

VOSH PROGRAM DIRECTIVE: 09-003G

ISSUED: 01 February 2018

SUBJECT

Administrative Regulations Manual (ARM) for the Virginia Occupational Safety and Health Program

Purpose

- **CHANGE I** transmits to field personnel the above-referenced Administrative Regulations Manual.
- **CHANGE II** amends the ARM to correct a typographical error and to reflect revised statutory language concerning the time limit for employers to report work-related incidents resulting in a fatality or in the in-patient hospitalization of at least 3 individuals.
- **CHANGE III** reflects the requirements from the Abatement Verification regulation that employers provide specific documentation of abatement, including detailed evidence of the corrective actions that have been taken to abate hazards for which citations were issued.
- **CHANGE IV** removes outdated references to the Administrative Process Act (APA) which appear in the Administrative Regulations Manual and replaces those outdated references with renumbered references reflecting the statutory revisions to the APA.
- **CHANGE V** codifies in regulation the agency's longstanding multi-employer worksite policy for citation issuance and the multi-employer worksite defense and requires the use of manufacturer's guidelines for machinery, equipment, vehicles, materials and tools where no overriding specific regulations exist.
- **CHANGE VI** provides VOSH personnel with procedures for exercising the Commissioner's statutory authority to take and preserve testimony, examine witnesses and administer oaths, in instances where such witnesses/employees/supervisors refuse requests for interviews or refuse to answer specific questions posed by a VOSH inspector. Also, it makes longstanding non-substantive housekeeping changes to match the Virginia Registrar of Regulations official copy.
- **CHANGE VII** codifies in regulation a number of changes impacting public employers, disclosure of information, whistleblower discrimination, action by the Commissioner in circuit court, enforcement of VDOT MUTCD, use of administrative subpoenas, and burdens of proof.

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 is not being enforced as having the force of law.

Scope This directive applies to all VOSH personnel.

References

CHANGE I: Not Applicable;
CHANGE II: Not Applicable;
CHANGE III: 62 FR 15324, 31 Mar. 1997 & OSHA Inst. STP 2.23, 04 June 1997;
CHANGE IV: Not Applicable;
CHANGE V: Not Applicable;
CHANGE VI: Not Applicable; and
CHANGE VII: Not Applicable

Cancellations

CHANGE I: VOSH Program Directive 09-003, 01 Sep. 1993;
CHANGE II: VOSH Program Directive 09-003A, 01 Sep. 1994;
CHANGE III: VOSH Program Directive 09-003B, 01 July 1995;
CHANGE IV: VOSH Program Directive 09-003C, 15 Mar. 1998;
CHANGE IV: VOSH Program Directive 09-003D, 01 Apr. 2003);
CHANGE V: VOSH Program Directive 09-003E, 01 Oct. 2006; and
CHANGE VI: VOSH Program Directive 09-003F, 05 Dec. 2012.

Action The Assistant Commissioner, Directors and Managers shall assure that VOSH personnel are aware of and comply with the rules, requirements and procedures of the ARM for the VOSH Program, as amended.

Effective Dates

CHANGE I: 30 June 1994;
CHANGE II: 01 Aug. 1995;
CHANGE III: 15 Dec. 1997;
CHANGE IV: 01 March 2003;
CHANGE V: 21 Sept. 2006;
CHANGE VI: 05 Dec. 2012, and
CHANGE VII: 15 Dec. 2017.

C. Ray Davenport
Commissioner

Attachments: None. Amendments for Change VII have already been incorporated into the attached updated VOSH ARM, 16VAC25-60, at sections 30, 90, 110, 130, 140, 150, 245, and 260.

Distribution: Commissioner of Labor and Industry
Assistant Commissioner
VOSH Directors and Managers
Legal Support and IMIS Staffs

Cooperative Programs Manager
VOSH Compliance and Cooperative Programs Staffs
OSHA Region III and OSHA Norfolk Area Offices

I. **Background.**

CHANGE I: The purpose of the Administrative Regulations Manual (ARM) is to provide an operational framework of rules and procedures for the administration of the Virginia Occupational Safety and Health (VOSH) program. The major objective of the revision was to provide employers, employees, the public, VOSH employees, and other parties interested in the administrative rules governing the VOSH program with a simplified document in a more concise format to aid in the understanding of the general administrative provisions and specific related procedures of the program.

CHANGE II: Two amendments were adopted. The first, which appears in paragraph 4 of what was then § 2.3, is to delete a typographical error that inadvertently resulted during the 1994 revision. The second, affects what was then § 2.4. A. and B., was made pursuant to Chapter 373 of the 1995 Virginia Acts of Assembly which amends Chapter 40.1-51.1, dealing with duties of employers. This statutory change was initiated by the Department to comply with a similar regulatory change by federal OSHA published at 59 FR 15594 on April 1, 1994.

CHANGE III: Historically, employer compliance with requests by both federal OSHA nationally and VOSH to provide evidence of abatement has been administrative, rather than regulatory in nature and follow-up inspections were often necessary to determine whether abatement had occurred. A 1991 General Accounting Office (GAO) Report to Congress assessed the adequacy of federal OSHA's policies and procedures for ensuring abatement of cited hazards and determined that OSHA's existing policies had limitations that interfered with OSHA's ability to identify those employers who have failed to abate the hazards for which they had been cited.

CHANGE IV: Chapter 844 of the 2001 session of the General Assembly amended the *Code of Virginia* by recodifying Titles 2.1 and 9. As a result of this action effective on October 1, 2001, the *Code* sections in the Administrative Process Act were renumbered and the ARM amended to reflect these changes.

CHANGE V: Amendments were necessary to comply with changes to statutory law or to address procedural or other administrative changes that had occurred since the Administrative Regulations were revised.

CHANGE VI: Amendments were needed to provide procedures for exercising the Commissioner's statutory authority to take and preserve testimony, examine witnesses and administer oaths, in instances where such witnesses/employees/supervisors refuse requests for interviews or refuse to answer specific questions posed by a VOSH inspector. Also, longstanding non-substantive housekeeping changes were made to match the Registrar of Regulations official copy.

CHANGE VII: The final regulation addresses certain issues in regard to the Administrative Regulation of the VOSH Program:

- A. Allows VOSH to enforce the requirements of the Virginia Department of Transportation (VDOT) Work Area Protection Manual in lieu of the federal Manual on Uniform Traffic Control Devices, i.e., Part VI of the MUTCD, 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition, in any contract for construction, repair, or maintenance between either the Commonwealth or one of its local governments and an employer, where such contract stipulates employer compliance with the VDOT Work Area Protection Manual.

Although the federal MUTCD has been adopted by OSHA and VOSH in §§1926.200 through 1926.202, a significant amount of the language provisions therein are merely recommended and non-compulsory, i.e., the terms "should" or "may" are used rather than the mandatory "must" or "shall" for desired activities and procedures, and are therefore not enforceable in a compliance

setting. To mitigate this problem, VDOT has adopted its own Work Area Protection Manual which contains fewer instances of the use of the terms “should” and “may”. VDOT routinely specifies language in its contracts with employers that requires specific employer compliance with the VDOT Work Area Protection Manual.

- B. Clarifies anti-retaliation safeguards for public sector employees, 16VAC25-60-30. Allowing Commonwealth’s Attorneys to act on behalf of the Commissioner for public sector employers, 16VAC25-60-30.F.
- C. Allows the Commissioner to petition the Cabinet Secretary and then the Executive regarding resolution of anti-retaliation violations with a state agency, 16VAC25-60-30.G.
- D. Clarifies Virginia Freedom of Information Act (FOIA) requirements in regard to the Voluntary Protection Program (VPP), 16VAC25-60-90.
- E. Changes section title(s) to reflect recent terminology changes in occupational discrimination or anti-retaliation cases, 16VAC25-60-110.
- F. Clarifies that the Commissioner can request penalties or fines for occupational discrimination or anti-retaliation cases at the litigation stage, 16VAC25-60-110.
- G. Updates ARM section title to reflect naming change with regard to the Commissioner's authority to issue administrative subpoenas, 16VAC25-60-245.
- H. Clarifies that the “burden of proof” in VOSH court cases is by a “preponderance of the evidence”, 16VAC25-60-260.
- I. Clarifies that the burden for proving an affirmative defense to a citation lies with the employer, 16VAC25-60-260.

II. Summary.

CHANGE I: This was the first complete revision of the Administrative Regulations Manual (ARM) which was initially adopted in 1986. This revision contained substantive changes primarily in the areas of additional definition of terms and clarification of the 48-hour accident reporting requirements of employers. To respond to the requests to the Department for information by subpoena, new language was added which allowed the Commissioner to restrict VOSH employees from being deposed, testifying or otherwise participating in third-party lawsuits in which the Department had no genuine interest. This revision also clarified the VOSH program's response to certain federal judicial action, such as vacation of §1910.1000 permissible exposure limits (PEL). The revised ARM codified the employee misconduct defense and provided that the defense does not apply to supervisory personnel. This revision also simplified the regulation by omitting requirements already stipulated in Title 40.1 of the Code of Virginia in those cases where no further regulatory language was necessary to carry out that mandate.

CHANGE II: This first amendment involves removing the unnecessary language, "subsection B of," which appears in paragraph 4 of § 2.3., Notification and Posting Requirements. This typographical error was made when the Administrative Regulation for the Virginia Occupational Safety and Health Program was revised in 1994. The second amendment, which appears in § 2.4. A. and B., reduces from 48 hours to 8 hours the time limit for employers to report any work-related incident resulting in a fatality or the hospitalization of at least 3, rather than 5, individuals. In cases where an employer does not immediately learn of a reportable incident,

the employer would report within 8 hours, rather than 48 hours, of learning of such incident. This amendment also requires an employer to report within 8 hours, rather than 48 hours, after learning of the death of a worker who dies within 30 days of an incident; and provides specifics for information requirements and reporting methods.

CHANGE III: If abatement occurs during or immediately after the inspection that identified the violation(s), the employer would not be required to submit an abatement certification letter to VOSH. If the violation(s) is an other-than-serious violation, or serious violation that does not require additional documentation, the employer is required to certify abatement using a simple one page form letter or equivalent. This simple form describing the completed abatement actions will meet the requirements for most violations. The employer certification that abatement is complete must include, among other things, a statement that affected employees and their representatives have been informed of the abatement (1903.19(c)(3)).

In cases involving the most serious violations, additional documentation will be required. Willful and repeat violations will require certification and documentation of abatement. Serious violations will require abatement documentation only if designated by VOSH. OSHA has estimated that between 84 and 90 percent of all violations will require only a simple letter verification of abatement. Abatement plans may be required by VOSH if the period allowed for abatement exceeds 90 days. Such plans, when required, will generally be simple one page documents. Progress reports may also be required by VOSH to note the status of abatement efforts and may require only a simple sentence description of the interim action taken. For movable equipment, such as construction equipment, that has been cited as a serious hazard, the regulation would allow employers to either post a copy of the citation on the cited equipment or attach a warning tag supplied by VOSH, or devised by the employer to the equipment to alert affected employees to the presence of the hazard. VOSH must indicate cited items on the citation for which documentation and/or an abatement plan is required and the cited items of which certification are not required.

CHANGE IV: These amendments to the Administrative Regulation for the Virginia Occupational Safety and Health Program will replace outdated references to Title 9 of the Administrative Process Act with the current references in the Code of Virginia.

