

Virginia Occupational Safety & Health

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VOSH

VOSH PROGRAM DIRECTIVE: 09-001

ISSUED: August 1, 2024

Subject: VOSH Field Operations Manual (FOM) - Revision 3.8

Purpose: This Directive officially issues revision 3.8 of VOSH Field Operations Manual (FOM) which was last revised in August, 2023 into the Program Directive System and establishes the effective date for its usage.

This Program Directive is an internal manual, not a statutory or regulatory rule or guidance document, and is intended to provide instructions to VOSH Personnel regarding internal operation of the Virginia Occupational Safety and Health Program and is solely for the benefit of the program. This document is not subject to the Virginia Register Act or the Virginia Administrative Process Act; it does not have general application or the force of law.

Scope: This Directive applies VOSH-wide.

References: OSHA Instruction CPL 02-00-159, Field Operations Manual (October 1, 2015)
OSHA Instruction CPL 02-00-160, Field Operations Manual (August 2, 2016)

Cancellation: **VOSH Program Directive 09-001 (August 1, 2023)**
VOSH Program Directive 09-001 (August 1, 2022)
VOSH Program Directive 09-001 (August 1, 2021)
VOSH Program Directive 09-001 (August 1, 2020)
VOSH Program Directive 09-001 (August 1, 2019)
VOSH Program Directive 09-001 (November 1, 2017)
VOSH Program Directive 02-001G (October 1, 2013)
VOSH Program Directive 02-001I (August 2, 2017)

Effective Date: **August 1, 2024**

Action: The Directors and Managers shall assure that the change contained in this revision to the VOSH FOM is adhered to by VOSH personnel.

NOTICE: Virginia Code § 40.1-49.4.P provides that:

“the Commissioner annually shall adjust the maximum civil penalties stated in subsections G through J each year by the percentage increase, if any, in the United States Average Consumer Price Index for all Urban Consumers (CPI-U), as published by the Bureau of Labor Statistics of the United States Department of Labor, from its monthly average for the previous calendar year. The amount of each adjustment to the maximum civil penalties shall be rounded to the nearest whole dollar. The adjustments to the maximum civil penalties shall be effective on each August 1.” (Emphasis added).

REFERENCE: The CPI-U for 2023 was 1.03241 (3.241%).

<https://www.federalregister.gov/documents/2024/01/11/2024-00253/federal-civil-penalties-inflation-adjustment-act-annual-adjustments-for-2024>

The maximum penalty provisions of the above-named directive are enforceable by the VOSH Program under the terms of Virginia Code § 40.1-49.4.P on August 1, 2024, and apply to all VOSH inspections opened on or after August 1, 2024.

Expiration Date: Not Applicable

Gary G. Pan
Commissioner

Distribution: Commissioner of Labor and Industry
Assistant Commissioner
VOSH Directors and Managers
VOSH Compliance and Cooperative Programs Staffs
Division of Hearing and Legal Services
OSHA Region III and OSHA Norfolk Area Office

Attachment: VOSH Field Operations Manual (FOM) - **Revision 3.8**

Document Background:

On August 2, 1977, VOSH submitted a compliance manual for safety and health compliance officers. By letters dated November 20, 1978, and August 2, 1979, VOSH informed federal OSHA that it would adopt and implement federal OSHA's Field Operations Manual and Industrial Hygiene Field Operations Manual. VOSH adopted subsequent federal changes to these manuals by letters dated August 26, 1981, February 9, 1984, and June 18, 1984.

On July 30, 1984, VOSH submitted to federal OSHA a completely revised FOM, reflecting changes to the federal manual through June 1, 1984, with only minor changes being made to accommodate Virginia procedures and terminology. The VOSH FOM was revised on May 20, 1986, and incorporated administrative and procedural changes which resulted from the merging of the Bureau of Occupational Health of the Virginia Department of Health into the Department of Labor and Industry. Subsequently the FOM was updated on March 1, 1991, and again on July 1, 1997. On January 1, 2002, VOSH completed and issued a comprehensive redrafting of the FOM to generally conform to the then existing federal FIRM, CPL 2.103. The FOM issued 01 June 2011, (*Version 2.0*), reflects the substantial rewrite and reintroduction of the federal FOM as reflected in CPL 02-00-148 (09 November 2009). The FOM issued October 1, 2013, addressed changes of the federal FOM reflected in CPL 02-00-150 (April 22, 2011). The FOM issued November 1, 2017, addressed changes to the federal FOM reflected in OSHA Instruction CPL 02-00-159, Field Operations Manual (October 1, 2015), OSHA Instruction CPL 02-00-160, Field Operations Manual (August 2, 2016)

This most recent change primarily updates VOSH maximum penalties in Chapter 11. As per the previous versions, this revised FOM documents VOSH internal operating procedures. It contains guidelines for scheduling inspections, conducting inspections, case file development and the writing of case narratives, preparing citations, assessing penalties and other matters primarily related to the Compliance Officer for the operation of the VOSH program.

Summary of Changes in this update by type and form:

- ❖ **Non-substantive Changes:** There are also a number of typographical and housekeeping corrections, grammatical rewrites, as well as other changes of formatting, reordering, or relocation of text within or between chapters. There are also corrections for continuity throughout the document. **These changes, if notable, may be highlighted in yellow; however, they are not listed on the document revision log.**
- ❖ **VOSH Substantive Procedural Changes:** There are VOSH initiated procedural updates throughout this update. Such revisions are highlighted in yellow throughout the document for ease of use and are also listed on the document revision log on the next page.
- ❖ **OSHA Required Substantive Changes:** If there are federal OSHA required changes in this update, such revisions are highlighted in turquoise for ease of use and are also listed on the document revision log on the next page.

CHAPTER 11

PENALTIES

I. Penalties

A. **General Policy**

The penalty structure provided under §40.1-49.4, of the *Code of Virginia*, is intended primarily to provide an incentive toward correcting violations voluntarily, not only to the offending employer, but also to other employers who may be in violation of the same infractions of the standards or regulations. Administratively, VOSH will not issue a penalty of less than \$100.

1. **Deterrent to Violations**

Proposed penalties are not designed as punishment for violations or as a source of income for the Department; however, the penalty amounts should be sufficient to serve as an effective deterrent to violations.

2. **Other-Than-Serious Violations**

In accordance with §40.1-49.4.G., *Code of Virginia*, other-than-serious or regulatory violations may be cited without a penalty. There is no statutory requirement that a penalty must be assessed when the violation is not serious; but a penalty must be assessed when the violation is serious.

B. **Civil Penalties**

The following factors are used to calculate a proposed penalty.

1. **Type of Violation as a Factor**

In assessing civil penalties for violations, a distinction is made between serious and other-than-serious violations.

- a. Serious. The maximum penalty that may be assessed for a serious violation is **\$15,875** at issuance.
- b. Other-Than-Serious. The maximum penalty that may be assessed for an other-than-serious violation is **\$15,875**.
- c. Willful or Repeated. Willful or repeated violations may be based on hazards classified as either serious or other-than-serious. In the case of willful or repeated violations, a civil penalty of up to **\$158,725** may be assessed, but the penalty may not be less than \$10,000 for a willful violation.
- d. Regulatory Violations. The maximum penalty that may be assessed for an other-than-serious regulatory violation is **\$15,875**.

- e. Failure to Abate. Penalties for failure to abate a violation may be up to **\$15,875** for each calendar day that the violation continues beyond the final abatement date.

2. Statutory Authority

Section 40.1-49.4.A.4.(a) provides the Commissioner with the statutory authority to assess civil penalties for violations of §40.1-49.4.

- a. Section 40.1-49.4.H., *Code of Virginia*, provides that any employer who has received a citation for an alleged violation of a serious nature shall be assessed a civil penalty of up to **\$15,875** for each violation.
- b. Section 40.1-49.4.G., *Code of Virginia*, provides that, when the violation is specifically determined to be other-than-serious, a civil penalty of up to **\$15,875** may be assessed for each violation.
- c. Section 40.1-49.4. G., *Code of Virginia*, provides that, when violations of certain posting requirements (refer to Section I.B.14) are cited, a civil penalty of up to **\$15,875** shall be assessed.

