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June 22, 2020

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Mr. Jay Withrow  
Director  
Division of Legal Support, ORA, OPPPI, and OWP  
Virginia Department of Labor and Industry  
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RE: VA Department of Labor and Industry, Safety and Health Codes Board; Emergency  
Temporary Standard/Emergency Regulation, Infectious Disease Prevention: SARS-  
CoV-2 Virus That Causes COVID-19

Dr. Mr. Withrow:

Thank you for the opportunity to comment on the Virginia Department of Labor and Industry's recommended 16 VAC 25-220, Emergency Temporary Standard/Emergency Regulation, "Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID 19."

I fully and enthusiastically support the Department's issuance of these important protections for Virginia's working people. Given the significant risk that workers exposed to COVID-19 face and federal OSHA's stubborn failure to develop an enforceable standard, it is vitally important that OSHA state plan states such as Virginia exercise their authority under the law to issue an enforceable standard to protect the states' workers.

In January and in March, I joined Congresswoman Alma Adams in calling on OSHA to put the infectious disease standard back on the active agenda and to issue an Emergency Temporary Standard for COVID-19. Federal OSHA has regrettably refused to adopt such a standard despite the fact that this pandemic represents the most significant worker safety crisis in OSHA's 50-year history.

On Friday, May 15, 2020, the U.S. House of Representatives passed the *Heroes Act*, which included the *COVID-19 Every Worker Protection Act* (H.R. 6559) which I introduced along with Representatives Adams and Donna Shalala. That bill directs OSHA to issue an emergency temporary standard within seven days to protect workers in hospitals, meatpacking plants, retail stores, restaurants, offices, shipyards, and any other workplace where a person may face risk

from exposure to the novel coronavirus. The *Heroes Act* would also prohibit employers from retaliating against workers for sounding the alarm about unsafe conditions. Unfortunately, that legislation is languishing in the U.S. Senate.

Virginia's workers should not have to wait for the U.S. Senate or federal OSHA to decide whether they will even consider further action. Fortunately, Virginia has its own state plan and can act under its own authority to issue an Emergency Temporary Standard. Virginians have already experienced over 58,000 infections and over 1,600 deaths from COVID-19.<sup>1</sup> As Virginia begins to reopen, more workers will be at risk of infection unless Virginia OSHA makes clear to employers and employees what protections are required. One important way to avoid the reinstatement of stay-at-home orders, which will do further damage to the state's economy and businesses, is to reduce workplace transmission of COVID-19 through an enforceable Emergency Temporary Standard. This will allow Virginia to recover more quickly than states that do not adopt similar workplace protections.

### **Health care workers are at highest risk**

Across the country, more than 83,000 health care workers have been diagnosed with COVID-19 and at least 463 have died since the beginning of the pandemic. According to the Centers for Disease Control and Prevention (CDC), these are significant underestimates due to incomplete reporting by many states. Virginia reports almost 6,400 suspected or confirmed nursing home worker infections and 11 deaths, although only 15% of Virginia nursing homes have responded to the CMS survey<sup>2</sup>.

### **Infection outbreaks have also been concentrated in meatpacking plants**

Nationwide, more than 27,000 workers in meatpacking plants have tested positive for COVID-19. Dozens of plants have experienced closures resulting in over 45,000 workers being unable to work, at one point impacting 25% of the nation's beef supply and 40 percent of the pork supply.<sup>3</sup> The United Food and Commercial Workers (UFCW), which represents approximately 1.3 million laborers in grocery stores, meatpacking, retail and other sectors, estimates that 29,000 of its members have contracted the coronavirus and 225 have died from Covid-19.<sup>4</sup>

In Virginia, the Central Shenandoah Health District reports that 335 poultry workers who work in the seven plants in Harrisonburg/Rockingham County tested positive for COVID-19 as of

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<sup>1</sup> <https://www.vdh.virginia.gov/coronavirus/>

<sup>2</sup> <https://data.cms.gov/Special-Programs-Initiatives-COVID-19-Nursing-Home/COVID-19-Nursing-Home-Dataset/s2uc-8wxd>

<sup>3</sup> Statement of Ademola Oyefeso at a Member briefing held by the Subcommittee on Workforce Protections, Committee on Education and Labor, May 14, 2020

<sup>4</sup> <http://www.ufcw.org/tag/coronavirus/0>

June 17, 2020.<sup>5</sup> As of the beginning of May, there were 260 cases associated with two poultry facilities run by Tyson Foods and Perdue Farms in Accomack County.<sup>6</sup>

### **COVID-19 disproportionately impacts low-income workers and persons of color**

We also cannot lose sight of the fact that this pandemic disproportionately impacts essential workers who are low-income workers as well as persons of color. Dr. Norman Oliver, the State Health Commissioner at the Virginia Department of Health, has noted the disproportionate number of Latinx individuals testing positive for COVID-19 in the Shenandoah Valley. As of May 1, 47.8% of the coronavirus cases reported in the Central Shenandoah Health District were among people who reported Hispanic or Latino ethnicity,<sup>7</sup> and 42% of 1,163 cases and one-third of those hospitalized were most “probably related to poultry plants” in the area.<sup>8</sup>

### **Virginia has the authority to issue a standard**

Although federal OSHA has not developed any enforceable standards for employers to follow that can protect workers from the airborne transmission of the novel coronavirus, federally approved OSHA State Plans are permitted to issue standards that go beyond federal OSHA standards or issue standards where no federal OSHA standards exist.