CHANGE V: This amendment to the Administrative Regulations for the Virginia Occupational Safety and Health (VOSH) Program further clarifies and specifies the intent of definitions or other procedural actions listed in the regulation. It adds omitted statutory references applicable to the regulation and corrects omissions in listing of documents covered under notification and posting requirements. It clarifies the disclosability of file documents prior to the issuance of a final order. It further specifies the eligibility of a person to file a complaint, to modify the classification of complaints to correspond with the parallel procedures of federal OSHA and the response to such complaints. This amendment requires employers to comply with manufacturer's specifications, requirements and limitations on all machinery, equipment, vehicles, materials and tools where not superseded by more stringent VOSH regulations. This amendment clarifies the meaning of the term "agricultural operations." It also further clarifies the existing timetable for issuing citations and proposed penalties. Additionally, the amendment codifies in regulation the multi-employer worksite policy for citation issuance; and it removes the direct involvement of the Commissioner of Labor and Industry in the determination of the extension of abatement times.

CHANGE VI: This amendment seeks to establish procedures for the Commissioner or his appointed representatives under Va. Code §40.1-6(5) to take and preserve testimony, examine witnesses and administer oaths under Va. Code §§40.1-6(4) and 40.1-10. The amendment makes the following changes:

- A. Specifies the wording of the oath to be administered and the manner in which it would be administered.

- B. Explains the manner in which the Commissioner would appoint in writing Department personnel as his representatives having the authority to administer such oaths and having the authority to examine witnesses in accordance with the procedures outlined in the regulation.
- C. Specifies that testimony preserved under the regulation would be recorded by a court reporter.
- D. Specifies the level of confidentiality that would attach to any testimony preserved under the statute.
- E. Establishes a procedure for the Commissioner or his authorized representatives to follow in the event that any employer refuses to make an employee or supervisor available to provide testimony in accordance with Va. Code 40.1-6(4). The final regulation provides that an application for an inspection warrant under Va. Code §§40.1-49.8 through 40.1-49.12 for VOSH investigations/inspections will be submitted to the local General District or Circuit Court with jurisdiction over the employer.
- F. Establishes a procedure for the Commissioner or his authorized representatives to follow in the event that any person who has sworn to give testimony willfully refuses or fails to answer any legal and proper question in accordance with Va. Code §§40.1-10 and 40.1-6(4), up to and including referring such refusal to the appropriate Commonwealth's Attorney for prosecution of the individual involved.
- G. Recommends longstanding non-substantive housekeeping changes to the final regulation that are primarily in response to a request from the Registrar of Regulations to correct sections which do not comply with Virginia Administrative Code (VAC) formatting requirements:
 - Section 10, Definitions, definitions are put in alphabetical order.
 - Section 20, Jurisdiction, sections are renumbered, and cross-references to other sections in the regulation are put in proper VAC format.
 - Section 90, Release of information and disclosure pursuant to requests under the Virginia Freedom of Information Act and subpoenas, the following language was amended:

“B. Interview statements of employers, owners, operators, agents, or employees given to the commissioner pursuant to § 40.1-49.8 of the Code of Virginia are confidential. Pursuant to the requirements set forth in §40.1-11 of the Code of Virginia, individuals shall have the right to request a copy of their own interview statements.”
 - Section 100, Complaints, cross-references to other sections in the regulation were put in proper VAC format.
 - Section 130, Construction industry standards, sections renumbered.
 - Cross-references to other sections within the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program were put in proper Virginia Administrative Code format for the following sections:
 - 16VAC25-60-140, Agricultural standards
 - 16VAC25-60-190, General provisions
 - 16VAC25-60-210, Permanent variances
 - 16VAC25-60-220, Interim order
 - 16VAC25-60-260, Issuance of citation and proposed penalty

- 16VAC25-60-270, Contest of citation or proposed penalty
- 16VAC25-60-280, General contest proceedings applicable to the public sector
- 16VAC25-60-310, Contest of abatement period
- 16VAC25-60-320, Extension of abatement time
- 16VAC25-60-330, Informal Conference
- 16VAC25-60-340, Settlement

CHANGE VII: The purpose of amending the Administrative Regulation is to make certain substantive and procedural changes and to clarify additional changes that reflect current VOSH policy:

- A. The amendment to 16VAC25-60-130 allows VOSH to enforce the Virginia Department of Transportation (VDOT) Work Area Protection Manual in lieu of the federal Manual on Uniform Traffic Control Devices (Part VI of the MUTCD, 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition). This amendment applies to any contract for construction, repair or maintenance between either the Commonwealth or one of its local governments and an employer, when such contract provides that the parties assure compliance with the VDOT Work Area Protection Manual. A housekeeping change to renumber all paragraphs in §§16VAC25-60-120 through 16VAC25-60-150 is also included.
- B. The amendment to 16VAC25-60-30.D clarifies whistleblower anti-retaliation safeguards for public sector employees other than the Commonwealth and its agencies, e.g., political subdivisions such as city and county governments. The VOSH ARM defines the term "public employer" in §16VAC25-60-10 as follows: "*Public employer*" means the Commonwealth of Virginia, including its agencies, authorities, or instrumentalities or any political subdivision or public body.

The current wording of §16VAC25-60-30.D applies §40.1-51.2:2.A of the *Code of Virginia* to all public employers, i.e., both state and local government, but states that the Commissioner shall not bring an action in Circuit Court for a violation involving a public employer. This language appears to conflict with paragraph §16VAC25-60-30.E's comprehensive application of §40.1-51.2:2. of the *Code of Virginia* to political subdivisions or public bodies, which allows the Commissioner to litigate such a violation in Circuit Court.

Prior to proposing this amendment, it has been the Department's position that the right of the Commissioner to litigate a violation against a political subdivision or public body in §16VAC25-60-30.E, takes precedence over §16VAC25-60-30.D, because paragraph E. is the more specific provision in that it specifically applies §40.1-51.2:2 to a subset of the broader category of the term "public employer". The final regulation will eliminate this conflict.

- C. The amendment to 16VAC25-60-30.E applies §40.1-7 of the *Code of Virginia* to public employers other than the Commonwealth and its agencies, which will allow Commonwealth's Attorneys to act on behalf of the Commissioner in certain situations involving those public sector employers.

Section 16VAC25-60-30.E provides that the following sections of the *Code of Virginia* apply to public employers other than the Commonwealth and its agencies:

- §40.1-49.4.F - Commissioner's authority to seek injunctive relief in certain situations.
- Commissioner's authority to obtain administrative search warrants under §§40.1-49.9 through -49.12 of the *Code of Virginia*.

D. The amendment to 16VAC25-60-30.G clarifies that when seeking to resolve whistleblower anti-retaliation cases involving the Commonwealth and its agencies, the Commissioner will petition the appropriate state official in a manner similar to that specified in 16VAC25-60-300.B, which outlines the process for resolving failure-to-abate issues involving the Commonwealth and its agencies. Section 16VAC25-60-300.B provides that:

“B. Whenever the Commonwealth or any of its agencies fails to abate a violation within the time provided in an appropriate final order, the Commissioner of Labor and Industry shall normally petition for redress as follows: For violations in the Department of Law, to the Attorney General; for violations in the Office of the Lieutenant Governor, to the Lieutenant Governor; for violations otherwise in the executive branch, to the appropriate cabinet secretary; for violations in the State Corporation Commission, to a judge of the commission; for violations in the Department of Workers' Compensation, to the Chairman of the Workers' Compensation Commission; for violations in the legislative branch of government, to the Chairman of the Senate Committee on Commerce and Labor; for violations in the judicial branch, to the chief judge of the circuit court or to the Chief Justice of the Supreme Court. Where the violation cannot be timely resolved by this petition, the commissioner shall bring the matter to the Governor for resolution.”

E. The amendment to 16VAC25-60-90 clarifies Virginia Freedom of Information Act (FOIA) requirements in regard to the Voluntary Protection Program (VPP), §40.1-49.13 of the *Code of Virginia*. The final regulation tracks federal OSHA's requirements under the federal Freedom of Information Act provisions for the federal VPP and provides that the following documents are releasable pursuant to an FOIA request:

- Participant applications and amendments;
- Onsite evaluation reports;
- Annual self-evaluations;
- Agency staff correspondence containing recommendations to the Commissioner;
- Approval letters; and
- Notifications to compliance staff removing the participants from the general inspection list, related formal correspondence.

It is the Department's intent to treat FOIA requests for VPP documents in the same manner as requests for VOSH compliance documents, by complying with the Virginia FOIA statutory requirements as well as Va. Code §40.1-11¹, and legal precedent.

Examples of information that would not be released in response to an FOIA request include employee interview statements (see 16VAC25-60-90.E.1 and Va. Code §40.1-11); employee medical and personnel records (see 16VAC25-60-90.E.3 and Va. Code §40.1-11); and information contained in VPP files the disclosure of which would jeopardize the safety or security of persons or buildings/facilities at VPP sites (see Va. Code 2.2-3705.2(14)).

¹ § 40.1-11. Using or revealing information gathered. Neither the Commissioner nor any employee of the Department shall make use of or reveal any information or statistics gathered from any person, company or corporation for any purposes other than those of this title.

F. The amendment to 16VAC25-60-110 specifies that occupational safety and health anti-discrimination cases will also be referred to as "whistleblower" cases. This terminology change reflects changes implemented by federal OSHA to refer to employees who allege discriminatory or retaliatory practices by an employer when the employees have engaged in activities protected by §11(c) of the OSH Act of 1970, as "whistleblowers".

G. The amendment to 16VAC25-60-110 clarifies that the Commissioner may request penalties that would be paid to the employee for occupational whistleblower discrimination or anti-retaliation cases at the litigation stage pursuant to §40.1-51.2:2.

Section 40.1-51.2:1 prohibits employers from discriminating against employees who have exercised their safety and health rights under Title 40.1. Section 40.1-51.2:2.A² provides that the Commissioner shall bring an action in Circuit Court when it is determined that a violation of §40.1-51.2:1 has occurred and attempts at conciliation have failed. Section §40.1-51.2:2.A further provides that the court "...shall have jurisdiction, for cause shown, to restrain violations and order appropriate relief..."

The amendment clarifies that the court's authority to "...restrain violations and order appropriate relief" includes the ability to issue penalties or fines to the employer which would be payable to the employee.

H. The amendment to 16VAC25-60-245 clarifies that the Commissioner's authority in Subdivision 4 of § 40.1-6 of the Code of Virginia to take and preserve testimony, examine witnesses and administer oath constitutes an administrative subpoena power.

I. The amendment to 16VAC25-60-260 clarifies that the Commissioner's burden of proving the basis for a VOSH citation, penalty and order of abatement is by a "preponderance of the evidence". While the Virginia Court of Appeals has ruled that the burden of proof for the Commissioner in a VOSH case is by a preponderance of the evidence (*Nat'l Coll. of Bus. & Tech., Inc. v. Davenport*, 57 Va. App. 677, 685, 705 S.E. 2d 519, 523 (2011)), the issue has not been definitively ruled on by the Virginia Supreme Court.

² Section 40.1-51.2:2.A of the *Code of Virginia* contains several provisions:

- The right of an employee who believes he or she has been discriminated against to file a complaint with the Commissioner of Labor and Industry.
- The complaint must be filed within 60 days after such violation occurs.
- Failure to file the complaint within 60 days bars the employee from seeking relief under §40.1-51.2:2.
- The Commissioner is authorized to conduct investigations of timely complaints received.
- If the Commissioner determines that a violation of the statute has occurred, settlement must be attempted.
- If voluntary settlement cannot be reached, the Commissioner will file litigation in Circuit Court.
- The Court has jurisdiction to "restrain violations and order appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay plus interest at a rate not to exceed eight percent per annum."

J. The amendment to 16VAC25-60-260 clarifies that the burden for proving an affirmative defense to a citation lies with the defendant. While it is generally accepted in case law that the burden for proving an affirmative defense to an OSHA/VOSH citation lies with the employer, it is not conclusively so.

