



**Final Regulation
Agency Background Document**

Agency name	Virginia Department of Labor and Industry
Virginia Administrative Code (VAC) citation	New: 16 VAC 25-95; 16 VAC 25-177 Amend: 16 VAC 25-90-1910.151(a)-(c); 16 VAC 25-175-1926.50 (a)-(g)
Regulation title	16 VAC 25-95, Medical Services and First Aid Standards for General Industry, and for 16 VAC 25-177, Medical Services and First Aid Standards for the Construction Industry
Action title	Final regulation to amend the Medical Services and First Aid Standards for General Industry, §16 VAC 25-90-1910.151 and for the Construction Industry, §16 VAC 25-175-1926.50
Date this document prepared	May 1, 2009

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.

Summary of Original Proposed Regulation

Under the **original** proposed regulations employers with employees in job classifications or exposed to workplace hazards that could result in serious physical harm or death would be required to have at each job site and for each workshift at least one employee trained in first aid and CPR. Other issues include:

- A. Allowing an employer to make written arrangements with other contractors/employers on the same job site to provide designated employees to serve as first aid/CPR responders, to lessen the cost of compliance with the regulation;

- B. Clarifying that first aid requirements for employers of mobile work crews (i.e., crews that travel to more than one worksite per day) of two or more employees that assign employees to travel to worksites or engage in work activities that could potentially expose those employees to serious physical harm or death shall either assure that at least one employee on the mobile crew is designated and adequately trained to render immediate first aid and CPR during all work shifts; or make written arrangements with other contractors/employers on the same job sites to provide designated employees to serve as first aid responders.
- C. Clarifying that employers of individual mobile employees (i.e., an employee who travels alone to more than one worksite per day), that assign employees to travel to worksites or engage in work activities that could potentially expose those employees to serious physical harm or death shall either assure that the mobile employee is adequately trained to self-administer first aid; make written arrangements with other contractors/employers on the same job sites to provide designated employees to serve as first aid responders; or assure that their employees have access to a communication system that will allow them to immediately request medical assistance through a 911 emergency call or comparable communication system.

Major changes to the original proposed regulation are as follows:

The final regulation extends the mobile communication option for single employees to employers with worksites where only one employee is permanently stationed; adds definitions for the terms “serious physical harm” and “serious workplace hazard”; deletes the term “job classification”; amends §§16 VAC 25-95.C and 16 VAC 25-177.D as follows: the word “designated” is replaced with the word “selected”, the word “render” is replaced with the word “administer”, and the word “immediate” is deleted. These changes will clarify that it is not the intent of the Department to apply the full provisions of the Bloodborne Pathogens Standard to employees trained under the final first aid/CPR regulation.

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

On April 16, 2009, the Virginia Safety and Health Codes Board voted unanimously to adopt as a final regulation of the Board, 16 VAC 25-95, Medical Services and First Aid Standards for General Industry, and 16 VAC 25-177, Medical Services and First Aid Standards for the Construction Industry, and to amend 16 VAC 25-90-1910.151(a)-(c); 16 VAC 25-175-1926.50 (a)-(g).

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 numbers, if applicable, and (2) promulgating entity, i.e., 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 to regulate occupational safety and health under Title 40.1-22(5) of the *Code of Virginia* 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 this same statutory section, the Board is further mandated:

“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.”

Va. Code §40.1-51.3:2 provides limited legal protection for an employer found to be in violation of the final regulations:

“In the trial of any action to recover for personal injury or property damage sustained by any party, in which action it is alleged that an employer acted in violation of or failed to act in accordance with any provision of this chapter or any state or federal occupational safety, health and safety standards act, the fact of the issuance of a **citation**, the **voluntary payment of a civil penalty** by a party charged with a violation, or the **judicial assessment of a civil penalty** under this chapter or any such state or federal occupational safety, health and safety standards act, **shall not be admissible in evidence.**” (Emphasis added.)

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The purpose of the final regulation is to provide additional first aid/CPR services to employees exposed to serious occupational hazards in construction and general industry and provide employers with some flexibility to make arrangements for first aid/CPR services on individual work sites. Current regulations do not require CPR training for designated first aid providers, and the final regulations would correct this oversight. The final regulations will also exclude

work sites from the requirement to provide first aid and CPR training where no serious occupational hazards are present. In addition, the final regulations will also clarify requirements for employers of mobile crews and individual mobile and permanently assigned employees.

Current Regulatory Framework : The Existing Regulations are Confusing and Difficult for Employers to Comply With and Difficult for the Department to Enforce

The current first aid regulations, which are identical to their federal OSHA counterparts and are the subject of this rulemaking, apply to all general industry and construction employers:

Section 16 VAC 25-90-1910.151(b) of the General Industry Regulation for Medical and First Aid provides that “In the absence of an infirmary, clinic, or hospital in **near proximity** to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid....” (Emphasis added).

Section 16 VAC 25-175-1926.50(c) of the Construction Regulation for Medical Services and First Aid provides: “In the absence of an infirmary, clinic, hospital or physician, that is **reasonably accessible** in terms of time and distance to the worksite, which is available for the treatment of injured employees, a person who has a valid certificate in first aid training....” (Emphasis added).

Both existing regulations lack clarity and are difficult for employers to comply with and for the VOSH Program to enforce. For instance, the existing regulations do not define the terms “near proximity” and “reasonably accessible.” These phrases have been interpreted by federal OSHA to mean that all general industry and construction employers must have either an employee trained in first aid, or:

their worksite must be located within a 3 to 4 minute response time of a hospital, clinic or infirmary if the worksite contains workplace hazards that could cause life threatening injuries; or

their worksite must be located within a 15 minute response time of a hospital, clinic, or infirmary if the worksite does not contain workplace hazards that could cause life threatening injuries.

According to statistics for 2003 from the Department of Emergency Medical Services (EMS) website, EMS providers arrived at the scene of 522,345 calls **with an average response time of approximately 12 minutes**. Approximately 72 % of all reported calls were provided in less than 10 minutes, and approximately 87 % of all reported calls were provided in less than 15 minutes.

The Department requested more recent data from EMS for statewide response times for all calls as well as calls for industrial sites specifically for the years 2004 through 2006 (“Industrial premises” includes “building under construction, dockyard, dry dock, factory building or premises, garage (place of work), industrial yard, loading platform in factory or store, industrial plant, railway yard, shop (place of work), warehouse and workhouse.” Source: PPCR/PPDR Program Data Element Dictionary):

Statewide Response Time Statistics by Year
"Response time" defined as "Arrived at Scene" minus
"Dispatched"

	2004	2005	2006
All Cases: Response Time			
1-3 minutes	13.0%	12.9%	12.5%
4-15 minutes	74.6%	74.7%	75.1%
15-100 minutes	12.4%	12.5%	12.5%
Mean (Average) in minutes	8.89	8.94	8.96
Industrial Sites Only: Response Time			
1-3 minutes	19.2%	19.3%	20.9%
4-15 minutes	75.1%	73.9%	72.2%
15-100 minutes	5.7%	6.8%	6.9%
Mean (Average) in minutes	7.10	7.58	7.34

NOTE 1: *Calculation of the above response times is from the time “dispatched” to the time of “arrived at scene.” Although the PPCR/PPDR Program Data Element Dictionary indicates that there is a data field called “Time of Call” defined as “Time call is first received by Public Safety Answering Point (PSAP) or other designated entity,” VOSH was informed by EMS that “Time of Call” data is not regularly available to the local EMS responders to enter into the reporting system. Therefore, the 2004-2006 data supplied by EMS underreports the average response times because it does not include the time it takes for the 911 call to be received and then referred to the local EMS provider.*

NOTE 2: *Calculation of the above response times is limited to data where a response time of between 1 minute and 100 minutes was reported. EMS personnel indicated that this approach was used to eliminate some obviously inaccurate data in the system (e.g., response times in the negatives, response times that were several days, etc.).*

As the more recent statistics above indicate, the average EMS response time for all cases statewide has been approximately 9 minutes for the last three years (more than twice the 3-4 minute response time required by OSHA for life threatening injuries), while the average response time to industrial sites falls between 7 and 7.5 minutes, which is 75% above the 3-4 minute requirement. Furthermore, the chart demonstrates that for all cases statewide, only 12.5 to 13% of the responses occur within the 3-4 minute requirement for life threatening injuries, while from

19 to 21% of the responses occur to industrial sites within the 3-4 minute requirement.

The above statistics graphically demonstrate that the large majority of employers in Virginia fail to meet the 3-4 minute exemption contained in the interpretations for the current VOSH first aid regulations for construction and general industry that would allow them to avoid having a trained first aid provider on site (the OSHA 3-4 minute interpretation applies to worksites with hazards that could cause life threatening injuries).

Another difficulty with the current first aid regulations is that neither the current regulations nor federal OSHA interpretations provide clear guidance to employers of mobile work crews who are exposed to hazards that could cause death or serious physical harm. The final regulations specifically provide compliance options for such covered employers.

Finally, to assure compliance with the current regulations, both employers and the VOSH Program are often faced with having to document whether an infirmary, clinic or hospital would be accessible within 3-4 minutes or 15 minutes. This may include going to such lengths as having to drive from the inspection site to the facility, or by contacting the nearest rescue squad to determine what the normal response time would be to the specific worksite. Even in such cases where response time information may be readily available, the response time for emergency responders to a particular site can vary widely from day to day depending on such factors as whether the worksite is in an urban or rural location (see discussion below on geographic differences in EMS response times around the state), whether the medical/emergency response facility is staffed 24 hours a day or not, and such vagaries as traffic congestion, road construction and weather. For these reasons under the current regulations, the vast majority of injured employees cannot receive timely, reliable and consistent first aid response to injuries suffered on the job if there is no trained first aid responder on site.

Existing Regulations Do Not Provide Adequate First Aid and CPR Protections for Employees

The existing general industry and construction first aid regulations do not assure that adequate first aid attention for employees will be provided in certain hazardous situations. For instance, current regulations do not require CPR training for designated first aid providers, nor do they clearly state that designated first aid providers will be available at each hazardous work location and each work shift. The final regulation changes correct these oversights.

In addition, the current regulations allow an employer to physically move an employee who had suffered a head/spinal injury or other serious injury by transporting them to a medical facility that is within 3 to 4 minutes driving distance, in lieu of having a trained first aid responder on site to administer first aid and CPR while emergency response personnel are in route.

Existing Regulations Do Not Provide Equal First Aid/CPR Treatment Opportunities for Similarly Exposed Employees

The current regulations do not provide the same level of first aid and CPR protection for employees in different general industry and construction settings who are exposed to similar

kinds of serious and life threatening workplace hazards. For instance, a number of current industry specific regulations require general industry and construction employers to assure that one or more employees trained in first aid and CPR are present at each worksite and workshift:

General Industry

Logging Industry employers must assure that all logging employees receive first aid and CPR training - §16 VAC 25-90-1910.266(i)(7);

Electric Power Generation, Transmission and Distribution Industry employers must assure that trained first aid and CPR providers are present for field work and fixed work locations - §16 VAC 25-90-1910.269(b)(1);

Employers engaged in **Welding, Cutting and Brazing** must assure that first aid can be rendered to an injured employee until medical attention can be provided - §16 VAC 25-90-1910.252(c)(13);

Telecommunications Industry employers must assure that employees are trained in first aid and CPR - §16 VAC 25-90-1910.268(c)(3);

Employers with a **Temporary Labor Camp** must assure that a trained first aid and CPR provider is present at the camp - §16 VAC 25-90-1910.142(k)(2);

Commercial Dive Operation employers must assure that all dive team members are trained in first aid and CPR - §16 VAC 25-90-1910.410(a)(3).

Construction Industry

Power Generation and Distribution employers must assure that employees are trained in first aid and CPR - §16 VAC 25-175-1926.950(e)(1)(ii);

Employers involved in **Underground Construction, Caissons, Cofferdams and Compressed Air** must provide a first aid station at each project (see §16 VAC 25-175-1926.803(b)(7));

Employees in the above industries benefit from greater first aid and CPR protections than employees who, for instance, work in construction around but not on overhead high voltage lines (contact with overhead high voltage lines is regularly one of the top four causes of occupationally related Virginia fatalities). The final regulation changes assure that all construction and general industry employees exposed to hazards that could cause death or serious physical harm are provided an equal level of first aid and CPR protection.

The Department also requested recent data from EMS for statewide response times for calls for industrial sites broken down by geographic region for the years 2004 through 2006 (“Industrial premises” includes “building under construction, dockyard, dry dock, factory building or premises, garage (place of work), industrial yard, loading platform in factory or store, industrial

plant, railway yard, shop (place of work), warehouse and workhouse.” Source: PPCR/PPDR Program Data Element Dictionary):

Statewide Response Time Statistics by Year for Industrial Sites Only
"Response time" defined as "Arrived at Scene" minus "Dispatched"

Industrial Sites	2004 Response Times			2005 Response Times			2006 Response Times		
	1-3	4-15	Avg	1-3	4-15	Avg	1-3	4-15	Avg
No Region Listed	22.3%	69.2%	7.7	26.5%	63.6%	8.2	52.4%	44.6%	4.7
BLUE RIDGE	6.0%	67.8%	12.1	8.9%	64.2%	13.0	9.5%	73.6%	10.5
CENTRAL									
SHENANDOAH	11.1%	82.9%	8.1	16.3%	79.2%	7.6	18.9%	73.2%	7.8
LORD FAIRFAX	7.8%	85.4%	8.6	10.1%	82.6%	8.5	8.9%	81.8%	8.7
NORTHERN									
VIRGINIA	18.3%	78.3%	6.4	13.2%	81.6%	7.7	12.1%	84.1%	7.2
OLD DOMINION	17.2%	77.7%	7.2	15.4%	79.0%	7.2	15.7%	79.3%	6.9
PENINSULAS	44.1%	53.1%	4.8	41.1%	56.4%	4.9	46.1%	51.5%	4.9
RAPPAHANNOCK	13.1%	77.2%	8.5	10.9%	80.2%	8.8	13.5%	74.3%	9.2
SOUTHWEST									
VIRGINIA	9.5%	73.1%	10.4	12.6%	67.0%	10.5	13.2%	69.1%	10.0
THOMAS									
JEFFERSON	9.9%	67.3%	11.3	10.7%	76.2%	10.0	7.1%	66.9%	12.0
TIDEWATER	15.1%	79.1%	7.6	12.3%	82.7%	7.8	11.4%	83.1%	7.6
WESTERN VIRGINIA	25.9%	66.9%	7.2	26.2%	69.1%	6.8	22.5%	72.7%	6.9
Total	19.1%	75.1%	7.1	19.1%	74.0%	7.6	20.7%	72.3%	7.3

NOTE 1: Calculation of the above response times is from the time “dispatched” to the time of “arrived at scene.” Although the PPCR/PPDR Program Data Element Dictionary indicates that there is a data field called “Time of Call” defined as “Time call is first received by Public Safety Answering Point (PSAP) or other designated entity,” VOSH was informed by EMS that “Time of Call” data is not regularly available to the local EMS responders to enter into the reporting system. Therefore, the 2004-2006 data supplied by EMS underreports the average response times because it does not include the time it takes for the 911 call to be received and then referred to the local EMS provider.

