



September 25, 2020

Mr. Jay Withrow
Director
Division of Legal Support, ORA, OPPPI, and OWP
Virginia Department of Labor and Industry
600 E. Main Street, Suite 207
Richmond, VA 23219

RE: Comments on 16 VAC 25-220, Permanent Standard for Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19

Dear Mr. Withrow:

On behalf of the Virginia Health Care Association-Virginia Center for Assisted Living (VHCA-VCAL), I provide the following comments on 16 VAC 25-220, the permanent standard for COVID-19 prevention and mitigation in the workplace. Fighting the virus and its spread has been the priority for Virginia's nursing facilities and assisted living communities for more than six months and will remain our top priority for the foreseeable future. As such, long term care facilities have implemented extensive measures and follow detailed requirements and guidelines set forth by the Centers for Medicare and Medicaid Services (CMS), Centers for Disease Control and Prevention (CDC), Virginia Department of Health (VDH), the Virginia Department of Social Services (DSS), local health departments, and most recently the Virginia Department of Labor and Industry (DOLI) to prevent, mitigate, and control the spread of COVID-19 in long term care facilities. We appreciate the work of the Safety and Health Codes Board thus far, but we have several concerns with the draft permanent standard as written and the potential burden it could put on long term care facilities beyond the emergency period.

Accordingly, VHCA-VCAL respectfully requests that the Board: 1) eliminate the duplicative requirements for employers to report positive SARS-CoV-2 test results to VDH and DOLI; 2) clarify the return to work requirements regarding the test-based strategy; and 3) clarify the applicability of the permanent standard so that it is only in effect during a declared public health emergency related to COVID-19.

Reporting Testing Results

Under the CARES Act, all clinical laboratories and testing providers in Virginia, which include long term care facilities, are required to report the results of any test to detect SARS-CoV-2 to VDH. As such, all positive tests are already being reported to VDH by the testing provider. Requiring employers to report test results to VDH and DOLI in

addition to the testing provider is duplicative and unnecessarily burdensome. We respectfully request these requirements be stricken from the permanent standard.

Return to Work Requirements

There appears to be a conflict in how DOLI and VDH treat testing for SARS-CoV-2. Under its “Return to Work” requirements, the draft permanent standard requires employers to select either a test-based strategy or a non-test-based strategy for determining whether employees known to be infected with SARS-CoV-2 can return to work. The test-based strategy would require the employee to have obtained two negative test results more than 24 hours apart. This is problematic because the individual may continue to test positive for the virus for up to 120 days after being infected, even though the individual is no longer infectious and the virus is not contagious after 10-20 days, depending on the severity.¹ Therefore, VDH and CDC recommend that a person who tests positive for SARS-CoV-2 not be tested again within three months.

However, if a facility chooses to use the test-based strategy under the DOLI standard to determine whether employees can return to work, those employees could be absent from work unnecessarily for up to three months. In such a case, the employee would be forced to take unpaid leave if they do not have enough paid time off to cover the period beyond that which is required under the Families First Coronavirus Response Act and the Family and Medical Leave Act. Although the draft permanent standard would allow facilities to select the non-test-based strategy for compliance, the option for a test-based strategy creates confusion for facilities already under a significant amount of pressure complying with other laws, regulations, and guidelines.

This conflict also has the potential to affect public health policy at the state level if testing providers are then required to report several positive test results for the same individual. As the draft is written currently, VDH could be sent duplicative and unnecessary reports from both the testing provider that reported the positive test result and the employer/facility that is required to report positive cases. This scenario could create supply issues for much-needed testing materials such as nasopharyngeal swabs as well as put a strain on resources at VDH to sift through duplicative data. Accordingly, we respectfully request the test-based strategy for known SARS-CoV-2 cases be eliminated or clarified in the permanent standard.

Applicability of the Permanent Standard

Lastly, the permanent standard, as currently written, will apply to Virginia businesses indefinitely, potentially surpassing a foreseeable time at which COVID-19 is no longer a critical public health emergency. Consequently, businesses would still be required to

¹ Duration of Isolation and Precautions for Adults with COVID-19, Centers for Disease Control and Prevention (<https://www.cdc.gov/coronavirus/2019-ncov/hcp/duration-isolation.html#:~:text=Recovered%20persons%20can%20continue%20to,recovered%20and%20infectiousness%20is%20unlikely.>)

comply with the strict requirements in this standard three years from now when most people may have been immunized and effective treatments have been developed.

Most public health experts agree that the SARS-CoV-2 virus will never fully disappear. However, like the seasonal flu and other viruses, more effective treatments and vaccines will be developed such that the virus will no longer be an emergent public health threat. Accordingly, it is foreseeable that current prevention measures like those contained in this draft permanent standard will no longer be necessary at such a time.

We understand that such a time might not occur for another year or more and therefore appreciate the need for a permanent standard to be in place. However, we request that language be included that specifically limits application of these measures to a period of declared public health emergency due to COVID-19. Once the emergency period is over, businesses can operate without the burden of complying with regulations that are no longer necessary to protect public health. And if there is a future outbreak of COVID-19 in Virginia that necessitates a declaration of public health emergency, this regulation could become effective again.

We respectfully request the above changes to the draft permanent standard to provide clarity and certainty for long term care facilities in the Commonwealth.

Sincerely,

A handwritten signature in black ink that reads "Keith Hare". The signature is written in a cursive, flowing style.

Keith Hare
President and CEO

CC: W. Scott Johnson, Esq., Hancock, Daniel & Johnson
Benjamin H. Traynham, Esq., Hancock, Daniel & Johnson
Tyler S. Cox, Hancock, Daniel & Johnson