

VOSH PROGRAM DIRECTIVE: 02-028A

ISSUED: September 19, 2019

SUBJECT: State and Local Government Penalties

Purpose: This Directive establishes policies and procedures for implementation of VOSH penalties in state and local government.

This Program Directive is an internal guideline, not a statutory or regulatory rule, 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 Administrative Process Act; it does not have general application; and it is not being enforced as having the force of law.

Scope: This Directive applies VOSH-wide.

Reference: VOSH Directive 12-003H [and successor], Administrative Regulations Manual for the VOSH Program

VOSH Directive 09-001, VOSH Field Operations Manual [and successor]

§16VAC25-60-260 [and successor]

Notice: Notwithstanding the effective date of this directive, §16VAC25-60-260 was adopted by the Virginia Safety and Health Codes Board as authorized by Va. Code §§40.1-22(5) and 2.2-4006.A.4(c) on November 30, 2017, and published in the Virginia Register on October 1, 2018 with a 30 day comment period and an effective date of November 1, 2018. The above named regulation became fully effective and enforceable by the VOSH Program under the terms of the regulation on November 1, 2018.

Cancellation: VOSH Program Directive 02-028, December 1, 2018

Effective Date: September 19, 2019

Expiration Date: Not Applicable – remains in effect until cancelled or superseded.

Action: Directors and Managers shall ensure that policies and procedures

established in this Directive are uniformly enforced and field personnel understand and comply with the requirements included in this Directive.

C. Ray Davenport
Commissioner

Distribution:	Commissioner of Labor and Industry Assistant Commissioner VOSH Directors and Managers OSHA Region III & OSHA Norfolk Area Offices	Director of Cooperative Programs VOSH Compliance & Cooperative Programs Staffs VOSH Legal Support & OIS Staffs
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When the guidelines, as set forth in this Program Directive, are applied to the Commissioner of the Department of Labor and Industry and/or to Virginia employers, the following federal terms if, and where they are used, shall be considered to read as below:

<u>Federal Terms</u>	<u>VOSH Equivalent</u>
OSHA	VOSH
Federal Agency	State Agency
Agency	Department
Regional Administrator	Assistant Commissioner
Area Director	Regional Director VOSH Program Director
Regional Solicitor	Attorney General or VOSH Division of Legal Support (DLS)
Office of Statistics	VOSH Research and Analysis
29 CFR	VOSH Standard
Compliance Safety and Health Officer (CSHO)	CSHO
OSHA Directives	VOSH Program Directives

I. **Background**

Public Sector Penalty Legislation.

Senate Bill 607 was passed by the Virginia General Assembly and signed into law by Governor Terry McAuliffe to direct the Virginia Safety and Health Codes Board to adopt regulations for the issuance of proposed penalties to the Commonwealth, its agencies, political subdivisions, or any public body. The law became effective July 1, 2016.

Information can be found at:

<https://lis.virginia.gov/cgi-bin/legp604.exe?ses=161&typ=bil&val=sb607>

Public Sector Penalty Regulation.

The Virginia Safety and Health Codes Board adopted a proposed regulation on February 16, 2017, on public sector penalties amending the VOSH Administrative Regulations Manual (ARM), 16VAC25-60-260. The proposed regulation would allow issuance of penalties to public sector employers for willful, repeat, and failure-to-abate violations, as well as serious violations that cause a fatal accident or are classified as "high gravity".

A public hearing was held on October 26, 2017, and the 60 day written comment period ended November 3, 2017. The Board adopted a final regulation on November 30, 2017. The final regulation was published in the Virginia Register of Regulations on October 1, 2018, with a 30 day comment period.

The final regulation takes effect on November 1, 2018, and will be applied to VOSH inspections opened on or after December 1, 2018.

Progress on the final regulation can be tracked on the Virginia Regulatory Town Hall at:

<http://townhall.virginia.gov/L/ViewAction.cfm?actionid=4681>

Based on an analysis of historical data, approximately five percent (5%) of the serious violations issued in the private and public sectors are classified as high gravity (high severity and greater probability).

VOSH estimates that approximately 15 high gravity serious, 3 willful and 5 repeat violations will be issued in state and local government per year.

VOSH Maximum Penalties

The Department proposed HB 1883 and companion bill SB 1542 to increase the maximum statutory VOSH civil penalties by 78.15%. Virginia's legislation mirrors the 2015 increase in OSHA penalties. The legislation passed both houses of the General Assembly by unanimous vote and was signed into law. The legislative history can be viewed at:

<http://lis.virginia.gov/cgi-bin/legp604.exe?171+sum+HB1883>

The statute also requires the Commissioner of Labor and Industry to annually increase the maximum civil penalty amounts, starting August 1, 2018, by an amount that reflects the percentage increase, if any, in the Consumer Price Index – Urban (CPI-U) from the previous calendar year.

Information on current maximum VOSH penalties can be found at:

<https://www.doli.virginia.gov/vosh-penalty-increases/>

II. Definitions

From 16VAC25-60-10:

"Failure to abate" means that the employer has failed to correct a cited violation within the period permitted for its correction.