3. Minimum Penalties

The following guidelines apply:

- a. Serious. **The minimum penalty amount for serious violations shall be \$600 at issuance.**
- b. Willful. **The assessed penalty for any willful violation shall not be less than \$10,000.** This is an OSH Act statutory minimum and not subject to administrative discretion.

4. Penalty Factors

Section 40.1-49.4.A.4(a), *Code of Virginia*, provides that, in assessing penalties, due consideration shall be given to the following factors:

- a. The **gravity** of the violation,
- b. The **size** of the business (i.e., number of employees),
- c. The **good faith** of the employer, and
- d. The employer's **history** of previous violations.

Neither a penalty calculation factor, e.g., probability assessment factors, nor penalty adjustment factor, e.g., the gravity of the violation, size of the business, good faith of the employer, or the employer's history of previous violations, shall materially affect the final penalty calculation if it would tend to dilute the penalty

excessively.

EXAMPLE: In a particularly dangerous trenching situation or in a confined space where there is insufficient oxygen to support life, even when only one or two employees are exposed, it may be appropriate to reduce the weight that might be otherwise given to the number of employees exposed.

5. Gravity of Violation

The gravity of the violation primarily determines penalty amounts. It shall be the basis for calculating the basic penalty for both serious and other-than-serious violations.

- a. Gravity Factors. To determine the gravity of a violation, the following two assessments shall be made:
 - (1) The **severity** of the injury or illness which could result from the alleged violation.
 - (2) The **probability** that an injury or illness could occur as a result of the alleged violation.
- b. Other Penalty Factors. The size of the business, the good faith of the employer, and the history of previous violations shall be taken into account in deciding whether and to what extent the gravity-based penalty (GBP) may be reduced or increased.
- c. Severity Assessment. The classification of the alleged violation(s) as serious or other-than-serious is based on the severity of the injury or illness which could *reasonably* be expected to result from the employee's exposure to the hazard. This classification constitutes the first step in determining the gravity of the violation. The most serious injury or illness which is reasonably predictable as a result of an employee's exposure to the safety or health hazard cited shall be assigned a severity assessment in accordance with the following factors:
 - (1) High Severity. This would include death from injury or illness, injuries involving permanent disability, or chronic, irreversible illnesses.
 - (2) Medium Severity. This would include injuries or temporary, reversible illnesses resulting in hospitalization, substantial outpatient care of a variable but limited period of disability.
 - (3) Low Severity. This would include injuries or temporary,

reversible illnesses not resulting in hospitalization and requiring only minor supportive treatment, i.e., limited out-patient care.

- (4) Minimal Severity. This would include other-than-serious violations. Although such violations reflect conditions which have a direct and immediate relationship to the safety and health of employees, the injury or illness most likely to result would probably not cause death or serious physical harm.
- d. Probability Assessment. The probability (likelihood or chance) that an injury or illness would result from a hazard affects the amount of the penalty to be assessed. However, **probability has no role in determining the classification of the violation.**

To determine penalty, the Compliance Officer, using professional judgment, shall identify and evaluate all of the factors influencing the probability of the occurrence of an injury or illness and shall assign them a weight in accordance with the relative contribution of each.

Probability shall be categorized as either greater or lesser probability:

- (1) Greater probability. This applies when a death or an injury or illness has actually occurred or the likelihood that an injury or illness will occur is relatively high, for example, when near miss has actually occurred. The violation shall be assessed as “greater probability.”
- (2) Lesser probability. This applies when the likelihood that an injury or illness will occur is judged to be relatively low.
- (3) Violations. When violations likely to result in injury and/or illness are involved, the following circumstances shall be considered (and documented in the case file).
- (a) Probability for Imminent Danger. The Compliance Officer shall assign a greater probability value for hazards that are determined to be imminent danger. *See Chapter 7, Fatality and Imminent Danger, for definition and procedures for imminent danger.*
- (b) Probability Rating Chart. The Compliance Officer shall use the Probability Rating Chart for assessing probability in alleged hazards for situations other than where a death, injury, illness or imminent danger situation has

actually occurred:

Rating	1	2	3	4	5	6	7	8
# of Employees	1	2	3	4	5	6	7	8 or more
Frequency	<1 wk	1/wk	2-6/wk	<2h/day	2-5h/day	4-5h/day	6-7h/day	8+h/day
Proximity	Marginal			In Danger Zone				Point of danger
Other Factors	1	"other factors" must be justified on 15						8

1. Add the rating for each factor used = sum
 2. Divide the sum by the total number of factors used, and
 3. Round the result to the nearest tenth.

1.0 – 4.5 = Lesser Probability
 4.6 – 8.0 = Greater Probability

(Example: # of Employees 5 + Frequency 4 + Proximity 5 = 14
 Sum of 14/3 factors = 4.67
 Rounded to 4.7 total = Greater Probability)

See below for further guidance on the elements of actual or potential exposure, other considerations in determining probability and other factors affecting probability.

(c) Safety Violations. Among the factors to be considered are:

- 1 Number of employees exposed.
- 2 Frequency of exposure or the duration of employee overexposure to contaminants.
- 3 Employee proximity to hazardous condition ("marginal", "in danger zone" "point of danger").

Other factors.

- 4 Weather/working conditions.
- 5 Employee skill level.
- 6 Employee awareness of hazard.
- 7 Pace/speed/nature of task/work.
- 8 Use of appropriate PPE.
- 9 Medical surveillance program.
- 10 Youth and inexperience of employees, especially those under 18 years old.
- 11 Other pertinent working conditions or mitigating circumstances.

EXAMPLE:

Greater Probability: Five employees exposed 4-5 hours per day, installing roofing materials on a 10/12 pitch roof, gusty wind and showers. Two of the employees have less than two weeks experience, no fall protection equipment on site, no documented safety training or orientation.

Probability Rating Chart Application:

<u>Factor</u>	<u>Rating</u>
Number of employees:	5
Frequency:	6
Proximity:	8
Other:	<u>8</u>
Total:	27

Sum of 27 (rating) / 4 (factors with score) = 6.75

Rounded to: 6.7 - Greater Probability

Versus:

Lesser Probability: Two employees exposed 4 hours per week, installing roofing materials on a 4/12 pitch roof, sunny and fair weather, both workers having over three

(3) years' experience.

Probability Rating Chart Application:

<u>Factor</u>	<u>Rating</u>
Number of employees:	2
Frequency:	3
Proximity:	6
Other:	<u>0</u>
Total:	11

Sum of 11 (rating) / 3 (factors with score) = 3.67

Rounded to: 3.7 - Lesser Probability

(d) Health Violations. Program violations are **not** included in probability assessment, but are considered separately in Section I.B.6. Health violations typically involve exposure to chemicals, noise, infectious agents, heat stress, or non-ionizing radiation.

- 1 Number of workers exposed to the hazardous conditions, both at the same time and sequentially.
- 2 Duration of employee overexposure to hazardous levels of contaminants or other illness-producing conditions.
- 3 Use of appropriate personal protective equipment; whether, for example, such equipment is utilized by all exposed employees and the employer has an effective PPE program in effect should be mentioned, or whether it is not utilized by any of the exposed employees and the employer has no program.
- 4 Medical surveillance program is in place as appropriate and effectively protects the employees, and a defective program which only partially and inadequately protects them, or no

medical surveillance program is in effect.

EXAMPLE:

Lesser Probability: One employee exposed to chemicals 4 hours per day with no GHS update training provided, but the employee is aware of specific chemical hazards and appropriate PPE is provided and used.

