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## Proposed Regulation Agency Background Document

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| <b>Agency name</b>                                 | Virginia Department of Labor and Industry   |
| <b>Virginia Administrative Code (VAC) citation</b> | 16 VAC 25-60-240<br>16 VAC 25-60-245  |
| <b>Regulation title</b>                            | Administrative Regulations for the Virginia Occupational Safety and Health Program  |
| <b>Action title</b>                                | Proposed regulations to Amend the Administrative Regulations for the Virginia Occupational Safety and Health Program to Take and Preserve Testimony, Examine Witnesses and Administer Oaths |
| <b>Date this document prepared</b>                 | July 21, 2008   |

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.*

The Virginia Occupational Safety and Health (VOSH) Program seeks the amendment of VOSH Administrative Regulations Manual (ARM) to establish procedures for the Commissioner or his appointed representatives under VA. Code §40.1-6(5) to take and preserve testimony, examine witnesses and administer oaths under Va. Code §§40.1-6(4) and 40.1-10.

Following are the requirements of Va. Code §§40.1-6(4) and 40.1-10:

**Va. Code §40.1-6(4), Powers and duties of the Commissioner.**

“The Commissioner shall:  
....

**(4) In the discharge of his duties, have power to take and preserve testimony, examine witnesses and administer oaths** and to file a written or printed list of relevant interrogatories and require full and complete answers to the same to be returned under oath within thirty days of the receipt of such list of questions. “ (Emphasis added).

**Va. Code §40.1-10, Offenses in regard to examinations, inspections, etc.**

**“If any person who may be sworn to give testimony shall willfully fail or refuse to answer any legal and proper question propounded to him concerning the subject of such examination as indicated in §§ 40.1-6, or if any person to whom a written or printed list of such interrogatories has been furnished by the Commissioner shall neglect or refuse to answer fully and return the same under oath, or if any person in charge of any business establishment shall refuse admission to, or obstruct in any manner the inspection or investigation of such establishment or the proper performance of the authorized duties of the Commissioner or any of his representatives, he shall be guilty of a misdemeanor. Such person, upon conviction thereof, shall be fined not exceeding \$100 nor less than \$25 or imprisoned in jail not exceeding 90 days, or both.”** (Emphasis added).

The proposed regulation:

- \* Specifies the wording of the oath to be administered and the manner in which it would be administered;
- \* Explains the manner in which the Commissioner would appoint in writing Department personnel as his representatives having the authority to administer such oaths and have the authority to examine witnesses in accordance with the procedures outlined in the regulation;
- \* Specifies that testimony preserved under the regulation would be recorded by a court reporter;
- \* Specifies the level of confidentiality that would attach to any testimony preserved under the statute;
- \* Establishes a procedure for the Commissioner or his authorized representatives to follow in the event that any employer refuses to make an employee or supervisor available to provide testimony in accordance with Va. Code 40.1-6(4). The proposed regulation provides that an application for an inspection warrant under Va. Code §§40.1-49.8

through -49.12 for VOSH investigations/inspections will be submitted to the local General District or Circuit Court with jurisdiction over the employer.

- \* Establishes a procedure for the Commissioner or his authorized representatives to follow in the event that any person who has sworn to give testimony willfully refuses or fails to answer any legal and proper question in accordance with Va. Code §§40.1-10 and 40.1-6(4), up to and including referring such refusal to the appropriate Commonwealth’s Attorney for prosecution of the individual involved.

**Legal basis**

*Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.*

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. However, such standards shall be at least as stringent as the standards promulgated by the federal OSH Act of 1970 (P.L.91-596). In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experiences gained under this and other health and safety laws.”

**Purpose**

*Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.*

The purpose of the proposal is to provide VOSH personnel with procedures on how to exercise the Commissioner’s statutory authority to take and preserve testimony, examine witnesses and administer oaths, in instances where witnesses/employees/supervisors refuse requests for interviews or refuse to answer specific questions posed by a VOSH inspector.