From February 2020 to the end of May 2020, the Virginia Workers’ Compensation Commission has received 3,154 COVID-19 related claims in a wide variety of occupational settings. More recently, the Commission has seen a 44.5% increase in claims over a 20-day period since May 11, 2020.

### **Federal law empowers Virginia to adopt an Emergency Temporary Standard**

COVID-19 represents a “grave danger” to workers in the state of Virginia, and the *Occupational Safety and Health Act* (OSH Act) authorizes states with state plans approved under Section 18 of the OSH Act the authority to issue their own standards as long as they are “at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 6” of the OSH Act.<sup>9</sup>

Section 18(a) of the OSH Act states: “Nothing in this Act shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with

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<sup>5</sup> City of Harrisonburg “Resolution Urging the Virginia Safety and Health Codes Board to Approve emergency regulations Standards for All Worker During the COVID-19 Pandemic.”

<sup>6</sup> <https://www.nbc12.com/2020/05/05/covid-cases-keep-climbing-virginia-poultry-plants-some-members-congress-seek-better-protections/>

<sup>7</sup> <https://www.whsv.com/content/news/Hispanic-and-Latino-groups-hit-hard-with-coronavirus-VDH-says--570105991.html>

<sup>8</sup> City of Harrisonburg “Resolution Urging the Virginia Safety and Health Codes Board to Approve emergency regulations and Standards for All Workers During the COVID-19 Pandemic.”

<sup>9</sup> Occupational Safety and Health Act of 1970

respect to which no standard is in effect under section 6.” Federal OSHA has no airborne transmissible disease standard applicable to COVID-19 issued under Section 6 of the OSH Act.

In other words, existing OSHA standards provide a floor. State plan states are permitted to issue standards when no standards exist or to issue standards that are more effective than the standard OSHA has already issued. There is precedent for the proposed action by the Virginia Department of Labor and Industry:

- Many states have issued standard where federal OSHA has not. California, Washington and Minnesota have heat standards, for example. California also has a workplace violence prevention standard.
- California’s OSHA program adopted an Airborne Transmissible Disease (ATD) standard for health care, corrections, and mortuary facilities in 2009.<sup>10</sup> For employers not covered under the ATD Standard, Cal-OSHA has advised employers that, pursuant to its Injury and Illness Prevention Program Rule, employers must prepare an infection control plan based on the CDC Guidelines if the COVID-19 infection is a workplace hazard.<sup>11</sup>
- Thirty years ago, OSHA issued—and continues to enforce—a bloodborne pathogens standard that has been implemented in every hospital and nursing home in this country. State OSHA plans have adopted this and are familiar with the techniques needed to prevent the transmission of bloodborne infectious disease in the workplace.

### **Specific comments on the proposed VOSH Standard**

- 1) This proposed Emergency Temporary Standard is not a “one-size-fits-all” regulation

Each employer covered under this standard will be required to “assess their workplace for hazards and job tasks that can potentially expose employees to SARS-CoV-2 or COVID-19,” (Section 40(A)) and based on that assessment, they will be required develop an individualized Infectious Disease Preparedness and Response plan (Section 70) that is based on guidance issued by federal OSHA.<sup>12</sup> This is the opposite of “one-size-fits-all,” allowing each employer to develop a plan—based on OSHA guidance and the basic elements of this regulation—specific to the hazards identified in that workplace.

- 2) Language in Section 90 “Discrimination against an employee for exercising rights under this standard/regulation is prohibited” is vitally important

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<sup>10</sup> CAL-OSHA Airborne Transmissible Disease rule, <https://www.dir.ca.gov/title8/5199.html>

<sup>11</sup> <https://www.dir.ca.gov/dosh/coronavirus/General-Industry.html>

<sup>12</sup> <https://www.osha.gov/Publications/OSHA3990.pdf>, starting at page

<sup>12</sup> <https://www.osha.gov/Publications/OSHA3990.pdf>, starting at page

Workers have been retaliated against for reporting unsafe working conditions, discussing<sup>13</sup> working conditions on social media,<sup>14</sup> and wearing their own more effective personal protective equipment.<sup>15</sup> Federal OSHA reports that it has received 1,759 COVID-19 whistleblower complaints of which over 1,100 have been screened.<sup>16</sup> The proposed standard properly includes these protections.