Probability Rating Chart Application:

<u>Factor</u>	<u>Rating</u>
Number of employees:	1
Frequency:	6
Proximity:	1
Other:	<u>0</u>
Total:	8

Sum of 8 (rating) / 3 (factors with score) = 2.67

Rounded to: 2.7 - Lesser Probability

Versus:

Greater Probability: Same facts as above (One employee exposed to chemicals 4 hours per day with no GHS update training provided, but aware of specific chemical hazards), except PPE is not provided to the employee.

Probability Rating Chart Application:

<u>Factor</u>	<u>Rating</u>
Number of employees:	1
Frequency:	6
Proximity:	7
Other:	<u>0</u>

Total: **14**

Sum of 11 (rating) / 3 (factors with score) = 4.67

Rounded to: 4.7 - Greater Probability

- (e) Elements of Actual or Potential Exposure. The following three items shall normally be considered for actual or potential exposure in relation to the hazard and standard violated, and weighted accordingly (as documented in the case file). Violations with actual overexposure will usually receive a higher probability factor than comparable violations with potential overexposure. All violations shall be considered for conditions, circumstances, and/or practices at the worksite which would affect the likelihood of harmful contact, ingestion, inhalation, or other harmful exposure cited.
- 1 Level of Exposure. Generally, the greater the level of exposure, the greater the probability of harm. Inhalation exposure shall be considered in relation to the level above the PEL, STEL, ceiling, IDLH, or proximity to the lethal level. Ingestion or contact exposure shall take into account area and amount of contaminant in solid or liquid form, and relation to the likelihood of harmful exposure. Noise shall be considered for the level above the PEL. Other agents shall be considered in relation to the level above established limits or for the intensity of exposure where there is a dose/effect relationship.
 - 2 Frequency/Duration of Employee Over-exposure. Generally, the greater the frequency or length of exposure, the greater the probability is for harm. Frequency of exposure (how often) may be more significant for acutely acting agents, whereas duration (how long) may be more significant for chronically acting agents.
 - 3 Number of Employees Exposed. The probability of harm is usually dependent upon the number of employees exposed. An exception would be when the exposure situation reaches an upper

level in which all would be affected if the event or exposure occurred.

(f) Other Considerations in Determining Probability. The following two items may also be considered in determining probability. These considerations will be used less often, but the Compliance Officer shall weigh them into the probability assessment as applicable (and document in the case file.)

1 Personal Protective Equipment. When the use of appropriate PPE is a factor, the Compliance Officer shall consider whether such equipment is utilized by all exposed employees and the extent to which such equipment is *effectively* utilized, if at all.

2 Medical Surveillance. Where medical surveillance is a factor, the Compliance Officer shall consider if it effectively protects the employees or if it is a defective program which only partly and inadequately protects them, or no medical surveillance at all is in effect.

(g) Other Factors Affecting Probability. There are other factors which may significantly affect the probability that the hazard will produce an injury or illness. They shall also be considered and documented:

1 Mitigating Circumstances. Situations or conditions that may lower the probability, such as specific safety or health instructions, effective training programs, evidence of correction underway, warning signs and labels or special procedures, or mandatory administrative controls providing some, though not complete protection, may be used to lower the probability.

2 Contributing Circumstances. On the other hand, contributing circumstances may be used to raise probability. This would include inappropriate or inadequate safety or health instructions, inadequate or no training, or widespread hazardous conditions or faulty equipment, with

little or no attempt to control them, may be used to raise the probability.

6. Final Probability Assessment

All of the factors outlined above shall be considered together in arriving at a final probability assessment.

- a. A factor shall not materially affect the final probability assessment if, based on the professional judgment of the Compliance Officer as documented in the case file, it:
 - (1) Does not significantly influence the probability of an injury or illness causing condition, or
 - (2) Would tend to dilute the penalty excessively.

EXAMPLE: In a particularly dangerous trenching situation or in a confined space where there is insufficient oxygen to support life, even when only one or two employees are exposed, it may be appropriate to reduce the weight given to the number of employees exposed.

This can be achieved by either properly classifying the hazard as an imminent danger situation which would automatically result in a greater probability assessment, or by eliminating the use of the “number of employees exposed” factor on the Probability Rating Chart, and only using the “frequency”, “proximity” and “other” factors in assessing probability.

- b. When strict adherence to the probability assessment procedures would result in an unreasonably high or low gravity, the Compliance Officer shall use professional judgment to adjust the probability appropriately. Such decisions shall be adequately documented in the case file.

7. Program Violations

Certain program and certification requirements have specific performance criteria within the body of their codes and can be readily processed through the gravity based penalty (GBP) structure. These include, but are not limited to: hazard communication program, respirator protection program, confined space entry program, bloodborne pathogen program, and the hearing conservation program. (*Refer to the applicable program directive for further guidance*).

Other program and certification requirements are not as readily processed through the GBP structure. These include, but are not limited to: accident prevention program, first aid certification, fall protection work plan, lockout/tagout program, logging plan, effective supervision, etc.

- a. Classification. The following procedures shall generally be followed in determining the severity of the program violation (*See VOSH PD 01-009A, October 15, 2007, or successor for further guidance*):
 - (1) Other-than-serious. Program violations are classified as other-than-serious when it is documented that the employer does not have a written program or the program is missing one (1) or more element(s) *and no related serious hazards exist*.
 - (2) Serious. Program violations are classified as serious when it is documented that the employer does not have the required written program or certification *and it can be documented that a related serious hazard is associated with a program deficiency*.

8. Gravity-Based Penalty (GBP)

The GBP is an unadjusted penalty and is calculated in accordance with the following procedures:

- a. **Severity and Probability**
The GBP for each violation shall be determined based on an appropriate and balanced professional judgment, combining the severity assessment and the final probability assessment.
- b. **For Serious Violations**, the GBP shall be assigned on the basis of the following scale:

<u>Severity</u>	<u>Probability</u>	<u>GBP</u>
High	Greater	\$15,875
Medium	Greater	\$12,135
Low	Greater	\$8,730

<u>Severity</u>	<u>Probability</u>	<u>GBP</u>
High	Lesser	\$13,415
Medium	Lesser	\$10,220
Low	Lesser	\$7,025

A medium gravity violation is one with a GBP between \$8,730 and \$13,415.

A low gravity violation is one with GBP of \$7,025.

- c. **Regulatory Violations**

Penalties to be assessed for regulatory violations are discussed in I.B.14. of this chapter.

d. **Penalty Adjustment**

OIS shall be used for determining appropriate adjusted penalties for violations, which consider the employer's good faith, size of business, and history.

- No adjustment of penalty amounts for good faith is made in cases for high gravity serious violations.
- The Regional Safety or Health Director has the option to determine that no adjustment for an other-than-serious violation may, on occasion, be appropriate and a high unadjusted penalty amount is warranted.

e. **Other-Than-Serious (O-T-S) Severity Assessment**

For other-than-serious safety and health violations, there is only minimal severity:

- (1) Other-than-serious safety and health violations judged to be of greater probability shall be assigned a GBP of \$1,300 to which appropriate adjustment factors shall be applied.
- (2) Other-than-serious safety and health violations judged to be of lesser probability shall be cited with no penalty.
- (3) Penalties to be proposed for other-than-serious regulatory violations are discussed in the section covering regulatory violations.

9. **Gravity Calculations for Combined or Grouped Violations**

Combined or grouped violations are normally considered as one violation and shall be assessed one GBP. *(For guidance on when to combine or group violations see Chapter 10, Violations)* The following procedures apply to the calculation of penalties for combined and grouped violations:

a. **Combined Violations**

Severity and probability assessments for combined violations shall be based on the instance with the highest gravity.

It is not necessary to complete the penalty calculations for each instance or sub item of a combined or grouped violation if it is clear which instance or sub item will have the highest gravity.

b. **Grouped Violations**

For grouped violations, the following special guidelines shall be adhered to:

(1) Severity Assessment. There are two considerations to be kept in mind in calculating the severity of grouped violations:

(a) The severity assigned to the grouped violation shall be no less than the severity of the most serious injury or illness that could reasonably be expected to result from the employee's exposure to the hazard on any single item.

