COMMONWEALTH of VIRGINIA

DEPARTMENT OF LABOR AND INDUSTRY

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AGENDA

SAFETY AND HEALTH CODES BOARD

PUBLIC HEARING

State Corporation Commission
1300 East Main Street, Court Room A, Second Floor
Richmond, Virginia

Thursday, April 16, 2009
10:00 a.m.

I. Call to Order

II. Items for Discussion:

1) 16 VAC 25-60, Proposed Rule for Administrative Regulations for the Virginia Occupational Safety and Health (VOSH) Program; and

2) 16 VAC 25-73, Proposed Rule for Tree Trimming Operations

III. Opportunity for Public Comment on the Proposed Amendments

IV. Adjournment

MEMORANDUM

TO: MEMBERS OF THE VIRGINIA OCCUPATIONAL SAFETY AND HEALTH CODES BOARD

FROM: Jay Withrow, Director
Office of Legal Support

DATE: April 3, 2009

SUBJECT: Proposed Regulation on Tree Trimming Operations, 16 VAC 25-73

For presentation at the Board's public hearing on the above proposed regulation scheduled for April, 16, 2009:

Some changes were made to the above-referenced proposed regulation by the Virginia Registrar of Regulations from that originally adopted by the Board. Following is a summary of the changes:

- The "Definitions" section was moved to the front of the proposed regulation.
- The Registrar reworked the numbering system.
- Some references to National Consensus standards were deleted because we found that they were no longer published or were not easily available.
- Some typographical errors were corrected in the definitions section.

Department staff does not believe the above changes will have any substantive effect on the regulation.

Attachment **(Example Pages)**

EXAMPLE: 16 VAC 25-73

REGULATION APPLICABLE TO Tree Trimming Operations

~~A. General~~

16VAC25-73-10. Scope, purpose and applicability.

~~1. Scope~~

A. This regulation contains arboriculture safety requirements for pruning, repairing, maintaining, and removing trees; cutting brush; and for using equipment in such operations. (Note: Terms specific to the safe practice of arboriculture **are defined in 16VAC25-73-20** ~~appear in boldface type at first use and are defined in Appendix A, the glossary.)~~

~~2. Purpose~~

B. The purpose of this regulation is to provide safety criteria for arborists and other workers engaged in arboricultural operations.

~~3. Application~~

C. This regulation is intended to apply to all employers engaged in the business, trade, or performance of arboriculture, including employers engaged in tree pruning, repairing, maintaining; removing trees; cutting brush; or performing pest or soil management who hire one or more persons to perform such work. This regulation may require situational modifications in response to personnel emergencies and is not intended to limit the options available to emergency responders. This regulation does not apply to logging operations covered by 16 VAC 25-90-1910.266. This regulation does not apply to tree removal activities where the primary objective is land clearing in preparation for construction, real estate development, or other related activities, unless directly supervised by a qualified arborist. Such activities are covered by 16 VAC 25-90-1910.266.

EXAMPLE: **16VAC25-73-20. Definitions.**

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

[DEFINITIONS MOVED HERE FROM FORMER APPENDIX A – DEFINITIONS ARE NOT REPRINTED AS THERE WERE NO SUBSTANTIVE CHANGES]

~~B.~~ **16VAC25-73-30.** Orientation and training.

[RENUMBERING NOT SHOWN]

1. Prior to permitting an employee to engage in any arboricultural activity covered by this regulation, the employer shall ensure that each employee receives orientation and training on the requirements of this regulation.

2. Refresher training on applicable provisions of this regulation shall be provided by the employer for any employee who has:

   a. Been observed to violate the requirements of this regulation;

   b. Been involved in an accident or near miss accident; or

   c. Received an evaluation that reveals the employee is not working in a safe manner in accordance with the requirements of this regulation.

~~C.~~ **16VAC25-73-40.** General safety requirements.

[RENUMBERING NOT SHOWN]

1. General

   a. Machinery, vehicles, tools, materials and equipment shall conform to the requirements of this regulation. 16 VAC 25-60-120 is hereby incorporated by reference.

   b. Employers shall instruct their employees in the proper use, inspection, and maintenance of tools and equipment, including

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EXAMPLE:

Table 1. Minimum approach distances from energized conductors for qualified line-clearance arborists and qualified line-clearance arborist trainees.

