



Virginia
Regulatory
Town Hall

Notice of Intended Regulatory Action Agency Background Document

Agency Name:	Virginia Department of Labor and Industry/Safety and Health Codes Board
VAC Chapter Number:	16 VAC 25-60
Regulation Title:	Administrative Regulations for the Virginia Occupational Safety and Health (VOSH) Program
Action Title:	Amendments to the Administrative Regulations Manual for the Virginia Occupational Safety and Health (VOSH) Program
Date:	December 14, 2004

This information is required prior to the submission to the Registrar of Regulations of a Notice of Intended Regulatory Action (NOIRA) pursuant to the Administrative Process Act § 9-6.14:7.1 (B). Please refer to Executive Order Twenty-Five (98) and Executive Order Fifty-Eight (99) for more information.

Purpose

Please describe the subject matter and intent of the planned regulation. This description should include a brief explanation of the need for and the goals of the new or amended regulation.

The amendments to the Administrative Regulations for the Virginia Occupational Safety and Health (VOSH) Program are necessary to comply with changes to statutory law or to address procedural or other administrative changes that have occurred since the Administrative Regulations Manual (ARM) was last revised.

Basis

Please identify the state and/or federal source of legal authority to promulgate the contemplated regulation. The discussion of this authority should include a description of its scope and the extent to which the authority is mandatory or discretionary. The correlation between the proposed regulatory action and the legal authority identified above should be explained. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority must be provided.

The Safety and Health Codes Board authorized the Department to initiate the regulatory process to amend the Administrative Regulations for the VOSH Program by filing this notice pursuant to the Virginia Administrative Process Act, §2.2-4007 of the *Code of Virginia*.

The Safety and Health Codes Board is authorized by Title 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".

"In making such rules and regulations to protect the occupational safety and health of employees, the Board shall adopt the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence that no employee will suffer material impairment of health or functional capacity".

Substance

Please detail any changes that would be implemented: this discussion should include a summary of the proposed regulatory action where a new regulation is being promulgated; where existing provisions of a regulation are being amended, the statement should explain how the existing regulation will be changed. The statement should set forth the specific reasons the agency has determined that the proposed regulatory action would be essential to protect the health, safety or welfare of citizens. In addition, a statement delineating any potential issues that may need to be addressed as the regulation is developed shall be supplied.

The NOIRA request is to accommodate VOSH Program concerns by amendment of the Administrative Regulations Manual. Such changes may include Defined Terms, General Provisions including notification, posting, recordkeeping complaints and discrimination, Standards including the inclusion of Part 1918, Safety and Health Regulations for Longshoring--public sector only, and Part 1919, Gear Certification-public sector only, Variances, Inspections Citation and Penalty, Abatement, and Review and Settlement.

Changes to be considered include, but are not limited to:

- A. Add to §10, Definitions, a definition of the term "Agricultural Operations." Current VOSH standards for Agriculture use the term "agricultural operations" but do not define the term.
- B. Amend certain definitions contained in §10, Definitions, including "Abatement period," "Commissioner," "Commissioner of Labor and Industry," "Other violation," "Person," and "Public employer."
- C. Add to §30, Applicability to Public Employers, that Va. Code §§40.1-49.9, Issuance of warrant; 40.1-49.10, Duration of warrant; 40.1-49.11, Conduct of inspection, testing, or

collection of samples for analysis; 40.1-49.12, Review by courts, shall apply to political subdivisions in the Commonwealth.