(b) If a more serious injury or illness is reasonably predictable from the grouped items than from any single violation item, the more serious injury or illness shall serve as the basis for the calculation of the severity factor of the grouped violation.

(2) Probability Assessment. There are two considerations to be kept in mind in calculating the probability of grouped violations:

(a) The probability assigned to the grouped violation shall be no less than the probability of the item which is most likely to result in an injury or illness.

(b) If the overall probability of injury or illness is greater with the grouped violation than with any single violation item, the greater probability of injury or illness shall serve as the basis for the calculation of the probability assessment of the grouped violation.

In addition, it should be kept in mind that some individual probability factors may be increased by grouping, and others may not. The increased values shall be used in the probability calculation if, in the professional judgment of the Compliance Officer, a more appropriate assessment will result. For example, the number of employees exposed may be increased, while the proximity factor may not.

(3) Gravity-Based Penalty. A single severity assessment and a single probability assessment for the combined or grouped violation will result from the foregoing considerations. That result shall be the basis for determining an appropriate GBP for the violation item according to the guidelines.

10. Penalty Adjustment Factors

Since these adjustment factors are based on the general character of a business and its safety and health performance, the factors shall generally be calculated only once for each employer. After the classification and probability ratings have been determined for each violation, the adjustment factors shall be applied subject to the limitations indicated in the following paragraphs.

- a. Penalties assessed for violations that are classified as high severity and greater probability shall be adjusted only for size and history.
- b. Penalties assessed for violations that are classified as repeated shall be adjusted only for size.
- c. Penalties assessed for regulatory violations which are classified as willful shall be adjusted only for size. Penalties assessed for violations classified as willful shall be adjusted only for size and history.

NOTE: If one violation is classified as willful, no reduction for good faith can be applied to any of the violations found during the same inspection. The employer cannot be willfully in violation and at the same time acting in good faith.

- d. The rate of penalty reduction for size of business, employer's good faith and employer's history of previous violations shall be calculated on the basis of the criteria described in the following paragraphs:

- (1) Size. A maximum penalty reduction of 70 percent is permitted for small businesses. "Size of business" shall be measured on the basis of the maximum number of employees of an employer at all workplaces nationwide, including federal OSHA and State Plan States at any one time during the previous 12 months. Information on the total number of an employer's employees can generally be obtained at the inspected worksite. However, on occasion, it may be necessary to obtain or confirm the information from the employer's headquarters.

- (a) The rates of reduction are as follows:

<u>Number of Employees</u>	<u>Percent Reduction</u>
1-25	70%
26-100	40%
101-250	20%
251 or more	zero

- (b) When a small business has one or more serious violation(s) of high gravity or a number of serious violations of moderate gravity indicating a lack of concern for employee safety and health, the Regional Safety or Health Director may determine that only a partial reduction in penalty shall be permitted for size of business.
 - (c) An employer's ability to pay a penalty shall not normally be investigated or considered in determining the penalty reduction for size of business.
 - (d) However, if an employer presents convincing evidence at an informal conference of inability to pay a penalty because of financial difficulties, the Regional Safety or Health Director may determine that a penalty reduction or a penalty installment payment plan is appropriate. Such a determination shall be documented in the case file.
 - (e) Where VOSH has reasonable cause to believe that employee misclassification has occurred, penalty reductions for *size and good faith* will NOT be afforded to the employer. (*Refer to Chapter 15, I.B.3.d.*)
- (2) Good Faith. A penalty reduction of up to 25 percent is permitted in recognition of an employer's "good faith" in increments of 0%, 5%, 10%, 15%, 20% and 25%.

The maximum allowable good faith reduction for "primary considerations" (*see below*) is 15%.

The maximum allowable good faith reduction for written programs is 10%.

The total adjustment for good faith will be the sum of the percentage scores arrived at by the CSHO on primary considerations and written programs.

EXCEPTION: If one willful violation is found, no good faith reduction can be applied to any of the violations found during the same inspection. As stated above, an employer cannot be willfully in violation of the Act and at the same time be acting in

“good faith.”

No *single* factor shall be used to determine good faith. Primary considerations include:

- (a) The employer’s cooperation/attitude during the inspection.
- (b) Whether any efforts were made to comply with safety standards before the inspection.
- (c) Whether the employer promptly abates violations during the inspection.
- (d) The employer’s participation in professional organizations.
- (e) Did the employer conduct worksite inspections either internally or through outside consultants, insurance companies, etc.
- (f) Employee comments during interviews on the safety and health protections provided by the employer, both positive and negative will be considered.
- (g) **No reduction (0%)** shall be given for an **assessment of “not good”**.
 - A **reduction of 5%** shall normally be given when the CSHO’s assessment of the primary considerations indicates the employer’s approach to safety and health at the site was **“acceptable”**.
 - A **reduction of 10%** shall normally be given for a **“good” assessment**.
 - A **reduction of 15%** shall normally be given for a **“very good” assessment**.
- (h) A **10% reduction for written programs** shall normally be given if the employer has a written safety and health program, documented during the inspection, that has been effectively implemented, and also:

- 1 Provides for appropriate management commitment and employee involvement; worksite analysis for the purpose of hazard identification; hazard prevention and control measures, and safety and health training.
 - 2 Has deficiencies that are only incidental.
 - 3 Includes all programs required under VOSH standards applicable to the workplace, e.g., hazard communication, lockout-tagout, hazardous materials and emergency response, safety and health programs for construction (§1926.20), and trenching and excavation).
 - 4 Where young persons, i.e., less than 18 years old, are employed, the Compliance Officer's evaluation shall consider whether the employers program appropriately addresses the particular regulatory requirements for the employment of such minors, relative to the types of work they perform and the potential hazards to which they might be exposed.
 - 5 Where persons who speak limited or no English are employed, the Compliance Officer's evaluation shall consider whether the employer's program appropriately addresses the particular needs of such employees, relative to the types of work they perform, and the potential hazards to which they might be exposed.
 - 6 One example of the contents and framework of an effective safety and health management program is OSHA's Voluntary Safety and Health Program Management Guidelines; Issuance of Voluntary Guidelines (*See Federal Register, Vol. 54, No. 16, 26 January 1989, pp. 3904-3916, or later revisions as published*).
- (i) A **5% reduction for written programs** shall normally be given if the employer has a documentable and effective

safety and health program, but with no more than only incidental deficiencies. For example, an acceptable program will be documentable by such means as the minutes of employee safety and health meetings, employee training sessions, or other evidence of implemented programs applicable to the workplace.

- (j) Only increments of 5% may be used to reduce penalties due to the employer's good faith from 0% up to 25%; no intermediate percentages shall be used.
 - (k) No reduction shall be given to an employer for any violation in the inspection where a willful, repeated, high gravity serious violation is found or a failure to abate penalty is assessed.
 - (l) No adjustment for good faith is made in the case of a violation that has directly contributed to the cause of a fatal accident, or a violation that has directly contributed to the cause of a non-fatal injury or illness resulting in serious physical harm to an employee.
 - (m) No reduction shall be given to an employer who has no safety and health program or if there are major deficiencies in the program.
 - (n) An employer whose inspection history includes fatality-related violations or has a willful or a significant number of serious violations within the previous three years may not receive a reduction for good faith.
 - (o) No reduction shall be given to an employer being cited for abatement verification violations.
 - (p.) Where VOSH has reasonable cause to believe that employee misclassification has occurred, penalty reductions for *size and good faith* will NOT be afforded to the employer. (*Refer to Chapter 15, I.B.3.d.*)
- (3) History. A reduction of 10% shall be given to employers who have not been cited by VOSH for any serious, willful or repeated violations in the past three years.
- (4) Total Adjustment. The total adjustment will normally be the sum

of all the adjustment factors.

