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Exempt Action Final Regulation Agency Background Document

Agency name	Virginia Department of Labor and Industry/Safety and Health Codes Board
Virginia Administrative Code (VAC) citation(s)	16VAC25-85-1904.2, Partial Exemption for Establishments in Certain Industries; 16VAC25-85-1904.39, Reporting Fatalities, Hospitalizations, amputations, and losses of an eye as a Result of Work-related Incidents to OSHA
Regulation title(s)	Occupational and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions
Action title	Amendments to Occupational and Illness Recording and Reporting Requirements
Final agency action date	July 9, 2015
Date this document prepared	July 10, 2015

When a regulatory action is exempt from executive branch review pursuant to § 2.2-4002 or § 2.2-4006 of the Virginia Administrative Process Act (APA) or an agency's basic statute, the agency is not required, however, is encouraged to provide information to the public on the Regulatory Town Hall using this form. Note: While posting this form on the Town Hall is optional, the agency must comply with requirements of the Virginia Register Act, Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.

The revised federal final rule makes several changes to the recording and reporting requirements in 29 CFR Part 1904:

A. Update to Non-Mandatory Appendix A to Subpart B of Part 1904 – Partially Exempt Industries

Appendix A to Subpart B of Part 1904 contains a list of industries that are partially exempt from requirements to keep records of work-related injuries and illnesses due to relatively low occupational injury and illness rates.

The updated appendix is based on more recent injury and illness data and lists industry groups classified by the North American Industry Classification System (NAICS). Prior to this recent change, the appendix listed industries classified by Standard Industrial Classification (SIC). The affected establishments are only partially exempt from keeping these records because, while they are exempt from routine OSHA injury and illness recordkeeping requirements, the Bureau of Labor Statistics (BLS) may require any establishment to respond to its Survey of Occupational Injuries and Illnesses (SOII), and OSHA may require any establishment to respond to its annual injury and illness survey.

B. Change in Reportable Work Related Injury and Illness Events

NOTE: Due to a legislative drafting error by the Department in the recently adopted revision to §40.1-51.1.D, the VOSH proposed regulation is not identical to the federal OSHA requirement to report in-patient hospitalizations, amputations and loss of an eye within 24 hours. The Virginia statute mistakenly requires an 8 hour reporting period.

The VOSH proposed regulation is required by law to be no less stringent than the statutory provision. The Department will be seeking to amend §40.1-51.1.D during the 2016 Session of the Virginia General Assembly to bring the statute into conformity with the OSHA regulation. Once the statute is amended, VOSH will file another proposed regulation with the Board to bring the VOSH regulation into conformity as well.

What is required to be reported has been expanded and certain reporting intervals for such reporting have changed. The current VOSH regulation requires all employers to report all work-related fatalities and in-patient hospitalizations of three or more employees to OSHA within eight hours of the event.

The new federal amendments retain the requirement for employers to report all work-related fatalities within eight hours of the event. Additionally, as modified by Virginia statute, employers are now required to report:

1. Each fatality resulting from a work-related incident within eight (8) hours of the death, as before, but this requirement now applies only to fatalities occurring within 30 days of a work-related incident;
2. Every in-patient hospitalization, not a minimum 3 or more as is required in the current regulation, resulting from a work-related incident and do so within eight (8) hours of the hospitalization;

3. All amputations resulting from work-related incidents, within eight (8) hours of the incident;
4. Each loss of an eye from a work-related incident within eight (8) hours of the incident;

C. Update to Include a Third Method of Reporting

The existing VOSH regulation allows employers to report covered incidents either by:

- telephone or in person to the VOSH Office that is nearest to the site of the incident, or
- using the central toll-free telephone number of either federal OSHA or the Virginia State Police.

In addition to these methods, the new federal revised final rule Section 1904.39(a)(3) now also allows employers a third way to report such incidents by:

- electronic submission using the fatality/injury/illness reporting application located on OSHA's public Web site at www.osha.gov. If the revised regulation is adopted by the Board, DOLI also plans to allow reporting on its website as well.

