sit or whom they can stand next to, perhaps to have a private conversation or maybe simply to hold hands – or frankly any other manner of close personal activity.

Virginians have a fundamental right in who they choose to dance with, who to hold close, who to have a normal conversation with, and, generally, who to be next to as long as the other person wants the same. All Virginians “have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.” Va. Const., Art. I, § 1. The Constitution of Virginia notes the desire to have a government that is most effectually secured against the dangers of maladministration. Va. Const., Art. I, § 3. Virginians have a fundamental freedom of speech and assembly. Va. Const., Art. I, § 12. We know that “No free government, nor the blessings of liberty, can be preserved to any people, but ...by frequent recurrence to fundamental principles.” Va. Const., Art. Art. I, § 15.

A government definition of who can be close to other people and who cannot, imposed broadly, indefinitely, arbitrarily, and unilaterally upon all Virginians is a profound and impermissible assault on their fundamental rights. EO72 provides several definitions of who may associate without distancing, which apply in certain settings but not in others. Several elements of EO72 require maintaining a 6-foot

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or 10-foot distance in certain settings for certain groups but not others based on a definition in the order of either family or household.

The Virginia Supreme Court has stated that provisions of the Constitution of Virginia that are substantively similar to those in the United States Constitution will be afforded the same meaning. See, e.g., *Shivaee*, 270 Va. at 119, 613 S.E.2d at 574 (“due process protections afforded under the Constitution of Virginia are co-extensive with those of the federal constitution.”); *Habel v. Industrial Development Authority*, 241 Va. 96, 100, 400 S.E.2d 516, 518 (1991) (federal construction of the Establishment Clause in the First Amendment “helpful and persuasive” in construing the analogous state constitutional provision). While the First Amendment does not, by its terms, protect a “right of association,” the United States Supreme Court has recognized such a right in certain circumstances. *Dallas v. Stanglin*, 490 U.S. 19, 23-24 (1989). In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Court defined the right at issue to include choices to enter into and maintain certain intimate human relationships and the separate but related right to “expressive association.”

By penalizing employers for not following impermissible infringements on Constitutional rights by the Governor, the Health Commissioner, and the Board itself in the ETS, forces employers to participate in an illegal scheme. There should be no government definition of who must distance versus not distance based on relationships which neither the government nor businesses can reasonably assess. In various settings the Board would have employers ask customers about their family or household relationships to enforce the distancing requirements. This is not a workable scheme. There is no evidence after many months that this scheme has yielded any benefit other than to threaten all with criminal sanctions. The Board would penalize a wedding venue because a boyfriend and girlfriend not residing in the same house sat together at a religious service or walked at a farmer’s market together. These requirements have never been feasible. The requirements if enforced by a local police department would place those police officers at threat for damages under a section 1983 civil rights suit. There is nothing reasonable or workable about these provisions. The Board should not allow that any such requirements are requirements for employers as the Board, the Governor and the Commissioner of Health review these provisions in the context of this process.

IX. The Proposed Rules Many Footnote References to Webpages Is Yet Another Example That the Proposal Is Not an Understandable or Enforceable Regulation

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Why does the proposed rule have 20 footnotes that link to websites? What is the legal import of the footnotes and websites? When the owners of the websites change the language on the website is that intended change the legal import of the proposed rule? In the footnote referring to the frequently asked questions regarding the ETS, is that intended to have legal effect? Who is providing the content of the frequently asked questions, if it is intended to have legal impact? What is the purpose of the websites? Can there be subsequent changes to the frequently asked question document intended to have legal effect. Are they necessary to understand the text of the rule? How will the Virginia Registrar incorporate the websites in the Virginia Administrative Code?

X. *If the Permanent Standard Is Adopted, It Should Sunset When the PHE is Over or Earlier Where Provisions Are Not Necessary to Prevent a Grave Danger*

The onerous requirements of the permanent standards are not likely useful and do not address a grave danger when the Governor either removes the Declaration of a State of Emergency or when COVID-19 transmission rates among employers or categories of employers are found to be low. Accordingly, there should be a sunset clause. The proposed rule would delay the end of the rule and requirements and, effectively require another rulemaking process to end the rule. There is no justification for such an approach. Indeed, if anything the rule should expire in 6 months or earlier unless the Board republishes the rule.

XI. *The Board and DOLI Staff Should Provide an Analysis of What Has Happened Related to Operation of the ETS and Employers in Virginia Over the Past Months*

The unfortunate ETS has been effective since July 27, 2020. It is incumbent on the Board and DOLI to provide information on its operation. This should include a survey of what employers know about the standards, what reporting as occurred, how many employees have been sent home, and some assessment of how the operation of the rules have impacted the transmission of COVID based on actual evidence supporting such assessment. In conversations with multiple employers, there seems to be almost no understanding that the rules exist much less compliance. This is a point that strongly weighs against the hasty promulgation of a rule that threatens businesses but for which the Board and DOLI

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have done little to explain. There is no evidence to support a claim that businesses are aware of the ETS much less in compliance.