For instance the Fourth Circuit Court of Appeals has ruled that the burden of proving unforeseeable and unpreventable employee misconduct lies with the government (*Ocean Electric Corp. v. Sec of Labor*, 594 F. 2d 396 (4th Cir. 1979); and *L.R. Willson & Sons, Inc. v. Occupational Safety and Health Review Comm'n*, 134 F. 3d 1235 (4th Cir.), cert denied, 525 U. S. 962 (1998). While the Virginia Court of Appeals has ruled that the burden of proof on the issue of employee misconduct lies with the employer in Virginia (*Magco of Maryland, Inc., v. Barr*, 33 Va. App. 78, 531 S. E. 2d 614 (2000)), the issue has not been definitively ruled on by the Virginia Supreme Court.

**Administrative Regulations Manual (ARM) for the Virginia
Occupational Safety and Health Program**

As adopted by the

Safety and Health Codes Board

Date: April 25, 1994



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: June 30, 1994

Administrative Regulations Manual for the
Virginia Occupational Safety and Health Program

VR 425-02-95

**Administrative Regulations Manual (ARM) for the Virginia
Occupational Safety and Health Program;
and Corrections**

As adopted by the

Safety and Health Codes Board

Date: April 17, 1995



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: August 1, 1995

Administrative Regulations Manual for the
Virginia Occupational Safety and Health Program

VR 425-02-95

**Amendment to the Administrative Regulation for the Virginia Occupational Safety and Health Program by
inclusion of Abatement Verification, Final Rule, 29 CFR § 1903.19**

As adopted by the

Safety and Health Codes Board

Date: September 29, 1997



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: December 15, 1997

16 VAC 25-60-307, Abatement Verification

When the regulations as set forth in the final rule for Abatement Verification, 29 CFR §1903.19, are applied to the Commissioner of the Department of Labor and Industry and/or to Virginia employers, the following federal terms or language, shall be considered to read as below:

Federal Terms/Language:

VOSH Equivalent:

OSHA

VOSH

Occupational Safety and Health Act of 1970

Virginia Occupational Safety and Health Act

29 CFR

VOSH Standard

§1903.16

§0ARM.0002.03

§1903.19

§0ARM.0007.00

Assistant Secretary

Commissioner of Labor and Industry

Agency

Department

May 30, 1997

December 15, 1997

Occupational Safety and Health
Review Commission

Virginia Circuit Court

“(b)(2)(ii) For a contested citation item for which the Occupational Safety and Health Review Commission (OSHRC) has issued an order affirming the violation, the later of:
(A) The date identified in the final order for abatement; or
(B) The date computed by adding the period allowed in the citation for the abatement to the final order date;
(C) The date established by a formal settlement agreement.

“(b)(2)(ii) For a contested citation item the date established in a formal settlement agreement between VOSH and the employer; **or**
For a contested citation item for which a Virginia Circuit Court has issued an order affirming the violation, the later of:
(A) The date identified in the final order; or
(B) The date computed by adding the period allowed in the citation for the abatement to the final order date;
or
(C) The date established by an agreed order.

“(b)(4)(ii)(A) The thirtieth day after the date on which a decision or order of a commission law judge administrative law judge has been docketed with the commission, unless a member of the commission has directed review; or...”

“(b)(4)(ii)(A) Date that a formal settlement agreement is signed by VOSH; or..”

“(b)(4)(ii)(B) Where review has been directed, the Thirtieth day after the date on which the Commission issues its decision or order Disposing of all or pertinent part of a case; or...”

“(b)(4)(ii)(B) The thirtieth day after the date on which a decision or order of a circuit court judge has been entered;, or...”

“(b)(4)(ii)(C) That date on which a federal appeals court issues a decision affirming the violation in a case in which a final order of OSHRC has been stayed.”

“(b)(4)(ii)(C) The date on which the Virginia Court of Appeals issues a decision affirming the violation in a VOSH case.”

16 VAC 25-60, *et seq.*, Administrative Regulation for the Virginia Occupational Safety and Health Program

As Adopted by the
Safety and Health Codes Board

Date: December 2, 2002



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: March 1, 2003

16 VAC 25-60, *et. seq.*, Administrative Regulation
for the Virginia Occupational Safety and Health Program

16 VAC 25-60, *et seq.*, Administrative Regulation for the Virginia Occupational Safety and Health Program

As Adopted by the
Safety and Health Codes Board

Date: March 7, 2006



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: September 21, 2006

16 VAC 25-60, *et. seq.*, Administrative Regulation
for the Virginia Occupational Safety and Health Program

16 VAC 25-60, *et seq.*, Administrative Regulation for the Virginia Occupational Safety and Health Program

As Adopted by the
Safety and Health Codes Board

Date: August 18, 2010



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: December 5, 2012

16 VAC 25-60, *et. seq.*, Administrative Regulation
for the Virginia Occupational Safety and Health Program

**16VAC25-60, et seq., Administrative Regulation for the
Virginia Occupational Safety and Health (VOSH) Program, Miscellaneous Changes**

As Adopted by the
Safety and Health Codes Board

Date: 27 July 2017



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: 15 December 2017

16VAC25-60, et seq., Administrative Regulation for the
Virginia Occupational Safety and Health (VOSH) Program

AAdministrative

RRegulation

MManual



**Virginia Occupational Safety
and Health Program**

Effective: 15 December 2017

ADMINISTRATIVE REGULATION FOR THE VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM - 16VAC25-60

Part I. Definitions

16VAC25-60-10. Definitions

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Abatement period" means the period of time defined or set out in the citation for correction of a violation.

"Board" means the Safety and Health Codes Board.

"Bureau of Labor Statistics" means the Bureau of Labor Statistics of the United States Department of Labor.

"Citation" means the notice to an employer that the commissioner has found a condition or conditions that violate Title 40.1 of the Code of Virginia or the standards, rules or regulations established by the commissioner or the board.

"Commissioner" means the Commissioner of Labor and Industry. Except where the context clearly indicates the contrary, any such reference shall include his authorized representatives.

"Commissioner of Labor and Industry" means only the individual who is Commissioner of Labor and Industry.

"Department" means the Virginia Department of Labor and Industry.

"De minimis violation" means a violation which has no direct or immediate relationship to safety and health.

"Employee" means an employee of an employer who is employed in a business of his employer.

"Employee representative" means a person specified by employees to serve as their representative.

"Employer" means any person or entity engaged in business who has employees but does not include the United States.

"Establishment" means, for the purpose of record keeping requirements, a single physical location where business is conducted or where services or industrial operations are performed, e.g., factory, mill, store, hotel, restaurant, movie theater, farm, ranch, bank, sales office, warehouse, or central administrative office. Where distinctly separate activities are performed at a single physical location, such as contract activities operated from the same physical location as a lumberyard; each activity is a separate establishment. In the public sector, an establishment is either (i) a single physical location where a specific governmental function is performed; or (ii) that location which is the lowest level where attendance or payroll records are kept for a group of employees who are in the same specific organizational unit, even though the activities are carried on at more than a single physical location.

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

"FOIA" means the Freedom of Information Act.

"Imminent danger condition" means any condition or practice in any place of employment such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through standard enforcement procedures provided by Title 40.1 of the Code of Virginia.

"OSHA" means the Occupational Safety and Health Administration of the United States Department of Labor.

"Other 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.

"Person" means any individual, corporation, partnership, association, cooperative, limited liability company, trust, joint venture, government, political subdivision, or any other legal or commercial entity and any successor, representative, agent, agency, or instrumentality thereof.

"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.

"Recordable occupational injury and illness" means (i) a fatality, regardless of the time between the injury and death or the length of illness; (ii) a nonfatal case that results in lost work days; or (iii) a nonfatal case without lost work days which results in transfer to another job or termination of employment, which requires medical treatment other than first aid, or involves loss of consciousness or restriction of work or motion. This category also includes any diagnosed occupational illness which is reported to the employer but is not otherwise classified as a fatality or lost work day case.

"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.

"*Standard*" means an occupational safety and health standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

"*VOSH*" means Virginia Occupational Safety and Health.

"*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.

"*Working days*" means Monday through Friday, excluding legal holidays, Saturday, and Sunday.

Part II. General Provisions

16VAC25-60-20. Jurisdiction

All Virginia statutes, standards, and regulations pertaining to occupational safety and health shall apply to every employer, employee and place of employment in the Commonwealth of Virginia except where:

1. The United States is the employer or exercises exclusive jurisdiction;
2. The federal Occupational Safety and Health Act of 1970 does not apply by virtue of § 4(b)(1) of that Act. The commissioner shall consider federal OSHA case law in determining where jurisdiction over specific working conditions has been preempted by the regulations of a federal agency; or
3. The employer is a public employer, as that term is defined in this chapter. In such cases, the Virginia laws, standards and regulations governing occupational safety and health are applicable as stated including [16VAC25-60-10](#), [16VAC25-60-30](#), [16VAC25-60-280](#), [16VAC25-60-290](#), and [16VAC25-60-300](#).

16VAC25-60-30. Applicability to Public Employers

A. All occupational safety and health standards adopted by the board shall apply to public employers and their employees in the same manner as to private employers.

B. All sections of this chapter shall apply to public employers and their employees. Where specific procedures are set out for the public sector, such procedures shall take precedence.

C. The following portions of Title 40.1 of the Code of Virginia shall apply to public employers: §§ [40.1-10](#), subdivision A 1 of § [40.1-49.4](#), [40.1-49.8](#), [40.1-51](#), [40.1-51.1](#), [40.1-51.2](#), [40.1-51.2:1](#), [40.1-51.3](#), [40.1-51.3:2](#), and [40.1-51.4:2](#).

D. Section [40.1-51.2:2](#) A of the Code of Virginia shall apply to the Commonwealth and its agencies except that the commissioner shall not bring action in circuit court in the event that a voluntary agreement cannot be obtained.

E. Sections [40.1-7](#), [40.1-49.4](#) F, [40.1-49.9](#), [40.1-49.10](#), [40.1-49.11](#), [40.1-49.12](#), and [40.1-51.2:2](#) of the Code of Virginia shall apply to public employers other than the Commonwealth and its agencies.

F. If the commissioner determines that an imminent danger situation, as defined in § [40.1-49.4](#) F of the Code of Virginia, exists for an employee of the Commonwealth or one of its agencies, and if the employer does not abate that imminent danger immediately upon request, the Commissioner of Labor and Industry shall forthwith petition the governor to direct that the imminent danger be abated.

G. If the commissioner is unable to obtain a voluntary agreement to resolve a violation of § [40.1-51.2:1](#) of the Code of Virginia by the Commonwealth or one of its agencies, the Commissioner of Labor and Industry shall petition for redress in the manner provided in [16VAC25-60-300](#) B.

16VAC25-60-40. Notification and Posting Requirements

Every employer shall post and keep posted any notice or notices, as required by the commissioner, including the Job Safety and Health Protection Poster which shall be available from the department. Such notices shall inform employees of their rights and obligations under the safety and health provisions of Title 40.1 of the Code of Virginia and this chapter. Violations of notification or posting requirements are subject to citation and penalty.

1. Such notice or notices, including all citations, notices of contest, petitions for variances or extensions of abatement periods, orders, and other documents of which employees are required to be informed by the employer under statute or by this chapter, shall be delivered by the employer to any authorized employee representative, and shall be posted at a conspicuous place where notices to employees are routinely posted and shall be kept in good repair and in unobstructed view. The document must remain posted for 10 working days unless a different period is prescribed elsewhere in Title 40.1 of the Code of Virginia or this chapter.

2. A citation issued to an employer, or a copy of it, shall remain posted in a conspicuous place and in unobstructed view at or near each place of alleged violation for three working days or until the violation has been abated, whichever is longer.