- a. No penalty reduction factors may be applied to any violation which has directly contributed to a fatality. Such a violation shall be penalized at \$15,875 for each serious and \$158,725 for each willful or repeat.
- b. No adjustment of penalty amount may, on occasion, be appropriate for other-than-serious violations where the Regional Safety or Health Director has determined that a high unadjusted penalty amount is warranted.
- c. No penalty reduction factors may be applied to any violation which has directly contributed to a non-fatal injury or illness resulting in serious physical harm to an employee (Reference Chapter 10.II.B.2.c on criteria for determining “serious physical harm”). Such a violation shall be penalized at \$15,875 for each serious and \$158,725 for each willful or repeat.

11. Effect on Penalties If Employer Immediately Corrects or Initiates Corrective Action

Appropriate penalties will be assessed with respect to an alleged violation after being informed of such alleged violation by the Compliance Officer, even though the employer immediately corrects or initiates steps to correct the hazard. Such correction may be considered in calculating good faith.

12. Ability to Pay

An employer’s ability to pay a penalty shall not normally be investigated or considered in determining any penalty reduction. However, if an employer presents convincing evidence of inability to pay a penalty because of financial difficulties at an informal conference, the Regional Safety or Health Director may determine that a penalty reduction is appropriate. Such a determination shall be documented in the case file.

Table 11-1
PENALTY TABLE

Penalty Reduction in Dollars	Gravity Assessments						
	OTS	Low/Lesser	Low/Greater	Med/Lesser	Med/Greater	High/Lesser	High/Greater
GBP	\$1,300	\$7,025	\$8,730	\$10,220	\$12,135	\$13,415	\$15,875
10%	\$1,170	\$6,325	\$7,855	\$9,200	\$10,920	\$12,075	\$14,290
15%	\$1,105	\$5,970	\$7,420	\$8,685	\$10,315	\$11,405	NA
20%	\$1,040	\$5,620	\$6,985	\$8,175	\$9,710	\$10,730	\$12,700
25%	\$975	\$5,270	\$6,550	\$7,665	\$9,100	\$10,060	NA
30%	\$910	\$4,920	\$6,110	\$7,155	\$8,495	\$9,390	\$11,115
35%	\$845	\$4,565	\$5,675	\$6,645	\$7,890	\$8,720	NA
40%	\$780	\$4,215	\$5,240	\$6,130	\$7,280	\$8,050	\$9,525
45%	\$715	\$3,865	\$4,800	\$5,620	\$6,675	\$7,380	NA
50%	\$650	\$3,515	\$4,365	\$5,110	\$6,070	\$6,710	\$7,940
55%	\$585	\$3,160	\$3,930	\$4,600	\$5,460	\$6,035	NA
60%	\$520	\$2,810	\$3,490	\$4,090	\$4,855	\$5,365	\$6,350
65%	\$455	\$2,460	\$3,055	\$3,575	\$4,245	\$4,695	NA
70%	\$390	\$2,110	\$2,620	\$3,065	\$3,640	\$4,025	\$4,765
75%	\$325	\$1,755	\$2,185	\$2,555	\$3,035	\$3,355	NA
80%	\$260	\$1,405	\$1,745	\$2,045	\$2,425	\$2,685	\$3,175
85%	\$195	\$1,055	\$1,310	\$1,535	\$1,820	\$2,010	NA
90%	\$130	\$705	\$875	\$1,020	\$1,215	\$1,340	NA
95%	\$65	\$600*	\$600*	\$600*	\$605	\$670	NA

Note 1: Increases Minimum Serious penalty to \$600.00

Note 2: No reduction for good faith is permitted for High Gravity Serious

Severity	Probability	GBP
High	Greater	\$15,875
Medium	Greater	\$12,135
Low	Greater	\$8,730

Severity	Probability	GBP
High	Lesser	\$13,415
Medium	Lesser	\$10,220
Low	Lesser	\$7,025

13. Repeat Violations

Section 40.1-49.4.J., *Code of Virginia*, provides that an employer who repeatedly violates VOSH requirements may be assessed a civil penalty of not more than **\$158,725** for each violation.

The VOSH *Administrative Regulation Manual* defines a repeated violation as:

“... a violation deemed to exist in a place of employment that is substantially similar to a previous violation of a law, standard or

regulation that was the subject of a prior final order against the same employer. A repeated violation results from an inadvertent or accidental act, since a violation otherwise repeated would be willful.”

Repeat violations may be cited for a period of three years following issuance of a final order which cites any violation of standard, regulation, or statute.

No penalty reduction factors may be applied to any violation which directly contributed to a fatality. Such a repeat violation shall be penalized at **\$158,725**.

No penalty reduction factors may be applied to any repeat violation which directly contributed to a non-fatal injury or illness resulting in serious physical harm to an employee (Reference Chapter 10.II.B.2.c on criteria for determining “serious physical harm”). Such a repeat violation shall be penalized at **\$158,725**.

- a. Gravity-Based Penalty Factors. Each violation shall be classified as serious or other-than-serious. A GBP shall then be calculated for repeated violations based on facts noted during the current inspection. Only the adjustment factors for size appropriate to the facts at the time of the inspection shall be applied.
- b. Penalty Increase Factors. The amount of the increased penalty to be assessed for a repeated violation shall be determined by the size of the employer.
 - (1) Smaller Employers. For employers with 250 or fewer employees, the GBP shall be doubled for the first repeated violation and quintupled if the violations have been cited twice before. If the Program Director determines that it is appropriate to achieve the necessary deterrent effect, the GBP may be multiplied by 10. The reasons for imposing a higher multiplier factor shall be explained in the file.
 - (2) Larger Employers. For employers with more than 250 employees, the GBP shall be multiplied by 5 for the first repeated violation and multiplied by 10 for the second repeated violation.
- c. Other-than-Serious Violations with No Initial Penalty. For a repeated other-than-serious violation that had no initial penalty, if a decision is made to penalize, a GBP of \$200 shall be assessed for the first repeated violation, \$500 if the violation has been cited twice before, and \$1,000 for a third repetition.

- d. Regulatory Violations. For repeated regulatory violations, the initial penalty shall be doubled for the first repeated violation and quintupled if the violation has been cited twice before. If the Program Director determines that it is appropriate to apply a deterrent effect, the initial penalty may be multiplied by 10.

14. Willful Violations

Section 40.1-49.4.J., *Code of Virginia*, provides that an employer who willfully violates VOSH requirements may be assessed a civil penalty of not more than **\$158,725** but not less than \$10,000 for each violation.

- Willful violations shall be classified as serious or other-than-serious.
 - There shall be no reduction for good faith.
 - If a willful violation directly contributes to a fatality, a penalty of **\$158,725** shall be assessed.
 - A **\$158,725** penalty may also be assessed in cases where there is no fatality.
- a. Gravity-Based Penalty Factors Each violation shall be classified as serious or other-than-serious. After determining the gravity of the violation for both severity and probability, a GBP shall be determined based on the facts noted during the inspection.
- b. Determination of the Gravity of the Violation
- Severity of the injury/illness:
 - High:** Death from injury/illness; injuries involving permanent disability; or chronic, irreversible illnesses;
 - Medium:** Injuries or temporary reversible illnesses resulting in hospitalization, substantial outpatient care of a variable but limited period of disability;
 - Low:** Injuries or temporary, reversible illnesses not resulting in hospitalization and requiring only minor supportive treatment, i.e., limited

outpatient care.

➤ **Probability** that an injury/illness could occur:

Greater: A death or an injury or illness has actually occurred or the likelihood that an injury or illness will occur is judged to be relatively high;

Lesser: Likelihood that an injury or illness will occur is judged to be relatively low.