Nominal voltage in kilovolts (kV) phase to phase	Includes 1910.269 elevation factor, sea level to 5,000 ft*		Includes 1910.269 elevation factor, 5,000–10,000 ft*		Includes 1910.269 elevation factor, 10,001–14,000*	
	ft-in	m	ft-in	m	ft-in	m
0.051 to 0.3	Avoid contact		Avoid contact		Avoid contact	
0.301 to 0.75	1-01	0.33	1-03	0.38	1-04	0.41
0.751 to 15.0	2-05	0.7	2-09	0.81	3-00	0.88
15.1 to 36.0	3-00	0.91	3-05	1.04	3-09	1
36.1 to 46.0	3-04	1.01	3-10	1.16	4-02	1.09
46.1 to 72.5	4-02	1.26	4-09	1.44	5-02	1.3
72.6 to 121.0	4-06	1.36	5-02	1.55	5-07	1.68
138.0 to 145.0	5-02	1.58	5-11	1.8	6-05	1.96
161.0 to 169.0	6-00	1.8	6-10	2.06	7-05	2.23
230.0 to 242.0	7-11	2.39	9-00	2.73	9-09	2.95
345.0 to 362.0	13-02	3.99	15-00	4.56	16-03	4.94
500.0 to 550.0	19-00	5.78	21-09	6.6	23-07	7.16
765.0 to 800.0	27-04	8.31	31-03	9.5	33-10	10.29

*Exceeds phase to ground; elevation factor per 29 CFR 1910.269.

Note: At time of publication, the minimum approach distances in this table for voltages between 301 and 1,000 volts exceed those specified by 29 CFR 1910.269, ~~in anticipation of OSHA adopting these distances during the life of ANSI Z133.1-2006.~~

EXAMPLE: (2) Ensure that all guards are in place and employees are in the clear.

(3) Confirm that controls are in neutral.

(4) Reconnect key, cable, or plug wires.

(5) Notify affected employees that equipment is ready to return to service.

16VAC25-73-120. Appendix ~~D~~ **C** (Informative): Additional Resources

1. Applicable American National Standards

Fall protection systems for construction and demolition operations (A10.32-2004)

~~Gasoline-powered chain saws (B175.1-2000)~~

~~High-visibility safety apparel and head wear (107-2004)~~

~~Mast-climbing work platforms (A92.9-1993)~~

~~Occupational and educational eye and face protection devices (Z87.1-2003)~~

Personal fall arrest systems, subsystems, and components (Z359.1-1992 [R1999])

~~Portable metal ladders (A14.2-2002)~~

~~Portable reinforced plastic ladders (A14.5-1992)~~

~~Portable wood ladders (A14.1-2000)~~

Protective headgear for industrial workers (Z89.1-2003)

~~Respiratory protection (Z88.2-1991)~~

Tree care operations—tree, shrub, and other woody plant maintenance (A300 **Parts 1-7**)

Vehicle-mounted elevating and rotating aerial devices (A92.2-200~~2~~**1**)

~~Workplace floor and wall openings, stairs, and railing systems (A1264.1-1995 [R2002])~~

2.

Cordage Institute Rope Standards

The Cordage Institute, www.ropecord.com

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March 4, 2009, Department of Labor and Industry responses to questions from Registrar of Regulations concerning the Proposed Tree Trimming Operations Regulation:

1. In the definition of conventional notch, open-face notch, and Humboldt notch it has "see drawing" what is this referring to?

It is referring to a drawing in the ANSI standard on which this regulation is based. It is OK to delete the references to the drawing, as it is not necessary to the regulation - sorry we missed that.

2. In the definition of Line clearance should there be an "and" or "or" after "electric supply lines and equipment"?

"and"

3. In the definition of "load binder" it reads "the of a "-are words missing?

Delete "The of" and capitalize "A" - sorry we missed that.

4. In the definition of "Working-load limit, " at the end it has "see working load under additional terms, below" to what is this referring?

Delete that parenthetical. In the original ANSI standard on which this regulation is based, they had a definitions section and an "additional terms" section which we combined - sorry we missed that.

5. Under electrical hazards, working in proximity to electrical hazards (D 2 a) a line reads "anytime the voltage of overhead high voltage lines exceeds 600 volts as defined in the Act" should this read "anytime the voltage of overhead high voltage lines, as defined in the Act, exceeds 600 volts" since overhead high voltage lines is defined in 59.1-407?

Good rewording.

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AGENDA

SAFETY AND HEALTH CODES BOARD

State Corporation Commission
1300 East Main Street, Court Room A
Second Floor
Richmond, Virginia

Thursday, April 16, 2009

10:00 a.m.