## Substance

*Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the "Detail of changes" section.)*

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The amendment of the Administrative Regulations of the VOSH Program establishes procedures for the Commissioner or his appointed representatives under Va. Code §40.1-6(5) to take and preserve testimony, examine witnesses and administer oaths under Va. Code §§40.1-6(4) and 40.1-10. The proposed regulation specifies the wording of the oath to be administered and the manner in which it would be administered. It explains the manner in which the Commissioner would appoint in writing Department personnel as his representatives having the authority to administer such oaths and have the authority to examine witnesses in accordance with the procedures outlined in the regulation. It specifies that testimony preserved under the regulation would be recorded by a court reporter. It specifies the level of confidentiality that would attach to any testimony preserved under the statute. The amendment establishes a procedure for the Commissioner or his authorized representatives to follow in the event that any employer refuses to make an employee or supervisor available to provide testimony in accordance with Va. Code 40.1-6(4). The proposed regulation provides that an application for an inspection warrant under Va. Code §§40.1-49.8 through 40.1-49.12 for VOSH investigations/inspections will be submitted to the local General District or Circuit Court with jurisdiction over the employer.

Lastly, it establishes a procedure for the Commissioner or his authorized representatives to follow in the event that any person who has sworn to give testimony willfully refuses or fails to answer any legal and proper question in accordance with Va. Code §§40.1-10 and 40.1-6(4), up to and including referring such refusal to the appropriate Commonwealth's Attorney for prosecution of the individual involved.

## Issues

*Please identify the issues associated with the proposed regulatory action, including:*

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

*If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.*

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In fatal and non-fatal accident investigations particularly and more routine inspections as well, VOSH inspectors are required to interview one or more employees and supervisors. VOSH personnel sometimes encounter witnesses/employees/supervisors that refuse to talk with our inspectors or avoid answering specific questions for a variety of reasons. Although such refusals are rare, they can have a significant impact on the promptness, thoroughness and quality of the investigation.

It is a generally accepted investigative principle that the closer in time to an event that information about the event is obtained from witnesses, the better the chance is that the information will be accurate. Refusals can result in delays in obtaining witness statements immediately after the accident occurs, potentially resulting in altered memories and less accurate information concerning the cause of the

accident.

In addition, the investigative process is often a very fluid one, where statements made by one witness can lead to additional questions being asked of other witnesses, or previously undisclosed documents being obtained from the employer. Such refusals can not only result in the loss of the individuals' testimony, but can also result in the loss of other potential leads in the investigation. Early access to such information will result in higher quality investigations, and better and more accurate outcomes.

When such refusals do occur, the inability to gather crucial information from eyewitnesses and sometimes the testimony of the injured employee greatly hampers the VOSH program's ability to complete a full and fair investigation of the accident in a timely manner - Va. Code §40.1-49.4.A.3 requires VOSH to issue citations within six months following the occurrence of any alleged violation. The Commissioner's statutory authority to take and preserve testimony, examine witnesses and administer oaths, if implemented through regulation, could be used to obtain necessary testimony very early in the investigative process, avoiding delays and potentially altered memories.

Employers would have to make employees available for private interview as identified by the Commissioner or his representative, in accordance with procedures in the proposed regulation, implementing the statutory requirements in Va. Code §§40.1-6(4) and 40.1-10.

The Commissioner currently has the statutory authority to "question privately any such employer, owner, operator, agent or employee" during a VOSH inspection in accordance with Va. Code §40.1-49.8(2). As noted previously, VOSH investigation procedures provide for employee interviews on all inspections, and employers, as a regular course of business, make their employees available for such interviews without limitation. VOSH does not believe the proposed regulation will have a significant cost impact on employers for the following reasons:

- VOSH estimates that it will seek to use the new procedures in the proposed regulation to require an employer to make an employee available for an interview on an average of five or fewer cases per year.
- The average length of a VOSH interview is normally 15 minutes or less; however, in accident cases an interview may last up to 60-90 minutes. Significant down time for employers or employees is not anticipated.
- Interview locations would normally be at the employer's worksite, an agreed to alternate site, or at the local VOSH Office. Significant travel costs are not anticipated.
- VOSH will assume the cost of transcription services.

Employees would have to provide testimony, in accordance with any procedures implementing the statutory requirements in Va. Code §§40.1-6(4) and 40.1-10. As noted previously, VOSH investigation procedures provide for employee interviews on all inspections, and employees and supervisory personnel regularly agree, without limitation, to be interviewed. VOSH does not believe the proposed regulation will have a significant cost impact on employees for the reasons listed in C. above.

The Department would have to designate and train personnel on the procedures implementing the statutory requirements in Va. Code §§40.1-6(4) and 40.1-10. The average cost of transcriptions services

ranges for a one hour interview is approximately \$200. The VOSH Program estimates that annual costs for interviews under the proposed regulations would be \$1,000 or less.

### Requirements more restrictive than federal

*Please identify and describe any requirement of the proposal which are more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.*

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There are no requirements in the proposed regulation that exceed applicable federal requirements.