- (1) The Compliance Officer will determine the gravity of the violation based upon: 1) the severity of the injury or illness which could result from the alleged violation, and 2), the probability that an injury or illness could occur as a result of the alleged violation using the Probability Rating Chart.
- (2) For willful violations, a severity of high, medium or low shall be assigned and a probability of greater or lesser is also assigned. The greater probability factor shall be used if an employee(s) suffers an injury or illness as a result of a violation.
- (3) Once the gravity of the violation is determined, the penalty will be adjusted for size and history

NOTE: For a willful violation, no penalty reduction will be permitted on the basis of good faith, and no penalty reduction will be permitted where there has been a fatality.

No penalty reduction factors may be applied to any willful violation which directly contributed to a non-fatal injury or illness resulting in serious physical harm to an employee (Reference Chapter 10.II.B.2.c on criteria for determining "serious physical harm"). Such a willful violation shall be penalized at \$158,725.

EXAMPLE: A Compliance Officer inspects the trenching site of Employer X. Employer X has 15 employees. A review of the employer's history shows that the employer has been cited for serious violations within the past three years. The Compliance Officer categorizes the trenching violation as medium severity and greater probability. The Compliance Officer then determines that Employer X is entitled to a 70% reduction for size (fewer than 25 employees) and no reduction for history: therefore, the total

penalty reduction is 70%.

Go to the following table. Look for the severity and probability factors which you have assigned to the violation. A willful violation categorized as medium severity/greater probability with a penalty reduction of 70% results in a proposed penalty of \$34,500.

c. Reduction Factor for Size – Serious Willful

The reduction factors for size for serious willful violations shall be applied as shown in the following chart. This chart helps minimize the impact of large penalties for small employers with 250 fewer employees.

However, in no case shall the proposed penalty be less than the minimum, i.e., \$10,000, for these employers. The rates of reduction are as follows:

<u>Number of Employees</u>	<u>Percent Reduction</u>
1-25	70% reduction
26-100	40% reduction
101-250	20% reduction
251 or more	zero reduction

d. Reduction Factor for History– Serious Willful

A ten percent (10%) reduction for history shall be given to employers who have not been cited by VOSH for any serious, willful, or repeat violations in the last 3 years. The percentage reduction factor for history shall be added to the percentage reduction for size and the combined percentage reduction factor shall be applied at the same time. The proposed penalty shall then be determined from the table below. **In no case shall a proposed penalty for a willful violation be less than \$10,000.**

Table 11-2

PENALTY REDUCTIONS FOR WILLFUL VIOLATION(S)

Penalty Reduction in Dollars	Willful Gravity Assessment					
	Low/Lesser	Low/Greater	Med/Lesser	Med/Greater	High/Lesser	High/Greater
GBP	\$110,000	\$115,000	\$120,000	\$125,000	\$130,000	\$158,725
10%	\$99,000	\$103,500	\$108,000	\$112,500	\$117,000	\$142,855
20%	\$88,000	\$92,000	\$96,000	\$100,000	\$104,000	\$126,980
30%	\$77,000	\$80,500	\$84,000	\$87,500	\$91,000	\$111,110
40%	\$66,000	\$69,000	\$72,000	\$75,000	\$78,000	\$95,235
50%	\$55,000	\$57,500	\$60,000	\$62,500	\$65,000	\$79,365
60%	\$44,000	\$46,000	\$48,000	\$50,000	\$52,000	\$63,490
70%	\$33,000	\$34,500	\$36,000	\$37,500	\$39,000	\$47,620
80%	\$22,000	\$23,000	\$24,000	\$25,000	\$26,000	\$31,745

Note 1: No reduction for good faith is permitted for Willful violations

Note 2: Minimum penalty for Willful violation is \$10,000



The proposed penalty for any willful violation shall not be less than \$10,000.



No penalty reduction factors may be applied to any violation which directly contributed to a fatality. Such a willful violation shall be penalized at **\$158,725**.



No penalty reduction factors may be applied to any willful violation which directly contributed to a non-fatal injury or illness resulting in serious physical harm to an employee (*reference chapter 10.ii.b.2.c on criteria for determining "serious physical harm"*). Such a willful violation shall be penalized at **\$158,725**.

- e. Other-than-Serious Violations. Sections 40 through 60 of the VOSH *Administrative Regulation Manual* provide that an employer who violates

any of the posting or recordkeeping requirements may be assessed a civil penalty of up to \$15,875 for each violation. In the case of regulatory violations that are determined to be willful, the GBP penalty shall be multiplied by 10. In no event shall the penalty, after reduction for size and history, be less than \$10,000.

- f. Egregious Violations. For flagrant cases involving willful violations, an egregious, i.e., violation-by-violation, penalty procedure may be considered. Under this procedure, standard penalty calculations described in section C. are applied, but instead of grouping or combining violations for penalty purposes, *each* instance of noncompliance is considered to be a separate violation and a separate penalty is applied. Compliance Officers who identify a case which could have egregious violations shall notify the Regional Safety or Health Director as soon as possible. Only the Commissioner may authorize the use of this policy and approve the assessment of egregious penalties.

15. General Application

The procedures that follow shall be used in determining proposed penalties for violations of VOSH regulatory requirements contained in the VOSH *Administrative Regulation Manual*, only when the employer has received a copy of the OSHA 300 Form through the Recordkeeping Requirements booklet or from any other source, or had knowledge of the requirements.

- a. If the employer has not received the booklet or the OSHA 300 Form, and did not have knowledge, citations without proposed penalties will be issued.
- b. Except as otherwise noted, penalties for regulatory violations shall have adjustment factors for size and history applied in determining the proposed penalty.

16. Posting Requirements

Penalties for violation of posting requirements shall be proposed as follows:

- a. VOSH Notice. If the employer has not displayed (posted) the notice furnished by the Virginia Occupational Safety and Health Program (or OSHA) as prescribed in §40 of the VOSH *Administrative Regulation Manual*, an other-than-serious citation shall normally be issued. The unadjusted penalty for this alleged violation shall be \$1,000.
- b. Annual Summary. If an employer fails to post the summary portion of the OSHA-300 Form or an equivalent form as required by 16VAC25-85-1904.29 during the most recent period 01 February to 30 April, as required by 16VAC25-85-1904.32, even if there have been no injuries, an

other-than-serious citation shall be issued with an unadjusted penalty of \$1,000.

- c. Citation. If an employer received a citation which has not been posted as prescribed in §40 of the VOSH *Administrative Regulation Manual*, an other-than-serious citation shall be issued. The unadjusted penalty shall be \$3,000.

17. Reporting and Recordkeeping Requirements

Section 40.1-49.4.G., *Code of Virginia*, provides that violations of the recordkeeping and reporting requirements may be assessed civil penalties of up to \$15,875 for each violation.

- a. OSHA-300 Form or Equivalent Form. If the employer does not maintain the Log and Summary of Occupational Injuries and Illnesses, the OSHA-300 Form or equivalent form as prescribed in 16VAC25-85-1904 recordkeeping requirements for recordable injuries and illnesses have occurred during the calendar year, an other-than-serious citation shall be issued. There shall be an unadjusted penalty of \$1,000 for each year the form was not maintained.
 - (1) No Recordable Injuries or Illnesses. When no recordable injuries or illnesses have occurred at a workplace during the current calendar year, the OSHA-300 Form or equivalent form need not be completed until the end of the calendar year for certification of the summary.
 - (2) Significant Recordkeeping Deficiencies. An OSHA-300 with significant deficiencies shall be considered as “not maintained”.
- b. OSHA-301 FORM. If the employer does not maintain the Supplementary Record, OSHA-301 Form or equivalent form, as prescribed in 16VAC25-85-1904 recordkeeping requirements, an other-than-serious citation shall be issued.

There shall be an adjusted penalty of \$1,000 for each OSHA-301 form not maintained.

- (1) A penalty of \$1,000 shall be assessed for each OSHA-301 form or equivalent form not maintained up to a maximum of \$15,875.
- (2) A penalty of \$1,000 shall be assessed for each OSHA-301 Form or equivalent form inaccurately maintained, up to a maximum of \$15,875.
- (3) Minor inaccuracies shall be cited, but with no penalties.