- D. Add to §30, Applicability to Public Employers, that Va. Code §§40.1-49.4.J (i.e., penalties for willful - but not repeated - violations may be issued of up to \$70,000.00) shall apply to public employers.
- E. Add to §30, Applicability to Public Employers, that Va. Code §§40.1-49.4.K (i.e., criminal penalties for willful violations that cause the death of an employee may be issued of up to \$70,000.00 and up to six months imprisonment for the first such violation; and \$140,000.00 in criminal penalties and up to one year imprisonment) shall apply to public employers.
- F. Amend §40, Notification and Posting Requirements, to §40.1. to clarify that notices of contests shall be delivered by the employer to any authorized employee representative.
- G. Amend §90, Release of Information and Disclosure Pursuant to Requests under the Virginia Freedom of Information Act and Subpoenas, to permit the release of VOSH contested case file information once litigation has been initiated and a copy of the file has been released to the employer under a discovery request (request for production).
- H. Amend §100, Complaints, to eliminate references to “formal” (signed employee complaints) and “nonformal” complaints (unsigned employee complaints or complaints filed by former employees) and substitute language similar to that in the VOSH Field Operations Manual which describes complaints as those that are either inspected (i.e., the employer receives an onsite inspection) or investigated (the employer is contacted by phone or fax).
- I. Amend Part III, Occupational Safety and Health Standards, to add regulatory authority for the VOSH Program to issue citations and penalties for an employer’s failure to comply with the applicable manufacturer’s requirements for construction, design, installation, testing, inspection, maintenance, use and operation of any machinery, vehicle, tool, material or equipment.
- J. Amend §150, Maritime Standards, to include references to 29 C.F.R. 1918 and 1919 standards (Longshoring-public sector only, and Gear Certification-public sector only, respectively).
- K. Add to §260, Issuance of Citation and Proposed Penalty, guidance on how to apply the requirement in Va. Code §40.1-49.4.A.3. which provides that “No citation may be issued under this section after the expiration of six months following the occurrence of any alleged violation.” Issues to be addressed include:
 - 1. when does the six months period start if an employer fails to notify the Commissioner of a fatal accident as required by §40.1-51.1.D;

2. when does the six months period start if the Department first finds out about a serious accident through receipt of a First Report of Accident from the Virginia Workers' Compensation Commission as provided in Va. Code §65.2-900;
 3. when does the six months period start if the Department finds out about a potential hazard through receipt of an employee complaint or referral;
 4. when is the six month period tolled, when the citations are issued, or when the employer receives the citations.
- L. Amend § 300, Contest Proceedings Applicable to the Commonwealth, by changing "Attorney General" to "Governor" as the individual who VOSH will refer contested citations involving the Commonwealth or one of its agencies to if the case cannot be settled at the Department level.
- M. Amend Part V, Inspections, to codify the Department's multi-employer worksite inspection policy. The policy is described in the VOSH Field Operations Manual as follows:

On multi-employer worksites, both construction and non-construction citations normally shall be issued to employers whose employees are exposed to hazards (the exposing employer).

Additional Categories of Employers. Additionally, the following employers normally shall be cited, whether or not their own employees are exposed (see below for defense to citation under this policy):

1. The employer who actually creates the hazard (the creating employer);
 2. The employer who is responsible, by contract or through actual practice, for safety and health conditions on the worksite; i.e., the employer who has the authority for ensuring that the hazardous condition is corrected (the controlling employer);
 3. The employer who has the responsibility for actually correcting the hazard (the correcting employer).
- N. Amend Part VI, Citation and Penalty, to codify the Department's multi-employer worksite defense. The defense is described in the VOSH Field Operations Manual as follows:

Prior to issuing citations to an exposing employer, it must first be determined whether the available facts indicate that employer has a legitimate defense to the citation, as set forth below:

1. The employer did not create the hazard;
 2. The employer did not have the responsibility or the authority to have the hazard corrected;
 3. The employer did not have the ability to correct or remove the hazard;
 4. The employer can demonstrate that the creating, the controlling and/or the correcting employers, as appropriate, have been specifically notified of the hazards to which his/her employees are exposed;
 5. The employer has instructed his/her employees to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it.
 - a. Where feasible, an exposing employer must have taken appropriate alternative means of protecting employees from the hazard.
 - b. When extreme circumstances justify it, the exposing employer shall have removed his/her employees from the job.
- O. Amend §340, Settlement, to eliminate references to “amended citations” as the VOSH Program no longer issues amended citations as part of informal or formal settlement agreements.

Alternatives

Please describe, to the extent known, the specific alternatives to the proposal that have been considered or will be considered to meet the essential purpose of the action.

There are no known alternatives to these amendments which are necessary to comply with changes to statutory law or that address procedural or other administrative changes that have occurred since the Administrative Regulations Manual was last revised.

Family Impact Statement

Please provide a preliminary analysis of the potential impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and one’s children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

These amendments will have no impact on the institution of family or family stability.