NOTE 2: Calculation of the above response times is limited to data where a response time of between 1 minute and 100 minutes was reported. EMS personnel indicated that this approach was used to eliminate some obviously inaccurate data in the system (e.g. response times in the negatives, response times that were several days, etc.).

As the above statistics indicate, there is a wide disparity in EMS response times across the state based on geographic region. For instance in 2006 there is a range of a low of 7.1% of EMS responses occurring within 1-3 minutes in the Thomas Jefferson region to a high of 46.1% within 1-3 minutes in the Peninsulas region; while the average response times range from 4.9 minutes in the Peninsulas' region to 12 minutes in the Thomas Jefferson region.

Again, the above statistics graphically demonstrate that the large majority of employers in Virginia cannot consistently meet the 3-4 minute exemption contained in the interpretations for the exemption contained in the current VOSH first aid regulations for construction and general industry that would allow them to avoid having a trained first aid provider on site (the 3-4 minute interpretation applies to worksites with hazards that could cause life threatening injuries). In addition, the geographic disparities in response time demonstrate that the current regulations do not provide equal access to adequate first aid and CPR protections for employees.

The Existing General Industry First Aid Regulation is Overreaching

The current general industry regulation is overreaching in that it applies to all general industry employers, even when there are no workplace hazards present that could pose a threat of serious physical harm or death, such as in office settings - it should be noted that, with rare exceptions, construction worksites are universally acknowledged to contain both job classifications and workplace hazards that are likely to cause death or serious physical harm. The final regulations will exclude worksites that do not contain such serious hazards from the requirement to provide designated employees with first aid and CPR training.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.

The VOSH Program seeks the amendment of medical services and first aid standards for general industry, §1910.151(b), and the construction industry, §1926.50(c), to require employers to train employee(s) to render first aid and cardio pulmonary resuscitation (CPR) when employees are exposed to occupational hazards which could result in serious physical harm or death. Worksites covered by the current regulations that do not contain occupational hazards which could result in serious physical harm or death will be exempted from first aid and CPR requirements under the proposed regulation.

Under the **original** proposed regulations employers with employees in job classifications or exposed to workplace hazards that could result in serious physical harm or death would be required to have at each job site and for each workshift at least one employee trained in first aid and CPR.

The following boxes highlight the differences between the existing standards on this issue:

The General Industry Standard for Medical and First Aid

Section 1910.151(b) provides:

“In the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid. Adequate first aid supplies shall be readily available.”

The Construction Industry Standard for Medical Services and First Aid Section 1926.50(c) provides:

“In the absence of an infirmary, clinic, hospital or physician, that is reasonably accessible in terms of time and distance to the worksite, which is available for the treatment of injured employees, a person who has a valid certificate in first aid training from the U. S. Bureau of Mines, the American Red Cross, or equivalent training that can be verified by documentary evidence, shall be available at the worksite to render first aid.”

Other issues that were addressed in the **original** proposed language include:

- A. Allowing an employer to make written arrangements with another contractor/employer on the same job site to provide designated employees to serve as first aid responders, to lessen the cost of compliance with the standard;
- B. Clarifying that employers of mobile work crews (i.e., crews that travel to more than one worksite per day) of two or more employees that assign employees to travel to worksites or engage in work activities that could potentially expose those employees to serious physical harm or death shall either:
 - 1. Assure that at least one employee on the mobile crew is designated and adequately trained to render immediate first aid and CPR during all workshifts; or
 - 2. Make written arrangements with another contractor/employer on the same job site to provide designated employees to serve as first aid responders.
- C. Clarifying that employers of individual mobile employees (i.e., an employee who travels alone to more than one worksite per day), that assign employees to travel to worksites or engage in work activities that could potentially expose those employees to serious physical harm or death shall either:
 - 1. Assure that the mobile employee is adequately trained to self-administer first aid;
 - 2. Make written arrangements with another contractor/employer on the same job site

to provide designated employees to serve as first aid responders; or

3. Assure that their employees have access to a communication system that will allow them to immediately request medical assistance through a 911 emergency call or comparable communication system.

D. Major changes to the original proposed regulation are as follows:

1. The final regulation extends the mobile communication option for single employees to employers with worksites where only one employee is permanently stationed, as there is no rationale for treating them differently from single mobile employees.
2. The final regulation adds definitions for the terms “serious physical harm” and “serious workplace hazard.”
3. The final regulation deletes the term “job classification.”
4. The final regulation amends §§16 VAC 25-95.C and 16 VAC 25-177.D as follows: the word “designated” is replaced with the word “selected”, the word “render” is replaced with the word “administer”, and the word “immediate” is deleted. These changes will clarify that it is not the intent of the Department to apply the full provisions of the Bloodborne Pathogens Standard to employees trained under the final first aid/CPR regulation.

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 there are no disadvantages to the public or the Commonwealth, please indicate.

A Notice of Intended Regulatory Action (NOIRA) was adopted by the Board on March 7, 2006. The NOIRA was published on October 16, 2006, with 30-day comment period ending November 16, 2006. Comments received and the Department’s response are summarized in section V. below. The Board adopted proposed regulatory language on December 6, 2006. The proposed regulation was published on September 29, 2008, with a 60-day comment period ending on November 29, 2008. A public hearing was held by the Board on November 20, 2008.

Employers covered by the final regulations would be required to have at each job site and for each workshift at least one employee trained in first aid and CPR. The Department believes that the majority of general industry employers that were cited by the VOSH Program under the current regulations would also be covered by the final regulations. While many employers in construction and general industry already assure that some employees are trained in first aid and CPR, some employers would have to incur the additional cost of securing such training. As an

example, the Central Virginia Chapter of the American Red Cross currently charges \$73.00 for adult first aid/CPR training (2009).

A couple of commenters expressed the concern of the impact of the proposed regulation on small employers:

Commenter 5: November 29, 2008

Wallace L., Virginia Citizen

“The regulation appears overburdensome to small employers especially those with small crews. For single person work crew it does allow for the use of only a communications device with 911 access, which greatly reduces the cost but for two person crews there is still a significant cost associated with this regulation, mostly in the area of schedule than cost. I believe the regulation for substitution of communication devices for crews of up to 3 persons should be adopted instead of just single person crews. Especially if they are within 15 minutes of a public safety service.”

Agency Response:

While the Department is sympathetic to the argument that the requirement for training in first aid/CPR for mobile crews - in the absence of the employer being able to make arrangements with another contractor on site - poses both scheduling and cost concerns for small employers, it does not recommend expanding the mobile communication option, available to single mobile employees, to mobile work crews of multiple employees.

First, as a point of clarification, under existing federal OSHA identical first aid regulations, an employer must be within 3-4 minutes of a medical facility or emergency response personnel when employees are potentially exposed to serious/life threatening hazards, not the 15 minutes suggested by the commenter. The final regulations will not apply to employers whose employees are not potentially exposed to serious/life threatening hazards.

In addition, there does not appear to be any statistical or other rationale for deciding what size crew the mobile communication option should be extended to (2 person, 3 person, 4 person, etc. – any exception could be seen to swallow the rule). One of the main reasons for the Board proposing the regulatory change is to:

“eliminate inequities contained in the existing regulations by assuring all construction and general industry employees exposed to hazards that could cause death or serious physical harm equal access to first aid and CPR services, regardless of their specific industrial or construction setting, or the geographical location of their work.”

[Townhall Agency Background Document, Form TH-02, p. 9, September 4, 2008].

If the mobile communication option is extended to mobile crews with 2, 3, 4 or more people, those crews would be provided with less protection under the regulation than employees located at permanent locations and exposed to the same or similar hazards that could result in serious physical harm or death.

Costs associated with compliance with the final regulations will be lessened by the specific language in the final regulations that allow an employer to make written arrangements with another contractor/employer on the same job site to provide designated employees to serve as first aid/CPR responders.

Costs associated with the current regulation will be eliminated for work sites where no serious occupational hazards are present. The current regulation is interpreted by federal OSHA to require low hazard employers to provide first aid if no medical assistance can be provided within 15 minutes by EMS or other personnel, or there is no medical facility within 15 minutes driving distance. As previously noted in the aforementioned EMS statistics, approximately 13% of all responses by EMS personnel exceeded 15 minutes.

[NOTE: However, it should be noted that within a particular industry that is normally considered to not have serious occupational hazards present, there may be some specific worksites or portions of establishments that have workplace hazards that could trigger application of the final regulations (e.g., a large department store that has service personnel who deal directly with customers who would not be exposed to serious or life threatening hazards, may also have warehouse personnel who operate forklifts who are exposed to such hazards; a large grocery or supermarket have retail clerks who would not be covered by the final regulations, but may have forklift operators, or other employees that use potentially dangerous equipment such as a meat slicing machine).]

As Virginia Employment Commission 2005 statistics demonstrate, there are a significant number of employers who will now be exempt from the current regulations because they operate work sites where no serious occupational hazards are present.

compliance costs for approximately 27% of Virginia's employers covered by the current federal identical OSHA regulation (approximately 59,000 of the estimated 215,201 employers in Virginia); and by maximizing the benefits of the final regulation by targeting those worksites that pose the highest risk of serious injury and illness for employees.

It is the Department's position that the estimate of **exempted** employers should be larger than 27%, and perhaps by a significant amount. In preparing the above estimates, the Department used a conservative approach in determining which employers should meet the exemption. For instance, even though the Department believes that most retail establishments should be exempt from the regulation, it nonetheless did not include retail establishments (26,800 or 12.5%) in the exempt category because of the previously mentioned example of a large department store having a warehouse operation where forklifts are used, which would require compliance with the final regulation. Most small to midsized retail establishments do not have any warehouse or similar operations that would involve potential exposure to serious workplace hazards. Nor did

the Department include such industries as wholesale establishments (12,580 establishments or 5.8%); information (NAICS 51, 4,078 establishments or 1.9%); other services, except public administration (NAICS 81, 23,030 establishments or 10.7%); or arts, entertainment and recreation (NAICS 71, 2,748 establishments or 1.3 %) in the count of potential exempt employers, even though many of those workplaces will not contain serious workplace hazards.

In addition, the data the Department used in counting offices that would be exempt from the final regulation is what we would refer to as "soft" data and is most likely to be under-inclusive. As an example, under NAICS 53, Real Estate and Rental Leasing, the Department was able to identify NAICS 5312, Offices of Real Estate Agents and Brokers, as a subset of employers that should be exempt because the NAICS description indicates that only office work is involved. However, the Department could not break out anything under NAICS 5311, Lessors of Real Estate (6,152 establishments or 2.8%), even though many individual worksites would only consist of office workers, because there may be some worksites in that industry that do have maintenance personnel for the leased property (maintenance personnel can be exposed to hazards posing a risk of serious physical harm or death because they will do such tasks as work on electrical related issues, work around boilers, air conditioners, etc., all of which pose a risk of electrocution, or caught-in hazards).

Finally, as noted in DPB's Economic Impact Analysis (page 9), the cost of compliance can be offset significantly by lessening the severity of injuries/illnesses experienced by employees through the receipt of immediate first aid/CPR treatment, and potentially result in an overall reduction in work-related injuries when workers are trained in first aid/CPR:

“There are also studies that indicate that having a first aid person readily available reduces the risk of serious injury or death. According to the Canadian Red Cross and SMARTRISK, a non-profit organization dedicated to preventing injuries and saving lives, getting trained in first aid can reduce your risk of injury by more than 40 percent.¹² Research conducted by St. John Ambulance found that the number of work-related injuries is reduced by between 20 and 30 percent when workers are trained in first aid.¹³ According to the International Labor Organization Encyclopedia of Occupational Health and Safety, defibrillation administered within four minutes of cardiac arrest yields survival rates of 40 to 50%, versus less than 5% if given later. For chemical eye injuries, immediate flushing with water can save eyesight. For spinal cord injuries, correct immobilization can make the difference between full recovery and paralysis. For hemorrhages, the simple application of a fingertip to a bleeding vessel can stop life-threatening blood loss.”

Construction and General Industry employees working in covered worksites across the state would benefit from the immediate presence of trained first aid/CPR responders at their work locations.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar's office, please put an asterisk next to any substantive changes.

Section number	Requirement at proposed stage	What has changed	Rationale for change
<p>16 VAC 25-95 A.</p>	<p>16 VAC 25-95, <u>Medical Services and First Aid for General Industry</u></p> <p><u>A. The employer shall ensure the ready availability of medical personnel for advice and consultation on matters of plant health.</u></p>	<p>* <u>[A. The following words and terms when used in this regulation shall have the following meanings unless the context clearly indicates otherwise:</u> <u>“Serious physical harm” means impairment of the body in which part of the body is made functionally useless or is substantially reduced in efficiency on or off the job. Such impairment may be permanent or temporary, chronic or acute. Injuries and illnesses involving such impairment would usually require treatment by a medical doctor or other licensed health care professional. Injuries that constitute serious physical harm include, but are not limited, to amputations (loss of all or part of a bodily appendage); concussion; crushing (internal, even though skin surface may be intact); fractures (simple or compound); burns or scalds, including electric and chemical burns; cuts, lacerations, or punctures involving significant bleeding and/or requiring suturing; sprains and strains. Illnesses that constitute serious physical harm include, but are not limited, to cancer; respiratory</u></p>	<p>Rationale: Former 16 VAC 25-95.A. redesignated as 16 VAC 25-95 B. New subsection A adds definitions of terms “serious physical harm” and “serious workplace hazard.” These terms were not previously defined in the proposed regulation.</p> <p>Based on comments received, the Department agreed that further definitional guidance would be of benefit to the regulated community in applying the final regulation. In developing revised language the Department consulted the following sources:</p> <p>Va. Code §40.1-49.3 contains a definition of “Serious violation” as follows: “means a violation deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment....”</p> <p>The VOSH Administrative Regulations Manual, 16</p>