- (4) If a large number of violations or other circumstances indicate that the violations are willful, then other penalties, including violation-by-violation may be applied.
- c. Reporting Fatalities. Employers are required to report, either orally or in writing, to the Department within eight (8) hours of any occurrence of an employment accident which is classified as a fatality. (See *VOSH Administrative Regulation Manual §50 and §40.1-51.1.D. Code of Virginia.*) A penalty of \$5,000 shall be assessed. No adjustments shall be applied.
- (1) An other-than-serious citation shall be issued for failure to report such an occurrence. The unadjusted penalty shall be \$5,000.
- (2) If the Program Director determines that it is appropriate to achieve the necessary deterrent effect, an unadjusted penalty of **\$15,875** may be assessed.
- (3) If the Regional Safety or Health Director becomes aware of an incident required to be reported through some means other than an employer report prior to the elapse of the 8-hour reporting period and an inspection of the incident is made, a citable violation for failure to report does not exist.
- d. Reporting hospitalizations, amputations and loss of an eye. Employers are required to report, either orally or in writing, to the Department within twenty-four (24) hours the hospitalization of one or more persons, an amputation or loss of an eye.
- (1) An other-than-serious citation shall be issued for failure to report such an occurrence. The unadjusted penalty shall be \$5,000.
- (2) If the Program Director determines that it is appropriate to achieve the necessary deterrent effect, an unadjusted penalty of **\$15,875** may be assessed.
- (3) If the Regional Safety or Health Director becomes aware of an incident required to be reported through some means other than an employer report prior to the elapse of the 24-hour reporting period and an inspection of the incident is made, a citable violation for failure to report does not exist.

NOTE: Part 1904 and §40.1-51.1.D of the *Code of Virginia* have new requirements for reporting work-related fatalities, hospitalizations, amputations or losses of an eye. The new rule also updates the list of employers partially exempt from OSHA record-keeping requirements. (See 79 FR 56129, *Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions, September 18, 2014.*)

18. Failure to Abate

Section 40.1-49.4.I., *Code of Virginia*, provides criteria for assessing civil penalties for failure to abate a violation. A penalty of not more than \$15,875 may be assessed for each day the violation continues past the final abatement date.

- a. Application. An appropriate citation shall be issued in cases where violations have not been corrected as required.

Failure to abate penalties shall be applied when an employer has not corrected a violation which was cited previously when the previous citation has become a final order. A good faith but unsuccessful effort to abate the violation shall be taken into consideration when determining the appropriate penalty amount as indicated in later sections.

- (1) No Employer Contest. If a timely notice of contest has not been filed, the citation and proposed penalties shall be deemed to be a final order of the Commissioner upon the expiration of the contest period and not subject to review by any court or agency. Penalties for failure to abate shall be applied where abatement has not been accomplished.
- (2) Employer Contests Alleged Violation(s). If an employer contests one or more of the alleged violations, the period for abatement does not begin to run, for the contested items, until the day following the entry of the final order affirming the citation by the Circuit Court or by the Supreme Court in the case of an appeal.
 - (a) If the employer contests only the amount of the proposed penalty, the employer must correct the alleged violation within the prescribed abatement period.
 - (b) If an employer contests an abatement date in good faith, a Failure to Abate notice shall not be issued for the item contested until a final order affirming a date is entered, the new abatement period, if any, has been completed, and the employer has still failed to abate.

EXCEPTION: When a high gravity serious hazard is cited with an abatement date of less than 15 working days, a follow-up inspection may be scheduled after expiration of the abatement period, but still within the 15-day notice of contest period, provided that the employer has not actually filed such a notice.

- b. Employer Contest. If an employer contests one or more of the alleged violations, the period for abatement does not begin to run (as to those items contested) until the final order has been issued, and the contest rights have lapsed or been exhausted.

If an employer has been granted an extension of abatement, a Failure to Abate Notice shall not be issued for that violation until the new abatement period has lapsed, and the employer has still failed to abate the violation.

- c. Calculation of Additional Penalties. A GBP for unabated violations shall be calculated for failure to abate a serious or other-than-serious violation on the basis of the facts noted upon re-inspection. This recalculated GBP, however, shall not be less than that assessed for the item when originally cited, except as provided in I.B.16.e., *Good Faith Effort to Abate*, below.

- (1) Method of Calculation. In those instances where no penalty was initially proposed, an appropriate penalty shall be determined after consulting with the Regional Safety or Health Director. In no case shall the penalty be less than \$1,000 per day. Adjustment factors shall then be applied to arrive at the daily proposed penalty.
- (2) Only the adjustment factor for size, based upon the circumstances noted during the re-inspection, shall then be applied to arrive at the daily proposed penalty.
- (3) The daily proposed penalty shall be multiplied by the number of calendar days that the unabated violation has continued, except as provided below.
 - (a) The number of days unabated shall be counted from the day following the abatement date specified in the citation as the final order. It will include all calendar days between that date and the date of re-inspection, excluding the date of re-inspection.

- (b) Normally, the maximum total proposed penalty for failure to abate a particular violation shall not exceed 30 times the amount of the daily proposed penalty.
 - (c) At the discretion of the Program Director, a lesser penalty may be proposed with the reasons for doing so, e.g., achievement of an appropriate deterrent effect, documented in the case file.
 - (d) If a penalty in excess of the normal maximum of 30 times the amount of the daily proposed penalty is deemed appropriate by the Program Director, the case shall be treated under the violation-by-violation penalty procedures established.
- (4) In unusual circumstances such as where the gravity of the violation is at the highest level (high severity and greater probability), or when the employer has willfully failed to abate the violation or has failed to abate a second time, higher penalties shall be proposed. In such situations, the proposed penalty and factors involved shall be developed in consultation with the appropriate VOSH Programs Director and the Division of Legal Support and approved by the Commissioner.

d. Partial Abatement

- (1) Partial Reduction. When the violation has been partially abated, the Regional Safety or Health Director may authorize the Compliance Officer to factor in a reduction of 25% to 75% to the amount of the assessed penalty calculated as outlined in part (2), above. The reasons for this action shall be documented in the case file.
- (2) Only Some Instances Corrected. When a violation consists of a number of instances and the follow-up inspection reveals that only some instances of the violation have been corrected, the additional assessed penalty shall take into consideration the extent to which the violation has been abated.

EXAMPLE: Where three out of five instances have been corrected, the assessed penalty (calculated as outlined in part (2) above, without regard to any partial abatement) may be reduced by 60%.

- (3) Substantive Requirements. In multi-step correction items, only the failure to comply with substantive (rather than procedural) requirements shall generally incur a failure to abate penalty.
- (4) Procedural Requirements. On rare occasions, when the Department decides to issue a Failure to Abate Notice for failure to comply with procedural requirements, the calculation of the assessed penalty shall consider the extent to which a violation has been substantially abated, with the daily assessed penalty (calculated as outlined in above, without regard to any partial abatement) reduced accordingly.
 - a. Good Faith Effort to Abate. When the Compliance Officer believes, and so documents in the case file, that the employer has made a good faith effort to correct the violation and the employer had good reason to believe that it was fully abated, the Compliance Officer may reduce or eliminate the assessed penalty that would otherwise be justified.

19. Grouping

Violations of the posting and recordkeeping requirements which involve the same document (e.g., summary portion of the OSHA-300 Form was neither posted nor maintained) shall be grouped as an other-than-serious violation for penalty purposes. The unadjusted penalty for the group violations would then take on the highest dollar value of the individual items, which would normally be \$1,000.

20. Access to Records

The *VOSH Administrative Regulation Manual* requires an employer to maintain forms and records and provide them for inspection and copying by an authorized representative of the Commissioner or by an employee, former employee or authorized representative of employees. (See *VOSH Administrative Regulation Manual*, §§60 and 80).