D. Other Significant Changes

1. Under §1904.39(b)(7) of the revised final rule, if the employer does not immediately learn about a reportable event, i.e., fatality, in-patient hospitalization, amputation, or loss of an eye, the employer must make the report within eight (8) hours for a fatality, as well as for an in-patient hospitalization, amputation, or loss of an eye, from the time the event is reported to the employer.
2. The amended federal regulatory text now provides an explicit definition for "in-patient hospitalization" to be used, specified at §§1904.39(b)(9) and 1904.39(b)(10)). The final rule defines "in-patient hospitalization" as a formal admission to the in-patient service of a hospital or clinic for care or treatment. Employers do not have to report in-patient hospitalizations that involve only observation and/or diagnostic testing. [79 FR 56156];
3. Section 1904.39(b)(11) of the revised federal final rule adds a specific definition of "amputation" as the traumatic loss of a limb or other external body part. An amputation includes a part, such as a limb or appendage that has been severed, cut off, amputated (either completely or partially); fingertip amputations with or without bone loss; medical amputations resulting from irreparable damage; amputations of body parts that have since been reattached. [79 FR 56188]

E. VOSH Enforcement Policy

Due to the legislative drafting error discussed above, no citations or penalties will be issued in instances where an in-patient hospitalization, amputation or loss of an eye are reported within

OSHA's requirement of 24 hours, but not within the 8 hours required by §40.1-51.1.D. Instead, a "de minimis" violation will be noted in the case file in accordance with §40.1-49.4.A.2. A "de minimis" violation is defined as one that has no direct or immediate relationship to safety and health.

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 July 9, 2015, the Safety and Health Codes Board adopted federal OSHA's amendments to the Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions, as authorized by Virginia Code §§40.1-22(5), 40.1-51.1.D., and 2.2-4006.A.4(c), with an effective date of September 15, 2015.

Family impact

Please assess the impact of this 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 regulatory action will have no impact on the institution of the family and family stability.

2015 SESSION

CHAPTER 270

An Act to amend and reenact § [40.1-51.1](#) of the Code of Virginia, relating to workplace safety; employer reporting requirements.

[H 1681]

Approved March 17, 2015

Be it enacted by the General Assembly of Virginia:

1. That § [40.1-51.1](#) of the Code of Virginia is amended and reenacted as follows:

§ [40.1-51.1](#). Duties of employers.

A. It shall be the duty of every employer to furnish to each of his employees safe employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees, and to comply with all applicable occupational safety and health rules and regulations promulgated under this title.

B. Every employer shall provide to employees by such suitable means as shall be prescribed in rules and regulations of the Safety and Health Codes Board, information regarding their exposure to toxic materials or harmful physical agents and prompt information when they are exposed to concentration or levels of toxic materials or harmful physical agents in excess of those prescribed by the applicable safety and health standards and shall provide employees or their representatives with the opportunity to observe monitoring or measuring of exposures. Every employer shall also inform any employee who is being exposed of the corrective action being taken and shall provide former employees with access to information about their exposure to toxic materials or harmful physical agents.

C. Every employer cited for a violation of any safety and health provisions of this title or standards, rules and regulations promulgated thereunder shall post a copy of such citation at the site of the violations so noted as prescribed in the rules and regulations of the Safety and Health Codes Board.

D. Every employer shall report to the Virginia Department of Labor and Industry within eight hours any work-related incident resulting in *(i)* a fatality ~~or in~~, *(ii)* the ~~in-patient~~ *inpatient* hospitalization of ~~three~~ *one* or more persons, *(iii)* an amputation, or *(iv)* the loss of an eye, as prescribed in the rules and regulations of the Safety and Health Codes Board.

E. Every employer, through posting of notices or other appropriate means, shall keep his employees informed of their rights and responsibilities under this title and of specific safety and health standards applicable to his business establishment.

F. An employer representative shall be given the opportunity to accompany the safety and health inspectors on safety or health inspections.

G. Nothing in this section shall be construed to limit the authority of the Commissioner pursuant to § [40.1-6](#) or the Board pursuant to § [40.1-22](#) to promulgate necessary rules and regulations to protect and promote the safety and health of employees.

**Occupational Injury and Illness Recording and Reporting Requirements –
NAICS Update and Reporting Revisions, 16VAC25-85-1904.2 and 16VAC25-85-1904.39**

As Adopted by the

Safety and Health Codes Board

Date: July 9, 2015



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: September 15, 2015

Occupational Injury and Illness Recording and Reporting Requirements –
NAICS Update and Reporting Revisions, 16VAC25-85-1904.2 and 16VAC25-85-1904.39

When the regulations, as set forth in the amendment to Regulation for Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions, 16VAC25-85-1904.2 and 16VAC25-85-1904.39, are applied to the Commissioner of the Department of Labor and Industry and/or to Virginia employers, the following federal terms shall be considered to read as below:

<u>Federal Terms</u>	<u>VOSH Equivalent</u>
OSHA	VOSH
29 CFR	VOSH Standard
Assistant Secretary	Commissioner of Labor and Industry
Area Office	Regional Office
Agency	Department
January 1, 2015	September 15, 2015

Final Rule

Part 1904 of Title 29 of the Code of Federal Regulations is hereby amended as follows:

PART 1904—[AMENDED]

■ 1. The authority citation for part 1904 continues to read as follows:
Authority: 29 U.S.C. 657, 658, 660, 666, 669, 673, Secretary of Labor's Order No. 3–2000 (65 FR 50017), and 5 U.S.C. 533.