		<p><u>illnesses; hearing impairment; central nervous system impairment; visual impairment; and poisoning. “Serious workplace hazard” means a hazard deemed to exist in a place of employment where there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment. The term “substantial probability” does not refer to the likelihood that illness or injury will result from the violative condition but to the likelihood that, if illness or injury does occur, death or serious physical harm will be the result.].</u></p>	<p>VAC 25-60-10, contains a definition of "Serious violation" as follows:</p> <p>“means a violation deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment.... The term "substantial probability" does not refer to the likelihood that illness or injury will result from the violative condition but to the likelihood that, if illness or injury does occur, death or serious physical harm will be the result.“</p> <p>The Federal OSHA Field Operations Manual (FOM), 2009, defines “serious physical harm” as:</p> <p>Impairment of the body in which part of the body is made functionally useless or is substantially reduced in efficiency on or off the job. Such impairment may be permanent or temporary, chronic or acute. Injuries involving such impairment would usually require treatment by a medical doctor or other licensed health care professional.</p>
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<p>16 VAC 25-95 B.</p>	<p><u>B. A person or persons shall be</u></p>	<p>A. [B.] <u>The employer shall ensure the ready availability of medical personnel for advice and consultation on matters of plant health.</u></p> <p>*</p> <p>B. [C.] <u>A person or persons</u></p>	<p>a. Injuries that constitute serious physical harm include, but are not limited to:</p> <ul style="list-style-type: none"> • Amputations (loss of all or part of a bodily appendage); • Concussion; • Crushing (internal, even though skin surface may be intact); • Fractures (simple or compound); • Burns or scalds, including electric and chemical burns; • Cuts, lacerations, or punctures involving significant bleeding and/or requiring suturing; • Sprains and strains • Musculoskeletal disorders. <p>b. Illnesses that constitute serious physical harm include, but are not limited, to:</p> <ul style="list-style-type: none"> • Cancer; • Respiratory illnesses (silicosis, asbestosis, byssinosis, etc.); • Hearing impairment; • Central nervous system impairment; • Visual impairment; and • Poisoning. <p>Rationale: Renumbering</p> <p>Rationale: Renumbering. Also, the Department has added the American Heart</p>
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	<p><u>designated by the employer and adequately trained to render immediate first aid and cardio pulmonary resuscitation (CPR) during all workshifts on worksites containing job classifications or workplace hazards that could potentially expose employees to serious physical harm or death. The designated person or persons shall have a valid, current certificate in first aid and CPR training from the U. S. Bureau of Mines, the American Red Cross, the National Safety Council, or equivalent training that can be verified by documentary evidence, and shall be available at the worksite to render first aid and CPR to injured or ill employees.</u></p>	<p>shall be designated <u>[selected]</u> by the employer and adequately trained to render <u>immediate</u> [administer] first aid and cardio pulmonary resuscitation (CPR) during all workshifts on worksites containing job classifications <u>or [serious]</u> workplace hazards that could potentially expose employees to serious physical harm or death. The designated person or persons <u>[selected]</u> shall have a valid, current certificate in first aid and CPR training from the U. S. Bureau of Mines, the American Red Cross, the National Safety Council, <u>[the American Heart Association,]</u> or equivalent training that can be verified by documentary evidence, and shall be available at the worksite to render <u>[administer]</u> first aid and CPR to injured or ill employees.</p>	<p>Association to the list of recognized first aid/CPR providers in the final regulation. Following is a link to federal OSHA's "Best Practices Guide: Fundamentals of a Workplace First-Aid Program":</p> <p>http://www.osha.gov/Publications/OSHA3317first-aid.pdf</p> <p>On page 13, federal OSHA lists the American Heart Association, American Red Cross, and the National Safety Council as recognized first aid/CPR training providers, and indicates that other "nationally recognized and private educational organizations" provide first aid training. The Department will accept any first aid/CPR training provider that federal OSHA recognizes.</p> <p>Also, the final regulation amends §§16 VAC 25-95.C and 16 VAC 25-177.D as follows: the word "designated" is replaced with the word "selected", the word "render" is replaced with the word "administer", and that the word "immediate" is deleted. These changes will clarify that it is not the intent of the Department to apply the full provisions of the Bloodborne Pathogens Standard to employees trained under the</p>
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<p>16 VAC 25-95 C.</p>	<p><u>C. Covered employers are permitted to make written arrangements with and reasonably rely on another contractor or employer on the same job site or establishment to provide designated employees to serve as first aid and CPR responders for employees of the covered employer.</u></p>	<p>* C. [D.] <u>Covered employers are permitted to make written arrangements with and reasonably rely on another contractor or employer on the same job site or establishment to provide designated [selected] employees to serve as first aid and CPR responders for employees of the covered employer.</u></p>	<p>final first aid/CPR regulation.</p> <p>The term “job classification” is removed from the final regulation to eliminate any confusion over how to apply the regulation.</p> <p>Rationale: Renumbering. Also, see above discussion for new subsection C.</p>
<p>16 VAC 25-95 D.</p>	<p><u>D. Employers of mobile work crews (i.e., crews that travel to more than one worksite per day) of two or more employees that assign employees to travel to worksites or engage in work activities that could potentially expose those employees to serious physical harm or death shall either:</u> <u>1. assure that at least one employee on the mobile crew is</u></p>	<p>* D. [E.] <u>Employers of mobile work crews (i.e., crews that travel to more than one worksite per day) of two or more employees that assign employees to travel to worksites or engage in work activities that could potentially expose those employees to serious physical harm or death shall either:</u> <u>1. assure that at least one employee on the mobile crew is designated [selected] and adequately trained to render immediate</u></p>	<p>Rationale: Renumbering. Also, see above discussion for new subsection C.</p>

<p>16 VAC 25-95 E.</p>	<p><u>designated and adequately trained to render immediate first aid and CPR during all workshifts; or</u> <u>2. comply with section C. above.</u></p> <p><u>E. Employers of individual mobile employees (i.e., an employee who travels alone to more than one worksite per day) that assign employees to travel to worksites or engage in work activities that could potentially expose those employees to serious physical harm or death shall either:</u> <u>1. assure that the mobile employee is adequately trained to self-administer first aid;</u> <u>2. comply with section C. above; or</u> <u>3. assure that their employee has access to a communication system that will allow them to immediately request medical assistance through a 911 emergency call or comparable communication system.</u></p>	<p><u>[administer] first aid and CPR during all workshifts; or</u> <u>2. comply with section C. [D.] above.</u></p> <p>* <u>E. [F.] Employers of individual <u>[employees assigned to a permanent work location; or individual]</u> mobile employees (i.e., an employee who travels alone to more than one worksite per day) <u>that—assign employees to travel to worksites—or engage in</u> <u>[whose]</u> work activities <u>that</u> could potentially expose those employees to serious physical harm or death shall either: <u>1. assure that the mobile employee is adequately trained to self-administer first aid;</u> <u>2. comply with section C. [D.] above; or</u> <u>3. assure that their employee has access to a communication system that will allow them to immediately request medical assistance through a 911 emergency call or comparable communication system.</u></u></p>	<p>Rationale: Renumbering. Also, the proposed regulatory text was amended to extend the mobile communication option to employers with worksites where only one employee is permanently stationed, as there is no rationale for treating them differently from single mobile employees.</p>
<p>16 VAC 25-95 F.</p>	<p><u>F. Sections A. through E. of this regulation do not</u></p>	<p>* <u>F. [G.] Sections A. [C.] through E. [F.] of this</u></p>	<p>Rationale: Renumbering. Also, the term “job classification” was deleted to</p>

<p>16 VAC 25-95 G.</p>	<p><u>apply to worksites that do not contain job classifications or workplace hazards that expose employees to serious physical harm or death.</u></p> <p><u>G. Adequate first aid supplies shall be readily available.</u></p>	<p><u>regulation do not apply to worksites that do not contain job classifications or [serious] workplace hazards that [could potentially] expose employees to serious physical harm or death.</u></p> <p>G. [H.] Adequate first aid supplies shall be readily available.</p>	<p>eliminate any possible confusion; and the term “could potentially” was added to assure consistency with wording in other subsections.</p> <p>Rationale: Renumbering.</p>
<p>16 VAC 25-95 H.</p>	<p><u>H. Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.</u></p>	<p>H. [I.] <u>Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.</u></p>	<p>Rationale: Renumbering.</p>
<p>16 VAC 25-177</p>	<p><u>Medical Services and First Aid Standards for the Construction Industry</u></p>		
<p>16 VAC 25-177.A.</p>	<p><u>A. The employer shall insure the availability of medical personnel for advice and consultation on matters of occupational health.</u></p>	<p>* <u>[A. The following words and terms when used in this regulation shall have the following meanings unless the context clearly indicates otherwise: “Serious physical harm” means impairment of the body in which part of the body is made functionally useless or is substantially reduced in efficiency on or</u></p>	<p>Rationale: Renumbering. See discussion above for new subsection 16VAC25-95.A.</p>

		<p><u>off the job. Such impairment may be permanent or temporary, chronic or acute. Injuries and illnesses involving such impairment would usually require treatment by a medical doctor or other licensed health care professional. Injuries that constitute serious physical harm include, but are not limited, to amputations (loss of all or part of a bodily appendage); concussion; crushing (internal, even though skin surface may be intact); fractures (simple or compound); burns or scalds, including electric and chemical burns; cuts, lacerations, or punctures involving significant bleeding and/or requiring suturing; sprains and strains. Illnesses that constitute serious physical harm include, but are not limited, to cancer; respiratory illnesses; hearing impairment; central nervous system impairment; visual impairment; and poisoning. "Serious workplace hazard" means a hazard deemed to exist in a place of employment where there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment. The</u></p>	
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<p>16 VAC 25- 177.B.</p>	<p><u>B. Provisions shall be made prior to commencement of the project for prompt medical attention in case of serious injury.</u></p>	<p><u>term "substantial probability" does not refer to the likelihood that illness or injury will result from the violative condition but to the likelihood that, if illness or injury does occur, death or serious physical harm will be the result.].</u></p> <p><u>A. [B.] The employer shall insure the availability of medical personnel for advice and consultation on matters of occupational health.</u></p> <p><u>B. [C.] Provisions shall be made prior to commencement of the project for prompt medical attention in case of serious injury.</u></p>	<p>Rationale: Renumbering.</p> <p>Rationale: Renumbering.</p>
<p>16 VAC 25- 177.C.</p>	<p><u>C. A person or persons shall be designated by the employer and adequately trained to render immediate first aid and cardio pulmonary resuscitation (CPR) during all workshifts on worksites containing job classifications or workplace hazards that could potentially expose employees to serious physical harm or death. The designated person or persons shall have a valid, current certificate in first aid</u></p>	<p><u>* C. [D.] A person or persons shall be designated [selected] by the employer and adequately trained to render immediate [administer] first aid and cardio pulmonary resuscitation (CPR) during all workshifts on worksites containing job classifications or [serious] workplace hazards that could potentially expose employees to serious physical harm or death. The designated person or persons [selected] shall have a valid, current certificate in first aid and CPR training from the U. S. Bureau of Mines, the American Red Cross, the National Safety Council, [the American Heart</u></p>	<p>Rationale: Renumbering. See discussion above for new subsection 16VAC25-95.D.</p>

	<p><u>and CPR training from the U. S. Bureau of Mines, the American Red Cross, the National Safety Council, or equivalent training that can be verified by documentary evidence, and shall be available at the worksite to render first aid and CPR to injured or ill employees.</u></p>	<p><u>Association.] or equivalent training that can be verified by documentary evidence, and shall be available at the worksite to render [administer] first aid and CPR to injured or ill employees.</u></p>	
<p>16 VAC 25-177.D.</p>	<p><u>D. Covered employers are permitted to make written arrangements with and reasonably rely on another contractor or employer on the same job site or establishment to provide designated employees to serve as first aid and CPR responders for employees of the covered employer.</u></p>	<p><u>* D. [E.] Covered employers are permitted to make written arrangements with and reasonably rely on another contractor or employer on the same job site or establishment to provide designated [selected] employees to serve as first aid and CPR responders for employees of the covered employer.</u></p>	<p>Rationale: Renumbering. See discussion above for new subsection 16VAC25-95.E.</p>
<p>16 VAC 25-177.E.</p>	<p><u>E. Employers of mobile work crews (i.e., crews that travel to more than one worksite per day) of two or more employees that assign employees to travel to worksites or engage in work activities that could potentially expose those</u></p>	<p><u>* E. [F.] Employers of mobile work crews (i.e., crews that travel to more than one worksite per day) of two or more employees that assign employees to travel to worksites or engage in work activities that could potentially expose those employees to serious physical harm or death shall</u></p>	<p>Rationale: Renumbering. See discussion above for new subsection 16VAC25-95.F.</p>

<p>16 VAC 25- 177.F.</p>	<p>employees to serious physical harm or death shall either: <u>1. assure that at least one employee on the mobile crew is designated and adequately trained to render immediate first aid and CPR during all workshifts; or</u> <u>2. comply with section D. above.</u></p> <p>F. Employers of individual mobile employees (i.e., an employee who travels alone to more than one worksite per day) that assign employees to travel to worksites or engage in work activities that could potentially expose those employees to serious physical harm or death shall either: <u>1. assure that the mobile employee is adequately trained to self-administer first aid;</u> <u>2. comply with section D. above; or</u> <u>3. assure that their employee has access to a communication system that will allow them to immediately request medical assistance through a 911 emergency call or comparable communication</u></p>	<p>either: <u>1. assure that at least one employee on the mobile crew is designated [selected] and adequately trained to render immediate [administer] first aid and CPR during all workshifts; or</u> <u>2. comply with section D. [E.] above.</u></p> <p>* <u>F. [G.] Employers of individual [employees assigned to a permanent work location; or individual] mobile employees (i.e., an employee who travels alone to more than one worksite per day) that assign employees to travel to worksites or engage in [whose] work activities that could potentially expose those employees to serious physical harm or death shall either:</u> <u>1. assure that the mobile employee is adequately trained to self-administer first aid;</u> <u>2. comply with section D. [E.] above; or</u> <u>3. assure that their employee has access to a communication system that will allow them to immediately request medical assistance through a 911 emergency call or comparable communication system.</u></p>	<p>Rationale: Renumbering. See discussion above for new subsection 16VAC25-95.G.</p>
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<p>16 VAC 25- 177.G.</p>	<p><u>system.</u> <u>G. Sections A. through F. of this regulation do not apply to worksites that do not contain job classifications or workplace hazards that expose employees to serious physical harm or death.</u></p>	<p>* G. [H.] Sections A. [C.] through F. [G.] of this regulation do not apply to worksites that do not contain <u>job classifications or [serious] workplace hazards that [could potentially] expose employees to serious physical harm or death.</u></p>	<p>Rationale: Renumbering. See discussion above for new subsection 16VAC25-95.H.</p>
<p>16 VAC 25- 177.H.</p>	<p><u>H. Adequate first aid supplies shall be readily available.</u></p>	<p>H. [I.] Adequate first aid supplies shall be readily available.</p>	<p>Rationale: Renumbering.</p>
<p>16 VAC 25- 177.I.</p>	<p><u>I. The contents of the first aid kit shall be placed in a weatherproof container with individual sealed packages for each type of item, and shall be checked by the employer before being sent out on each job and at least weekly on each job to ensure that the expended items are replaced.</u></p>	<p>I. [J.] The contents of the first aid kit shall be placed in a weatherproof container with individual sealed packages for each type of item, and shall be checked by the employer before being sent out on each job and at least weekly on each job to ensure that the expended items are replaced.</p>	<p>Rationale: Renumbering.</p>
<p>16 VAC 25- 177.J.</p>	<p><u>J. A communication system for contacting necessary ambulance service, shall be provided.</u></p>	<p>J. [K.] A communication system for contacting necessary ambulance service, shall be provided.</p>	<p>Rationale: Renumbering.</p>
<p>16 VAC 25- 177.K.</p>	<p><u>K. In areas where 911 is not available, the telephone numbers of the physicians, hospitals, or</u></p>	<p>K. [L.] In areas where 911 is not available, the telephone numbers of the physicians, hospitals, or ambulances shall be conspicuously</p>	<p>Rationale: Renumbering.</p>

<p>16 VAC 25- 177.L.</p>	<p><u>ambulances shall be conspicuously posted.</u></p> <p><u>L. Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.</u></p>	<p><u>posted.</u></p> <p><u>L. [M.] Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.</u></p>	<p>Rationale: Renumbering.</p>
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Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.