21. Notification Requirements

An employer who has received advance notice of an inspection, as required by §40 of the *Administration Regulations Manual*, must notify the authorized employee representative.

When an employer has received advance notice of an inspection and fails to notify the authorized employee representative as required by §230 of the *VOSH Administrative Regulation Manual*, an other-than-serious citation shall be issued with an unadjusted penalty for \$2,000.

C. Criminal Penalties

1. Code of Virginia Provisions

The *Code of Virginia* provides criminal penalties in the following cases:

- a. Willful violations of a VOSH standard, rule of order causing death of an employee. (§40.1-49.4.K.);
- b. Giving unauthorized advance notice. (§40.1-51.3:1);
- c. Giving false information. (§40.1-51.4:2);
- d. Refusal to answer questions; obstruction of inspection. (§40.1-10).

2. Imposed by Courts

Criminal penalties are imposed by the courts after trials and not by VOSH.

D. Egregious Penalties**1. Purpose**

Large proposed penalties, e.g., where penalties are proposed on a violation-by-violation basis, and criteria guiding approval of such penalties by the Commissioner, are based on meeting the public purpose.

2. Guidance

- a. Early Identification of Cases. It is important that the Regional Safety or Health Director identify, as early as possible, cases which may be appropriate for violation-by-violation treatment.
 - (1) Careful documentation of evidence for each violation and appropriate involvement of technical specialists required for litigation is essential to the successful pursuit of potential egregious cases.
 - (2) Coordination with Headquarters must be scheduled in time for comprehensive review before the expiration of the statutory 6-month citation period.
 - (3) Early involvement of the Division of Legal Support will ensure adequate legal, evidentiary, and resource coordination.
- b. Criteria. Those conditions which constitute a flagrant violation of the law or of VOSH standards/regulations are appropriate for violation-by-violation handling. The following criteria shall be used by the Regional Safety or Health Director to determine whether to recommend the use of violation-by-violation citations and penalties:
 - (1) Cases must be classified as willful.

- (a) The employer is found in violation of a VOSH requirement:
 - 1 Of which he has actual knowledge at the time of the violation. Such knowledge may be demonstrated through previous citation history, accident experience, widely publicized agency compliance, direct evidence of specific recognized jobsite hazards or other appropriate factors; and
 - 2 Intentionally, through conscious, voluntary action or inaction, having made no reasonable effort to eliminate the known violation.
 - (2) Cases must fall in at least one of the categories given in the following list, (a) through (f).
 - (a) The violations resulted in worker fatalities or a large number of injuries or illnesses.
 - (b) The violations resulted in persistently high rates of worker injuries or illnesses.
 - (c) The employer has an extensive history of prior violations of VOSH law.
 - (d) The employer has intentionally disregarded safety and health responsibilities.
 - (e) The employer's conduct taken as a whole amounts to clear bad faith in the performance of his duties under the law.
 - (f) The employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that might be in place.
 - (3) Cases which satisfy only one of the two main criteria, above, are not suitable for violation-by-violation penalties. For example, an employer who has an extensive history for the case in question may not be subject to egregious penalties.
- c. Case Support Requirements. Because these cases involve administrative

and legal issues critical to effective compliance with the law, it is essential to ensure that the highest professional standards are met in the conduct of inspections, the issuance of citations and the litigation of these cases.

(1) Documentation. Whenever a case is proposed for violation-by-violation treatment, fully detailed written responses to the questions in the appendix must be developed. Supporting documentation shall be provided and cross-referenced whenever possible. Mandatory use of these questions is intended to provide a consistent format to aid in review of these cases, as well as to ensure as much as possible uniformity of case development across the state.

(2) Evidence. Documentary support shall ordinarily be planned for and obtained early in the investigation.

(a) The evidence necessary to support citations being considered for violation-by-violation penalty sanctions shall be included in the case file. Such evidence must be present for each separate violation.

1 Photographs, videotapes, audiotapes, sampling data, and witness statements shall be used whenever possible to provide supporting evidence of violative conditions.

2 Company documents supporting knowledge of that standard and the violative conditions as well as willfulness of the violation shall be diligently sought and obtained by interrogatories as appropriate.

3 Examples of such documents are internal audit reports, consultant or insurance company reports, trade association articles, minutes from safety meetings, complaints from employees, memoranda and other correspondence from safety personnel, especially from plant (or site) safety to plant (or site) management.

Also included might be recognition by corporate safety personnel of violations and bringing these violations to the attention of higher management, notes relating to VOSH activities,

and industry practice in other companies or industries.

- (b) Employers must be asked explicitly:
 - 1 If and when they recognized the hazardous nature of each of the violations;
 - 2 If they knew what VOSH's standards require and, if so, what steps the company had taken to abate the violations and why the apparent violations had not been corrected;
 - 3 Whether they knew of the documents identified under subparagraph (a), above, and what those documents contained.
 - (c) Their response shall be carefully documented in writing (verbatim, if possible). An attempt shall be made to have a second person present as a witness, particularly when dealing with potentially compromising matters.
 - (d) Signed employee statements shall be obtained routinely to support each of these violations in as much detail as possible.
 - (e) Employee exposure and the nature and extent of injuries or illnesses related to the violations shall be carefully and adequately described.
 - (f) The need for interrogatories and medical access orders shall be decided and documents obtained as soon as possible.
 - (g) The need for experts shall also be decided and necessary arrangements made as soon as possible. It is anticipated that experts will be needed for cases involving complex violations, such as ergonomics or abatement methods.
 - (h) Particular attention shall be paid to anticipating and preparing for possible employer defenses in accordance with the guidelines in this FOM.
- (3) The Division of Legal Support Involvement. Early involvement of the Division of Legal Support is essential to examine and evaluate

the documentation and other evidence supporting the violations and to determine whether expert witnesses or depositions will be necessary, as well as to provide sufficient time for the Division of Legal Support to write an opinion on the merits of the case.

- d. Citations. The law authorizes penalties to be proposed for each violation but limits the maximum penalty that can be proposed. In accordance with the guidelines, the following procedures shall be adhered to in issuing citations with violation-by-violation penalties.
- (1) Each separate violation must have its own Alleged Violation Description which will describe the particular conditions associated with that violation instance.
 - (2) Each separate violation must have its own penalty calculated in accordance with the procedures given in this Chapter.
- e. Case Review. The procedures and timetables for significant case review will be followed in all cases involving violation-by-violation citations.
- (1) The Regional Safety or Health Director shall notify the Program Director of a potential egregious case. The Program Director shall, in turn, notify the Commissioner of the following:
 - (a) Establishment name;
 - (b) Regional Office of jurisdiction;
 - (c) Six-month date;
 - (d) Opening conference date;
 - (e) General type of apparent violations, e.g., safety, health, recordkeeping.
 - (2) Regional Safety or Health Director(s) shall take care not to expand the inspection beyond what they can reasonably expect to accomplish within these time frames.
 - (3) The Program Director shall coordinate the provision of needed technical support and expert witnesses and may request assistance from federal OSHA, if necessary.
 - (4) The Regional Safety or Health Director shall complete his part of the significant case review as soon as possible, but not later than 45 days prior to the 6-month date, and forward the case file to the Program Director for review.

- f. Recordkeeping Violations. If the case involves recordkeeping violations which are being considered for additional penalties, further steps are necessary.
- (1) Copies of evidence supporting each recordkeeping violation proposed as egregious, as developed from the company's occupational injury and illness logs and supplementary records, worker's compensation records, medical records, first aid logs and other sources shall be included in the package.
 - (2) This evidence must support the existence of a violation for both non-recorded and mis-recorded cases. It must include the particular recordability criteria involved: whether the case involved days away from work or days of restricted work activity beyond the day of injury or onset of illness as well as evidence that the case was work-related.

NOTE: Medical records contained in the case file shall be handled in accordance with the guidelines.