3. A copy of any written notice of contest shall remain posted until all proceedings concerning the contest have been completed.

4. Upon receipt of a subpoena, the employer shall use the methods set forth in this section to further notify his employees and any authorized employee representative of their rights to party status. This written notification shall include both the date, time and place set for court hearing, and any subsequent changes to hearing arrangements. The notification shall remain posted until commencement of the hearing or until an earlier disposition.

16VAC25-60-50 to 16VAC25-60-70. [Repealed]

16VAC25-60-80. Access to Employee Medical and Exposure Records

A. An employee and his authorized representative shall have access to his exposure and medical records required to be maintained by the employer.

B. When required by a standard, a health care professional under contract to the employer or employed by the employer shall have access to the exposure and medical records of an employee only to the extent necessary to comply with the requirements of the standard and shall not disclose or report without the employee's express written consent to any person within or outside the workplace except as required by the standard.

C. Under certain circumstances it may be necessary for the commissioner to obtain access to employee exposure and medical records to carry out statutory and regulatory functions. However, due to the substantial personal privacy interests involved, the commissioner shall seek to gain access to such records only after a careful determination of the need for such information and only with appropriate safeguards described at 29 CFR 1913.10(i) in order to protect individual privacy. In the event that the employer requests the commissioner to wait 24 hours for the presence of medical personnel to review the records, the commissioner will do so on presentation of an affidavit that the employer has not and will not modify or change any of the records. The commissioner's examination and use of this information shall not exceed that which is necessary to accomplish the purpose for access. Personally identifiable medical information shall be retained only for so long as is needed to carry out the function for which it was sought. Personally identifiable information shall be kept secure while it is being used and shall not be released to other agencies or to the public except under certain narrowly defined circumstances outlined at 29 CFR 1913.10(m).

D. In order to implement the policies described in subsection C of this section, the rules and procedures of 29 CFR Part 1913.10, Rules of Agency Practice and Procedure Concerning Access to Employee and Medical Records, are hereby expressly incorporated by reference. When these rules and procedures are applied to the commissioner the following federal terms should be considered to read as below:

FEDERAL TERM	VOSH EQUIVALENT
AGENCY	Virginia Department Of Labor And Industry
OSHA	VOSH
Assistant Secretary	Commissioner
Office Of The Solicitor Of Labor	Office Of The Attorney General
Department Of Justice	Office of the Attorney General
Privacy Act	§§ 2.2-3800 to 2.2-3809 OF THE CODE OF VIRGINIA

16VAC25-60-90. Release of Information and Disclosure Pursuant to Requests under the Virginia Freedom of Information Act and Subpoenas

A. Pursuant to the Virginia Freedom of Information Act (FOIA) (§ [2.2-3700](#) et seq. of the Code of Virginia) and with the exceptions stated in subsections B through H of this section, employers, employees and their representatives shall have access to information gathered in the course of an inspection.

B. Interview statements of employers, owners, operators, agents, or employees given to the commissioner pursuant to § [40.1-49.8](#) of the Code of Virginia are confidential. Pursuant to the requirements set forth in § [40.1-11](#) of the Code of Virginia, individuals shall have the right to request a copy of their own interview statements.

C. All file documents contained in case files that are under investigation, and where a citation has not been issued, are not disclosable until:

1. The decision has been made not to issue citations; or
2. Six months has lapsed following the occurrence of an alleged violation.

D. Issued citations, orders of abatement, and proposed penalties are public documents and are releasable upon a written request. All other file documents in cases where a citation has been issued are not disclosable until the case is a final order of the commissioner or the court, except that once a copy of file documents in a contested case has been provided to legal counsel for the employer in response to a request for discovery, or to a third party in response to a subpoena duces tecum, such documents shall be releasable upon a written request, subject to the exclusions in this section and the Virginia Freedom of Information Act.

E. Information required to be kept confidential by law shall not be disclosed by the commissioner or by any employee of the department. In particular, the following specific information is deemed to be nondisclosable:

1. The identity of and statements of an employee or employee representative who has complained of hazardous conditions to the commissioner;
2. The identities of employers, owners, operators, agents, or employees interviewed during inspections and their interview statements;
3. Employee medical and personnel records obtained during VOSH inspections. Such records may be released to the employee or his duly authorized representative upon a written and endorsed request; and
4. Employer trade secrets, commercial, and financial data.

F. The commissioner may decline to disclose a document that is excluded from the disclosure requirements of the Virginia FOIA, particularly documents and evidence related to criminal investigations, writings protected by the attorney-client privilege, documents compiled for use in litigation, and personnel records.

G. An effective program of investigation and conciliation of complaints of discrimination requires confidentiality. Accordingly, disclosure of records of such complaints, investigations, and conciliations will be presumed to not serve the purposes of Title 40.1 of the Code of Virginia, except for statistical and other general information that does not reveal the identities of particular employers or employees.

H. All information gathered through participation in consultation services or training programs of the department shall be withheld from disclosure except for statistical data that does not identify individual employers.

I. All information gathered through participation in voluntary protection programs of the department pursuant to § [40.1-49.13](#) of the Code of Virginia shall be withheld from disclosure except for statistical data that does not identify individual employers and for the following:

1. Participant applications and amendments, onsite evaluation reports, and annual self-evaluations; and
2. Agency staff correspondence containing recommendations to the commissioner, approval letters, notifications to compliance staff removing the participants from the general inspection list, and related formal correspondence.

J. The commissioner, in response to a subpoena, order, or other demand of a court or other authority in connection with a proceeding to which the department is not a party, shall not disclose any information or produce any material acquired as part of the performance of his official duties or because of his official status without the approval of the Commissioner of Labor and Industry.

K. The commissioner shall disclose information and statistics gathered pursuant to the enforcement of Virginia's occupational safety and health laws, standards, and regulations where it has been determined that such a disclosure will serve to promote the safety, health, and welfare of employees. Any person requesting disclosure of such information and statistics should include in his written request any information that will aid the commissioner in this determination.

16VAC25-60-100. Complaints

A. An employee or other person who believes that a safety or health hazard exists in a workplace may request an inspection by giving notice to the commissioner.

B. For purposes of this section and § [40.1-51.2](#)(b) of the Code of Virginia, the representative(s) that will be recognized as authorized to act for employees can be:

1. A representative of the employee bargaining unit;
2. Any member of the employee's immediate family acting on behalf of the employee; or
3. A lawyer or physician retained by the employee.

C. A written complaint may be preceded by an oral complaint at which time the commissioner will either give instructions for filing the written complaint or provide forms for that purpose. Section [40.1-51.2](#)(b) of the Code of Virginia stipulates that the written complaint follow an oral complaint by no more than two working days. However, if an oral complaint gives the commissioner reasonable grounds to believe that a serious condition or imminent danger situation exists, the commissioner may cause an inspection to be conducted as soon as possible without waiting for a written complaint.

- D. A complaint should allege that a violation of safety and health laws, standards, rules, or regulations has taken place. The violation or hazard should be described with reasonable particularity.
- E. A complaint will be evaluated to determine whether there are reasonable grounds to believe that the violation or hazard complained of exists.
1. If the commissioner determines that there are no reasonable grounds for believing that the violation or hazard exists, the employer and the complainant shall be informed in writing of the reasons for this determination.
 2. An employee or authorized representative may obtain review of the commissioner's determination that no reasonable grounds for believing that the violation or hazard exists by submitting a written statement of his position with regard to the issue. Upon receipt of such written statement a further review of the matter will be made which may include a requested written statement of position from the employer, further discussions with the complainant or an informal conference with complainant or employer if requested by either party. After review of the matter, the commissioner shall affirm, modify or reverse the original determination and furnish the complainant and the employer written notification of his decision.
- F. The commissioner's response to a complaint will either be in the form of an onsite inspection or an investigation that does not involve onsite response by the commissioner.
1. Onsite inspections will normally be conducted in response to complaints alleging the following:
 - a. The complaint was reduced to writing, is signed by a current employee or employee representative, and states the reason for the inspection request with reasonable particularity. In addition, there are reasonable grounds to believe that a violation of a safety or health standard has occurred;
 - b. Imminent danger hazard;
 - c. Serious hazard, which in the discretion of the commissioner requires an onsite inspection;
 - d. Permanently disabling injury or illness related to a hazard potentially still in existence;
 - e. The establishment has a significant history of noncompliance with VOSH laws and standards;
 - f. The complaint identifies an establishment or an alleged hazard covered by a local or national emphasis inspection program;
 - g. A request from a VOSH/OSHA discrimination investigator to conduct an inspection in response to a complaint initially filed with the investigator; or
 - h. The employer fails to provide an adequate response to a VOSH investigation contact, or the complainant provides evidence that the employer's response is false, incorrect, incomplete or does not adequately address the hazard.
 2. A complaint investigation, which does not involve onsite activity, shall normally be conducted for all complaints that do not meet the criteria listed in subdivision 1 of this subsection.

3. The commissioner reserves the right, for good cause shown, to initiate an inspection with regard to certain complaints that do not meet the criteria listed in subdivision 1 of this subsection; as well as to decline to conduct an inspection and instead conduct an investigation, for good cause shown, when certain complaints are found to otherwise meet the criteria listed in subdivision 1 of this subsection.

G. If there are several complaints to be investigated, the commissioner may prioritize them by considering such factors as the gravity of the danger alleged and the number of exposed employees.

H. At the beginning of the inspection the employer shall be provided with a copy of the written complaint. The complainant's name shall be deleted and any other information which would identify the complainant shall be reworded or deleted so as to protect the complainant's identity.

I. An inspection pursuant to a complaint may cover the entire operation of the employer, particularly if it appears to the commissioner that a full inspection is warranted. However, if there has been a recent inspection of the worksite or if there is reason to believe that the alleged violation or hazard concerns only a limited area or aspect of the employer's operation, the inspection may be limited accordingly.

J. After an inspection based on a complaint, the commissioner shall inform the complainant in writing whether a citation has been issued and briefly set forth the reasons if not. The commissioner shall provide the complainant with a copy of any resulting citation issued to the employer.

16VAC25-60-110. Whistleblower Discrimination; Discharge or Retaliation; Remedy for Retaliation

A. In carrying out his duties under § [40.1-51.2:2](#) of the Code of Virginia, the commissioner shall consider case law, regulations, and formal policies of federal OSHA. An employee's engagement in activities protected by Title 40.1 does not automatically render him immune from discharge or discipline for legitimate reasons. Termination or other disciplinary action may be taken for a combination of reasons, involving both discriminatory and nondiscriminatory motivations. In such a case, a violation of § [40.1-51.2:1](#) of the Code of Virginia has occurred if the protected activity was a substantial reason for the action, or if the discharge or other adverse action would not have taken place "but for" engagement in protected activity.

Employee whistleblower activities, protected by § [40.1-51.2:1](#) of the Code of Virginia, include:

1. Making any complaint to his employer or any other person under or related to the safety and health provisions of Title 40.1 of the Code of Virginia;
2. Instituting or causing to be instituted any proceeding under or related to the safety and health provisions of Title 40.1 of the Code of Virginia;
3. Testifying or intending to testify in any proceeding under or related to the safety and health provisions of Title 40.1 of the Code of Virginia;
4. Cooperating with or providing information to the commissioner during a worksite inspection; or
5. Exercising on his own behalf or on behalf of any other employee any right afforded by the safety and health provisions of Title 40.1 of the Code of Virginia.

Discharge or discipline of an employee who has refused to complete an assigned task because of a reasonable fear of injury or death will be considered retaliatory only if the employee has sought abatement of the hazard from the employer and the statutory procedures for securing abatement would not have provided timely protection. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, an abatement of the dangerous condition.