Commenter	Comment	Agency response
<p>Commenter 1: October 14, 2008 Mark Whiting, Vice President, Greater Richmond Chapter, American Red Cross</p>	<p>“The Center for Community and Corporate Education at the Greater Richmond Chapter of the American Red Cross fully supports these proposed regulatory amendments. As Sudden Cardiac Arrest (SCA) is a leading killer of all Virginian’s, we commend DOLI’s commitment to a safe workplace by requiring CPR training for those at a higher SCA risk due to occupational hazards.”</p>	<p>Agency Response: None.</p>
<p>Commenter 2: November 16, 2008 Teressa</p>	<p>“If ever in the situation to save a life....do it...it might be yours!”</p>	<p>Agency Response: None.</p>
<p>Commenter 3: November 24, 2008 Linda L.</p>	<p>“The Occupational Safety and Health Administration of the United States Government has produced Publication 3317-2006 (Best Practices Guide: Fundamentals of a</p>	<p>Agency Response: The Department has added the American Heart Association to the list of</p>

<p>Cannon, Directorate of Safety, MSDS</p>	<p>Workplace First-Aid Program). Page 13 of this publication states the following – “Training for first aid is offered by the American Heart Association, the American Red Cross, the National Safety Council, and other nationally recognized and private educational organizations.” 16VAC25-95-10B states “ The designated person or persons shall have a valid, current certificate in first aid and CPR training from the U.S. Bureau of Mines, the American Red Cross, or the National Safety Council, or equivalent training that can be verified by documentary evidence...”</p> <p>Our firm offers first aid training from the American Heart Association. It has been our recent experience that organizations are hesitant to subscribe to training offered under the American Heart Association standard, as it is not directly stated in the proposed regulation. As it currently stands, the American Heart Association is the ONLY of the 3 major organizations listed in the Federal OSHA best practice guidelines that is not listed in 16VAC25-95-10.</p> <p>I would make the request that, at the very least, the American Heart Association is listed verbatim in this proposed regulation, along with the American Red Cross and the National Safety Council, in order to maintain continuity with Federal OSHA best practice listings. Otherwise, organizations offering one or the other training programs could be at an advantage or disadvantage when marketing services to industry.”</p>	<p>recognized first aid/CPR providers in the final regulation. Following is a link to federal OSHA's "Best Practices Guide: Fundamentals of a Workplace First-Aid Program":</p> <p>http://www.osha.gov/Publications/OSHA3317first-aid.pdf</p> <p>On page 13, federal OSHA lists the American Heart Association, American Red Cross, and the National Safety Council as recognized first aid/CPR training providers, and indicates that other "nationally recognized and private educational organizations" provide first aid training. <u>The Department will accept any first aid/CPR training provider that federal OSHA recognizes.</u></p>
<p>Commenter 4: November 28, 2008 Pam Carter, RN COHNS American Association of Occupational</p>	<p>“The American Association of Occupational Health Nurses, Inc. (AAOHN), a nursing specialty association dedicated to the promotion of health, safety and productivity of workers and worker populations, nationally and internationally, fully supports the Virginia Department of Labor and Industry’s efforts to promote safe and healthful work and</p>	<p>Agency Response: None.</p>

<p>Health Nurses</p>	<p>community environments. Given that, we support VOSH's effort to seek the amendment of medical services and first aid regulations for general industry, §16 VAC 25-90-1910.151(a)-(c), and the construction industry, §16 VAC 25-175-1926.50 (a)-(g), to require employers to train employee(s) to render first aid and cardio pulmonary resuscitation (CPR) when employees are exposed to occupational hazards which could result in serious physical harm or death.</p> <p>First aid is the immediate care given to an injured or suddenly ill worker. The outcome usually depends on the immediate rendering of care. This is especially important when employees are exposed to high risk hazards in their work environment.</p> <p>As a national association committed to innovative and business compatible solutions for workplaces and worker health and safety, the American Association of Occupational Health Nurses, Inc. appreciates the opportunity to state our views and recommendations to the Virginia Department of Labor and Industry's on the <i>Medical Standards and First Aid Standards for General Industry and for the Construction Industry.</i>"</p>	
<p>Commenter 5: November 29, 2008 Wallace L., Virginia Citizen</p>	<p>"The regulation appears overburdensome to small employers especially those with small crews. For single person work crew it does allow for the use of only a communications device with 911 access, which greatly reduces the cost but for two person crews there is still a significant cost associated with this regulation, mostly in the area of schedule than cost. I believe the regulation for substitution of communication devices for crews of up to 3 persons should be adopted instead of just single person crews. Especially if they are within 15 minutes of a public safety service."</p>	<p>Agency Response:</p> <p>While the Department is sympathetic to the argument that the requirement for training in first aid/CPR for mobile crews - in the absence of the employer being able to make arrangements with another contractor on site - poses both scheduling and cost concerns for small employers, it does not recommend expanding the mobile communication</p>