- 3) The fact that COVID-19 is not unique to the workplace does not foreclose regulation of this hazard in the same way as other workplace hazards

Many infectious diseases and other hazards cause diseases that are not unique to the workplace. But OSHA has determined that workplace exposures to such hazards present a significant risk to workers necessitating the issuance of regulations to protect them. In 1990, for example, OSHA issued a bloodborne pathogens standard which continues to save hundreds of workers' lives every year, even though the diseases it covers—such as HIV and Hepatitis B and C—are diseases that are not unique to the workplace.

- 4) “Medium Risk” Category Contains High Risk Workplaces and Excludes Important Requirements

Many of the operations and services included in the “medium risk” category of the proposed standard are demonstrably “high risk”. Workers in industries such as poultry, meat, and seafood processing, many manufacturing settings, correctional facilities, jails, juvenile detention centers, homeless shelters, and others face high risk of exposure and have suffered high levels of illness and related fatalities. This misclassification of hazards for these “high risk” workplaces should be modified in the final standard.

The proposal is unclear whether training applies to “medium risk” workers. In Section 70(C)(7) such “medium risk” workers are excluded. However, Section 70(B) states that “training requirements tied to the plan shall only apply to those employees classified as ‘very high,’ ‘high,’ and ‘medium’ covered by this section.” All employers—whatever risk category—should be required to provide training appropriate to the risk in their specific workplace. This requirement would not be overly burdensome for small, low risk employers. A small employer in a low-risk workplace would have very little training to conduct compared with a large employer in a medium- or high-risk workplace.

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<sup>14</sup> Healthcare Workers Face Punishment for Speaking Out, *Medpage Today*, April 9, 2020, <https://www.medpagetoday.com/infectiousdisease/covid19/85869> and <https://www.reuters.com/article/us-health-coronavirus-nurses-retaliation/life-care-fired-staffer-who-revealed-nursing-home-nightmare-to-reuters-idUSKBN23T1JA>

<sup>15</sup> Another N.J. nurse is fired during the coronavirus outbreak in dispute over protective gear, April 12, 2020, <https://www.nj.com/coronavirus/2020/04/another-nj-nurse-is-fired-during-the-coronavirus-outbreak-in-dispute-over-protective-gear.html>

<sup>16</sup> <https://www.whistleblowers.gov/covid-19-data>

For small- or medium-size employers that may have trouble developing and conducting training programs, Virginia OSHA, like every other state, has an OSHA Consultation Program<sup>17</sup> that provides training materials, conducts training, and provides technical assistance for small- and medium-size businesses.

5) This standard needs to improve recordkeeping and reporting requirements

Prompt follow-up and contact tracing for positive cases is extremely important to prevent further exposures and infections in the workplace. Section 40(A)(7) should be expanded to:

- Include prompt reporting of individual cases to the Virginia Department of Health.
- Require employers to report outbreaks of multiple cases to the Virginia Department of Labor and Industry in order to identify and investigate outbreaks that may be work-related.

6) Section 10(G) page 6 should be deleted

Section 10(G) states that employers shall be considered in compliance with this standard “[T]o the extent that an employer complies with requirements contained in CDC publications to mitigate SARS-CoV-2 and COVID-19 related hazards or job tasks addressed by this standard/regulation.”

This catchall language will substantially undermine the enforceability of this standard and should be deleted.

- First, the CDC does not issue “requirements”; it issues voluntary workplace guidance.
- Second, the CDC’s voluntary guidance contains weak and unenforceable provisos suggesting to employers that they “should consider” certain actions “when possible” or “if feasible.” By adopting this language, an employer would be allowed to avoid compliance with the Virginia OSHA standard as long as the employer has “considered” an action, but not complied with it, particularly if the employer decides that the measure is not feasible in their workplace.<sup>18</sup>

In conclusion, I commend the respective agencies responsible for developing this proposed Emergency Temporary Standard. Its adoption will be good for workers, good for business, and

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<sup>17</sup> <https://www.doli.virginia.gov/vosh-programs/consultation/>

<sup>18</sup> White House Press Secretary Kayleigh McEnany argued recently that by not wearing a facemask at President Trump’s rally, she was actually in compliance with CDC guidance because CDC guidance is voluntary. Under this interpretation any employer who does not comply with voluntary CDC workplace guidance would be “in compliance” with voluntary CDC guidance and therefore exempt from the requirements of this standard.

good for the recovery of the economy of the Commonwealth. At the same time, I hope you will consider these suggestions for improvement.

Please contact me or Jordan Barab, Senior Labor Policy Advisor, on the Committee on Education and Labor staff at [jordan.barab@mail.house.gov](mailto:jordan.barab@mail.house.gov) if you have any questions.

Sincerely,



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**Robert C. "Bobby" Scott**  
Chairman

Cc: Hon. Justin Fairfax, Lieutenant Governor  
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