Disciplinary measures taken by employers solely in response to employee refusal to comply with appropriate safety rules and regulations shall not be regarded as retaliatory action prohibited by § [40.1-51.2:1](#) of the Code of Virginia.

B. A complaint pursuant to § [40.1-51.2:2](#) of the Code of Virginia may be filed by the employee himself or anyone authorized to act in his behalf.

The investigation of the commissioner shall include an opportunity for the employer to furnish the commissioner with any information relevant to the complaint.

An attempt by an employee to withdraw a previously filed complaint shall not automatically terminate the investigation of the commissioner. Although a voluntary and uncoerced request from the employee that his complaint be withdrawn shall receive due consideration, it shall be the decision of the commissioner whether further action is necessary to enforce the statute.

The filing of a retaliation complaint with the commissioner shall not preclude the pursuit of a remedy through other channels. Where appropriate, the commissioner may postpone his investigation or defer to the outcome of other proceedings.

C. Subsection A of § [40.1-51.2:2](#) of the Code of Virginia provides that the commissioner shall bring an action in circuit court when it is determined that a violation of § [40.1-51.2:1](#) of the Code of Virginia has occurred and a voluntary agreement could not be obtained. Subsection A of § [40.1-51.2:2](#) further provides that the court "shall have jurisdiction, for cause shown, to restrain violations and order appropriate relief." The court's authority to restrain violations and order appropriate relief includes the ability to issue penalties or fines to the employer that would be payable to the employee. In determining the appropriate level of penalties or fines, the court may look to subsections G, H, I, and J of § [40.1-49.4](#) of the Code of Virginia.

Part III. Occupational Safety and Health Standards

16VAC25-60-120. General Industry Standards

A. The occupational safety or health standards adopted as rules or regulations by the board either directly or by reference, from 29 CFR Part 1910 shall apply by their own terms to all employers and employees at places of employment covered by the Virginia State Plan for Occupational Safety and Health.

B. The employer shall comply with the manufacturer's specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment, unless specifically superseded by a more stringent corresponding requirement in 29 CFR Part 1910. The use of any machinery, vehicle, tool, material or equipment that is not in compliance with any applicable requirement of the manufacturer is prohibited and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable or be physically removed from its place of use or operation.

16VAC25-60-130. Construction Industry Standards

A. The occupational safety or health standards adopted as rules or regulations by the Virginia Safety and Health Codes Board either directly, or by reference, from 29 CFR Part 1926 shall apply by their own terms to all employers and employees engaged in either construction work or construction related activities covered by the Virginia State Plan for Occupational Safety and Health.

B. The employer shall comply with the manufacturer's specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment, unless specifically superseded by a more stringent corresponding requirement in 29 CFR Part 1926. The use of any machinery, vehicle, tool, material or equipment that is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable or be physically removed from its place of use or operation.

C. For the purposes of the applicability of such Part 1926 standards, the key criteria utilized to make such a decision shall be the activities taking place at the worksite, not the primary business of the employer. Construction work shall generally include any building, altering, repairing, improving, demolishing, painting or decorating any structure, building, highway, or roadway and any draining, dredging, excavation, grading or similar work upon real property. Construction also generally includes work performed in traditional construction trades such as carpentry, roofing, masonry work, plumbing, trenching and excavating, tunneling, and electrical work. Construction does not include maintenance, alteration or repair of mechanical devices, machinery, or equipment, even when the mechanical device, machinery or equipment is part of a pre-existing structure.

D. The employer shall comply with the Virginia Department of Transportation (VDOT) Work Area Protection Manual in lieu of the federal Manual on Uniform Traffic Control Devices (Part VI of the MUTCD, 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition - referenced in [16VAC25-175-1926.200](#) through [16VAC25-175-1926.202](#)) when working under a contract for construction, repair, or maintenance between the employer and the Commonwealth; agencies, authorities, or instrumentalities of the Commonwealth; or any political subdivision or public body of the Commonwealth when such contract stipulates employer compliance with the VDOT Work Area Protection Manual in effect at the time of contractual agreement.

E. Certain standards of 29 CFR Part 1910 have been determined by federal OSHA to be applicable to construction and have been adopted for this application by the board.

F. The standards adopted from 29 CFR Part 1910.19 and 29 CFR Part 1910.20 containing respectively, special provisions regarding air contaminants and requirements concerning access to employee exposure and medical records shall apply to construction work as well as general industry.

16VAC25-60-140. Agriculture Standards

A. The occupational safety or health standards adopted as rules or regulations by the board either directly, or by reference, from 29 CFR Part 1910 and 29 CFR Part 1928 shall apply by their own terms to all employers and employees engaged in either agriculture or agriculture related activities covered by the Virginia State Plan for Occupational Safety and Health.

B. For the purposes of applicability of such Part 1910 and Part 1928 standards, the key criteria utilized to make a decision shall be the activities taking place at the worksite, not the primary business of the employer. Agricultural operations shall generally include any operation involved in the growing or harvesting of crops or the raising of livestock or poultry, or activities integrally related to agriculture, conducted by a farmer or agricultural employer on sites such as farms, ranches, orchards, dairy farms or similar establishments. Agricultural operations do not include construction work as described in subsection C of [16VAC25-60-130](#), nor do they include operations or activities substantially similar to those that occur in a general industry setting and are therefore not unique and integrally related to agriculture.

C. The employer shall comply with the manufacturer's specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment, unless specifically superseded by a more stringent corresponding requirement in 29 CFR Part 1910 or 29 CFR Part 1928. The use of any machinery, vehicle, tool, material or equipment that is not in compliance with any applicable requirement of the manufacturer is prohibited and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable or be physically removed from its place of use or operation.

16VAC25-60-150. Maritime Standards

A. The occupational safety or health standards adopted as rules or regulations by the board either directly, or by reference, from 29 CFR Part 1915, 29 CFR Part 1917, 29 CFR Part 1918, and 29 CFR Part 1919 shall apply by their own terms to all public sector employers and employees engaged in maritime related activities covered by the Virginia State Plan for Occupational Safety and Health.

B. The employer shall comply with the manufacturer's specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment, unless specifically superseded by a more stringent corresponding requirement in Part 1915, 1917, 1918 or 1919. The use of any machinery, vehicle, tool, material or equipment that is not in compliance with any applicable requirement of the manufacturer is prohibited and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable or be physically removed from its place of use or operation.

16VAC25-60-160. General Duty

Where a recognized hazard exists that is causing or likely to cause death or serious physical harm, and specific general industry, construction and agricultural standards do not apply or may not exist, the requirements of § [40.1-51.1](#)(a) of the Code of Virginia shall apply to all employers covered by the Virginia State Plan for Occupational Safety and Health.

16VAC25-60-170. Public Participation in the Adoption of Standards

Interested parties, e.g., employers, employees, employee representatives, and the general public, may offer written and oral comments in accordance with the requirements of the public participation guidelines of either the board or the department, as appropriate, regarding the adoption, alteration, amendment, or repeal of any rules or regulations by the board or the commissioner to further protect and promote the safety and health of employees in places of employment over which the board or the commissioner have jurisdiction.

16VAC25-60-180. Response to Judicial Action

A. Any federal occupational safety or health standard, or portion of them, adopted as rule or regulation by the board either directly, or by reference, and subsequently stayed by an order of any federal court will not be enforced by the commissioner until the stay has been lifted. Any federal standard which has been administratively stayed by OSHA will continue to be enforced by the commissioner until the stay has been reviewed by the board. The board will consider adoption or rejection of any federal administrative stay and will also subsequently review and then consider adoption or rejection of the lifting of such stays by federal OSHA.

B. The continued enforcement of any VOSH standard, or portion of it, which is substantively identical to a federal standard that has been vacated by an order of any federal court, shall be at the discretion of the commissioner until such time as the standard and related federal judicial action have been reviewed by the board. The board shall consider the revocation or the repromulgation of any such standard.

Part IV. Variances

16VAC25-60-190. General Provisions

A. Any employer or group of employers desiring a permanent or temporary variance from a standard or regulation pertaining to occupational safety and health may file with the commissioner a written application which shall be subject to the following policies:

1. A request for a variance shall not preclude or stay a citation or bill of complaint for violation of a safety or health standard;

2. No variances on record keeping requirements required by the U.S. Department of Labor shall be granted by the commissioner;
 3. An employer, or group of employers, who has applied for a variance from the U.S. Department of Labor, and whose application has been denied on its merits, shall not be granted a variance by the commissioner unless there is a showing of changed circumstances significantly affecting the basis upon which the variance was originally denied;
 4. An employer to whom the U.S. Secretary of Labor has granted a variance under OSHA provisions shall document this variance to the commissioner. In such cases, unless compelling local circumstances dictate otherwise, the variance shall be honored by the commissioner without the necessity of following the formal requirements which would otherwise be applicable. In addition, the commissioner will not withdraw a citation for violation of a standard for which the Secretary of Labor has granted a variance unless the commissioner previously received notice of and decided to honor the variance; and
 5. Incomplete applications will be returned within 30 days to the applicant with a statement indicating the reason or reasons that the application was found to be incomplete.
- B. In addition to the information specified in [16VAC25-60-200](#) A and [16VAC25-60-210](#) A, every variance application shall contain the following:
1. A statement that the applicant has informed affected employees of the application by delivering a copy of the application to their authorized representative, if there is one, as well as having posted, in accordance with [16VAC25-60-40](#), a summary of the application which indicates where a full copy of the application may be examined;
 2. A statement indicating that the applicant has posted, with the summary of the application described above, the following notice: "Affected employees or their representatives have the right to petition the Commissioner of Labor and Industry for an opportunity to present their views, data, or arguments on the requested variance, or they may submit their comments to the commissioner in writing. Petitions for a hearing or written comments should be addressed to the Commissioner of Labor and Industry, Main Street Centre, 600 East Main Street, Suite 207, Richmond, VA 23219. Such petitions will be accepted if they are received within 30 days from the posting of this notice or within 30 days from the date of publication of the commissioner's notice that public comments concerning this matter will be accepted, whichever is later."
 3. A statement indicating whether an application for a variance from the same standard or rule has been made to any federal agency or to an agency of another state. If such an application has been made, the name and address of each agency contacted shall be included.
- C. Upon receipt of a complete application for a variance, the commissioner shall publish a notice of the request in a newspaper of statewide circulation within 30 days after receipt, advising that public comments will be accepted for 30 days and that an informal hearing may be requested in conformance with subsection D of this section. Further, the commissioner may initiate an inspection of the establishment in regard to the variance request.

D. If within 30 days of the publication of notice the commissioner receives a request to be heard on the variance from the employer, affected employees, the employee representative, or other employers affected by the same standard or regulation, the commissioner will schedule a hearing with the party or parties wishing to be heard and the employer requesting the variance. The commissioner may also schedule a hearing upon his own motion. The hearing will be held within a reasonable time and will be conducted informally in accordance with §§ [2.2-4019](#) and [2.2-4021](#) of the Code of Virginia unless the commissioner finds that there is a substantial reason to proceed under the formal provisions of § [2.2-4020](#) of the Code of Virginia.

E. If the commissioner has not been petitioned for a hearing on the variance application, a decision on the application may be made promptly after the close of the period for public comments. This decision will be based upon the information contained in the application, the report of any variance inspection made concerning the application, any other pertinent staff reports, federal OSHA comments or public records, and any written data and views submitted by employees, employee representatives, other employers, or the public.

F. The commissioner will grant a variance request only if it is found that the employer has met by a preponderance of the evidence, the requirements of either [16VAC25-60-200](#) B 4 or [16VAC25-60-210](#) B 4.