		<p>option, available to single mobile employees, to mobile work crews of multiple employees.</p> <p>First, as a point of clarification, under existing federal OSHA identical first aid regulations, an employer must be within 3-4 minutes of a medical facility or emergency response personnel when employees are potentially exposed to serious/life threatening hazards, not the 15 minutes suggested by the commenter. The final regulations will not apply to employers whose employees are not potentially exposed to serious/life threatening hazards.</p> <p>In addition, there does not appear to be any statistical or other rationale for deciding what size crew the mobile communication option should be extended to (2 person, 3 person, 4 person, etc. – any exception could be seen to swallow the rule). One of the main reasons for the Board proposing the regulatory change is to:</p> <p>“eliminate inequities contained in the existing regulations by assuring all construction and general industry employees exposed to hazards that could cause death or serious physical harm equal access to first</p>
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		<p>aid and CPR services, regardless of their specific industrial or construction setting, or the geographical location of their work.” [Townhall Agency Background Document, Form TH-02, p. 9, September 4, 2008].</p> <p>If the mobile communication option is extended to mobile crews with 2, 3, 4 or more people, those crews would be provided with less protection under the regulation than employees located at permanent locations and exposed to the same or similar hazards that could result in serious physical harm or death.</p> <p>However, as a result of the above analysis, the Department does recommend amending the proposed regulatory text to extend the mobile communication option to employers with worksites where only one employee is <u>permanently</u> stationed, as there is no rationale for treating them differently from single mobile employees. Accordingly, the following language changes are recommended (new language in brackets and deleted language struck through):</p> <p><u>F. Employers of individual</u> <u>[employees assigned to a</u></p>
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<p>Commenter 6: November 29, 2008 Thomas A. Lisk, LeClair Ryan</p>	<p>“On behalf of the Virginia Retail Merchants Association (“VRMA”), the Virginia Hospitality & Travel Association (“VHTA”), the Virginia Manufacturers Association (“VMA”), and the National Federation of Independent Business (“NFIB”), we appreciate the opportunity to comment on the Draft Regulations Governing Medical Services and First Aid Standards for the General and Construction Industry (“Proposed Regulations”). Our comments will address two</p>	<p><u>permanent work location; or individual] mobile employees (i.e., an employee who travels alone to more than one worksite per day) that assign employees to travel to worksites or engage in [whose] work activities that could potentially expose those employees to serious physical harm or death shall either:</u></p> <ol style="list-style-type: none"> <u>1. assure that the mobile employee is adequately trained to self-administer first aid;</u> <u>2. comply with section C. [D.] above; or</u> <u>3. assure that their employee has access to a communication system that will allow them to immediately request medical assistance through a 911 emergency call or comparable communication system.”</u> <p>Agency Response: The Department does not believe that the proposed regulatory language provides two different “triggers” for determining when its provisions apply as the phrase “could potentially expose” is used numerous times throughout the proposed regulation and the</p>
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	<p>problematic aspects of your proposed regulations: 1) lack of regulatory clarity; and 2) an incomplete fiscal analysis including a general misunderstanding of the applicability of such an all encompassing regulatory change for all businesses in Virginia.</p> <p>VRMA, VHTA, VMA and NFIB all agree with the expressed concerns regarding the provision of rapid medical services to critically injured employees, the need for clear and unambiguous regulations, and the need to clarify the regulations for employers of mobile work crews. We cannot, however, agree to that the proposed changes accomplish any of those goals. In fact, our analysis indicates that your language may actually <u>lessen</u> the number of employers in ultra hazardous industries who have to provide medical care on site, while at the same time unwittingly trapping many others who very rarely have employees exposed to workplace hazards that would cause serious physical harm or death. Specifically, our primary concern is that the Proposed Regulations are overreaching in terms of regulating all businesses in Virginia and, given the state of the Virginia economy, if implemented, will make the costs of compliance a business ending decision for some employers. Thus, in light of the foregoing concerns VRMA, VHTA, VMA and NFIB offer the following recommendations.</p> <p>I. Regulatory Clarity: VRMA, VHTA, VMA and NFIB all support safe workplace environments and we support clarity in regulations. The proposed regulations, as proposed, would actually lessen the safety for some individuals in the workplace and add additional undefined and confusing regulatory language to what was heretofore a balanced, targeted, industry specific federal regulatory scheme. Under the current regulatory system, those employees in hazardous industries (logging, electric power, welding, telecommunications, labor camps, commercial dive operations, and underground construction)</p>	<p>term “actually expose” is never used. However, it does appear that in the paragraph referenced by the commenter (proposed § 16 VAC 25-95.F) and in one other place (proposed §16 VAC 25-177.G), it would be appropriate to amend the language as follows, to assure that there is no confusion:</p> <p>16 VAC 25-95.F:</p> <p><u>F. Sections A. through E. of this regulation do not apply to worksites that do not contain job classifications or workplace hazards that [could potentially] expose employees to serious physical harm or death.</u></p> <p>16 VAC 25-177.G:</p> <p><u>G. Sections A. through F. of this regulation do not apply to worksites that do not contain job classifications or workplace hazards that [could potentially] expose employees to serious physical harm or death.</u></p>
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<p>Commenter 6, Continued:</p>	<p>receive per se heightened protections. Under your proposed regulation, certain construction and general industry employers, regardless of the type of industry, would <u>not</u> have to provide on site medical assistance if the worksite did not contain job classifications or workplace hazards that potentially expose employees to serious physical harm or death. The exception you are creating is swallowing the general, current, common sense rule that mandates heightened industry specific protections. Our current existing regulations, modeled after the federal requirements, contain no such exception for either general industry or construction employees and therefore provide a safer working environment to the thousands of individuals currently employed in these trades. While your proposed scheme seems to be diametrically opposed to current federal regulations, we will refrain, at this time, from commenting on the wisdom of creating state regulatory exemptions that are incongruent with existing federal law.</p> <p>Additionally, the Proposed Regulation is confusing since it contains two different “triggers” for employers to determine when they need to have someone trained in CPR. First, in proposed 16 VAC25-95-10 (A), the standard test or “trigger” would be hazards that “could <u>potentially</u> expose” employees to the enumerated harms. Later in the same regulation, in paragraph (F), there is an exemption for all employers that do not have workplace hazards that <u>actually</u> expose employees to serious harm or death. Employers will be confused by this standard, is the test a worksite that “potentially” exposes an employee to the harms or a worksite that <u>actually</u> exposes the employee to one of the harms. Within our organization we have many employers who will not be able to logically determine if they are required to provide the services this Proposed Regulation is attempting to mandate. What will be the test to determine whether a retailer or other employer with a</p>	<p>Agency Response: The Department respectfully disagrees with the commenter’s suggestion that the Department of Planning and Budget (DPB) is confused about how the proposed regulation will be applied. The language cited by DPB is this Department’s</p>
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	<p>loading dock, an on site meat grinder, or a forklift has to comply with this regulation. What if an employer only occasionally uses these implements? What if they only use them once or twice a year? The proposed regulation provides much less clarity than the current regulatory framework.”</p> <p>“Although you state that the current OSHA requirements are “overreaching,” this Proposed Regulation suffers from that exact problem. While we see general statements contained in your description that the proposed regulation will exclude worksites that “do not contain such serious hazards,” your regulation, once again, provides little of no definitional guidance as to what that means and in fact, addresses additional sites that could “potentially” expose employees to such harm. As we have explained, many of our retailers and other employers have mixed use sites where there may actually be hazards of some small degree. Whether the hazard is of such a degree as to be classified as one that causes “serious physical harm” is a question of interpretation. Under the current regulatory framework, certain industrial classifications are clearly required to provide enhanced medical services on site. Your proposed change confuses what has been a logical, industry wide, risk specific framework, and creates a new regulatory scheme which is not even clear to various state agencies. For example, the Department of Planning and Budget disagrees with your offices general interpretation that this regulation will not apply to many retailers. As DPB states:</p> <p><i>The proposed amendments will affect all employers in Virginia. . . . Within a particular industry that is normally considered to be low hazard, there may be some specific work sites or portions of the establishments that have job classifications or workplace hazards that would fall under the more stringent requirements of the proposed regulation. For example, a large department store that has service personnel</i></p>	<p>interpretive language from the Townhall Agency Background Document posted on the Townhall along with the regulatory text. The commenter appears to be confused about how the current federal identical OSHA first aid standards are applied. As demonstrated in this language from the below federal OSHA interpretation, employers currently have to evaluate their worksite to determine if “serious accidents such as those involving falls, suffocation, electrocution, or amputation are possible,” to determine which response time applies (3 to 4 minutes for potential serious accidents; 15 minutes where the potential for serious accidents is less likely):</p> <p>“OSHA stated in a letter of interpretation dated January 16, 2007 to Mr. Charles F. Brogan: "The primary requirement addressed by these first aid standards is that an employer must ensure prompt first aid treatment for injured employees, either by providing for the availability of a trained first aid provider at the worksite, or by ensuring that emergency treatment services are within reasonable proximity of the worksite." The employer must ensure that ". . . adequate first aid is</p>
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	<p><u>who deal directly with customers who would not be exposed to serious or life-threatening hazards may also have warehouse personnel who operate forklifts and are therefore exposed to such hazards. As another example, a supermarket may have retail clerks who are not exposed to serious hazards, but may also have personnel using potentially dangerous equipment, such as a meat slicing machine. Therefore, although some businesses in the areas of Retail or Wholesale Trade may only have office workers, the section could not be considered exempt from the proposed regulation.</u> (emphasis added).</p> <p>Your office has already opined that the general regulation will NOT affect most retailers. Our retail members would thus be faced with a compliance dilemma if this regulation goes forward in its current form. Should such employers spend the time, effort and financial resources (possibly closing there doors while they are trying to obtain the mandated training) to comply if they might have a hazard, or should they comply only if DOLI determines they have a hazard that causes “serious” physical harm, or what about the case where they “potentially” may have a hazard, or even the case where they don’t actually expose an employee to these harms, but yet the harms are somewhere in the workplace. What is the definition under this regulation of “potentially?”</p>	<p>available in the critical minutes between the occurrence of an injury and the availability of physician or hospital care for the injured employee."</p> <p>The letter further explains: "While the first aid standards do not prescribe a number of minutes, OSHA has long interpreted the term 'near proximity' to mean that emergency care must be available within no more than 3-4 minutes from the workplace. Medical literature establishes that, for serious injuries such as those involving stopped breathing, cardiac arrest, or uncontrolled bleeding, first aid treatment must be provided within the first few minutes to avoid permanent medical impairment or death. Accordingly, in workplaces where serious accidents such as those involving falls, suffocation, electrocution, or amputation are possible, emergency medical services must be available within 3-4 minutes, if there is no employee on the site who is trained to render first aid.</p> <p>OSHA does exercise discretion in enforcing the first aid requirements in particular cases. For example, OSHA recognizes that in workplaces, such as offices, where the possibility of such serious</p>
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		<p>work-related injuries is less likely, a longer response time of up to 15 minutes may be reasonable.” [Interpretation Issued to Brian F. Bisland, March 23, 2007.]</p> <p>While the Department does not dispute that application of the final regulation may require additional interpretive guidance, as all regulations do, it does not believe it is any more burdensome than the current federal identical first aid regulation, and in fact believes it is less burdensome. As stated in the Department’s Townhall Agency Background Document, the final regulatory language will eliminate the necessity under the current federal identical OSHA first aid regulation to make a determination of whether EMS/hospital providers can meet the response time requirements:</p> <p>“Finally, to assure compliance with the current regulations, both employers and the VOSH Program are often faced with having to document whether an infirmary, clinic or hospital would be accessible within 3-4 minutes or 15 minutes. This may include going to such lengths as having to drive from the inspection site to the facility, or by</p>
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<p>Commenter 6, Continued:</p>	<p>“Finally, some of your comments to the regulation are confusing and do not match the proposed regulatory framework. For example you appear to state that your “proposed regulation will exclude worksites that do not contain such ‘serious’ hazards,” yet the regulation is written in terms of exposure of employees to <u>serious physical harm or death.</u>”</p>	<p>contacting the nearest rescue squad to determine what the normal response time would be to the specific worksite. Even in such cases where response time information may be readily available, the response time for emergency responders to a particular site can vary widely from day to day depending on such factors as whether the worksite is in an urban or rural location (see discussion below on geographic differences in EMS response times around the state), whether the medical/emergency response facility is staffed 24 hours a day or not, and such vagaries as traffic congestion, road construction and weather. For these reasons under the current regulations, the vast majority of injured employees cannot receive timely, reliable and consistent first aid response to injuries suffered on the job if there is no trained first aid responder on site.” [Townhall Agency Background Document, Form TH-02, p. 5, September 4, 2008]</p> <p>Agency Response: The Department agrees that further definitional guidance would be of benefit to the regulated community in applying the final regulation. In developing revised language the</p>
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	<p>Is the standard to be applied one of “serious hazards” or one “serious physical harm.” Does serious physical harm equate with serious hazard, if so, why is that standard not written into the regulation? The regulation speaks in terms of workplace hazards not serious workplace hazards. Are all non serious workplace hazards thus excluded from this regulation. We also wonder about job classifications. Is the Department going to classify some job classifications as “serious” and would that classification equate to only those that expose employees to “serious harm or death?” Once again, we feel the regulation is not providing any clarity to our members in what had been a fairly simple regulation based on industry specific criteria.”</p>	<p>Department consulted the following sources:</p> <p>Va. Code §40.1-49.3 contains a definition of “Serious violation” as follows:</p> <p>“means a violation deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment....”</p> <p>The VOSH Administrative Regulations Manual, 16 VAC 25-60-10, contains a definition of "Serious violation" as follows:</p> <p>“means a violation deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment.... The term "substantial probability" does not refer to the likelihood that illness or injury will result from the violative condition but to</p>
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		<p>the likelihood that, if illness or injury does occur, death or serious physical harm will be the result.“</p> <p>The Federal OSHA Field Operations Manual (FOM), 2009, defines “serious physical harm” as:</p> <p>Impairment of the body in which part of the body is made functionally useless or is substantially reduced in efficiency on or off the job. Such impairment may be permanent or temporary, chronic or acute. Injuries involving such impairment would usually require treatment by a medical doctor or other licensed health care professional.</p> <p>a. Injuries that constitute serious physical harm include, but are not limited to:</p> <ul style="list-style-type: none">• Amputations (loss of all or part of a bodily appendage);• Concussion;• Crushing (internal, even though skin surface may be intact);• Fractures (simple or compound);• Burns or scalds, including electric and chemical burns;• Cuts, lacerations, or punctures involving significant bleeding and/or requiring suturing;• Sprains and strains• Musculoskeletal disorders.
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		<p><u>harm include, but are not limited to, amputations (loss of all or part of a bodily appendage); concussion; crushing (internal, even though skin surface may be intact); fractures (simple or compound); burns or scalds, including electric and chemical burns; cuts, lacerations, or punctures involving significant bleeding and/or requiring suturing; sprains and strains. Illnesses that constitute serious physical harm include, but are not limited to, cancer; respiratory illnesses; hearing impairment; central nervous system impairment; visual impairment; and poisoning.</u></p> <p><u>“Serious workplace hazard” means a hazard deemed to exist in a place of employment where there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment. The term "substantial probability" does not refer to the likelihood that illness or injury will result from the violative condition but to the likelihood that, if illness or injury does occur, death or serious physical harm</u></p>
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<p>Commenter 6, Continued:</p>	<p>COMMENTS (Part II) REGARDING DRAFT REGULATIONS GOVERNING MEDICAL SERVICES & FIRST AID STANDARDS FOR THE GENERAL & CONSTRUCTION INDUSTRY</p> <p>“On behalf of the Virginia Retail Merchants Association (“VRMA”), the Virginia Hospitality & Travel Association (“VHTA”), the Virginia Manufacturers Association (“VMA”), and the National Federation of Independent Business (“NFIB”), we appreciate the opportunity to comment on the Draft Regulations Governing Medical Services and First Aid Standards for the General and Construction Industry (“Proposed Regulations”).</p> <p>II. DOLI fiscal analysis:</p> <p>VRMA, VHTA, VMA and NFIB believe that the DOLI fiscal analysis of the proposed regulation grossly underestimates the number and degree to which this proposed regulation will affect existing small and large businesses in Virginia. There appears to have been little, if any, realistic cost benefit analysis performed or documented before this regulation was published. As your comments clearly state, a “disadvantage is that some employers would have to incur the additional cost of securing such training” and as DPB recognizes “there is insufficient data to accurately compare the</p>	<p><u>will be the result.].</u></p> <p>The Department also agrees with the commenter that use of the term “job classification” might result in some unnecessary confusion for the regulated community and recommends the term be deleted from the proposed regulation.</p> <p>Agency Response: The Department respectfully disagrees with the commenter’s suggestion that little cost benefit analysis was performed for the proposed regulation. A sixteen page economic impact analysis was conducted by DPB and can be found at:</p> <p><u>http://www.townhall.state.va.us/L/GetFile.cfm?File=E:\townhall\docroot\92\2039\4149\EIA_DOLI_4149_v4.pdf</u></p> <p>The Department is well aware of current economic conditions and has attempted to take a balanced approach by assuring that the costs of compliance will be minimized as much as possible by eliminating compliance costs for approximately 27% of Virginia’s employers covered by the current federal identical OSHA regulation (approximately 59,000 of the estimated</p>
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	<p>magnitude of the benefits versus the costs.</p> <p>There also is a tremendous difference in the number of businesses affected by the current federally imposed regulation and the number that will be affected by the proposed DOLI change. As DPB explained “[i]n sum, under current regulations, most firms...are required to have a first-aid-trained employee on site <u>only if</u> medical attention...is not in near proximity or reasonably accessible.” (emphasis added). The new proposal, according to DPB, “<i>will affect all employers in Virginia</i>” (emphasis added). To force such a sweeping change, with little or no cost data, on Virginia employers is extremely problematic. Given the current state of economic affairs in the Commonwealth such a change evidences an extreme disregard and disrespect for the financial health and well-being of all Virginia businesses and for the people who are trying to make every dollar count by providing jobs to Virginians in this time of unprecedented economic downturn.”</p> <p>Furthermore, reading through the explanation provided, one could surmise that the regulation was intended to primarily affect industrial users. Most of the sited data analyzes only response times for industrial sites. Many businesses in Virginia, however, are not “industrial sites” but are simply small businesses. The associated cost of implementing this regulation to these businesses seems to have been given little or no weight in proposing the current regulatory scheme. As DPB mentions, there are reasonable alternatives to the single mandate contained in this proposal, including a requirement that medical services be provided only if a business could not meet the current delineated four and fifteen minute thresholds.</p> <p>II. Conclusion:</p> <p>While VMRA, VHTA, VMA and NFIB all agree in principal with creating a safer</p>	<p>215,201 employers in Virginia); and by maximizing the benefits of the final regulation by targeting those worksites that pose the highest risk of serious injury and illness for employees.</p> <p>It is the Department’s position that the estimate of exempted employers should be larger than 27%, and perhaps by a significant amount. In preparing the above estimates, the Department used a conservative approach in determining which employers should meet the exemption. For instance, even though the Department believes that most retail establishments should be exempt from the regulation, it nonetheless did not include retail establishments (26,800 or 12.5%) in the exempt category because of the previously mentioned example of a large department store having a warehouse operation where forklifts are used, which would require compliance with the final regulation. Most small to midsized retail establishments do not have any warehouse or similar operations that would involve potential exposure to serious workplace hazards. Nor did the Department include such industries as wholesale establishments (12,580</p>
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	<p>workplace for all employees and clarity in government regulations, we do not agree with the promulgation of a confusing regulatory scheme in troubling economic times. What Virginia employers need are precise rules and guidance. This proposed regulation provides neither. What it does do is add costly, unclear, and potentially weaker regulations to many large and small businesses at a time when government should be helping to remove additional costs and burdens on the citizens of this Commonwealth. We respectfully ask that you reconsider the implementation of this regulation, in its current form or at least provide for some common sense alternatives to the training and personnel expenditures contained in your proposed regulation.”</p>	<p>establishments or 5.8%); information (NAICS 51, 4,078 establishments or 1.9%); other services, except public administration (NAICS 81, 23,030 establishments or 10.7%); or arts, entertainment and recreation (NAICS 71, 2,748 establishments or 1.3 %) in the count of potential exempt employers, even though many of those workplaces will not contain serious workplace hazards.</p> <p>In addition, the data the Department used in counting offices that would be exempt from the final regulation is what we would refer to as "soft" data and is most likely to be under-inclusive. As an example, under NAICS 53, Real Estate and Rental Leasing, the Department was able to identify NAICS 5312, Offices of Real Estate Agents and Brokers, as a subset of employers that should be exempt because the NAICS description indicates that only office work is involved. However, the Department could not break out anything under NAICS 5311, Lessors of Real Estate 6,152 establishments or 2.8%), even though many individual worksites would only consist of office workers, because there may be some worksites in that industry that do have</p>