■ 2. Amend § 1904.2 by revising paragraphs (a)(1) and (b) to read as follows:

§ 1904.2 Partial exemption for establishments in certain industries.

(a) *Basic requirement.* (1) If your business establishment is classified in a specific industry group listed in appendix A to this subpart, you do not need to keep OSHA injury and illness records unless the government asks you to keep the records under §§ 1904.41 or 1904.42. However, all employers must report to OSHA any workplace incident that results in an employee's fatality, inpatient hospitalization, amputation, or loss of an eye (see § 1904.39).

(b) *Implementation—(1) Is the partial industry classification exemption based on the industry classification of my entire company or on the classification of individual business establishments operated by my company?* The partial industry classification exemption applies to individual business establishments. If a company has several business establishments engaged in different classes of business activities, some of the company's establishments may be required to keep records, while others may be partially exempt.

(2) *How do I determine the correct NAICS code for my company or for*

individual establishments? You can determine your NAICS code by using one of three methods, or you may contact your nearest OSHA office or State agency for help in determining your NAICS code:

(i) You can use the search feature at the U.S. Census Bureau NAICS main Web page: <http://www.census.gov/eos/www/naics/>. In the search box for the most recent NAICS, enter a keyword that describes your kind of business. A list of primary business activities containing that keyword and the corresponding NAICS codes will appear. Choose the one that most closely corresponds to your primary business activity, or refine your search to obtain other choices.

(ii) Rather than searching through a list of primary business activities, you may also view the most recent complete NAICS structure with codes and titles by clicking on the link for the most recent NAICS on the U.S. Census Bureau NAICS main Web page: <http://www.census.gov/eos/www/naics/>. Then click on the two-digit Sector code to see all the NAICS codes under that Sector. Then choose the six-digit code of your interest to see the corresponding definition, as well as cross-references and index items, when available.

(iii) If you know your old SIC code, you can also find the appropriate 2002 NAICS code by using the detailed conversion (concordance) between the 1987 SIC and 2002 NAICS available in Excel format for download at the "Concordances" link at the U.S. Census Bureau NAICS main Web page: <http://www.census.gov/eos/www/naics/>.

■ 3. Revise Non-Mandatory Appendix A to Subpart B of Part 1904 to read as follows:

Non-Mandatory Appendix A to Subpart B of Part 1904—Partially Exempt Industries

Employers are not required to keep OSHA injury and illness records for any establishment classified in the following North American Industry Classification System (NAICS) codes, unless they are asked in writing to do so by OSHA, the Bureau of Labor Statistics (BLS), or a state agency operating under the authority of OSHA or the BLS. All employers, including those partially exempted by reason of company size or industry classification, must report to OSHA any employee's fatality, inpatient hospitalization, amputation, or loss of an eye (see § 1904.39).

NAICS Code	Industry
4412	Other Motor Vehicle Dealers.
4431	Electronics and Appliance Stores.
4461	Health and Personal Care Stores.
4471	Gasoline Stations.