"Other [than serious] violation" means a violation which is not, by itself, a serious violation within the meaning of the law but which has a direct or immediate relationship to occupational safety or health.

"Public employer" means the Commonwealth of Virginia, including its agencies, authorities, or instrumentalities or any political subdivision or public body.

"Public employee" means any employee of a public employer. Volunteer members of volunteer fire departments, pursuant to § 27-42 of the Code of Virginia, members of volunteer rescue squads who serve without pay, and other volunteers pursuant to the Virginia State Government Volunteers Act are not public employees. Prisoners confined in jails controlled by any political subdivision of the Commonwealth and prisoners in institutions controlled by the Department of Corrections are not public employees unless employed by a public employer in a work-release program pursuant to § 53.1-60 or § 53.1-131 of the Code of Virginia.

"Repeated violation" means 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.

"Serious violation" means a violation deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. The term "substantial probability" does not refer to the likelihood that illness or injury will result from the violative condition but to the likelihood that, if illness or injury does occur, death or serious physical harm will be the result.

"Willful violation" means a violation deemed to exist in a place of employment where (i) the employer committed an intentional and knowing, as contrasted with inadvertent, violation and the employer was conscious that what he was doing constituted a violation; or (ii) the employer, even though not consciously committing a violation, was aware that a hazardous condition existed and made no reasonable effort to eliminate the condition.

From 1904.46:

Establishment. An establishment is a single physical location where business is conducted or where services or industrial operations are performed. For activities where employees do not work at a single physical location, such as construction; transportation; communications, electric, gas and sanitary services; and similar operations, the establishment is represented by main or branch offices, terminals, stations, etc., that either supervise such activities or are the base from which personnel carry out these activities.

1904.46(1)

Can one business location include two or more establishments? Normally, one business location has only one establishment. Under limited conditions, the employer may consider two or more separate businesses that share a single location to be separate establishments. An employer may divide one location into two or more establishments only when:

1904.46(1)(i)

Each of the establishments represents a distinctly separate business;

1904.46(1)(ii) – **not included for purposes of this policy.**

1904.46(1)(iii)

No one industry description in the Standard Industrial Classification Manual (1987) applies to the joint activities of the establishments; and

1904.46(1)(iv)

Separate reports are routinely prepared for each establishment on the number of employees, their wages and salaries, sales or receipts, and other business information. For example, if an employer operates a construction company at the same location as a lumber yard, the employer may consider each business to be a separate establishment.

III. Summary

16VAC25-60-260.E. provides that:

"The commissioner shall have authority to propose civil penalties to public employers for willful, repeat, and failure-to-abate violations in accordance with subsections I and J of § 40.1-49.4, and for serious violations that cause

death to an employee or are classified as high gravity in accordance with subsection H of § 40.1-49.4.”

Except as otherwise provided in this directive, the provisions of Chapter 11, Penalties, of the VOSH Field Operations Manual shall apply to the calculation of proposed penalties issued to state and local government employers (e.g., gravity based penalty calculation, penalty reduction factors).

IV. Inspection Guidance

A. Applicability.

From 16VAC25-60-10:

“Public employer” means the Commonwealth of Virginia, including its agencies, authorities, or instrumentalities or any political subdivision or public body.”

The Department considers authorities and instrumentalities such as, but not limited to, the Washington Metropolitan Area Transit Authority (WMATA), the Washington Metropolitan Airports Authority (MWAA), and the Greater Richmond Transit Company (GRTC) to be public employers covered by the state and local government penalty regulation in 16VAC25-60.

B. Violation Types.

16VAC25-60-260.E. provides that:

“The commissioner shall have authority to propose civil penalties to public employers for willful, repeat, and failure-to-abate violations in accordance with subsections I and J of § 40.1-49.4, and for serious violations that cause death to an employee or are classified as high gravity in accordance with subsection H of § 40.1-49.4.”

Penalties will not be issued for serious violations that are classified as non-high gravity (i.e., other than high severity and greater probability).

Penalties will not be issued for other-than-serious violations.

Penalties for willful, repeat, and failure to abate violations may be issued in cases where the original violation was classified as serious (both high gravity and non-high gravity) or other-than-serious.

C. VOSH Gravity Based Penalty

Reference: VOSH Field Operations Manual, Chapter 11, Penalties
VOSH generally follows OSHA's Gravity Based Penalty (GBP) methodology for calculating proposed penalties, which includes an assessment of the "Severity" of the hazard cited and the "Probability" that an injury or illness would result from the cited hazard.

"Severity" is classified as High, Medium or Low.

"Probability" is classified as Greater or Lesser.

There are six main Gravity Based Penalty levels for proposed "serious" violations:

High Severity/Greater Probability [High Gravity]

- High Severity/Lesser Probability
- Medium Severity/Greater Probability
- Medium Severity/Lesser Probability
- Low Severity/Greater Probability
- Low Severity/Lesser Probability

Only serious violations classified as "High Gravity" (high severity and greater probability) will be issued to state and local government employers with a penalty.