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		<p>maintenance personnel for the leased property (maintenance personnel can be exposed to hazards posing a risk of serious physical harm or death because they will do such tasks as work on electrical related issues, work around boilers, air conditioners, etc., all of which pose a risk of electrocution, or caught-in hazards).</p> <p>Finally, as noted in DPB's Economic Impact Analysis (page 9), the cost of compliance can be offset significantly by lessening the severity of injuries/illnesses experienced by employees through the receipt of immediate first aid/CPR treatment, and potentially result in an overall reduction in work-related injuries when workers are trained in first aid/CPR:</p> <p>“There are also studies that indicate that having a first aid person readily available reduces the risk of serious injury or death. According to the Canadian Red Cross and SMARTRISK, a non-profit organization dedicated to preventing injuries and saving lives, getting trained in first aid can reduce your risk of injury by more than 40 percent.¹² Research conducted by St. John Ambulance found that the</p>
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<p>Commenter 7: November 10, 2008 Laurie Peterson Aldrich, President, Virginia Retail Merchants Association</p>	<p>“I received a call from a retailer that was concerned that these regulatory changes would apply to them. From my reading, it does not apply, however it is always best to verify with the source. Can you verify that this regulatory change would NOT impact general retailers in their day to day business?”</p>	<p>number of work-related injuries is reduced by between 20 and 30 percent when workers are trained in first aid.¹³ According to the International Labor Organization Encyclopedia of Occupational Health and Safety, defibrillation administered within four minutes of cardiac arrest yields survival rates of 40 to 50%, versus less than 5% if given later. For chemical eye injuries, immediate flushing with water can save eyesight. For spinal cord injuries, correct immobilization can make the difference between full recovery and paralysis. For hemorrhages, the simple application of a fingertip to a bleeding vessel can stop life-threatening blood loss.”</p> <p>Agency Response: Unlike the current federal identical first aid regulation, the final First Aid regulation will not apply to the large majority of retail establishments because they do not generally have "occupational hazards which could result in serious physical harm or death," which is the "trigger event" for worksites where the proposed regulation would apply. However, there will be some retail worksites that would be covered by the final regulation. Following is a discussion on the issue given in the briefing</p>
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<p>Commenter 8: November 13, 2008 P. Dale Bennett, Executive Vice President, Virginia Trucking Association</p>	<p>“The following comments about the above-referenced proposed regulation are submitted on behalf of the members of the Virginia Trucking Association.</p> <p>Introduction The Virginia Trucking Association (VTA) is the statewide trade association representing the trucking industry in Virginia. Our membership includes large and small-sized for-hire trucking companies and private carriers that operate trucks to transport their own products and</p>	<p>document for the final regulation:</p> <p>"However, it should be noted that within a particular industry that is normally considered to be low hazard, there may be some specific worksites or portions of establishments that have job classifications or workplace hazards that could trigger application of the proposed regulation (e.g., a large department store that has service personnel who deal directly with customers who would not be exposed to serious or life threatening hazards, may also have warehouse personnel who operate forklifts who are exposed to such hazards; a large grocery or supermarket will have retail clerks who would not be covered by the proposed regulations, but may have forklift operators, or other employees that use potentially dangerous equipment such as a meat slicing machine).</p> <p>Agency Response: The commenter was asked the following questions before the Department initially responded:</p> <p>1. With your example are we just talking about delivery of the vehicle to the destination or do the drivers sometimes have the added responsibility of</p>
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	<p>materials as well as suppliers of goods and services to truck fleet operators. These companies are either headquartered in Virginia, have terminals here or operate trucks in the Commonwealth.</p> <p>Comments Our most significant concern is in regard to the application of the provisions governing employers of mobile work crews to trucking operations. The proposed regulation defines a mobile work crew as a crew that travels to more than one worksite per day and consists of two or more employees. The proposed regulation requires employers of mobile work crews to either:</p> <ol style="list-style-type: none"> 1. Assure that at least one employee on the mobile crew is designated and adequately trained to render immediate first aid and CPR during all workshifts; or 2. Comply with subsection C of this section, which allows covered employers to enter into an agreement with and rely on another employer at the same worksite to provide first aid and CPR responder services for its mobile work crew employees. <p>We believe this provision of the proposed regulation was drafted without proper consideration of how it would be applied or the burden it would create for trucking fleets that utilize team drivers in their operations.</p> <p>Some trucking operations utilize employees in what are referred to as “team operations” in which two drivers are sent out to deliver a load. In these operations, used mainly for long-distance trips, two drivers take turns driving the same truck in shifts to complete a particular trip, which may involve picking up and delivering freight at several locations, i.e., worksites, along the way. As we read the proposed regulations, these team driving operations would be considered mobile work</p>	<p>loading/unloading the trucks? If the latter, could you give me a few examples (e.g., furniture delivery, etc.,).</p> <p>2. If the latter in 1. above, is it at all common that the drivers might use a forklift or other piece of equipment to assist in loading/unloading the vehicle.</p> <p>The Commenter provided the following responses to the above questions:</p> <p>“1. With your example are we just talking about delivery of the vehicle to the destination or do the drivers sometimes have the added responsibility of loading/unloading the trucks? If the latter, could you give me a few examples (e.g., furniture delivery, etc.,).</p> <p>Although our industry is collectively referred to as the "trucking industry," we are made up of many different segments with different types of trucks and operations. Thus, delivery requirements vary widely.</p> <p>In LTL (less than truckload) operation, team drivers rarely, if ever, load or unload the freight. Team drivers are used in line-haul operations to move trailers between terminals. Once</p>
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	<p>crews.</p> <p>Few, if any, employers of such team operations would be able to practically utilize Option 2 to comply with requirements in paragraph D because their shipping and delivery customers are not always the same on a daily basis. Thus, their only option to comply with paragraph D would be to train a significant number of its drivers to render first aid and CPR. This would impose an added cost to an industry that can ill afford it during these difficult economic conditions. This year’s record-high fuel prices and soft freight demand have taken the deepest ever toll on the trucking industry with a record number of companies failing in the first three quarters of 2008. According to one leading trucking analyst, “the first three quarters of 2008 have already established a new record for the amount of capacity pulled from production within a single year.</p> <p>Never have more trucks been pulled off the road in a shorter period of time than in the first three quarters of this year.” A total of 2,690 companies located throughout the U.S. with 5 or more trucks went out of business between January and September. Imposition of any level of regulatory compliance costs at this time could have a significant negative impact on Virginia’s trucking industry.</p> <p>However, we recommend that the proposed regulations be amended to allow for an alternative compliance option for trucking industry employers that utilize team operations that would be much less expensive. Specifically, we recommend that the proposed regulations be amended to allow trucking industry employers that utilize team operations the option of paragraph E.2. to comply with the requirements of paragraph D.</p> <p>The vast majority of truck drivers maintain a means to communicate with their employers and the “outside world” while in their vehicles</p>	<p>they drop a trailer at a terminal, a solo, local driver will then make the deliveries of the freight.</p> <p>In TL (truckload) operations, team drivers spend most of their working time behind the wheel but also may occasionally have to load or unload their cargo. This is especially common when drivers haul specialty cargo because they may be the only ones at the destination familiar with procedures or certified to handle the materials. I’m not sure to what extent team operations are used in the following examples. Auto-transport drivers position cars on the trailers at the manufacturing plant and remove them at the dealerships. Drivers delivering furniture and household goods (movers) may participate in loading and/or unloading.</p> <p>In the food and grocery delivery business, drivers are not allowed on the dock at some places. Most, if not all, unloading is done by the customer or a lumper service (persons hired or contracted with by the customer to unload freight).</p> <p>There are receivers of freight that do not have personnel on hand for unloading and expect the driver’s labor to be part of</p>
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	<p>through devices such as cell phones, on-board computers, satellite communication systems and CB radios. Since this option would be allowed for single drivers, we do not believe there is adequate justification to disallow it simply because there is one additional driver in the vehicle.</p> <p>Thus, we respectfully request that the Safety and Health Codes Board consider amending the proposed regulations with language similar to the following:</p> <p>Add the following provision to 16VAC25-95-10, paragraph D:</p> <p><i>“3. Assure that mobile work crews that consist of two drivers of a commercial vehicle have access to a communication system that will allow them to immediately request medical assistance through a 911 emergency call or comparable communication system.”</i></p>	<p>the delivery process. Some receivers, and even shippers, use the threat of unpaid detention and delay as coercion to get free labor. Since over-the-road drivers are paid by the mile, it is always in the drivers' interest to get loaded/unloaded quickly and keep moving. Thus drivers may participate in loading and/or unloading even when not required to do so. In addition, the federal hours of service regulations make it in the drivers' best interest to not spend a lot of his "on-duty" time being involved in loading and unloading the truck.</p> <p>2. If the latter in 1. above, is it at all common that the drivers might use a forklift or other piece of equipment to assist in loading/unloading the vehicle.</p> <p>If a driver uses power equipment (fork trucks, tractors, platform lift trucks, motorized hand trucks, and other specialized industrial trucks powered by electric motors or internal combustion engines) to load or unload, the driver has to be certified on the type of equipment being used. (See OSHA Regulations at 29 CFR 1910.178(1)) Any shipper or receiver who requires a driver to use such</p>
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		<p>equipment should satisfy themselves that the driver has been properly trained and certified.</p> <p>Finally, if a driver is loading or unloading freight at a shipper/receiver's facility in Virginia, that shipper or receiver will be required under the proposed regulations to designate an employee and adequately train him or her to render immediate first aid and CPR during all workshifts on worksites with hazards that could potentially expose employees to serious physical harm or death. For traditional businesses and industries that use mobile work crews, the contracting option may not impose an unreasonable burden. However, for trucking companies there can be a constant change in pick up and delivery locations that may not be known until hours or a few days at most before the customer request for a pick up or delivery is made. This short time frame would make it difficult for the trucking company to enter into a written agreement for the provision of first aid and CPR. This would be especially true for "brokered" loads where there may be only a few hours notice for a pick up or delivery.</p>
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		<p>Finally, I pass along a comment from one of our members that I found to be an interesting viewpoint. He said, "If I were a member of a 2 person mobile work crew, wouldn't it be in my best interest to not be the one trained in first aid and CPR. Think about it. If I am the one trained and something happens to me, I am out of luck."</p> <p>The Department responds as follows:</p> <p>If LTL (Less Than Truckload) trucking operations consist of either a single driver or a two person driving team, and all they are doing is over-the-road driving (i.e., the only serious hazard they are exposed to is a traffic accident), the final First Aid regulation will not apply, since VOSH does not investigate traffic accidents.</p> <p>For TL (Truckload) trucking operations where there is a single driver, and the driver is potentially exposed to serious workplace hazards, the communication system option is available to the employer instead of having the employee trained in first aid.</p> <p>For TL trucking operations where there are two drivers potentially exposed to</p>
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<p>Commenter 9: November 20, 2008 Donald Hall, President, Virginia Automobile Dealers Association</p>	<p>(See Comments of Commenter 9 on the next page.)</p>	<p>serious workplace hazards, the current proposed regulation provides that at least one of the drivers must be trained in first aid/CPR or the employer must make written arrangements with contractor or employer on the same job site or establishment to provide first aid/CPR. The Department <u>does not recommend</u> adopting the commenter’s recommendation to amend the proposed regulation as follows:</p> <p>“3. Assure that mobile work crews that consist of two drivers of a commercial vehicle have access to a communication system that will allow them to immediately request medical assistance through a 911 emergency call or comparable communication system.”</p> <p>See Department’s response to Commenter 5, which addresses a request to extend the communication systems option to mobile work crews of 2 or 3 people.</p> <p>Agency Response: The Department generally agrees with the commenter’s summary of the law with regard to the issue of preemption of state occupational safety and health standards and the federal regulations that</p>
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	<p>VADA believes that the Proposed Regulations are an impermissible departure from federal OSHA regulations and require further modifications to ensure compliance.</p> <p>Preemption by Federal Law</p> <p>Because the Proposed Regulations appear to conflict with current federal OSHA rules, they are subject to pre-emption. “It is a familiar and well-established principle that the Supremacy Clause, U.S. Const. Art. VI, cl. 2, invalidates state laws that ‘interfere with or are contrary to federal law.’” <u>Hillsborough Cty., Florida v. Automated Medical Laboratories, Inc.</u>, 471 U.S. 707, 713 (1985). State law is nullified to the extent that it actually conflicts with federal law.” <u>Id.</u> “Federal regulations have no less pre-emptive effect than federal statutes.” <u>Nat’l City Bank of Indiana v. Turnbaugh</u>, 463 F.3d 325, 330 n.3 (4th Cir. 2006); <u>Donmar Enterprises, Inc. v. Southern Nat’l Bank of North Carolina</u>, 64 F.3d 944, 949 (4th Cir. 1995). Preemption may be either express or implied, and it “is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” <u>Gade v. Nat’l Solid Wastes Management Ass’n</u>, 505 U.S. 88, 98 (1992) (citing <u>Jones v. Rath Packing Co.</u>, 430 U.S. 519, 525 (1977)).</p> <p>In 1970, Congress passed the Occupational Safety and Health Act (“OSHA”), 29 U.S.C. § 651 <i>et seq.</i>, in order to provide every working person with a safe and healthy workplace. 29 U.S.C. § 651(b). OSHA preempts state regulation of an occupational safety or health issue where a federal standard has already been established, unless a state plan has been submitted and approved by the U.S. Secretary of Labor pursuant to OSHA §18(e). 29 U.S.C. § 667. State OSHA rules and regulations control over federal OSHA rules and regulations once the Secretary of Labor determines that the state has promulgated standards comparable to federal OSHA and has an adequate enforcement plan. <u>Id.</u> A state health and safety plan must meet specific criteria in order to obtain approval from the Secretary of Labor. 29 C.F.R. § 1902.3(a). With respect to a state plan’s health and safety standards, a state may either adopt the federal OSHA standards or promulgate “standards which are or will be <i>at least as effective</i> as those promulgated under [29 U.S.C. § 655 of OSHA].” 29 C.F.R. § 1902.3(c)(1) (emphasis added). Thus, State OSHA</p>	<p>apply to review of unique state plan regulations. As noted by the commenter, it is federal OSHA, and by extension not this Department, the Safety and Health Codes Board, nor the commenter, who is charged with the responsibility of making the determination of whether a unique state regulation is “as effective as” the current federal OSHA identical regulation. OSHA will not undertake to make such a determination until after the proposed regulation becomes final and is submitted by the VOSH Program as an amendment to the Virginia State Plan, so the commenter’s argument that the regulation should not go forward based on a failure to meet the “as effective as” requirement is premature. That argument can be made when federal OSHA undertakes its review of the eventual final regulation.</p> <p>With regard to the commenter’s substantive argument that because portions of the proposed regulation could be technically determined to be less stringent than a corresponding federal requirement (e.g., exemption of white collar offices from coverage under the standard), the entire proposed regulation would be not “as effective as” the</p>
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	<p>standards may be more, but not less, stringent than federal OSHA standards. See OSHA interpretation letter, Richard Fairfax to Charles Brogan (January 16, 2007). Virginia obtained final OSHA § 18(e) approval of its health and safety plan by the Secretary of Labor on November 30, 1988. 29 C.F.R. § 1952.374(a); see Va. Code Ann. § 40.1-22 <i>et seq.</i></p> <p>“Federal OSHA approval of a State plan under section 18(b) of the OSH Act in effect removes the barrier of Federal preemption, and permits the State to adopt and enforce State standards and other requirements regarding occupational safety or health issues regulated by OSHA.” 29 C.F.R. § 1953.3(a). “A State with an approved plan may modify or supplement the requirements contained in its plan, and may implement such requirements under State law, without prior approval of the plan change by Federal OSHA.” <i>Id.</i> “Changes to approved State plans are subject to subsequent OSHA review.”^a <i>Id.</i> Federal regulations provide potential consequences when a state alters a health and safety regulation which does not conform to OSHA requirements. “If OSHA finds reason to reject a State plan change, and this determination is upheld after an adjudicatory proceeding, the plan change would then be excluded from the State’s Federally-approved plan.” <i>Id.</i></p> <p>Under 29 U.S.C. § 667, a proposed change to a state OSHA regulation which is not “as effective as” the corresponding federal OSHA regulation is preempted. Such a regulation would not qualify under federal regulations to meet the specific criteria required of a federally-approved OSHA state plan. 29 C.F.R. § 1902.3(c)(1). Federal regulations require that components of a state plan be measured against “indicies of effectiveness” in determining whether an alternative regulation is “at least as effective as the Federal program.” 29 C.F.R. § 1902.4(a)(2). Two such indicies are relevant with respect to the Proposed Regulations. First, federal law requires that state OSHA regulations be developed and promulgated “by such means as ... obtaining the best available evidence through research, demonstrations, experiments, and experience under this and other safety and health laws.” 29 C.F.R. § 1902.4(b)(i). In addition, federal regulations require state plans to provide for variances from state OSH standards which are similar to federal variances. State OSHA regulations must “[p]rovide[] authority for the granting of variances from State standards, upon application of an employer or employers which correspond to variances authorized under the Act.” 29 C.F.R. § 1902.4(b)(iv).</p> <p>Based on these effectiveness requirements, the Proposed Regulations fail to meet federal standards and are preempted. First, the Proposed Regulations eliminate the federal safety requirements with respect to white collar workplaces such as offices. Proposed 16 Va. Admin. Code § 25-95-10(F). Under OSHA’s interpretation of 29 C.F.R. § 1910.151(b), office workplaces require employees trained in first aid if they are located more than 15 minutes from an infirmary, clinic, or hospital. See OSHA interpretation letter from Richard Fairfax to Brian</p> <hr/> <p>^a “Whenever a State makes a change to its ... regulations [or] standards ... which affect the operation of the State plan, the State shall provide written notification to OSHA. When the change differs from a corresponding Federal program component, the State shall submit a formal, written plan supplement.” 29 C.F.R. § 1953.3(a).</p>	<p>federal, the Department respectfully disagrees. The Department is of the opinion that the regulation will be found to be “as effective as” current federal identical regulations.</p> <p>By way of analogy, as recently as 2005, federal OSHA approved the Oregon State Plan’s unique fall protection regulation, even though for some activities Oregon maintains a 10 foot fall protection requirement, while the federal OSHA regulations contains a 6 foot fall protection requirement (see http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEDERAL_REGISTER&p_id=18343):</p> <p>“For many work activities Oregon’s fall protection standards mirror the federal standard and require employers to provide fall protection for employees working at heights of 6 feet and higher. OAR 437-003-1501(1)-(4). For some tasks, however, Oregon OSHA has a 10-foot trigger for fall protection requirements. OAR 437-003-1501. But while the federal standard often permits employers to utilize alternative measures, e.g., a controlled access zone with a safety monitor, at heights of 10 feet and above, OR-OSHA regularly requires the use of</p>
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<p>Commenter 9, Continued</p>	<p>Bisland (March 23, 2007). The Proposed Regulations are less effective in providing occupational health and safety than 29 C.F.R. § 1910.151(b) because they eliminate the employee first aid training requirement, even if the office workplace is located more than 15 minutes from emergency medical responders. Proposed 16 Va. Admin. Code § 25-95-10(F). Thus, Virginia office workers in more remote locations will be less safe under the Proposed Regulations. Indeed, the Department of Labor and Industry estimates that for about 65,000 Virginia employers the Proposed Regulation will be “less stringent” than the federal regulations. 25 Va. Reg. Regs. 286. Since the Proposed Regulations are less effective than the federal regulations, they cannot conform to federal law regarding approved state health and safety plans; they are thus preempted.</p> <p>Second, the Proposed Regulations are preempted under federal law because they are not the product of “the best available evidence through research, demonstrations, experiments, and experience.” 29 C.F.R. § 1902.4(b)(i). The Department promulgated the Proposed Regulations based on certain statistics about the average response times for emergency medical services (EMS) in Virginia. See 25 Va. Reg. Regs. 278-280. Current federal law requires that “in workplaces where serious accidents such as those involving falls, suffocation, electrocution, or amputation are possible, emergency medical services must be available within 3-4 minutes, if there is no employee on the site who is trained to render first aid.” OSHA interpretation letter from Richard Fairfax to Brian Bisland (March 23, 2007). In non-dangerous worksites, such as offices, a longer response time of up to 15 minutes may be reasonable. <i>Id.</i> The Department concluded based on its average EMS response time data that “the large majority of employers in Virginia fail to meet the three to four minute exemption contained in the interpretations for the current VOSH first aid regulations.” 25 Va. Reg. Regs. 279.</p>	<p>conventional fall protection at those more dangerous heights. Oregon has represented to federal OSHA that employers in that state virtually never raise infeasibility as a basis or defense for not providing conventional fall protection, and that infeasibility has not been a successful argument in a contested case or recognized in settlement agreements. Therefore, OSHA has determined that the Oregon standards are as strict or stricter than the federal standard with respect to those activities for which the state maintains a 6-foot trigger height and for all work done at heights of 10 feet or higher. With respect to those few fall hazards between 6 and 10 feet that are not otherwise covered by Oregon's fall protection standard, the state has assured OSHA that it will consider the issuance of citations or orders to correct under its general duty clause (ORS 654.010, 654.015), or the posting of red warning notices (ORS 654.082). Accordingly, OSHA believes that Oregon's fall protection program is at least as effective as the federal program.”</p> <p>Agency Response: As noted above, it is federal</p>