XII. The Illegal Mandates of Governor Northam In EO 63 Regarding an Emergency Temporary Standard or Rule Undermine the Validity of the Proposed Permanent COVID rule

On May 26, 2020, Governor Ralph Northam issued a revised Executive Order 63 that provides in part:

“E. Department of Labor and Industry
Except for paragraph B above, this Order does not apply to employees, employers, subcontractors, or other independent contractors in the workplace. **The Commissioner of the Virginia Department of Labor and Industry shall promulgate emergency regulations and standards to control, prevent, and mitigate the spread of COVID-19 in the workplace.** The regulations and standards adopted in accordance with §§ 40.1-22(6a) or 2.2-4011 of the Code of Virginia **shall apply to every employer, employee, and place of employment within the jurisdiction of the Virginia Occupational Safety and Health program as described in 16 Va. Admin. Code § 25-60-20 and Va. Admin. Code § 25-60-30.** These regulations and standards **must address personal protective equipment, respiratory protective equipment, and sanitation, access to employee exposure and medical records and hazard communication.** Further, these regulations and standards **may not conflict with requirements and guidelines applicable to businesses set out and incorporated into Amended Executive Order 61 and Amended Order of Public Health Emergency Three.**”(Emphasis added).

The Governor’s directives in EO63 as mandates to the Department of Labor and Industry are illegal, in excess of authority and inconsistent with law. The directive fails all tests related to Separation of Powers and violates the independence of the Board itself. The Board is a separate statutory creation of the General Assembly with separate duties and powers from those of the Governor.

The Governor’s mandate that “The Commissioner of the Virginia Department of Labor and Industry shall promulgate emergency regulations and standards to control, prevent, and mitigate the spread of COVID-19 in the workplace” was issued in excess of the Governor’s authority and is, therefore, void. Workplace standards and whether they are emergency standards are set forth in the basic laws and policies of this Commonwealth or implemented by the Board following regular and reasonable procedures. Workplace standards in this Commonwealth have never been based on unilateral directives from the Governor and no such authority is available to the Governor.

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The Governor's mandate that "The regulations and standards adopted in accordance with §§ 40.1-22(6a) or 2.2-4011 of the Code of Virginia shall apply to every employer, employee, and place of employment within the jurisdiction of the Virginia Occupational Safety and Health program" is both in excess of the Governor's authority and unlawfully constrains the lawful discretion of the Virginia Safety and Health Codes Board. The scope of any regulations under the basic laws must be decided by the Board through a process based on statutory policies and standards, rather than by directive from the Governor.

The directive in EO63 that "[t]hese regulations and standards must address personal protective equipment, respiratory protective equipment, and sanitation, access to employee exposure and medical records and hazard communication" is unlawful because the scope of any regulations under the basic laws must be decided by the Board through a process based on statutory policies and standards, rather than by directive from the Governor. The directive in EO63 that "[t]hese regulations and standards may not conflict with the requirements and guidelines applicable to businesses set out and incorporated into Amended Executive Order 61 and Amended Order of Public Health Emergency Three" is unlawful because the scope of any regulations under the basic laws must be decided by the Board through a process based on statutory policies and standards, rather than by directive from the Governor.

The Governor has no authority to cabin the lawful exercise of authority or discretion by executive agencies with a separate legal existence or to subvert all otherwise-lawful regulation in the Commonwealth to his whims. Nor can the independent agencies abdicate the responsibility that the legislature has given them to regulate in a manner that meets certain legislative policies and procedures out of a desire not to adopt regulations which conflict with the Governor's aims.

It appears that neither DOLI Staff nor the Board ever questioned the authority of the Governor's EO63 mandates. DOLI's website states "In accordance with Executive Order 63, the Department presented to the Safety and Health Codes Board an emergency temporary standard/emergency regulation to address COVID-19, applicable to all employers and employees covered by Virginia Occupational Safety and Health (VOSH) program jurisdiction." In document styled Draft Safety and Health Codes Board Public Hearing and Meeting Minutes, June 24, 2020, the second sentence describes the Governor's directive in EO63. The draft agenda for the July 24, 2020 describes the directives in EO63 under Summary of Rulemaking Process.

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XIII. The ETS And Now the Proposed Rule Fail to Meet the Requirements of Law Which Cannot Support the Scope and Unworkable Provisions of the Rule

The Safety and Health Codes Board (the Board) is authorized by Va. Code §40.1-22(5) to: “adopt, alter, amend, or repeal rules and regulations to further, protect and promote the safety and health of employees in places of employment over which it has jurisdiction and to effect compliance with the federal OSH Act of 1970...as may be **necessary** to carry out its functions established under this title.” (emphasis added). Va. Code §40.1-22(5) provides that rules must be to the extent “**feasible**” and be supported by the “**best available evidence**”. To restate this point, any standard must be necessary and supported by best available evidence. It is not evidence that COVID-19 is dangerous. It is evidence that the standard is necessary. The Board shall evaluate the “feasibility of the standards” and experience gained under this and other health and safety laws.

