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Re: Emergency Temporary Standard/Emergency Regulation, Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19

On behalf of the members of the Virginia Agribusiness Council (VAC), and its members who represent the \$91 billion industry of agriculture and forestry in the Commonwealth, we submit the following comments with regards to the proposed Emergency Temporary Standard/Emergency Regulation, Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19 (Regulation). The Council has signed on to a letter from a coalition of concerned business organizations, but wished to submit our own comments with commentary specific to the agribusiness members we represent.

The Regulations are Unnecessary

The Council does not believe the Regulations are necessary. The agribusiness community believes that our employee's safety is of the utmost importance and the industry has already invested millions of dollars and implemented unprecedented safety measures to protect their workforce and maintain the food supply. Agriculture and forestry are diverse industries and the different sectors of our industry has received guidelines from OSHA, U.S. DOL, CDC, VDH, and VDACS since the beginning of March to minimize the risk of COVID-19. The headlines cited in the Administrations background material appear to be out of date and prior to the industry establishing protocols and working with the CDC and VDH in guidelines and best practices to protect their workforce. A one-size fits all, static regulation runs the risk of contradicting further guidance as the science evolves and guidelines change. Indeed, in the time since the Governor directed the Commissioner to develop the Temporary Emergency Regulations, the Governor has released both the Phase II and Phase III guidelines and the CDC and U.S. Department of Labor have released updated guidelines for farmworkers and employers.

The draft regulations and the Executive Order 63 state that the regulation may not conflict with any executive orders. How can the Department ensure that the regulation will not conflict with executive orders and guidance that have not been written yet based on the latest data? For example, the just released Safer at Home: Phase III Guidelines state that all businesses "should screen employees prior to the start of a shift or working day." This would contradict the Emergency Temporary Standard/Regulation that has no screening requirement for lower risk employees. As the guidelines change for each industry as Virginia reopens, the Regulation would make it harder for businesses to adapt.

We further question the speed and process at which the regulation is being adopted. The Regulations contain numerous conflicting provisions. Asking the Board to make an informed decision and act on the content of the regulations or any necessary technical amendments after a 10-day comment period, one day to review the totality of those comments, and approving is simply not reasonable.

The Definition of “feasible” is Unclear and Subjective

The definition of “technical feasibility” holds the industry to a standard requiring “technical know-how” and a level of compliance that “lags significantly behind that of their industry”. Many of the requirements contained in the Regulation are qualified by the terms “to the extent feasible”. This standard will likely lead to subjective and inconsistent enforcement depending on the employee making the complaint and the VOSH investigator. Additionally, each individual industry is diverse, especially that of agriculture and forestry. Each individual farm, agribusiness, sawmill, papermill, etc. provides multiple services, could process products differently, and be a diversified operation with different types of agricultural production. As a result, there is no set overarching standard for the industry, but numerous guidelines from multiple sources.

VDACS alone has 9 different guidance documents for different sectors and commodities of the industry. CDC and U.S. DOL have produced guidance for farm labor and VDH has guidelines for farmer workers in temporary migrant labor camps. Many sectors of the forestry and agribusiness community must comply with additional federal regulations that protect worker safety as well as food safety. Many tasks in the forestry industry require the use of helmet and eye protection. Wearing a mask could lead to obstruction of vision in the eyewear leading to other safety hazards. Similarly, the electric utilities have specific safety standards that the Regulations would disrupt should they go into effect. Any state regulations that contradict these federal safety regulations would cause confusion and would force our members to choose between regulatory frameworks.

For example, the Virginia Department of Health developed guidance designed to reduce the risk of COVID-19 on operations that house temporary foreign workers. These guidelines allow the producer to house the workers on their property without violating U.S. DOL rules. The current definition of employee includes temporary workers and complying with a strict interpretation of feasibility could lead to a producer being in violation of their contract with U.S. DOL.