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NAICS Code	Industry
4481 Clothing Stores.
4482 Shoe Stores.
4483Jewelry, Luggage, and Leather Goods Stores.
4511	..... Sporting Goods, Hobby, and Musical Instrument Stores.
4512	.....Book, Periodical, and Music Stores.
4531	.....Florists.
4532	.....Office Supplies, Stationery, and Gift Stores.
4812	.....Nonscheduled Air Transportation.
4861	..... Pipeline Transportation of Crude Oil.
4862	.....Pipeline Transportation Natural Gas.
4869	..... Other Pipeline Transportation.
4879	..... Scenic and Sightseeing Transportation, Other.
4885	.....Freight Transportation Arrangement.
5111	.....Newspaper, Periodical, Book, and Directory Publishers.
5112	.....Software Publishers.
5121	.....Motion Picture and Video Industries.
5122	.....Sound Recording Industries.
5151	.....Radio and Television Broadcasting.
5172	.....Wireless Telecommunications Carriers (except Satellite).
5173	..... Telecommunications Resellers.
5179	..... Other Telecommunications.
5181	..... Internet Service Providers and Web Search Portals.
5182	..... Data Processing, Hosting, and Related Services.
5191	..... Other Information Services.
5211	..... Monetary Authorities—Central Bank.
5221	..... Depository Credit Intermediation.
5222	..... Nondepository Credit Intermediation.
5223	..... Activities Related to Credit Intermediation.
5231	..... Securities and Commodity Contracts Intermediation and Brokerage.
5232	..... Securities and Commodity Exchanges.
5239	..... Other Financial Investment Activities.
5241	..... Insurance Carriers.
5242	..... Agencies, Brokerages, and Other Insurance Related Activities.
5251	..... Insurance and Employee Benefit Funds.
5259	..... Other Investment Pools and Funds.
5312	..... Offices of Real Estate Agents and Brokers.
5331	..... Lessors of Nonfinancial Intangible Assets (except Copyrighted Works).
5411	..... Legal Services.
5412	..... Accounting, Tax Preparation, Bookkeeping, and Payroll Services.
5413	..... Architectural, Engineering, and Related Services.
5414	..... Specialized Design Services.
5415	..... Computer Systems Design and Related Services.

NAICS Code	Industry
5416	..... Management, Scientific, and Technical Consulting Services.
5417	..... Scientific Research and Development Services.
5418	..... Advertising and Related Services.
5511	..... Management of Companies and Enterprises.
5611	..... Office Administrative Services.
5614	..... Business Support Services.
5615	..... Travel Arrangement and Reservation Services.
5616	..... Investigation and Security Services.
6111	..... Elementary and Secondary Schools.
6112	..... Junior Colleges.
6113	..... Colleges, Universities, and Professional Schools.
6114	..... Business Schools and Computer and Management Training.
6115	..... Technical and Trade Schools.
6116	..... Other Schools and Instruction.
6117	..... Educational Support Services.
6211	..... Offices of Physicians.
6212	..... Offices of Dentists.
6213	..... Offices of Other Health Practitioners.
6214	..... Outpatient Care Centers.
6215	..... Medical and Diagnostic Laboratories.
6244	..... Child Day Care Services.
7114	..... Agents and Managers for Artists, Athletes, Entertainers, and Other Public Figures.
7115	..... Independent Artists, Writers, and Performers.
7213	..... Rooming and Boarding Houses.
7221	..... Full-Service Restaurants.
7222	..... Limited-Service Eating Places.
7224	..... Drinking Places (Alcoholic Beverages).
8112	..... Electronic and Precision Equipment Repair and Maintenance.
8114	..... Personal and Household Goods Repair and Maintenance.
8121	..... Personal Care Services.
8122	..... Death Care Services.
8131	..... Religious Organizations.
8132	..... Grantmaking and Giving Services.
8133	..... Social Advocacy Organizations.
8134	..... Civic and Social Organizations.
8139	..... Business, Professional, Labor, Political, and Similar Organizations.

■ 4. Revise § 1904.39 to read as follows:

§ 1904.39 Reporting fatalities, hospitalizations, amputations, and losses of an eye as a result of work-related incidents to OSHA.

(a) *Basic requirement.* (1) Within eight (8) hours after the death of any employee as a result of a work-related incident, you must report the fatality to the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

(2) Within ~~twenty-four (24)~~ **eight (8)** hours after the in-patient hospitalization of one or more employees or an employee's

amputation or an employee's loss of an eye, as a result of a work-related incident, you must report the in-patient hospitalization, amputation, or loss of an eye to OSHA.

(3) You must report the fatality, inpatient hospitalization, amputation, or loss of an eye using one of the following methods:

- (i) By telephone or in person to the OSHA Area Office that is nearest to the site of the incident.
- (ii) By telephone to the OSHA toll-free central telephone number, 1-800-321-OSHA (1-800-321-6742).
- (iii) By electronic submission using the reporting application located on OSHA's public Web site at www.osha.gov.

(b) *Implementation—*(1) *If the Area Office is closed, may I report the fatality, in-patient hospitalization, amputation, or loss of an eye by leaving a message on OSHA's answering machine, faxing the Area Office, or sending an email?* No, if the Area Office is closed, you must report the fatality, in-patient hospitalization, amputation, or loss of an eye using either the 800 number or the reporting application located on OSHA's public Web site at www.osha.gov.