The Governor's mandates poisoned the process and the Government's mandates are not substantial evidence or proof of necessity or anything else relevant to the decision of the Board. This is so, even the Governor appoints most members of the Board. The Board has legal obligations and acquiescing to illegal mandates is not consistent with those legal obligations. The text of the final ETS 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 ETS as applied across the scope of every employer in Virginia is necessary under the procedures of Va. Code §40.1-22(6a).

There are a wide range of problems but, as an example, the data has not shown a direct and immediate grave danger for those workers whose tasks fall into the “Low” and “Medium” categories as defined in 16VAC25-220-30, These categories should be removed from the Permanent Standard for those industries regulated by OSHA. These activities are the same risks that virtually everyone is facing while Virginia moved to Phase III. If these were a grave danger it must be different and bigger than the ordinary danger from people’s general activities.

XIV. The Board Has Not Shown That the Sweep, Components or Approach of the Standards Are Necessary Considering that the Federal Occupational Health and Safety Administration Has Guidelines and Certain Rules and Recommended Against the Basic Action the Board Has Taken

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The Federal Occupational Safety and Health Administration (“OSHA”) took the position that it will not be promulgating an emergency standard pursuant to its authority under the OSH Act of 1970, instead opting to rely upon many voluntary guidelines for various business sectors. There is no evidence the Board meaningfully considered OSHA’s regulatory framework, even though the Virginia Code provides that OSHA standards are presumptively lawful when adopted by the Board under its powers. The Safety and Health Codes Board has failed to meet the standard of finding that the full scope of the ETS are “necessary” to address a “grave danger”. There are many reasons the ETS fails on this front. First, it is important to consider the scope of the rule. The rule covers virtually every private and public employer in Virginia. Second, the rule is unworkable. Under the ETS, a single cough means an employee cannot work for 10 days. The ETS requires unrealistic reporting and planning burdens for every employer regardless of whether that employment situation is substantially above the background risk facing Virginians in multiple settings. That is not a burden that is proportional or reasonable for the risk. By their own statements and structure of the rule, the Board has stated 4 levels of risk from low to very high. Yet the rule poses substantial requirements on all levels. Additionally, the Board cannot justify how it can simultaneously designate parties to be a “low” risk while still regulating those same parties on the basis that they face “grave danger.” The Board has provided no comparative assessment or statement to support its finding of “grave danger.” More importantly the Board has not shown that the burdens in the ETS and now the proposed rule are necessary to address a grave danger.

The US Department of Labor 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 (except for 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.”

The letter also states

"your letter disparages OSHA's guidelines as 'only voluntary', suggesting that there are no compliance obligations on employers. That is false... Indeed, 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

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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."

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

The Board has not shown evidence that the myriad requirements it imposed are "necessary" with substantial evidence to address a "grave danger" and "feasible." First, for the requirements to be "necessary" and "feasible" they would need to be operationally workable and "necessary" in the sense that the timing concerns warranted the extraordinary step of not following the ordinary requirements of VAPA. VAPA would require economic impact analyses, regulatory flexibility analyses and a more meaningful comment period than provided by the Board.

The general duty requirements of Va. Code § 40.1-51.1 (a) of the Code of Virginia apply to all employers covered by the Virginia State Plan for Occupational Safety and Health. Under this provision "...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.." Accordingly, the baseline for understanding what is "necessary" to address a "grave danger" should be viewed against the baseline that employers already have legal obligations relating to COVID-19. There is no evidence that the Board has taken steps to make all Virginia employers aware of the rule and set-up appropriate steps for such a massive program.

XV. The Proposed "Suspected" COVID Provisions Remain Unworkable, Vague and Not Supported by Evidence

The operation of the latest proposed rule "suspected" COVID provisions are unworkable. The term "suspected to be infected with SARS-CoV-2 virus" means "a person that has signs or symptoms of COVID-19 but has not tested positive for SARS-CoV-2 and no alternative diagnosis has been made." See §16VAC25-220-30. The proposed rule defines "signs of COVID-19" are "abnormalities that can be objectively observed, and may include fever, trouble breathing or shortness of breath, cough, vomiting, new confusion, bluish lips or e face, etc." The proposed rule defines "symptoms of COVID-19 " as "abnormalities that are subjective to the person and not observable to others, and may include chills, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, nausea, congestion, runny nose, diarrhea, etc." "Symptomatic" means a "person is experiencing signs and/or symptoms

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attributed to COVID. The proposed rule states “[a] person may become symptomatic 2 to 14 days after exposure to the SARS-Cov-2.”