1. The commissioner shall advise the employer in writing of the decision and shall send a copy to the employee representative if applicable. If the variance is granted, a notice of the decision will be published in a newspaper of statewide circulation.

2. The employer shall post a copy of the commissioner's decision in accordance with [16VAC25-60-40](#).

G. Any party may within 15 days of the commissioner's decision file a notice of appeal to the board. Such appeal shall be in writing, addressed to the board, and include a statement of how other affected parties have been notified of the appeal. Upon notice of a proper appeal, the commissioner shall advise the board of the appeal and arrange a date for the board to consider the appeal. The commissioner shall advise the employer and employee representative of the time and place that the board will consider the appeal. Any party that submitted written or oral views or participated in the hearing concerning the original application for the variance shall be invited to attend the appeal hearing. If there is no employee representative, a copy of the commissioner's letter to the employer shall be posted by the employer in accordance with the requirements of [16VAC25-60-40](#).

H. The board shall sustain, reverse, or modify the commissioner's decision based upon consideration of the evidence in the record upon which the commissioner's decision was made and the views and arguments presented as provided above. The burden shall be on the party filing the appeal to designate and demonstrate any error by the commissioner which would justify reversal or modification of the decision. The issues to be considered by the board shall be those issues that could be considered by a court reviewing agency action in accordance with § [2.2-4027](#) of the Code of Virginia. All parties involved shall be advised of the board's decision within 10 working days after the hearing of the appeal.

16VAC25-60-200. Temporary Variances

A. The commissioner shall give consideration to an application for a temporary variance from a standard or regulation only if the employer or group of employers is unable to comply with that standard or regulation by its

effective date for good cause and files an application which meets the requirements set forth in this section. No temporary variance shall be granted for longer than the time needed to come into compliance with the standard or one year, whichever is shorter.

B. A letter of application for a temporary variance shall be in writing and contain the following information:

1. Name and address of the applicant;
2. Address of the place or places of employment involved;
3. Identification of the standard or part of it from which a temporary variance is sought; and
4. Evidence to establish that:
 - a. The applicant is unable to comply with a standard by its effective date because professional or technical personnel or materials and equipment needed to come into compliance with the standard are unavailable, or because necessary construction or alteration of facilities cannot be completed by the effective date;
 - b. The applicant is taking effective steps to safeguard his employees against the hazards covered by the standard; and
 - c. The applicant has an effective program for coming into compliance with the standard as quickly as practicable.

C. A temporary variance may be renewed if the application for renewal is filed at least 90 days prior to the expiration date and if the requirements of subsection A of this section are met. A temporary variance may not be renewed more than twice.

16VAC25-60-210. Permanent Variances

A. Applications filed with the commissioner for a permanent variance from a standard or regulation shall be subject to the requirements of [16VAC25-60-190](#) and the following additional requirements.

B. A letter of application for a permanent variance shall be submitted in writing by an employer or group of employers and shall contain the following information:

1. Name and address of the applicant;
2. Address of the place or places of employment involved;
3. Identification of the standard, or part thereof for which a permanent variance is sought; and
4. A description of the conditions, practices, means, methods, operations, or processes used and evidence that these would provide employment and a place of employment as safe and healthful as would be provided by the standard from which a variance is sought.

C. A permanent variance may be modified or revoked upon application by an employer, employees, or by the commissioner in the manner prescribed for its issuance at any time except that the burden shall be upon the party seeking the change to show altered circumstances justifying a modification or revocation.

16VAC25-60-220. Interim Order

A. Application for an interim order granting the variance until final action by the commissioner may be made by the employer prior to, or concurrent with, the submission of an application for a variance.

B. A letter of application for an interim order shall include statements as to why the interim order should be granted and shall include a statement that it has been posted in accordance with [16VAC25-60-40](#). The provisions contained in [16VAC25-60-190](#) A, B 1 and B 3 shall apply to applications for interim orders in the same manner as they do to variances.

C. The commissioner shall grant the interim order if the employer has shown by clear and convincing evidence that effective methods to safeguard the safety and health of employees have been implemented. No interim order shall have effect for more than 180 days. If an application for an interim order is granted, the employer shall be so notified and it shall be a condition of the order that employees shall be advised of the order in the same manner as used to inform them of the application for a variance.

D. If the application for an interim order is denied, the employer shall be so notified with a brief statement of the reason for denial.

Part V. Inspections

16VAC25-60-230. Advance Notice

A. Where advance notice of an inspection has been given to an employer, the employer, upon request of the commissioner, shall promptly notify the authorized employee representative of the inspection if the employees have such a representative.

B. An advance notice of a safety or health inspection may be given by the commissioner only in the following circumstances:

1. In cases of imminent danger;
2. Where it is necessary to conduct inspections at times other than regular working hours;
3. Where advance notice is necessary to assure the presence of personnel needed to conduct the inspection; or
4. Where the commissioner determines that advance notice will insure a more effective and thorough inspection.

16VAC25-60-240. Walkthrough

Walkthrough by the commissioner for the inspection of any workplace includes the following privileges.

1. The commissioner shall be in charge of the inspection and, as part of an inspection, may question privately any employer, owner, operator, agent, or employee. The commissioner shall conduct the interviews of persons during the inspection or at other convenient times. The commissioner may take and preserve testimony, examine witnesses, and administer oaths as provided for in [16VAC25-60-245](#).
2. As part of an inspection, the commissioner may take or obtain photographs, video recordings, audio recordings and samples of materials, and employ other reasonable investigative techniques as deemed appropriate. As used here, the term "employ other reasonable investigative techniques" includes, but is not limited to, the use of devices to measure employee exposures and the attachment of personal sampling equipment such as dosimeters, pumps, badges and other devices to employees in order to monitor their exposures.
3. Any employee representative selected to accompany the commissioner during the inspection of the workplace shall be an employee of the employer. Additional employer representatives and employee representatives may be permitted by the commissioner to accompany the inspection team where the commissioner determines such additional persons will aid in the inspection. A different employer representative or employee representative may accompany the commissioner during each phase of the inspection if, in the determination of the commissioner, this will aid in the conduct of the inspection.
4. The commissioner may limit the number of representatives when the inspection group would be of such size as to interfere with the inspection or create possible safety hazards, or when the representative does not represent an employer or employee present in the particular area under inspection.
5. In such cases as stated in subdivision 4 of this section, the commissioner must give each walkthrough representative the opportunity to advise of possible safety or health hazards and then proceed with the inspection without walkthrough representatives. Whenever the commissioner has limited the number of employee walkthrough representatives, a reasonable number of employees shall be consulted during the inspection concerning possible safety or health hazards.
6. Technical personnel such as safety engineers and industrial hygienists or other consultants to the commissioner or the employer may accompany the commissioner if the commissioner determines that their presence would aid in the conduct of the inspection and agreement is obtained from the employer or the commissioner obtains an order under § [40.1-6\(8\)\(b\)](#) of the Code of Virginia. All such consultants shall be bound by the confidentiality requirements of § [40.1-51.4:1](#) of the Code of Virginia.
7. The commissioner is authorized to dismiss from the inspection party at any time any person or persons whose conduct interferes with the inspection.

16VAC25-60-245. Use of Administrative Subpoenas to Take and Preserve Testimony, Examine Witnesses, and Administer Oaths

A. Subdivision 4 of § [40.1-6](#) of the Code of Virginia authorizes the commissioner, in the discharge of his duties, to take and preserve testimony, examine witnesses and administer oaths. In accordance with subdivision 5 of § [40.1-6](#) of the Code of Virginia, the Commissioner of Labor and Industry may appoint such representatives as

are necessary to carry out the functions outlined in subdivision 4 of § [40.1-6](#) of the Code of Virginia. Such appointments shall be made in writing; identify the individual being appointed, the length of appointment, and the method of withdrawal of such appointment; and specify what duties are being prescribed.

B. The oath shall be administered by the commissioner's appointed representative to the witness as follows: "Do you swear or affirm to tell the truth."

C. Testimony given under oath shall be recorded by a court reporter.

D. Questioning of employers, owners, operators, agents or employees under oath shall be in private in accordance with subdivision 2 of § [40.1-49.8](#) of the Code of Virginia.

E. An employer's refusal to make an owner, operator, agent or employee available to the commissioner for examination under this section shall be considered a refusal to consent to the commissioner's inspection authority under § [40.1-49.8](#) of the Code of Virginia. Upon such refusal the commissioner may seek an administrative search warrant in accordance with the provisions contained in §§ [40.1-49.9](#) through [40.1-49.12](#) of the Code of Virginia and obtain an order from the appropriate judge commanding the employer to make the subject owner, operator, agent or employee available for examination at a specified location by a date and time certain.

F. In accordance with § [40.1-10](#) of the Code of Virginia, if any person who may be sworn to give testimony shall willfully fail or refuse to answer any legal and proper question propounded to him concerning the subject of the examination under § [40.1-6](#) of the Code of Virginia, he shall be guilty of a misdemeanor. Such person, upon conviction thereof, shall be fined not exceeding \$100 nor less than \$25 or imprisoned in jail not exceeding 90 days or both. Any such refusal on the part of any person to comply with this section may be referred by the Commissioner of Labor and Industry to the appropriate attorney for the Commonwealth for prosecution.

16VAC25-60-250. Trade Secrets

The following rules shall govern the treatment of trade secrets.

1. At the beginning of an inspection the commissioner shall request that the employer identify any areas of the worksite that may contain or reveal a trade secret. At the close of an inspection the employer shall be given an opportunity to review the information gathered from those areas and identify to the commissioner that information which contains or may reveal a trade secret.

2. The employer shall notify the commissioner prior to the case becoming a final order of any information obtained during the inspection which is to be identified as containing trade secrets.

3. Properly identified trade secrets shall be kept in a separate case file in a secure area not open for inspection to the general public. The separate case file containing trade secrets shall be protected from disclosure in accordance with § [40.1-51.4:1](#) of the Code of Virginia.

4. Upon the request of an employer, any employee serving as the walkthrough representative in an area containing trade secrets shall be an employee in that area or an employee authorized by the employer to enter

that area. Where there is no such employee representative, the commissioner will interview a reasonable number of employees working in that area concerning matters of safety and health.

Part VI. Citation and Penalty

16VAC25-60-260. Issuance of Citation and Proposed Penalty

A. Each citation shall be in writing and describe with particularity the nature of the violation or violations, including a reference to the appropriate safety or health provision of Title 40.1 of the Code of Virginia or the appropriate rule, regulation, or standard. In addition, the citation must fix a reasonable time for abatement of the violation. The citation will contain substantially the following: "NOTICE: This citation will become a final order of the commissioner unless contested within fifteen working days from the date of receipt by the employer." The citation may be delivered to the employer or his agent by the commissioner or may be sent by certified mail or by personal service to an officer or agent of the employer or to the registered agent if the employer is a corporation.