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	<p>However, average EMS response times are not a good basis to reject the federal first aid regulations. Under the Proposed Regulations, employers located across the street from hospitals and medical facilities are required to pay for the same first aid training expenses as businesses located in rural outlying areas distant from such services. In addition, communities which incur the added expense of providing more comprehensive EMS service coverage cannot offer their local businesses the cost savings of no longer needing to train all of their employees in first aid and CPR. Thus, businesses which are adequately served by the local community, and are currently in compliance with federal law, will bear the significant cost of compliance with the Proposed Regulations without meaningfully increasing workplace safety. Although OSHA covers a wide range of workplace injuries, it is not “designed to require employers to provide absolutely risk-free workplaces.” <u>Industrial Union Dep’t, AFL-CIO v. American Petroleum Inst.</u>, 448 U.S. 607, 641 (1980). The Department has made no meaningful showing that Virginia has a need for a different standard than that contained in the current regulations.</p>	<p>OSHA, and by extension not this Department, the Board, nor the commenter, who is charged with the responsibility of making the determination of whether a unique state regulation meets the requirements of the OSH Act. OSHA will not undertake to make such a determination until after the proposed regulation becomes final and is submitted by the VOSH Program as an amendment to the Virginia State Plan, so the commenter’s argument that the regulation should not go forward based on a failure to meet the requirements of the OSH Act is premature.</p> <p>In addition, we respectfully disagree with the commenter’s conclusion that EMS response times are not an appropriate source of evidence to consider in support of the final regulation. As noted in the Department’s Townhall Agency Background Document:</p> <p>“As the more recent statistics above indicate, the average EMS response time for all cases statewide has been approximately 9 minutes for the last three years (more than twice the 3-4 minute response time required by OSHA for life threatening injuries), while the average response time to</p>
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		<p>industrial sites falls between 7 and 7.5 minutes, which is 75% above the 3-4 minute requirement. Furthermore, the chart demonstrates that for all cases statewide, only 12.5 to 13% of the responses occur within the 3-4 minute requirement for life threatening injuries, while from 19 to 21% of the responses occur to industrial sites within the 3-4 minute requirement.</p> <p>The above statistics graphically demonstrate that the large majority of employers in Virginia fail to meet the 3-4 minute exemption contained in the interpretations for the current VOSH first aid regulations for construction and general industry that would allow them to avoid having a trained first aid provider on site (the OSHA 3-4 minute interpretation applies to worksites with hazards that could cause life threatening injuries).</p> <p>....</p> <p>Finally, to assure compliance with the current regulations, both employers and the VOSH Program are often faced with having to document whether an infirmary, clinic or hospital would be accessible within 3-4 minutes or 15 minutes. This may include going to such lengths as having to drive from the inspection site to the facility, or by</p>
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<p>Commenter 9, Continued</p>	<p>Third, the Proposed Regulations are less effective than the federal OSHA regulations because they fail to “provide for variances from state OSH standards which are similar to federal variances.” 29 C.F.R. § 1902.4(b)(iv). As shown above, under the federal regulations,</p>	<p>contacting the nearest rescue squad to determine what the normal response time would be to the specific worksite. Even in such cases where response time information may be readily available, the response time for emergency responders to a particular site can vary widely from day to day depending on such factors as whether the worksite is in an urban or rural location (see discussion below on geographic differences in EMS response times around the state), whether the medical/emergency response facility is staffed 24 hours a day or not, and such vagaries as traffic congestion, road construction and weather. For these reasons under the current regulations, the vast majority of injured employees cannot receive timely, reliable and consistent first aid response to injuries suffered on the job if there is no trained first aid responder on site.</p> <p>....</p> <p>In addition, the current regulations allow an employer to physically move an employee who had suffered a head/spinal injury or other serious injury by transporting them to a medical facility that is within 3 to 4 minutes driving distance, in lieu of having a trained first aid responder on site to</p>
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<p>Commenter 9, Continued</p>	<p>employers located within 3-4 minutes of emergency medical services need not provide an employee on the site who is trained to render first aid. OSHA interpretation letter from Richard Fairfax to Brian Bisland (March 23, 2007). This variance is permitted to employers who can demonstrate that providing first-aid-trained employees is redundant given the close proximity of EMS. The Proposed Regulations, however, allow for no such variance as in federal law even though the Proposed Regulations are very similar to the federal OSHA regulations. As a result, the Proposed Regulations are more costly and less effective than the corresponding federal regulations. Federally-compliant state regulations must provide the variances permitted employers under federal law. Since the Proposed Regulations do not have a mechanism to grant such variances, they are preempted by federal law.</p> <p>Moreover, the Proposed Regulations utterly fail to define “job classifications or workplace hazards that expose employees to serious harm or death.” As a result, the Proposed Regulations are constitutionally void for vagueness. A statute is void for vagueness if it “either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application” <i>Roberts v. U.S. Jaycees</i>, 468 U.S. 609, 629 (1984) (citing <i>Connally v. Gen. Constr. Co.</i>, 269 U.S. 385, 391 (1926)); see also <i>Waynesboro v. Keiser</i>, 213 Va. 229, 234, 191 S.E.2d 196, 199 (1972) (striking down a statute that permitted a court to make property tax adjustments “if the court in its discretion [found that] the ends of justice would be met by making an adjustment”); <i>Norfolk 302, LLC v. Vassar</i>, 524 F. Supp.2d 728, 739-40 (E.D. Va. 2007) (enjoining enforcement of statute where the “General Assembly failed to tie the word ‘noisy’ to ‘any explicit standard[] for enforcement’ and statute encourage[s] arbitrary and discriminatory selective enforcement”). “The Due Process Clause requires that laws be crafted with sufficient clarity to ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited,’ and to ‘provide explicit standards for those who apply them.’” <i>Gen. Media Communications, Inc. v. Cohen</i>, 131 F.3d 273, 286 (2d Cir. 1997) (citing <i>Grayned v. City of Rockford</i>, 408 U.S. 104, 108, (1972)).</p>	<p>administer first aid and CPR while Emergency Response Personnel are in route.” [Townhall Agency Background Document, Form TH-02, pp. 5-6, September 4, 2008].</p> <p>The commenter also noted the following above:</p> <p>“In addition, communities which incur the added expense of providing more comprehensive EMS service coverage cannot offer their local businesses the cost savings of no longer needing to train all of their employees in first aid and CPR.”</p> <p>To the extent that the above quote by the commenter implies that the final regulation requires covered employers to train <u>all employees</u> in first aid and CPR, the Department wants to clarify that the final regulation only requires covered employers to provide one employee per workshift trained in first aid and CPR.</p> <p>Agency Response: The Department and VOSH Program has its own variance procedures as provided for in Va. Code §40.1-6(9):</p> <p>“The Commissioner shall: “Make rules and regulations</p>
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<p>Commenter 9, Continued</p>	<p>In this case, although it is clear that the Proposed Regulations do not apply to white collar office worksites, they nevertheless provide no additional guidance as to what constitutes “workplace hazards that expose employees to serious harm or death.” See Proposed 16 Va. Admin. Code § 25-95-10(F). This is extremely problematic because the vast majority of Virginia employers do not fall into the white-collar-office classification. See 25 Va. Reg. Regs. 286. The Proposed Regulations’ use of the term “workplace hazards” seems to be just as vague as the term “noisy conduct” which was prohibited by the statute invalidated in <u>Norfolk 302, LLC</u>. 524 F. Supp.2d at 739-40. Under the Proposed Regulations, the Department of Labor and Industry is given almost limitless discretion to determine which employers are required to designate CPR-trained employees and which do not. This is essentially the same unbounded discretion granted by the invalid statute in <u>Waynesboro</u> which gave the court unfettered power to make property tax adjustments. 213 Va. at 234. It is truly impossible for an employer, or other persons of common intelligence, to know whether the Proposed Regulations apply to them or not. Given the significant potential expense involved in complying with the Proposed Regulations, it is essential that the Department of Labor and Industry give Virginia employers “a reasonable opportunity to know what is prohibited” and the “explicit standards” that apply. The Proposed Regulations fail to provide such necessary standards. They therefore cannot survive constitutional scrutiny.</p> <p>Unfunded Mandate</p> <p>The Proposed Regulations create an enormous unfunded mandate for many Virginia businesses, including motor vehicle dealerships. While many dealers have personnel trained in first aid and CPR on staff, demanding that designated first aid and CPR responders be on duty at all times is highly burdensome and extremely expensive. Employees may be late appearing for work, may call in sick, be on vacation, or change jobs. In order to ensure compliance with the Proposed Regulations at all times, it will essentially become necessary for many businesses to provide the required training to all of their employees. Such a policy simply does not make sense for most of VADA’s members who are either located in metropolitan or well-populated areas where timely emergency service access is available. Based on the text of the Proposed Regulations, this unjustified mandate will likely be applicable to the vast majority of workers in Virginia.</p>	<p>governing the granting of temporary or permanent variances from all standards promulgated by the Board under this title. Any interested or affected party may appeal to the Board, the Commissioner's determination to grant or deny such a variance. The Board may, as it sees fit, adopt, modify or reject the determination of the Commissioner.”</p> <p>Regulations containing applicable procedures are contained in the VOSH Administrative Regulations Manual, 16 VAC 25-60-210, which can be found at: http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+16VAC25-60-210</p> <p>Agency Response: The Department respectfully disagrees with the commenter’s contention that the proposed regulation is vague (see response to Commenter 6). However, as noted in its response to Commenter 6, the Department is recommending that the term “job classification” be removed from the proposed regulation; and that definitions be added for the terms “serious physical harm” and “serious workplace hazard.”</p> <p>Agency Response: With regard to the Commenter’s</p>
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		<p>argument that the proposed regulation is an “unfunded mandate,” this is essentially a cost of compliance argument which was raised by Commenter 6 and previously addressed by the Department (see response to Commenter 6).</p> <p>With regard to motor vehicle dealerships, and as noted in the Department’s Townhall Agency Background Document:</p> <p>“Any VADA member with a vehicle maintenance or repair facility that engages in the activities of welding, cutting or brazing (e.g. for removal, fabrication, and installation of exhaust systems and mufflers), are required by current regulations to render first aid until medical attention can be provided, §16 VAC 25-90-1910.252(c)(13), Welding, Cutting and Brazing.</p> <p>To the extent that any motor vehicle dealership engages in the above activities, they have been required for decades by federal identical regulations to have employees trained in first aid available for each workshift. Accordingly, the Commenter’s representation that the regulation represents an unfunded mandate to such dealerships for first aid training costs is</p>
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		<p>not supported by the record (NOTE: CPR is not referenced in §16 VAC 25-90-1910.252(c)(13), so that training would constitute a potential added cost under the final regulation).</p> <p>With regard to a situation when an employer is faced with an unforeseen situation, for example when a first aid trained employee is late for work, calls in sick, or changes jobs; or a foreseeable situation when a first aid trained employee is on vacation, the Department will review those situations on a case-by-case basis. As with any VOSH inspection, in deciding whether or not to take enforcement action, the Department will take into account mitigating circumstances (e.g., sickness, job changes, cancellation of scheduled first aid classes, etc.). The final regulation was purposely drafted to allow employer's some level of flexibility in achieving compliance, and as with all VOSH regulations, each employer must determine how it can most effectively and efficiently meet the requirements of the final regulation.</p> <p>Finally, the Commenter's representation that VADA members located in metropolitan or well-</p>
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		<p>populated areas have access to “timely” emergency services, is not supported by the record. As noted in the Basis for Proposed Action section above, and the Agency Background Document:</p> <p>“According to statistics for 2003 from the Department of Emergency Medical Services (EMS) website, EMS providers arrived at the scene of 522,345 calls with an average response time of approximately 12 minutes. Approximately 72 % of all reported calls were provided in less than 10 minutes, and approximately 87 % of all reported calls were provided in less than 15 minutes.</p> <p>....</p> <p>The Department requested more recent data from EMS for statewide response times for all calls as well as calls for industrial sites specifically for the years 2004 through 2006 (“Industrial premises” includes “building under construction, dockyard, dry dock, factory building or premises, garage (place of work), industrial yard, loading platform in factory or store, industrial plant, railway yard, shop (place of work), warehouse and workhouse.”</p> <p>....</p> <p>As the more recent statistics above indicate, the average</p>
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<p>Commenter 9, Continued</p>	<p>Finally, requiring all Virginia employers to designate and train first aid responders will also result in additional costs for compliance with related federal law. For example, an employee trained in first aid and identified by the employer as responsible for rendering medical assistance as part of his job duties is covered by the federal bloodborne pathogen standard. 29 C.F.R. § 1910.1030(a) (“Occupational Exposure means reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials that may result from the performance of an employee’s duties.”); <u>Enforcement Procedures for the Occupational Exposure to Bloodborne Pathogens</u>, OSHA Directive CPL 02-02-069 (11/27/2001), XIII(A)(3)(c) (“If an employee is trained in first aid and identified by the employer as responsible for rendering medical assistance as part of his/her job duties, that employee is covered by the standard. ... An employee who routinely provides first aid to fellow employees with the knowledge of the employer may also fall, de facto, under this designation even if the employer has not officially designated this employee as a first aid provider.”) (emphasis in original); see also OSHA Interpretation Letter from Richard Fairfax to Murray Buchanan (May 25, 2004). Employers with designated first aid providers are required to develop annual pathogen exposure control plans and provide the hepatitis B vaccine to these designated employees prior to exposure at no cost to the employee. 29 C.F.R. § 1910.1030(a), (f); OSHA Interpretation Letter from Richard Fairfax to Murray Buchanan (May 25, 2004). The Proposed Regulations fail to address the significant resulting additional costs which will be imposed upon Virginia employers who will now be required to comply with the bloodborne pathogen standard for many of their employees. Indeed, the Department fails to account for these costs in its estimated economic impact of the Proposed Regulations. See 25 Va. Reg. Regs. 282-87.</p>	<p>EMS response time for all cases statewide has been approximately 9 minutes for the last three years [2004-2006] (more than twice the 3-4 minute response time required by OSHA for life threatening injuries), while the average response time to industrial sites falls between 7 and 7.5 minutes, which is 75% above the 3-4 minute requirement. Furthermore, the chart demonstrates that for all cases statewide, only 12.5 to 13% of the responses occur within the 3-4 minute requirement for life threatening injuries, while from 19 to 21% of the responses occur to industrial sites within the 3-4 minute requirement.</p> <p>The above statistics graphically demonstrate that the large majority of employers in Virginia fail to meet the 3-4 minute exemption contained in the interpretations for the current VOSH first aid regulations for construction and general industry that would allow them to avoid having a trained first aid provider on site (the OSHA 3-4 minute interpretation applies to worksites with hazards that could cause life threatening injuries).” (Emphasis added). [Townhall Agency Background Document, Form TH-02, p. 9,</p>
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	<p>VADA members are very proud of their safety record in their dealership operations as a whole and in their service departments specifically. VADA has been active in promoting worker safety. In fact, VADA has an affiliated group providing worker's compensation insurance coverage for new car dealer employees that has an active and effective loss control plan. VADA and its members do not disagree with the general principal of improving already safe workplaces. However, VADA is very concerned that the Department's Proposed Regulations will have unintended and costly consequences for Virginia motor vehicle dealers.</p> <p>We urge the Department of Labor and Industry to reconsider the Proposed Regulations and revise them to provide additional detail concerning the types of industry and employee risks to which the new rules are applicable. Employers should be given a safe harbor for compliance by limiting the number of potential employees who must be first-aid trained to a reasonable number, and allowing exceptions for unforeseen employee absences. We also believe that it is necessary to allow employers (such as VADA's members) who are not engaged in hazardous activities to have the option of electing compliance with either the new Virginia or the current federal regulatory schemes.</p>	<p>September 4, 2008].</p> <p>Agency Response: In VOSH Directive 06-002, Designated First Aid Providers - Applicability of Bloodborne Pathogens Standard in General Industry, the Department interprets the current federal identical General Industry First Aid regulation, 16 VAC 25-90-1910.151(b) concerning first aid requirements for employers in the absence of an infirmary, clinic or hospital in near proximity to the workplace if emergency rescue services are not available within a 3 - 4 minute response time, to:</p> <p>“require employers to provide employees first aid training and to <u>designate</u> at least one employee per work location and workshift to render first aid in response to an accident.</p> <p>....</p> <p>Employees designated under the above standards to provide first aid are covered by the Bloodborne Pathogens Standards, §1910.1030. See VOSH Program Directive 02-400A, Enforcement Procedures for the Occupational Exposure to Bloodborne Pathogens Standard, 1910.1030, for citation policy.</p> <p>[NOTE: VOSH will not cite an employer when a</p>
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		<p>designated first aid responder fails to render proper first aid, or refuses to render first aid in response to an “exposure incident” as defined in §1910.1030(b).]”</p> <p>Although an employer may choose to do so on its own, it is not the intent of the Department in revising the first aid/CPR regulations in general industry and the construction industry to apply the full provisions of the Bloodborne Pathogens Standard to employees trained under the proposed first aid/CPR regulation. This should help to reduce the cost of complying with the proposed regulation, since current compliance costs associated with the Bloodborne Pathogen’s standard applicability to first aid responders would, for the most part, be eliminated.</p> <p>[NOTE: The Bloodborne Pathogen Standard can still apply in a first aid-related setting if an employer requires the first aid responder, or janitor, or other employee, as part of their job duties, to clean up blood residue after an accident, instead of having an outside contractor conduct the clean-up, see federal OSHA interpretations:</p> <p>“‘Good Samaritan’ acts are not covered under the</p>
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		<p>standard regardless of the particular type of injury involved. The work-relatedness of the injury is not the determining factor; rather coverage is invoked when, as stated above, an employee is expected to render assistance as part of his or her job duties.”</p> <p>....</p> <p>"Occupational exposure" is defined as the reasonable anticipation of contact with blood or other potentially infectious materials as a result of performing one's job duties and is not limited to employees who experience occupational exposure by virtue of the fact that they render certain health care services. An employee whose job includes the cleaning and decontaminating of contaminated areas or surfaces would be considered to have occupational exposure.”</p> <p>....</p> <p>While OSHA does not generally consider maintenance personnel and janitorial staff employed in non-health care facilities to have occupational exposure, it is the employer's responsibility to determine which job classifications or specific tasks and procedures involve occupational exposure. For example, OSHA expects products such as discarded sanitary napkins to be</p>
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		<p>discarded into waste containers which are lined in such a way as to prevent contact with the contents. But at the same time, the employer must determine if employees can come into contact with blood during the normal handling of such products from initial pick-up through disposal in the outgoing trash. If OSHA determines, on a case-by-case basis, that sufficient evidence of reasonably anticipated exposure exists, the employer will be held responsible for providing the protections of 29 CFR 1910.1030 to the employees with occupational exposure.”</p> <p>http://www.osha.gov/pls/oshaweb/owadis.p.show_document?p_table=INTERPRETATIONS&p_id=21010</p> <p>Accordingly, the Department is recommending that the word “designated” in the proposed regulations be replaced with the word “selected”, that the word “render” be replaced with the word “administer”, and that the word “immediate” be deleted, as in the following example:</p> <p>16 VAC 25-95</p> <p><u>A person or persons shall be designated [selected] by the</u></p>
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<p>Commenter 10: November 20, 2008 Mark Whiting, Vice President, Center for Community and Corporate Education, Greater Richmond Chapter, American Red Cross</p>	<p>Last year, the Center for Community and Corporate Education provided life saving training to over 38,000 individuals in the greater Richmond region – 80% of those people were trained at their workplace.</p> <p>The inclusion of a CPR requirement for high-risk workplaces is yet one more step to help save lives in our community. In fact, in many cases individuals trained in the workplace used their lifesaving skills to save the life of a family member, friend or in some cases, a perfect stranger.</p> <p>This regulatory change is fully supported by the Greater Richmond Chapter of the American Red Cross and we commend the Virginia</p>	<p>employer and adequately trained to render immediate <u>[administer]</u> first aid and cardio pulmonary resuscitation (CPR) during all workshifts on worksites containing job classifications <u>or [serious]</u> workplace hazards that could potentially expose employees to serious physical harm or death. The designated person or persons <u>[selected]</u> shall have a valid, current certificate in first aid and CPR training from the U. S. Bureau of Mines, the American Red Cross, the National Safety Council, <u>[American Heart Association,]</u> or equivalent training that can be verified by documentary evidence, and shall be available at the worksite to render <u>[administer]</u> first aid and CPR to injured or ill employees.</p> <p>Agency Response: The Department shares the commenter’s concern about the quality and effectiveness of some on-line training sources. However, it is OSHA and VOSH policy that we do not certify first aid training programs, instructors or trainees:</p> <p>“Each employer using any first aid course must satisfy him/herself that the course adequately covers the type of injuries/illnesses likely to be encountered in the</p>
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	<p>Department of Labor and Industry for taking this measure.</p> <p>One note, there has recently been an increase in firms that provide on-line computer based training in CPR and first aid. Some, including the Red Cross provide on-line training in conjunction with instructor-led, hands-on skills practice. Others do not. It is simple pay your money, take a test, and print your certification card. The Red Cross believes this is not an ideal teaching method and is in fact dangerous. If possible, an amendment to the proposed regulations to not accept on-line only training would be recommended.</p> <p>The Red Cross motto is “Trained-Empowered-Prepared.” This proposed regulation will indeed help business and industry across the Commonwealth be just that, “Trained-Empowered-Prepared.”</p>	<p>workplace.”</p> <p>http://www.osha.gov/pls/oshaweb/owadis.p.show_document?p_table=INTERPRETATIONS&p_id=21434</p> <p>Because of changing training techniques and technologies, the Department is hesitant to endorse or prohibit specific practices in regulatory language. The final regulation specifies that the selected first aid trainee must be “adequately trained” and that the trainee must have a “valid, current certificate in first aid and CPR training from the U. S. Bureau of Mines, the American Red Cross, the National Safety Council, the American Heart Association or equivalent training.” (Emphasis added.). The Department is of the opinion that use of the qualifying language “adequately trained”, and “equivalent training” to that of well-recognized and respected training organizations as the American Red Cross, National Safety Council and American Heart Association, provides sufficient guidance for employees and the regulated community to assess whether a particular training organization is legitimate or an unscrupulous organization that might try</p>
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		to sell inadequate or ineffective training modules. If further guidance is needed by the regulated community, individual issues can be address by official agency interpretations.
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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.