This combined structure has three fundamental problems. The first problem is those same symptoms may be unrelated to COVID. The proposed rule does nothing to address this problem and neither the Board nor DOLI staff analysis has done anything to address the problem that is both obvious and was directly pointed to by me and others in prior comments. The proposed rule states that employers shall not permit employees or other persons 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. The universe of employees with suspected COVID-19 that pose the stated risk includes, among a broader universe, anyone who has a cough *or* headache *or* sore throat *or* congestion *or* runny nose, or fatigue, as just some examples. Neither the Board nor DOLI staff has made any effort to work on the problems posed by cold, flus, allergies, and all manner of other issues that are not COVID. Indeed, I would posit the universe of “suspected COVID” but is really not COVID vastly exceeds the universe that is COVID.² DOLI staff and the Board in the ETS force an unworkable and damaging

² According to CDC: **Both COVID-19 and flu** can have varying degrees of signs and symptoms, ranging from no symptoms (asymptomatic) to severe symptoms. Common symptoms that COVID-19 and flu share include:

- Fever or feeling feverish/chills
- Cough
- Shortness of breath or difficulty breathing
- Fatigue (tiredness)
- Sore throat
- Runny or stuffy nose
- Muscle pain or body aches
- Headache
- Some people may have vomiting and diarrhea, though this is more common in children than adults

According to CDC cold symptoms can include sneezing, stuffy nose, runny nose, sore throat, coughing. Less frequently there is fever. According to CDC overlapping symptoms from allergies include cough, shortness of breath and difficulty breathing, fatigue, headache, sore through, congestion or runny nose. <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/infographic-overlap-symptoms.html>

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scheme on employees who cannot afford absences for common colds, flus and allergies. It may be that Some settings might deserve such caution that even a cough, headache, sore throat, congestion, or runny nose should warrant removal from the worksite. That might be the right approach at a nursing home for employees in contact with nursing home patients. That same level of caution across the board will substantially and negatively impact businesses and are not necessary or useful.

The second problem is that the proposed rule, and the ETS before it, is filled with words of vague and indefinite meaning. Such an approach does not satisfy the requirements for standards of law. Who decides the “alternative diagnosis?” Is that the employee, the employer, a doctor, a relative? If it is a medical professional what kind of delay and economic burden does this pose? What is the standard for an alternative diagnosis? Does the alternative diagnosis have to rule out COVID? Or can someone have COVID and an alternative diagnosis. Someone can have COVID with no symptoms at all. What must the employer or DOLI learn about the “alternative diagnosis”? Who defines abnormalities? If symptoms are “subjective” can an employer rely on the subjective views of the employee? Can other information besides the symptoms come to play. What if a person believes something is a cold because his or her spouse had a cold? What if the person previously had COVID?

It is unrealistic to expect employers and contractors, including small and medium sized employers to evaluate alternative diagnosis or expect timely assessments by medical personnel in the time frames for the kinds of low-level symptoms described. There is no evidence that this is feasible or that this approach is necessary or even useful. If anything, the proposed rule and ETS creates a situation in which employees will be skittish to cooperate at all.

Pursuant to the ETS, employers are required to prohibit employees or other persons known or suspected to be infected with the 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. See proposed §16VAC25-220-40 (A)(5) and proposed §16VAC25-220-40 (C) Similar language covers subcontractors. See proposed §16VAC25-220-40 A(7) .No employee or subcontractor can return to the worksite until at least 72 hours since the signs of any symptom have passed and ten days have elapsed, whichever period is longer. (Note §16VAC25-220-40(B) seems to be missing?).

The return-to-work test-based strategy can be problematic because of the lack of testing availability but should not have been removed from the proposal. The regulation also requires

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compliance with symptom-based strategy if a known *asymptomatic* employee refuses to be tested. The Rule is asking both employers and employees to affect their business and livelihood, based symptoms that cannot be evaluated as being beyond ordinary and common circumstances. This is neither workable, feasible, nor supported by an evidence of operation.

The return to work provisions assume there is a passing illness, but coughs and shortness of breath may be present for reasons unrelated to COVID. Ten days is a long time if the person does not have COVID. The addition of 16VAC25-220-40(C)(2)(iii), is an example of relevant guidance for people but it is unclear what the obligations are for an employer. Similarly, what are employers supposed to do with 16VAC25-220-70(C)(3)(a)(ii) (suspected), (iii) different jobs, (iv) higher risk activities, (b) individual risk factors?