No citation may be issued after the expiration of six months following the occurrence of any alleged violation. The six-month timeframe is deemed to be tolled on the date the citation is issued by the commissioner, without regard for when the citation is received by the employer. For purposes of calculating the six-month timeframe for citation issuance, the following requirements shall apply:

1. The six-month timeframe begins to run on the day after the incident or event occurred or notice was received by the commissioner (as specified below), in accordance with § [1-210](#) A of the Code of Virginia. The word "month" shall be construed to mean one calendar month in accordance with § [1-223](#) of the Code of Virginia.
2. An alleged violation is deemed to have "occurred" on the day it was initially created by commission or omission on the part of the creating employer, and every day thereafter that it remains in existence uncorrected.
3. Notwithstanding subdivision 1 of this subsection, if an employer fails to notify the commissioner of any work-related incident resulting in a fatality or in the in-patient hospitalization of three or more persons within eight hours of such occurrence as required by § [40.1-51.1](#) D of the Code of Virginia, the six-month timeframe shall not be deemed to commence until the commissioner receives actual notice of the incident.
4. Notwithstanding subdivision 1 of this subsection, if the commissioner is first notified of a work-related incident resulting in an injury or illness to an employee or employees through receipt of an Employer's Accident Report (EAR) form from the Virginia Workers' Compensation Commission as provided in § [65.2-900](#) of the Code of Virginia, the six-month timeframe shall not be deemed to commence until the commissioner actually receives the EAR form.
5. Notwithstanding subdivision 1 of this subsection, if the commissioner is first notified of a work-related hazard, or incident resulting in an injury or illness to an employee or employees, through receipt of a complaint in accordance with [16VAC25-60-100](#) or referral, the six-month timeframe shall not be deemed to commence until the commissioner actually receives the complaint or referral.

B. A citation issued under subsection A of this section to an employer who violates any VOSH law, standard, rule or regulation shall be vacated if such employer demonstrates that:

1. Employees of such employer have been provided with the proper training and equipment to prevent such a violation;
2. Work rules designed to prevent such a violation have been established and adequately communicated to employees by such employer and have been effectively enforced when such a violation has been discovered;
3. The failure of employees to observe work rules led to the violation; and
4. Reasonable steps have been taken by such employer to discover any such violation.

C. For the purposes of subsection B of this section only, the term "employee" shall not include any officer, management official, or supervisor having direction, management control, or custody of any place of employment which was the subject of the violative condition cited.

D. The penalties as set forth in § [40.1-49.4](#) of the Code of Virginia shall also apply to violations relating to the requirements for recordkeeping, reports, or other documents filed or required to be maintained and to posting requirements.

E. In determining the amount of the proposed penalty for a violation the commissioner will ordinarily be guided by the system of penalty adjustment set forth in the VOSH Field Operations Manual. In any event the commissioner shall consider the gravity of the violation, the size of the business, the good faith of the employer, and the employer's history of previous violations.

F. On multi-employer worksites for all covered industries, citations shall normally be issued to an employer whose employee is exposed to an occupational hazard (the exposing employer). Additionally, the following employers shall normally be cited, whether or not their own employees are exposed:

1. The employer who actually creates the hazard (the creating employer);
2. The employer who is either:
 - a. Responsible, by contract or through actual practice, for safety and health conditions on the entire worksite and has the authority for ensuring that the hazardous condition is corrected (the controlling employer); or
 - b. Responsible, by contract or through actual practice, for safety and health conditions for a specific area of the worksite, or specific work practice, or specific phase of a construction project and has the authority for ensuring that the hazardous condition is corrected (the controlling employer); or
3. The employer who has the responsibility for actually correcting the hazard (the correcting employer).

G. A citation issued under subsection F of this section to an exposing employer who violates any VOSH law, standard, rule or regulation shall be vacated if such employer demonstrates that:

1. The employer did not create the hazard;
2. The employer did not have the responsibility or the authority to have the hazard corrected;

3. The employer did not have the ability to correct or remove the hazard;
 4. The employer can demonstrate that the creating, the controlling or the correcting employers, as appropriate, have been specifically notified of the hazards to which his employees were exposed;
 5. The employer has instructed his employees to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it;
 6. Where feasible, an exposing employer must have taken appropriate alternative means of protecting employees from the hazard; and
 7. When extreme circumstances justify it, the exposing employer shall have removed his employees from the job.
- H. The commissioner's burden of proving the basis for a VOSH citation, penalty, or order of abatement is by a preponderance of the evidence.
- I. The burden of proof in establishing an affirmative defense to a VOSH citation resides with the employer.

16VAC25-60-270. Contest of Citation or Proposed Penalty; General Proceedings

- A. An employer to whom a citation or proposed penalty has been issued may contest the citation by notifying the commissioner in writing of the contest. The notice of contest must be mailed or delivered by hand within 15 working days from the receipt of the citation or proposed penalty. No mistake, inadvertence, or neglect on the part of the employer shall serve to extend the 15 working day period in which the employer must contest.
- B. The notice of contest shall indicate whether the employer is contesting the alleged violation, the proposed penalty or the abatement time.
- C. The employer's contest of a citation or proposed penalty shall not affect the citation posting requirements of [16VAC25-60-40](#) unless and until the court ruling on the contest vacates the citation.
- D. When the commissioner has received written notification of a contest of citation or proposed penalty, he will attempt to resolve the matter by settlement, using the procedures of [16VAC25-60-330](#) and [16VAC25-60-340](#).
- E. If the matter is not settled or it is determined that settlement does not appear probable, the commissioner will initiate judicial proceedings by referring the contested issues to the appropriate Commonwealth's Attorney and arranging for the filing of a bill of complaint and issuance of a subpoena to the employer.
- F. A contest of the proposed penalty only shall not stay the time for abatement.

16VAC25-60-280. General Contest Proceedings Applicable to the Public Sector

- A. The commissioner will not propose penalties for citations issued to public employers.
- B. Public employers may contest citations or abatement orders by notifying the commissioner in writing of the contest. The notice of contest must be mailed or delivered by hand within 15 working days from receipt of the

citation or abatement order. No mistake, inadvertence, or neglect on the part of the employer shall serve to extend the 15 working day period during which the employer may contest.

C. The notice of contest shall indicate whether the employer is contesting the alleged violations or the abatement order.

D. Public employees may contest abatement orders by notifying the commissioner in the same manner as described at subsection B.

E. The commissioner shall seek to resolve any controversies or issues rising from a citation issued to any public employer in an informal conference as described in [16VAC25-60-330](#).

F. The contest by a public employer shall not affect the requirements to post the citation as required at [16VAC25-60-40](#) unless and until the commissioner's or the court ruling on the contest vacates the citation. A contest of a citation may stay the time permitted for abatement pursuant to § [40.1-49.4](#) C of the Code of Virginia.

16VAC25-60-290. Contest Proceedings Applicable to Political Subdivisions.

A. Where the informal conference has failed to resolve any controversies arising from the citation, and a timely notice of contest has been received regarding a citation issued to a public employer other than the Commonwealth or one of its agencies, the Commissioner of Labor and Industry shall schedule a hearing in accordance with the provisions of §§ [2.2-4019](#) and [2.2-4021](#) of the Code of Virginia. Upon conclusion of the hearing, the commissioner will notify all participants within five working days of the decision to affirm, modify or vacate the contested aspects of the citation or abatement order.

B. Public employers may appeal decisions of the commissioner in the manner provided for in §§ [2.2-4025](#) through [2.2-4029](#) of the Code of Virginia.

C. Public employees and their authorized representative have full rights to notification and participation in all hearings and appeals as are given private sector employees.

D. If abatement of citations is not accomplished, the commissioner shall seek injunctive relief under § [40.1-49.4F](#) of the Code of Virginia.

16VAC25-60-300. Contest Proceedings Applicable to the Commonwealth

A. Where the informal conference has failed to resolve any controversies arising from a citation issued to the Commonwealth or one of its agencies, and a timely notice of contest has been received, the Commissioner of Labor and Industry shall refer the case to the Governor, whose written decision on the contested matter shall become a final order of the commissioner.

B. Whenever the Commonwealth or any of its agencies fails to abate a violation within the time provided in an appropriate final order, the Commissioner of Labor and Industry shall formally petition for redress as follows: For violations in the Department of Law, to the Attorney General; for violations in the Office of the Lieutenant Governor, to the Lieutenant Governor; for violations otherwise in the executive branch, to the appropriate cabinet secretary; for violations in the State Corporation Commission, to a judge of the commission; for

violations in the Department of Workers' Compensation, to the Chairman of the Workers' Compensation Commission; for violations in the legislative branch of government, to the Chairman of the Senate Committee on Commerce and Labor; for violations in the judicial branch, to the chief judge of the circuit court or to the Chief Justice of the Supreme Court. Where the violation cannot be timely resolved by this petition, the commissioner shall bring the matter to the Governor for resolution.

C. Where abatement of a violation will require the appropriation of funds, the commissioner shall cooperate with the appropriate agency head in seeking such an appropriation; where the commissioner determines that an emergency exists, the commissioner shall petition the governor for funds from the Civil Contingency Fund or other appropriate source.

16VAC25-60-307. Abatement Verification

Part VII. Abatement

A. Virginia Occupational Safety and Health Program (VOSH) inspections are intended to result in the abatement of violations of the Virginia Occupational Safety and Health Act (§ [40.1-1](#) of the Code of Virginia). This section sets forth the procedures VOSH will use to ensure abatement. These procedures are tailored to the nature of the violation and the employer's abatement actions.

B. This section applies to employers who receive a citation for a violation of the Virginia Occupational Safety and Health Act.

C. Definitions.

"Abatement" means action by an employer to comply with a cited standard or regulation or to eliminate a recognized hazard identified by VOSH during an inspection.

"Abatement date" means:

1. For an uncontested citation item, the later of:

a. The date in the citation for abatement of the violation;

b. The date approved by VOSH or established in litigation as a result of a petition for modification of the abatement date (PMA); or

c. The date established in a citation by an informal settlement agreement.

2. For a contested citation item, the date established in a formal settlement agreement between VOSH and the employer, or for a contested citation item for which a Virginia circuit court has issued an order affirming the violation, the later of:

a. The date identified in the final order;

b. The date computed by adding the period allowed in the citation for the abatement to the final order date; or

c. The date established by an agreed order.

"Affected employees" means those employees who are exposed to the hazard(s) identified as violation(s) in a citation.

"Final order date" means:

1. For an uncontested citation item, the 15th working day after the employer's receipt of the citation;
2. For a contested citation item:
 - a. The date that a formal settlement agreement is signed by VOSH;
 - b. The 30th day after the date on which a decision or order of a circuit court judge has been entered; or
 - c. The date on which the Virginia Court of Appeals issues a decision affirming the violation in a VOSH case.

"Movable equipment" means a hand-held or nonhand-held machine or device, powered or unpowered, that is used to do work and is moved within or between worksites.

D. Abatement certification.

1. Within 10 calendar days after the abatement date, the employer must certify to the department that each cited violation has been abated, except as provided in subdivision 2 of this subsection.
2. The employer is not required to certify abatement if the VOSH compliance officer, during the on-site portion of the inspection:
 - a. Observes within 24 hours after a violation is identified that abatement has occurred; and
 - b. Notes in the citation that abatement has occurred.
3. The employer's certification that abatement is complete must include, for each cited violation, in addition to the information required by subsection I of this section, the date and method of abatement and a statement that affected employees and their representatives have been informed of the abatement. A sample abatement certification letter is shown as Form A.

E. Abatement documentation.

1. The employer must submit to the department, along with the information on abatement certification required by subdivision D 3 of this section documents demonstrating that abatement is complete for each willful or repeat violation and for any serious violation for which the department indicates in the citation that such abatement documentation is required.
2. Documents demonstrating that abatement is complete may include, but are not limited to, evidence of the purchase or repair of equipment, photographic or video evidence of abatement, or other written records.

F. Abatement plans.

1. The department may require an employer to submit an abatement plan for each cited violation (except an other-than-serious violation) when the time permitted for abatement is more than 90 calendar days. If an abatement plan is required, the citation must so indicate.

2. The employer must submit an abatement plan for each cited violation within 25 calendar days from the final order date when the citation indicates that such a plan is required. The abatement plan must identify the violation and the steps to be taken to achieve abatement, including a schedule for completing abatement and, where necessary, how employees will be protected from exposure to the violative condition in the interim until abatement is complete. A sample abatement plan is shown as Form B.