### Localities particularly affected

*Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.*

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There are no localities that are particularly affected by the proposed regulation.

### Public participation

*Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.*

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In addition to any other comments, the board/agency is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency/board is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so by mail, email or fax to Mr. Jay Withrow, Director, Office of Legal Support, Department of Labor & Industry, Powers-Taylor Building, 13 South Thirteenth Street, Richmond, VA 23219-4104; telephone # 804.786.9873; fax # 804.786.8418; [Jay.Withrow@doli.virginia.gov](mailto:Jay.Withrow@doli.virginia.gov)

Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last date of the public comment period.

A public hearing will be held and notice of the public hearing may appear on the Virginia Regulatory Town Hall website ([www.townhall.virginia.gov](http://www.townhall.virginia.gov)) and can be found in the Calendar of Events section of the Virginia Register of Regulations. Both oral and written comments may be submitted at that time.

**Economic impact**

*Please identify the anticipated economic impact of the proposed regulation.*

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| <p><b>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures</b></p>  | <p>The Department would have to designate and train personnel on the procedures implementing the statutory requirements in Va. Code §§40.1-6(4) and 40.1-10. VOSH will assume the cost of transcription services.</p> <p>VOSH estimates that it will seek to use the new procedures in the proposed regulation to require an employer to make an employee available for an interview on an average of five or fewer cases per year.</p> <p>The average length of a VOSH interview is normally 15 minutes or less; however, in accident cases an interview may last up to 60-90 minutes. Significant down time for employers or employees is not anticipated.</p> <p>Interview locations would normally be at the employer’s worksite, an agreed to alternate site, or at the local VOSH Office. Significant travel costs are not anticipated.</p> <p>The average cost of transcription service for a one hour interview is approximately \$200. The VOSH Program estimates that annual costs for interviews under the proposed regulation would be \$1,000.00 or less.</p> |
| <p><b>Projected cost of the regulation on localities</b></p>   | <p>No significant cost is anticipated for any locality.</p>  |
| <p><b>Description of the individuals, businesses or other entities likely to be affected by the regulation</b></p>   | <p>In fatal and non-fatal accident investigations particularly and more routine inspections as well, VOSH inspectors are required to interview one or more employees and supervisors. VOSH personnel sometimes encounter witnesses/employees/supervisors that refuse to talk with our inspectors or avoid answering specific questions for a variety of reasons. VOSH estimates that it will seek to use the new procedures in the proposed regulation to require an employer to make an employee available for an interview on an average of five or fewer cases per year.</p>  |
| <p><b>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected.</b> Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p> | <p>VOSH estimates that it will seek to use the new procedures in the proposed regulation to require an employer to make an employee available for an interview on an average of five or fewer cases per year.</p>  |

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| <p><b>All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.</b></p> | <p>No significant cost impact on employers is anticipated because: 1) VOSH estimates that it will seek to use the new procedures in the proposed regulation to require an employer to make an employee available for an interview on an average of five or fewer cases per year; 2) the average length of a VOSH interview is normally 5 minutes or less; however, in accident cases an interview may last up to 60-90 minutes. Significant down time for employers or employees is not anticipated; 3) interview locations would normally be at the employer’s worksite, an agreed to alternate site, or at the local VOSH Office. Significant travel costs are not anticipated; and 4) VOSH will assume the cost of transcription services.</p> |
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**Alternatives**

*Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.*

VOSH could adopt written guidelines to implement for the Commissioner or his appointed representatives under Va. Code §40.1-6(5) to take and preserve testimony, examine witnesses and administer oaths under Va. Code §§40.1-6(4) and 40.1-10.

**Regulatory flexibility analysis**

*Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.*

The VOSH Program considered the adoption of written guidelines in lieu of a regulatory approach. Written guidelines do not have the force and effect of law, nor are they subject to notice and comment procedures required by the Virginia Administrative Process Act. It has been the experience of the VOSH Program that the regulated community prefers the opportunity to officially comment on procedures that could impact how VOSH inspections are conducted, and prefers a regulatory approach that cannot be changed at the whim of the agency, but would be subject to additional notice and comment procedures if the agency desired to change the procedures in the future.



**Public comment**

*Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.*

There were no comments received during the public comment period.

**Family impact**

*Please assess the 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.*

No impact on the family is anticipated as a result of this proposed action.