XVI. The Board has not Evaluated the Likely Substantial Negative Impact of the Proposed Rule “Suspected” COVID and Return to Work Restrictions Where the Symptoms Are Not Really COVID

It is possible to model the impact of the problem of an aggressive “suspected” COVID section with a difficult return to work policy. CDC has information on other medical issues that share COVID symptoms. A 2018 CDC study looked at the percentage of the U.S. population who were sickened by flu using two different methods and compared the findings. Both methods had similar findings, which suggested that on average, about 8% of the U.S. population gets sick from flu each season, with a range of between 3% and 11%, depending on the season. The 3% to 11% range is an estimate of the proportion of people who have symptomatic flu illness. <https://www.cdc.gov/flu/about/keyfacts.htm>

Common colds are the main reason that children miss school and adults miss work. Each year in the United States, there are millions of cases of the common cold. Adults have an average of 2-3 colds per year, and children have even more. Sore throat and runny nose are usually the first signs of a cold, followed by coughing and sneezing. <https://www.cdc.gov/features/rhinoviruses/index.html>

According to CDC 7.7% of adults have been diagnosed with allergies annually. <https://www.cdc.gov/nchs/fastats/allergies.htm>

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In 2015, 20.0% of women and 9.7% of men aged ≥ 18 years had a severe headache or migraine in the past 3 months. Overall and for each age group, women aged ≥ 18 years were more likely than men to have had a severe headache or migraine in the past 3 months. For both sexes, a report of a severe headache or migraine in the the past 3 months decreased with advancing age, from 11.0% among men aged 18–44 years to 3.4% among men aged ≥ 75 years and from 24.7% among women aged 18–44 years to 6.3% among women aged ≥ 75 years.

Source: National Health Interview Survey, 2015. <https://www.cdc.gov/nchs/nhis/index.htm>. These statistics would suggest 4x these numbers for the yearly presence of headaches.

Each year, on average in the United States, norovirus causes:

- 900 deaths, mostly among adults aged 65 and older
- 109,000 hospitalizations
- 465,000 emergency department visits, mostly in young children
- 2,270,000 outpatient clinic visits annually, mostly in young children
- 19 to 21 million cases of vomiting and diarrhea illnesses

<https://www.cdc.gov/norovirus/trends-outbreaks/burden-US.html>

There are many more conditions that have symptoms that overlap with suspected COVID conditions. However, it is possible to model out the lost days from this proposal with a series of assumptions. Certainly, one could provide a range. The modelling could include the cost of getting a professional “alternative diagnosis.” The 10-days without symptoms can be modelled as pure days lost.

XVII. The Problems with the Suspected COVID Provisions Flow to Other Provisions

The exposure risk level structure in proposed 16VAC25-220-10 (D)(1) uses the word “suspected” and “suspected to be infected.” Since everyone has colds, flus etc, this is a useless and confusing structure. The same problem applies in the definition of airborne infection isolation room. The definition of very high exposure risk, high exposure risk, medium exposure risk, and lower exposure risk all require evaluation using the term “suspected” COVID, which, as discussed above is an unreasonably ambiguous and difficult to define term. Similarly, the term “may be infected” excludes a person who may be suspected with COVID, and this cannot be ascertained by employers. The areas in the place of employment requirement cleaning requirement under Sanitation and disinfecting also relies on the construct of “suspected” COVID. There are many other examples of this problem.

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XVIII. The Proposed Regulations Require Employers to Classify each Employee for Risk Level of Exposure and this Review Process Conflicts with Current OSHA Guidance

The proposal conflicts with OSHA 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. Further, OSHA Guidance is predicated on the use of a risk management process to determine appropriate control measures. The Regulations deviate to mandate specific control measures in workplace situations, regardless of potential exposures or other mitigating circumstances arising from the required risk assessment process.

XIX. Prohibiting Consideration of Serologic Tests Is Anti-Science and Illegal

Pursuant §16VAC25-220-40(A)(3), employers are prohibited from even considering serologic test results in deciding when an employee can return to work. A prohibition on using relevant medical information for decisions is an unprecedented political restriction of medical assessments. Not only has the Board seen fit to prohibit serologic testing from being conclusive or determinative of any issue, but the Board has outright prohibited employers from considering scientific evidence in their decision-making. Such an across-the-board prohibition is per se unreasonable and unnecessary.

The proposed rule frequently refers to the standards applicable to the industry which is language that may be appropriate for guidance but is too vague to be meaningful. This is compounded by numerous vague and unworkable definitions. For example, the physical distancing requirement in the ETS is unworkable and ambiguous. Distancing is not available for restaurant wait staff, personal services, physical instructors. The application of this rule is overly broad, unclear and not justified.

XX. The Americans with Disabilities Act Poses More Restrictions than Suggested in the Proposed Rule and The Burden of Compliance Makes Several Provisions of the Proposal Not Reasonable for Small Businesses

Under the Americans with Disability Act (ADA), an inquiry asking an employee to disclose a compromised immune system or a chronic health condition is disability-related because the response is likely to disclose the existence of a disability. The ADA does not permit such an inquiry in the absence of

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objective evidence that pandemic symptoms will cause a direct threat. As another example, an ADA-covered employer may not ask employees *who do not have influenza symptoms* to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to influenza complications. This is on top of the burdens of managing information under the privacy provisions of the Health Information Portability and Accountability Act (HIPAA). These points have relevance in various sections including for alternative diagnosis but also under (C)(3)(b)(Plan)

EEOC also notes:

As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

This point goes to the burden of the Suspected COVID provisions on the health care system.