Certain Standards are Impossible for Agribusinesses to Comply

The Regulation is unclear about whether “medium” level employees would need to train and certify the training of employees. Section 80 regarding training states that employers with “high” and “very high” risk categories must provide training to employees and certify that the employees have completed this training. However, Section 60, regarding requirements for employers with “medium” risk employees cites that these employers need to comply with Section 80. As most agribusinesses will likely fall in the “medium” risk category, it is important to be clear about the training requirements for their employees.

One page 13, the definition of “May be infected with SARS-CoV-2” contains the words “or suspected COVID-19 person,”. An employer has no way to determine if someone is “suspected” of COVID-19 exposure. Any singular symptom would cause an employer to send an employee home until the employee was tested for COVID-19. Testing has proven to be in inadequate supply for the broader population of the Commonwealth and an employee would be on indefinite leave, unable to begin the employer’s return to work protocols.

On page 28, Section 60.A.#1 assumes that HVAC systems are in the control of all employers. However, employers which lease space provide employers with no control over the HVAC systems other than operability.

Additionally, the Council objects to the provisions of Section 90 regarding discrimination against employees that lodge complaints in the press or via social media. Regulations specifically set up an avenue for an employee to lodge complaints to the relevant agencies of state government. Many of our corporate members have policies against publicly disparaging their employer, especially without providing evidence. This provision would allow employees of our members to violate the terms of their employment, without providing evidence, and take away any recourse the employer may have. Such public accusations would be especially damaging if they are found to be without merit by the VOSH investigators.

Any business which hires contracted services will also need to reduce access to the farm or property for which they operate, within feasibility. These services are performed on differing schedules, often determined by the weather, which will be difficult if not impossible, to ensure the contracting agent is following the provisions of the Regulation.

These requirements for those in the medium category will be harder for smaller businesses, which have no human resource officer or legal counsel, to comply with, especially without ample time to update their processes or training. These businesses will have to develop a risk-based plan, provide training, provide screenings, keep records with no amount of time built in to come into compliance or stay in compliance with the Regulation.

Timelines in the Regulation are Undefined

The regulation does not have any referenced timeframe for compliance once the regulation is approved or to update a business’s COVID response plan. For those producers involved in planting or harvesting, without adequate time to properly adopt a written response plan or certify training could mean the loss of crop, endangering the viability of the business.

The Regulation calls for all employers to perform a risk assessment and assign each employee with a given category of “very high”, “high”, “medium” or “low” risk. For employers with a large workforce, such an assignment process could take weeks if not months to achieve. The regulation offers very little guidance on how to evaluate the assigned tasks or those workers that fall under multiple categories. In addition, these evaluations must take into account the outbreak status of the locality or region in which the business or workers are located. Businesses have no mechanism to guide the status of these conditions nor do they have control over the status of the

locality's reopening. Given the constantly changing conditions and positive cases, this would also require the reclassification of employees during certain conditions or guidance from the Administration or federal government. There are no timelines offered in the Regulation as to how long businesses would have to comply.

The Terms Standard, Regulation and Guidance is Used Interchangeably

The use of the terms "standard" and "regulation" in tandem causes confusion for how long and which provisions of the Regulation will be enforced. Section 20 refers to the standard as being valid for up to six months. The regulation is to be effective for up to eighteen months. Why is the two terms used combined throughout the Regulation and yet have separate and distinct effective duration? The Regulation also requires certain industries and risk levels to comply with certain "guidelines" and "guidance". As stated previously, these guidelines are subject to change at various frequencies. This would require the regulation to update itself instantaneously without notification to our members.

Again, the members of the Virginia Agribusiness Council absolutely consider the protection of their employees a top priority. However, this Regulation provides confusion and a one-size fits all strategy that will ultimately make it harder for our essential employers to stay operational. Thank you for this opportunity to comment on this recurring issue here in Virginia. The Council opposes the Emergency Temporary Standard/Regulation.

Sincerely,



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Executive Director
Virginia Agribusiness Council

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