G. Progress reports.

1. An employer who is required to submit an abatement plan may also be required to submit periodic progress reports for each cited violation. The citation must indicate:

- a. That periodic progress reports are required and the citation items for which they are required;
- b. The date on which an initial progress report must be submitted, which may be no sooner than 30 calendar days after submission of an abatement plan;
- c. Whether additional progress reports are required; and
- d. The date or dates on which additional progress reports must be submitted.

2. For each violation, the progress report must identify, in a single sentence if possible, the action taken to achieve abatement and the date the action was taken. A sample progress report is shown as Form B.

H. Employee notification.

1. The employer must inform affected employees and their representatives about abatement activities covered by this section by posting a copy of each document submitted to the department or a summary of the document near the place where the violation occurred.

2. Where such posting does not effectively inform employees and their representatives about abatement activities (for example, for employers who have mobile work operations), the employer must:

- a. Post each document or a summary of the document in a location where it will be readily observable by affected employees and their representatives; or
- b. Take other steps to communicate fully to affected employees and their representatives about abatement activities.

3. The employer must inform employees and their representatives of their right to examine and copy all abatement documents submitted to the department.

- a. An employee or an employee representative must submit a request to examine and copy abatement documents within three working days of receiving notice that the documents have been submitted.
- b. The employer must comply with an employee's or employee representative's request to examine and copy abatement documents within five working days of receiving the request.

4. The employer must ensure that notice to employees and employee representatives is provided at the same time or before the information is provided to the department and that abatement documents are:

- a. Not altered, defaced, or covered by other material; and
 - b. Remain posted for three working days after submission to the department.
- I. Transmitting abatement documents.
1. The employer must include, in each submission required by this section, the following information:
 - a. The employer's name and address;
 - b. The inspection number to which the submission relates;
 - c. The citation and item numbers to which the submission relates;
 - d. A statement that the information submitted is accurate; and
 - e. The signature of the employer or the employer's authorized representative.
 2. The date of postmark is the date of submission for mailed documents. For documents transmitted by other means, the date the department receives the document is the date of submission.
- J. Movable equipment.
1. For serious, repeat, and willful violations involving movable equipment, the employer must attach a warning tag or a copy of the citation to the operating controls or to the cited component of equipment that is moved within the worksite or between worksites. Attaching a copy of the citation to the equipment is deemed by VOSH to meet the tagging requirement of this section as well as the posting requirement of [16VAC25-60-40](#).
 2. The employer must use a warning tag that properly warns employees about the nature of the violation involving the equipment and identifies the location of the citation issued. Form C is a sample tag that employers may use to meet this requirement.
 3. If the violation has not already been abated, a warning tag or copy of the citation must be attached to the equipment:
 - a. For hand-held equipment, immediately after the employer receives the citation; or
 - b. For nonhand-held equipment, prior to moving the equipment within or between worksites.
 4. For the construction industry, a tag that is designed and used in accordance with [16VAC25-175-1926.20\(b\)\(3\)](#) and [16VAC25-175-1926.200\(h\)](#) is deemed by VOSH to meet the requirements of this section when the information required by subdivision 2 of this subsection is included on the tag.
 5. The employer must ensure that the tag or copy of the citation attached to movable equipment is not altered, defaced, or covered by other material.
 6. The employer must ensure that the tag or copy of the citation attached to movable equipment remains attached until:

- a. The violation has been abated and all abatement verification documents required by this chapter have been submitted to the department;
- b. The cited equipment has been permanently removed from service or is no longer within the employer's control; or
- c. The Virginia circuit court issues a final order vacating the citation.

16VAC25-60-310. Contest of Abatement Period

- A. The employer, employees, or employee representative may, by written notification to the commissioner, contest the time permitted for abatement.
- B. The notice of contest of abatement period must be in writing and shall have been delivered by hand or mailed to the commissioner within 15 working days from the date of the receipt of the citation and order of abatement.
- C. The same procedures and requirements used for contest of citation and penalty, set forth at [16VAC25-60-270](#), [16VAC25-60-280](#), [16VAC25-60-290](#), and [16VAC25-60-300](#), shall apply to contests of abatement period.
- D. The time permitted for abatement, if contested in good faith and not merely for delay, does not begin to run until the entry of a final order of the circuit court.

16VAC25-60-320. Extension of Abatement Time

- A. Where an extension of abatement is sought concerning a final order of the commissioner or of a court, the extension can be granted as an exercise of the enforcement discretion of the commissioner. While the extension is in effect the commissioner will not seek to cite the employer for failure to abate the violation in question. The employer shall carry the burden of proof to show that an extension should be granted.
- B. The commissioner will consider a written petition for an extension of abatement time if the petition is mailed to or received by the commissioner prior to the expiration of the established abatement time.
- C. A written petition requesting an extension of abatement time shall include the following information:
 - 1. All steps taken by the employer, and the dates such actions were taken, in an effort to achieve compliance during the prescribed abatement period;
 - 2. The specific additional abatement time necessary in order to achieve compliance;
 - 3. The reasons such additional time is necessary, such as the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date;
 - 4. All available interim steps being taken to safeguard the employees against the cited hazard during the abatement period; and

5. A certification that a copy of the petition has been posted and served on the authorized representative of affected employees, if there is one, in accordance with [16VAC25-60-40](#), and a certification of the date upon which such posting and service was made.

D. A written petition requesting an extension of abatement which is filed with the commissioner after expiration of the established abatement time will be accepted only if the petition contains an explanation satisfactory to the commissioner as to why the petition could not have been filed in a timely manner.

1. The employer is to notify the commissioner as soon as possible.

2. Notification of the exceptional circumstances which prevents compliance within the original abatement period shall accompany a written petition which includes all information required in subsection C of this section.

E. The commissioner will not make a decision regarding such a petition until the expiration of 15 working days from the date the petition was posted or served.

F. Affected employees, or their representative, may file a written objection to a petition for extension of abatement time. Such objections must be received by the commissioner within 10 working days of the date of posting of the employer's petition. Failure to object within the specified time period shall constitute a waiver of any right to object to the request.

G. When affected employees, or their representatives object to the petition, the commissioner will attempt to resolve the issue in accordance with [16VAC25-60-330](#). If the matter is not settled or settlement does not appear probable, objections will be heard in the manner set forth in subsection I of this section.

H. The employer or an affected employee may seek review of an adverse decision regarding the petition for extension of abatement to the Commissioner of Labor and Industry within five working days after receipt of the commissioner's decision.

I. An employee's objection not resolved under subsection G of this section or an employer or employee appeal under subsection H of this section will be heard using the procedures of §§ [2.2-4019](#) and [2.2-4021](#) of the Code of Virginia. Burden of proof for a hearing under subsection G of this section shall lie with the employer. Burden of proof for an appeal under subsection H of this section shall lie with the party seeking review.

1. All parties shall be advised of the time and place of the hearing by the commissioner.

2. All parties will be advised of the decision within 15 working days of the hearing.

Part VIII. Review and Settlement

16VAC25-60-330. Informal Conference

A. An informal conference may be held for the purpose of discussing any issue raised by the inspection, citation, abatement order, proposed penalty, notice of contest, or any other disputed issue.

B. The employer, an employee, or an employee representative may request an informal conference. Neither the conference nor a request for a conference shall stay the running of time allowed for abatement of a cited violation or the time allowed for filing a notice of contest of the citation, abatement period or proposed penalty.

C. The informal conference will be held by the commissioner. However, other personnel of the Department of Labor and Industry, Department of Health, and any other state department or agency may participate as deemed necessary.

D. The time and location of the informal conference shall be at the discretion of the commissioner, except that the conference shall not be held at the employer's work site.

E. An employee representative shall be given the opportunity to participate in a conference requested by the employer. This same right will be extended to the employer when an informal conference is requested by employees. It is the duty of the employer, if he has requested a conference, to notify the employees by the means described in [16VAC25-60-40](#) as soon as the time and place of the conference have been established. Upon granting an employee request for a conference, the commissioner is responsible for notifying the employer. The commissioner, at his discretion, may conduct separate portions of the conference with the employer and employee representative.

F. During or following the conference the commissioner may affirm or amend the citations, penalties, or abatement period if the order has not become final. The commissioner shall notify the employer in writing of his decision. The employer shall notify employees of this decision in the manner set forth in [16VAC25-60-40](#).

G. The failure to request an informal conference before the expiration of 15 working days does not preclude settlement at a later stage of the proceedings if a notice of contest has been timely filed.

16VAC25-60-340. Settlement

A. Settlement negotiations may be held for the purpose of resolving any dispute regarding an inspection, citation, order of abatement, proposed penalty, or any other matter involving potential litigation. Settlement is encouraged at any stage of a proceeding until foreclosed by an order becoming final. It is the policy of the commissioner that the primary goal of all occupational safety and health activity is the protection of worker safety, health and welfare; all settlements shall be guided by this policy.

B. Settlement negotiations will ordinarily take place in the medium of an informal conference. Employees shall be given notice of scheduled settlement discussions and shall be given opportunity to participate in the manner provided for in [16VAC25-60-330](#) E.

C. Where a settlement with the employer is reached before the 15th working day after receipt of a citation, order of abatement, or proposed civil penalty, and no notice of contest has been filed, the commissioner shall forthwith prepare a settlement agreement noting any changes to the citation, order of abatement, or proposed civil penalty, as agreed. The agreement shall contain a statement to the following effect: "As part of the written agreement, the employer has waived his right to file a notice of contest to this order. This agreement shall not be construed as an admission by the employer of civil liability for any violation alleged by the commissioner."

D. Following receipt of an employer's timely notice of contest, the commissioner will immediately notify the appropriate Commonwealth's Attorney and may delay the initiation of judicial proceedings until settlement opportunities have been exhausted.

1. During this period, the commissioner may agree to amend the citation, order of abatement, or proposed civil penalty. The settlement agreement shall contain a statement to the following effect: "The employer, by his signature below, agrees to withdraw his notice of contest filed in this matter and not to contest the amended citation. This agreement shall not be construed as an admission by the employer of civil liability for any violation alleged by the commissioner."

2. At the end of this period, if settlement negotiations are not successful, the commissioner will initiate judicial proceedings by causing a bill of complaint to be filed and turning over the contested case to the Commonwealth's Attorney.

E. Employees or their representative have the right to contest abatement orders arising out of settlement negotiations if the notice is timely filed with the commissioner within 15 working days of issuance of the agreement and abatement order. Upon receipt of a timely notice of contest the commissioner will initiate judicial proceedings.

F. After a bill of complaint has been filed, any settlement shall be handled through the appropriate Commonwealth's Attorney and shall be embodied in a proposed order and presented for approval to the court before which the matter is pending. Every such order shall bear the signatures of the parties or their counsel; shall provide for abatement of any violation for which the citation is not vacated; shall provide that the employer's agreement not be construed as an admission of civil liability; and may permit the commissioner, when good cause is shown by the employer, to extend any abatement period contained within the order.

Forms (16VAC25-60)

Supplementary Record of Occupational Injuries and Illnesses, OSHA 101 (eff. 2/81).

Log and Summary of Injuries and Illnesses, OSHA 200.

Notice to Employees of An Informal Conference Between Your Employer and VOSH, VOSH-NIC (eff. 10/92).

Notice of Alleged Imminent Danger, VAOSH-8 (eff. 1/85).

Sample Abatement Certification Letter (Nonmandatory), Form A (16VAC25-60-307) (eff. 12/15/97).

Sample Abatement Plan or Progress Report (Nonmandatory), Form B (16VAC25-60-307) (eff. 12/15/97).

Sample Warning Tag (Nonmandatory), Form C (16VAC25-60-307) (eff. 12/15/97).