XXI. The Board Lacks Authority Over Sick Leave Policies and Recitation to Such Policies in the Proposed rule is Illegal

Proposed §16VAC25-220-40(B)(6) states that "employers shall ensure that sick leave policies are flexible and consistent with public health guidance..." Although the ETS contains language that is vague and threatens potential penalties, the Safety and Health Codes Board does not have authority over sick leave policies. Therefore, the proposal with regard to such policies is illegal and in excess of authority. The Board should eliminate all human resource policies from the proposed rule. The statement regarding sick leave nonetheless illustrates the problem with the ETS. An employee who coughs or sneezes loses work for significant time. That may deny that employee important employment opportunities, the ability to contribute to specific projects, and cause great disruption.

XXII. The Testing and Reporting Scheme Is Unreasonable and Requires Agreement with Third Parties Who May or May Not Cooperate

The proposed rule has a test reporting scheme that penalizes employers who cannot gain agreements with third parties and operate within unrealistic time frames and at risk for mishandling the privacy of medical information. See §16VAC25-220-40(B)(8). The system for reporting positive tests

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includes employees, subcontractors, contract employees, temporary employees, building owners, tenants, residents in a building, and 24-hour time frames is overly broad, not shown to be necessary, and not feasible for the full scope of employers. There is no information provided as to what either VDH or DOLI does with the information. There needs to be some time frame to consider the thresholds. Is it whenever two has occurred over a year? Or a week? There needs to be clarity on this point. There has been no explanation over why this reporting scheme is necessary.

This is a redundant activity, healthcare professionals already notify VDH, and the requirement should be struck from the proposed rule. If the data is not being analyzed, requiring employers to file these case reports within 24 hours is burdensome and detracts from ensuring employee safety. The private information required for this reporting can necessitate coordination between three groups within a company: Health Services, Human Resources, and Environmental Health & Safety. Few facilities staff these functions 24/7, whereas most production functions run 24/7. This makes reporting for compliance with these regulations over weekends and holiday periods impossible. It is not clear that VDH or DOLI are using this information in any way that necessitates a 24-hour reporting requirement. For small businesses this is very difficult. A regulatory flexibility analysis should review whether the provision is necessary or practical.

XXIII. The Provisions Asking Building or Facility Owners to Require All Employer Tenants to Satisfy Requirements is Beyond the Boards Authority

The provisions referencing building owners and tenants seem to imply third party obligations and third-party cooperation with employers. At best this is unclear but the source of authority for the Board beyond employers themselves is unclear. The lack of authority makes employer obligations unfair because of the necessary reliance on third parties. Indeed, throughout the proposed rule there are many sort of communal cooperation or mandatory cooperation concepts that include building owners, contractors and subcontractor s, but these are not well though through from a regulatory perspective. These provisions are unfair and unenforceable. The system to receive reports is one of these issues. While it might seem useful, it is unclear who to begin enforcement on.

XXIV. All Employers should not Have to Complete a COVID-19 Infections Disease Preparedness and Response Plan

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This mandate is overly burdensome, and “low and medium” risk facilities should not be regulated at this level. The burdens of this provision and others must be reviewed under the regulatory flexibility analysis.

XXV. The Proposed Rule Does Not Have A Rational Approach to Economic Feasibility That Meets the Statutory Standards

The proposed rule definition of economic feasibility at §16VAC25-220-30 is not appropriate. The rule defines “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 in order to find the funds to pay for the costs of the rule. The failure to provide an economic impact assessment or regulatory flexibility analysis for comment compounds this problem.

XXVI. The Physical Separation Requirements Are Not Rational

The ETS states 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.” Yet, as pointed out in comments to the Board, 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.

XXVII. The HVAC Requirements for Medium Risk Businesses Are Not Reasonable

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." Temporary plexiglass and other hard surface barriers are regularly used to retrofit workstations, counters, seating, and cubicles as physical separation "shields" or barriers for employees, particularly when coupled with PPE or face coverings. 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.). These conflicting references should be

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removed from the Regulations along with any reference to “permanent or floor to ceiling walls.” There is insufficient evidence that this requirement is workable or is necessary to address a grave danger.

XXVIII. The Physical Distancing Requirements Are Either Unworkable or Ambiguous

There are many sentences in the proposed rule regarding distancing. Proposed 16VAC25-220-10(D)(1) states:

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. It is further recognized that various required job tasks prohibit an employee from being able to observe physical distancing from other persons.

