



COMMONWEALTH of VIRGINIA

DEPARTMENT OF LABOR AND INDUSTRY

C. RAY DAVENPORT
COMMISSIONER

November 29, 2021

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Carrie R. Hunt, President/CEO
Virginia Credit Union League
108 N. 8th Street
Richmond, VA 23219

SUBJECT: Federal OSHA Vaccination and Testing Mandate, Emergency Temporary Standard (ETS), 1910.501

Va. Code §40.1-28, Unlawful to Require Payment for Medical Examination as a Condition of Employment¹

Dear Ms. Hunt:

Your letter of November 17, 2021 to Commissioner C. Ray Davenport on the above-referenced topic (copy attached) was referred to me for answer.

In response to your concerns about the application of Va. Code §40.1-28 to OSHA's Vaccination and Testing Mandate ETS which is in litigation in the 6th Circuit Court of Appeals, the Department is currently consulting with the Office of the Attorney General on the issue.

Once we receive a response, a Frequently Asked Question will be posted to our webpage on the ETS: <https://www.doli.virginia.gov/federal-covid-19-vaccine-mandate-ets/>

Thank you for your interest in the safety and health of Virginia's employees and employers.

Sincerely,

A handwritten signature in black ink, appearing to read "Jay Withrow".

Jay Withrow, Director
Division of Legal Support, ORA, OPPPI, and OWP

¹ <https://law.lis.virginia.gov/vacode/40.1-28/>, § 40.1-28. Unlawful to require payment for medical examination as condition of employment.

"It shall be unlawful for any employer to require any employee or applicant for employment to pay the cost of a medical examination or the cost of furnishing any medical records required by the employer as a condition of employment."



November 17, 2021

C. Ray Davenport, Commissioner
Virginia Department of Labor and Industry
600 East Main Street, Suite 207
Richmond, Virginia 23219

RE: Federal Occupational Safety and Health Administration (OSHA) Emergency Temporary Standard applicability to § 40.1-28 and 16VAC25-220-40.

Dear Commissioner Davenport:

I write to you representing Virginia's 110 member-owned credit unions. Credit unions, as member-owned cooperatives, have served their communities admirably throughout the pandemic as essential financial service providers. We support the safety and health of our workforce and those with whom we do business. However, uncertainty in the labor market is disruptive to our credit unions as employers. We ask that you preemptively remove uncertainty in Virginia by ruling that the Emergency Temporary Standard (ETS) OSHA regulation (if upheld) regarding the payment for testing will be the standard applied in the state, notwithstanding any provision in the Code of Virginia and/or the Administrative Code.

We submit that standard implied under § 40.1-28, "it shall be unlawful for any employer to require any employee or applicant for employment to pay the cost of a medical examination or the cost of furnishing any medical records required by the employer as condition of employment" is not relevant to a federal mandate. The Code relates to voluntary employer policies and requirements, not federal rules.

In adopting 16VAC25-220-40 (Mandatory requirements for all employers), the Virginia Safety and Health Codes Board only addressed payment for testing in section C 4 (return to work). Clearly, this section applies to suspected or confirmed COVID-19 employees when stating COVID-19 testing is considered a "medical examination" under § 40.1-28. Weekly testing at the will of the employee in lieu of vaccination is not analogous to a positive test or known exposure to the virus.

We respectfully request that should Virginia adopt the federal ETS policy, it clarify that those provisions preempt any other provision of Virginia law relative to the payment of testing. This will give employers the flexibility they need, and will also fit within the intent of the ETS which is to ensure that workers are vaccinated and we have a safe workforce.

Sincerely,

A handwritten signature in black ink that reads "Carrie R. Hunt".

Carrie R. Hunt
President/CEO

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VA DEPT OF LABOR AND INDUSTRY