A couple of commenters expressed the concern of the impact of the proposed regulation on small employers:

Commenter 5: November 29, 2008 Wallace L., Virginia Citizen

“The regulation appears overburdensome to small employers especially those with small crews. For single person work crew it does allow for the use of only a communications device with 911 access, which greatly reduces the cost but for two person crews there is still a significant cost associated with this regulation, mostly in the area of schedule than cost. I believe the regulation for substitution of communication devices for crews of up to 3 persons should be adopted instead of just single person crews. Especially if they are within 15 minutes of a public safety service.”

Agency Response:

While the Department is sympathetic to the argument that the requirement for training in first aid/CPR for mobile crews - in the absence of the employer being able to make arrangements with another contractor on site - poses both scheduling and cost concerns for small employers, it does not recommend expanding the mobile communication option, available to single mobile employees, to mobile work crews of multiple employees.

First, as a point of clarification, under existing federal OSHA identical first aid regulations, an employer must be within 3-4 minutes of a medical facility or emergency response personnel when employees are potentially exposed to serious/life threatening

hazards, not the 15 minutes suggested by the commenter. The final regulations will not apply to employers whose employees are not potentially exposed to serious/life threatening hazards.

In addition, there does not appear to be any statistical or other rationale for deciding what size crew the mobile communication option should be extended to (2 person, 3 person, 4 person, etc. – any exception could be seen to swallow the rule). One of the main reasons for the Board proposing the regulatory change is to:

“eliminate inequities contained in the existing regulations by assuring all construction and general industry employees exposed to hazards that could cause death or serious physical harm equal access to first aid and CPR services, regardless of their specific industrial or construction setting, or the geographical location of their work.”

[Townhall Agency Background Document, Form TH-02, p. 9, September 4, 2008].

If the mobile communication option is extended to mobile crews with 2, 3, 4 or more people, those crews would be provided with less protection under the regulation than employees located at permanent locations and exposed to the same or similar hazards that could result in serious physical harm or death.

The only alternative considered would be to leave the current regulatory language in effect. This would result in the continued current disparity in medical services and first aid protection for employees where first aid responders are not required to be trained in CPR, and interpretations of the current regulations would allow an employer to comply with the regulation by opting to move an employee who had suffered a head or spinal injury by transporting them to a medical facility in an area where emergency medical responders were not available within the prescribed 3 to 4 minute time limit, in lieu of having a trained first aid responder present.

The current general industry regulation is overreaching in that it applies to all general industry employers, even when there are no workplace hazards present that could pose a threat of serious physical harm or death, such as in office settings (it should be noted that, with rare exceptions, construction worksites are universally acknowledged to contain both job classifications and workplace hazards that are likely to cause death or serious physical harm). The final regulations exclude worksites that do not contain such serious hazards from the requirement to provide designated employees with first aid and CPR training.

Where there is the issue of “one man facilities”, the final regulations provide some regulatory flexibility to affected employers by providing the employer with the option of either training the employee in first aid, making written arrangements with other employers or contractors at the worksite to provide first aid and CPR, or assuring that their employee has access to a communication system that will allow them to immediately request medical assistance through a 911 emergency call or comparable communications system.

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.

This final regulation has no potential impact on the institution of the family or family stability.