The above can be a good sentence but unclear how operative.

Proposed 16VAC25-220-30 under definitions state

"Physical distancing" also called "social distancing" means keeping space between yourself and other persons while conducting work-related activities inside and outside of the physical establishment by staying at least six feet from other persons. Physical separation of an employee from other employees or persons by a permanent, solid floor to ceiling wall (e.g., an office setting) constitutes one form of physical distancing from an employee or other person stationed on the other side of the wall, provided that six feet of physical distance is maintained from others around the edges or sides of the wall as well.

This definition does not itself provide needed flexibility

Proposed 16VAC25-22-40 (D) states:

Unless otherwise provided in this standard, employers shall establish and implement policies and procedures that ensure that employees observe physical distancing while on the job and during paid breaks on the employer’s property, including policies and procedures that:.....

This is stated as a mandate, and exceptions are ambiguous although there is some claim to exceptions.

Proposed 16VAC25-22-40(G) states:

Where the nature of an employee’s work or the work area does not allow the employee to observe physical distancing requirements from employees or other persons, employers shall ensure compliance with respiratory protection and personal protective equipment standards applicable to its industry.

This provision may suggest some flexibility. More, and clearer, statements of flexibility would be useful.

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16VAC25-22-40(G) may or may not say at least the following does not require distancing, for example for serving staff, certain physical instructions, personal care and grooming, performance areas where space is not available, medical professionals, ceremonies, hibachi-style table grills and chefs, laborers and skilled trade that need to work together to accomplish certain tasks, sports teams, police teams, fire teams, certain construction teams, certain manufacturing activities, child care, home aides, and more.

Beyond that differences in whether the workers are outside or inside could make a difference. Some businesses are family businesses and the rules should not require distancing between such parties. What happens with respect to people who are vaccinated? If they no longer have a significant risk, why impose the requirement? Regardless, the overlap of the Orders and Safer at Home documents create more problems of lack of flexibility and ambiguity.

XXIX. The Decontamination Requirements when an Infected Person has been within the Facility within the Past 7 days are not Based upon Science

According to the CDC and US Department of Homeland Security, the SARS-CoV-2 Virus is predominantly transmitted through inhalation of airborne droplets and surface transmission has been verified to be eliminated within 70 hours not 7 days. The 7-day requirement is not necessary to protect against a grave danger.

XXX. The Face Coverings Provision Should Not Be Restricted to Washable Fabric

The 16VAC25-220-30 “PPE” definition should include “face coverings,” but not limit their materials to washable fabrics only. Washable fabric masks are not appropriate for many FDA regulated factory areas. These facilities use disposable sterile masks, and they should be accommodated in any “face covering” or “PPE” definition. This requirement may be anti-protective and is not necessary to protect against a grave danger.

XXXI. The Rule Concerning Handwashing Facilities and Sanitizer should not be Required in All Workplaces

CDC and OSHA guidance requires only either a handwashing facility or sanitizer but not both. The requirement is not necessary to protect against a grave danger.

XXXII. The Heat-Related Illness Provision Does Not Belong in This Rule

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16VAC25-220-80 includes a training mandate for “Heat-related illness prevention...” that has no connection to COVID-19 infection protection. In addition, it cannot be a coincidence that the agency issued a Notice of Intended Regulatory Action (NOIRA) on Heat Illness Prevention on 4/2/20 and that document has been with the Secretary of Commerce and Trade for 200+ days but a heat-related illness prevention training mandate was inserted into the Regulations. This should be removed from the proposed rule.

XXXIII. The Non-Discrimination Provisions Need Revision

Proposed section 16VAC25-220-90(C) states

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.

To be clearer, it would be better if this was written as:

No person shall discharge or in any way discriminate against an employee ~~who~~ **on the grounds that employee** 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, **or** a government agency, ~~or to the public such as through print, online, social, or any other media.~~

The first part is just a drafting issue. The substance regarding print, online, social or any other media may cause confusion regarding the rights of employers to contest unfair charges. Everyone has a right to defend themselves and if the charges are unfair or need clarification that right includes employers. If the rule provides one-sided language it makes it unclear whether the employer maintains its communication rights. Moreover, there are reasons that having public debates are not good for employers and employees. No evidence has been provided that this change to existing whistleblower law is addressing a grave danger or is just the opportunity to advance communication agendas. If an employer brings a cause of action for false or misleading statements, is that affected by this provision?

Proposed section 16VAC25-220-90(D) states:

Nothing in this standard shall limit an employee from refusing to do work or enter a location that the employee feels is unsafe. However, employees should familiarize themselves with 16VAC25-60-110, which contains the requirements concerning discharge of discipline of an

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employee who has refused to complete an assign task because of a reasonable fear of injur or death.