D. Penalty Reduction Factors

As provided in Va. Code §40.1-49.4.A.4.(a), prior to issuing a proposed penalty, VOSH penalty calculation procedures are required to take into account the:

- gravity of the violation,
- size of the employer's business,
- good faith of the employer, and
- history of previous violation

Reference: VOSH Field Operations Manual, Chapter 11, Penalties, for procedures regarding gravity, size, good faith, and history, except as noted below.

A violation (serious, willful, repeat, or failure to abate) related to the cause of a fatal accident is classified as "high severity/greater probability" and

will be issued with the maximum statutory penalty. No reductions for good faith, history, or size will be applied.

A violation (serious, willful, repeat, or failure to abate) related to the cause of a non-fatal but serious accident which results in serious physical harm to the employee is classified as "high severity/greater probability" will be issued with the maximum statutory penalty. No reductions for good faith, history or size will be applied.

Size of the Employer.

The maximum allowable size reduction is 70%, but size is determined by the total number of employees employed by the governing body (e.g., total employment in state government; total employment in county/city government).

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

No state government agency will receive a penalty reduction for size.

Most local government agencies will not receive a penalty reduction for size, unless total government employment for the city or county is 250 or fewer employees.

Good Faith of Employer

A penalty reduction of up to 25 percent is permitted for certain high gravity serious violations in recognition of an employer's "good faith" in increments of 0%, 5%, 10%, 15%, 20% and 25%.¹

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

¹ Although the VOSH FOM provides that no good faith penalty reduction is permitted for private sector inspections that result in a high gravity serious violation; a good faith penalty reduction will be available to state and local government employers in situations where the high gravity serious violation did not result in a fatal accident or serious physical harm to an employee in a non-fatal accident.

The maximum allowable good faith reduction for “primary considerations” is 15%.

Good Faith - “Primary Considerations” include:

- efforts to comply with VOSH standards before the inspection
- prompt abatement of violations during the inspection
- employer originated worksite inspection programs
- employee comments on safety and health during the inspection
- the employer's cooperation and attitude during the inspection
- employer participation in professional organizations

A violation that is classified as willful, repeat or failure to abate is not eligible for a good faith penalty reduction.

History

A reduction of 10% is given to employers who have not been cited for any serious, willful, or repeated violations in the past 3 years statewide.

E. Repeat Policy

The following provisions from VOSH Field Operations Manual, Chapter 11, Penalties, apply to repeat violations issued to State and Local Government employers:

F. An employer may be cited for a repeated violation if that employer has been cited previously for a substantially similar condition and the citation has become a final order. All repeated violations must be cited based on the nature of the hazardous condition, not just the code being cited. Repeated violations shall be cited regardless of the previous modification of an earlier violation.

....

3. Time Limitations. A citation will be issued as a repeated violation if the following apply:

- (1) The citation is issued within three (3) years of the final order of the previous citation, or,

(2) The citation is issued within three (3) years of the final abatement date of that previous citation, whichever is later.

....

4. Employers with Multiple Establishments or Operations

a. No Instance of Statewide Repeated Violations. Employers with multiple establishments or operations, statewide or across VOSH regional boundaries, or without a fixed site of business, may not be cited for statewide repeated violations where the violations occur in different VOSH Regional Office jurisdictions.

....

For purposes of determining whether a violation is a repeat, the following criteria will apply:

1. Fixed Establishment – State and Local Government - A fixed establishment in the public sector is normally a business, activity, or department operated by a public employer at a single physical location (e.g., fire department, hospital, elementary school, etc.).

A public employer can operate two or more establishments at a single physical location (e.g., a university science building with separate establishments for classroom operations, laboratories and a maintenance shop) provided the employer complies with 1904.46(1), (1)(i), (1)(iii), and (1)(iv) as described below:

1904.46. Can one business location include two or more establishments? Normally, one business location has only one establishment. Under limited conditions, the employer may consider two or more separate businesses that share a single location to be separate establishments. An employer may divide one location into two or more establishments only when:

- 1904.46(1)(i)

Each of the establishments represents a distinctly separate business;

- 1904.46(1)(ii) – **not included for purposes of this policy.**

- 1904.46(1)(iii)

No one industry description in the Standard Industrial Classification Manual (1987) applies to the joint activities of the establishments; and

- 1904.46(1)(iv)

Separate reports are routinely prepared for each establishment on the number of employees, their wages and salaries, sales or receipts, and other business information. For example, if an employer operates a construction company at the same location as a lumber yard, the employer may consider each business to be a separate establishment.

For purposes of considering whether a violation is a repeat, previous citations must have been issued within the same fixed establishment.

2. Non-fixed Establishment – State and Local Government – A non-fixed establishment in the public sector is normally where employees do not work at a single physical location, such as construction, transportation, communications, electric, gas, and sanitary services, and similar operations.

For public employers engaged in businesses having non-fixed establishments, repeat violations will be alleged based on prior violations of a substantially similar nature occurring anywhere within the applicable VOSH Regional jurisdiction.

3. See VOSH Directive 02-064A, Procedure for Handling Issuance of Citations to VDOT [Virginia Department of Transportation], December 15, 2007, for policies and procedures for issuing repeat violations to VDOT Residency Offices.

http://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\181\GDoc_DOLI_3442_v1.pdf