(2) *What information do I need to give to OSHA about the in-patient hospitalization, amputation, or loss of an eye?* You must give OSHA the following information for each fatality, in-patient hospitalization, amputation, or loss of an eye:

- (i) The establishment name;
- (ii) The location of the work-related incident;
- (iii) The time of the work-related incident;
- (iv) The type of reportable event (i.e., fatality, in-patient hospitalization, amputation, or loss of an eye);
- (v) The number of employees who suffered a fatality, in-patient hospitalization, amputation, or loss of an eye;
- (vi) The names of the employees who suffered a fatality, in-patient hospitalization, amputation, or loss of an eye;
- (vii) Your contact person and his or her phone number; and
- (viii) A brief description of the work related incident.

(3) *Do I have to report the fatality, inpatient hospitalization, amputation, or loss of an eye if it resulted from a motor vehicle accident on a public street or highway?* If the motor vehicle accident occurred in a construction work zone, you must report the fatality, in-patient hospitalization, amputation, or loss of an eye. If the motor vehicle accident occurred on a public street or highway,

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but not in a construction work zone, you do not have to report the fatality, inpatient hospitalization, amputation, or loss of an eye to OSHA. However, the fatality, in-patient hospitalization, amputation, or loss of an eye must be recorded on your OSHA injury and illness records, if you are required to keep such records.

(4) *Do I have to report the fatality, inpatient hospitalization, amputation, or loss of an eye if it occurred on a commercial or public transportation system?* No, you do not have to report the fatality, in-patient hospitalization, amputation, or loss of an eye to OSHA if it occurred on a commercial or public transportation system (e.g., airplane, train, subway, or bus). However, the fatality, in-patient hospitalization, amputation, or loss of an eye must be recorded on your OSHA injury and illness records, if you are required to keep such records.

(5) *Do I have to report a work-related fatality or in-patient hospitalization caused by a heart attack?* Yes, your local OSHA Area Office director will decide whether to investigate the event, depending on the circumstances of the heart attack.

(6) *What if the fatality, in-patient hospitalization, amputation, or loss of an eye does not occur during or right after the work-related incident?* You must only report a fatality to OSHA if the fatality occurs within thirty (30) days of the work-related incident. For

an in-patient hospitalization, amputation, or loss of an eye, you must only report the event to OSHA if it occurs within ~~twenty-four (24)~~ **eight (8)** hours of the work-related incident. However, the fatality, in-patient hospitalization, amputation, or loss of an eye must be recorded on your OSHA injury and illness records, if you are required to keep such records.

(7) *What if I don't learn about a reportable fatality, in-patient hospitalization, amputation, or loss of an eye right away?* If you do not learn about a reportable fatality, in-patient hospitalization, amputation, or loss of an eye at the time it takes place, you must make the report to OSHA within the following time period after the fatality, in-patient hospitalization, amputation, or loss of an eye is reported to you or to any of your agent(s): Eight (8) hours for a fatality, and ~~twenty-four (24)~~ **eight (8) hours** for an in-patient hospitalization, an amputation, or a loss of an eye.

(8) *What if I don't learn right away that the reportable fatality, in-patient hospitalization, amputation, or loss of an eye was the result of a work-related incident?* If you do not learn right away that the reportable fatality, in-patient hospitalization, amputation, or loss of an eye was the result of a work-related incident, you must make the report to OSHA within the following time period after you or any of your agent(s) learn that the reportable fatality, in-patient

hospitalization, amputation, or loss of an eye was the result of a work-related incident: Eight (8) hours for a fatality, and ~~twenty-four (24)~~ **eight (8)** hours for an inpatient hospitalization, an amputation, or a loss of an eye.

(9) *How does OSHA define "in-patient hospitalization"?* OSHA defines inpatient hospitalization as a formal admission to the in-patient service of a hospital or clinic for care or treatment.

(10) *Do I have to report an in-patient hospitalization that involves only observation or diagnostic testing?* No, you do not have to report an in-patient hospitalization that involves only observation or diagnostic testing. You must only report to OSHA each inpatient hospitalization that involves care or treatment.

(11) *How does OSHA define "amputation"?* An amputation is the traumatic loss of a limb or other external body part. Amputations include a part, such as a limb or appendage, that has been severed, cut off, amputated (either completely or partially); fingertip amputations with or without bone loss; medical amputations resulting from irreparable damage; amputations of body parts that have since been reattached. Amputations do not include avulsions, enucleations, degloving, scalplings, severed ears, or broken or chipped teeth.

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