**Detail of changes**

*Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.*

*If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.*

For changes to existing regulations, use this chart:

| <b>Current section number</b> | <b>Proposed new section number, if applicable</b> | <b>Current requirement</b>  | <b>Proposed change and rationale</b>  |
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| 16 VAC 25-60-240              |   | 16 VAC 25-60-240, Walkthrough<br><br>Walkthrough by the commissioner for the inspection of any workplace includes the following privileges.<br><br>1. The commissioner shall be in charge of the inspection and, as part of an inspection, may question privately any employer, owner, operator, agent, or employee. The commissioner shall conduct the interviews of persons during the inspection or at other convenient times. | 16 VAC 25-60-240, Walkthrough<br><br>Walkthrough by the commissioner for the inspection of any workplace includes the following privileges.<br><br>1. The commissioner shall be in charge of the inspection and, as part of an inspection, may question privately any employer, owner, operator, agent, or employee. The commissioner shall conduct the interviews of persons during the inspection or at other convenient times. <u>The commissioner may take and preserve testimony, examine witnesses and administer oaths as provided for in §245 of these regulations.</u> |

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|  | <p>16 VAC 25-60-245</p> | <p><u>Rationale:</u> Language was added to the regulation to specify the commissioner’s full authority with respect to conducting investigations.</p> <p><u>Take and Preserve Testimony, Examine Witnesses and Administer Oaths</u></p> <p><u>1. Section 40.1-6(4) of the Code of Virginia authorizes the commissioner, in the discharge of his duties, to take and preserve testimony, examine witnesses and administer oaths. In accordance with §40.1-6(5) of the Code of Virginia, the Commissioner of Labor and Industry may appoint such representatives as are necessary to carry out the functions outlined in §40.1-6(4) of the Code of Virginia. Such appointments shall be made in writing, identify the individual being appointed, the length of appointment, the method of withdrawal of such appointment, and specify what duties are being prescribed.</u></p> <p><u>2. The oath shall be administered by the commissioner’s appointed representative to the witness as follows: “Do you swear or affirm to tell the truth”.</u></p> <p><u>3. Testimony given under oath shall be recorded by a court reporter.</u></p> <p><u>4. Questioning of employers, owners, operators, agents or employees under oath shall be in private in accordance with §40.1-49.8(2) of the Code of Virginia.</u></p> <p><u>5. An employer’s refusal to make an owner, operator, agent or employee available to the commissioner for examination under this section shall be considered a refusal to consent to the commissioner’s inspection authority under §40.1-49.8 of the Code of Virginia. Upon such refusal the commissioner may seek an administrative search warrant in accordance with the provisions contained in §§40.1-49.9 to -49.12 of the Code of Virginia, and obtain an order from the appropriate judge commanding the employer to make the subject owner, operator, agent or employee available for examination at a specified location by a date and time certain.</u></p> <p><u>6. In accordance with §40.1-10 of the Code of Virginia, if any person who may be sworn to give testimony shall willfully fail or refuse to answer any legal and proper question propounded to him concerning the subject of the examination under §40.1-6 of the Code of Virginia, he shall be guilty of a misdemeanor. Such person, upon conviction thereof, shall be</u></p> |
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|  |  | <p><u>fined not exceeding \$100 nor less than \$25 or imprisoned in jail not exceeding 90 days or both. Any such refusal on the part of any person to comply with this section may be referred by the Commissioner of Labor and Industry to the appropriate Commonwealth's Attorney for prosecution.</u></p> <p><u>Rationale:</u> The proposed regulation:</p> <p>Specifies the wording of the oath to be administered and the manner in which it would be administered;</p> <p>Explains the manner in which the Commissioner would appoint in writing Department personnel as his representatives having the authority to administer such oaths and have the authority to examine witnesses in accordance with the procedures outlined in the regulation;</p> <p>Specifies that testimony preserved under the regulation would be recorded by a court reporter;</p> <p>Establishes a procedure for the Commissioner or his authorized representatives to follow in the event that any employer refuses to make an employee or supervisor available to provide testimony in accordance with Va. Code 40.1-6(4). The proposed regulation provides that an application for an inspection warrant under Va. Code §§40.1-49.8 through -49.12 for VOSH investigations/inspections will be submitted to the local General District or Circuit Court with jurisdiction over the employer.</p> <p>Establishes a procedure for the Commissioner or his authorized representatives to follow in the event that any person who has sworn to give testimony willfully refuses or fails to answer any legal and proper question in accordance with Va. Code §§40.1-10 and 40.1-6(4), up to and including referring such refusal to the appropriate Commonwealth's Attorney for prosecution of the individual involved.</p> |
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