Of course, no employer can force someone to enter any location, but the question is can there be consequences if an employee does not perform the job. The standard that an “employee feels” something is unsafe is not an objective standard and if this is to be a rule, there must be an objective, credible standard. It his hard to see how the language of proposed 16VAC25-220-90(D) is doing anything other than making regulatory language murkier. It is probably wise to just rely on 16VAC25-60-110 and not to cloud the issue with new language that adds nothing.

XXXIV. Employers Must Always Be Provided Due Process and Prior Notice

The proposed rule has no identifiable “due process” for employers involving a “whistleblower,” and no requirement that complaints filed with DOLI require identification of the plaintiff. Anonymous complaints should not be allowed as disgruntled employees, punitive customers, and unethical competitors could use complaints for destructive purposes. The employer should be afforded due process to defend themselves against accusations of safety violations and this should be included in the proposed rule.

XXXV. Much of the Proposed Rule Is Ambiguous and Vague Creating Problems Under Due Process Under the Virginia Constitution and In General

Worker’s rights and employer’s liabilities turn on the vagaries and complex interrelationships between the Orders, the Safer at Home document, the proposed rule and many other laws One of the largest sources of vagueness is the Suspected COVID provisions which really have so many convolutions and distinctions that science cannot make, and employers cannot reasonably interpret. The proposed 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. 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.” There are 20 footnotes that refer to websites. There are cross-references to multiple guidance documents. No effort has been made to translate these guidance documents and CDC constructs into

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operable and fair regulatory language. Employer responsibilities through-out the proposed rule depend on employee information which may or may not be forthcoming and the interaction is in the face of privacy and disability law. The rules themselves would make employees skittish to provide information as it may result in long absences from work. The entire scheme applies in the face of frequently conflicting OSHA guidance.

There are many more questions than answers in the text of the rules. 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? This liability should not be shifted to an employer and the relationship is unclear. Similarly, the provisions apply to building owners and tenants and their relationships to employers is unclear and likely outside of the authority of the Board.

The entire structure relating the rules to the Executive Orders, Orders of Public Health Emergencies and the Safer at Home document. This is especially so since the Orders have been changing all the time. Officials at VDH have been interpreting rules differently and the regional departments have been further interpreting rules differently. The Orders themselves often ask businesses to infringe on the fundamental rights of customers to stand, sit or have an ordinary conversation within six-feet of people of their own choosing. The distancing requirements in the proposed rule offer no clarifications and, potentially, make the issue worse. There is language in the proposed rule protecting employees who refuse to work because they “feel” unsafe. The criteria for protected work refusals are already in the Administrative Regulatory Manual and this provision is just adding more confusion.

These rules are simply not being followed now. Few employers are even aware of them. In the face of that, there has been no impact analysis and no outreach with respect to an impact analysis. Compound this problem with a proposal to have an immediate effective date and only by publishing notice in the city of Richmond, outside of the normal Virginia Registrar process where all regular rules, including emergency rules, appear.

All-in-all, as drafted, enforcing these provisions should be found void for vagueness and lack of due process. The Constitutional standard and the standard of fairness look at the resulting situation that includes the various overlaps between the Executive Orders, Orders of Public Health Emergency, Safer at Home document and the proposed rule if it became law. The analysis would include confusion with the ADA and HIPAA and OSHA standards. Under the Constitution, law or regulation that purports to penalize

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a party cannot operate if the combination of laws and regulations do not provide fair notice of what conduct is forbidden and what conduct is required. Similarly, the Due Process Clause of the Constitution will not support laws that are so ambiguous or lacking standards that they invite arbitrary and discriminatory enforcement actions. According to the Supreme Court in *Federal Communications Commission et al v. Fox Television Stations, Inc.* (SC June 21, 2012):

A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. See *Connally v. General Constr. Co.*, 269 U. S. 385, 391 (1926) (“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law”); *Papachristou v. Jacksonville*, 405 U. S. 156, 162 (1972)

(“Living under a rule of law entails various suppositions, one of which is that ‘[all persons] are entitled to be informed as to what the State commands or forbids’” (quoting *Lanzetta v. New Jersey*, 306 U. S. 451, 453 (1939) (alteration in original)). This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. See *United States v. Williams*, 553 U. S. 285, 304 (2008). It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *Ibid.* As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. See *id.*, at 306.

Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. See *Grayned v. City of Rockford*, 408 U. S. 104, 108–109 (1972). When speech is involved, rigorous adherence to those requirements is necessary.

In various sections, the proposed rule does not meet this Constitutional standard and the Board should abandon such an approach.

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RECOMMENDATIONS

For the reasons discussed above the Board should not promulgate a permanent standard and not promulgate the current proposal from DOLI staff. The Board should provide or obtain a regulatory impact statement and regulatory flexibility analysis concerning the rules including an opportunity for public comment. The Board should obtain an evaluation of the implementation of the ETS as it seems that few are aware of it, but the working information can provide information on what might work and what might not.

Sincerely,

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