Immediately Following Public Hearing which begins at 10:00 a.m.

1. Call to Order

2. Approval of Agenda

3. Approval of Minutes for Public Hearing and for Board Meeting of November 20, 2008

4. Opportunity for the Public to Address the Board on this issues pending before the Board today or on any other topic that may be of concern to the Board or within the scope of authority of the Board.

   This will be the only opportunity for public comment at this meeting. Please llimit remarks to 5 minutes in consideration of others wishing to address the Board.

5. **Old Business**

Virginia Unique Regulation:

a) 16 VAC 25-95, Final Regulation to Amend the Medical Services and First Aid Standard for General Industry, §1910.151(b); and 16 VAC 25-177, Final Regulation to Amend the Medical Services and First Aid Standard for the Construction Industry, §1926.50(c)

Presenter – Jay Withrow

6. **New Business**

a) Federal-Identical Regulations:

1) Electrical Standard, Subpart S of Part 1910, §§1910.303 and 1910.304; Final Rule; Clarifications and Correcting Amendments

Presenter – John Crisanti

2) Clarification of Employer Duty to Provide Personal Protective Equipment and Train Each Employee, Parts 1910 through 1926 and Correction; and

Presenter – Ron Graham

3) Longshoring and Marine Terminals; Vertical Tandem Lifts, §§1917.71 and 1918.85, Public Sector Only; Final Rule

Presenter – Glenn Cox

b) **Periodic Review of Regulations:**

1) 16 VAC 25-30, Regulations for asbestos Emissions Standards for Demolition and Renovation Construction Activities and the Disposal of Asbestos-Containing Construction Wastes—Incorporation By Reference, 40 CFR 61.140 through 61.156;

2) 16 VAC 25-35, Regulation Concerning Certified Lead Contractors Notification, Lead Project Permits and Permit Fees;

3) 16 VAC 25-40, Standard for Boiler and Pressure Vessel Operator Certification;

4) 16 VAC 25-70, Virginia Confined Space Standard for the Telecommunications Industry;

5) 16 VAC 25-80, Access to Employee Exposure and Medical Records;

6) 16 VAC 25-140, Virginia Confined Space Standard for the Construction Industry;

7) 16 VAC 25-150, Underground Construction, Construction Industry;

8) 16 VAC 25-160, Construction Industry Standard for Sanitation;

9) 16 VAC 25-170, Virginia Excavation Standard, Construction Industry; and

10) 16 VAC 25-180, Virginia Field Sanitation Standard, Agriculture

Presenter – Reba O'Connor

7. Items of Interest from the Department of Labor and Industry

8. Items of Interest from Members of the Board

9. Meeting Adjournment

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

APRIL 16, 2009

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16 VAC 25-95, Final Regulation to Amend the Medical Services and First Aid Standards for General Industry, §1910.151(b);

16 VAC 25-177, Final Regulation to Amend the Medical Services and First Aid Standards for the Construction Industry, §1926.50(c)

I. Action Requested.

The Virginia Occupational Safety and Health (VOSH) Program requests the Safety and Health Codes Board to consider for adoption as a **final** regulation of the Board these amendments to the medical services and first aid standards for general industry, §1910.151(b), and the construction industry, §1926.50(c), pursuant to Va. Code §40.1-22(5).

II. Summary of Rulemaking Process.

A. A Notice of Intended Regulatory Action (NOIRA) was adopted by the Board on March 7, 2006. The NOIRA was published on October 16, 2006, with 30-day

comment period ending November 16, 2006. Comments received and the Department's response are summarized in section V. below.

The Board adopted proposed regulatory language on December 6, 2006. The proposed regulation was published on September 29, 2008, with a 60-day comment period ending on November 29, 2008. A public hearing was held by the Board on November 20, 2008. Comments received and the Department's response are summarized in section VI. below.

III. Summary of the Final Regulations.

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

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

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

The General Industry Standard for Medical and First Aid

Section 1910.151(b) provides:

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

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

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

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

A. Allowing an employer to make written arrangements with another contractor/employer on the same job site to provide designated employees to serve as first aid responders, to lessen the cost of compliance with the standard;

B. Clarifying that employers of mobile work crews (i.e., crews that travel to more than one worksite per day) of two or more employees that assign employees to travel to worksites or engage in work activities that could potentially expose those employees to serious physical harm or death shall either:

1. Assure that at least one employee on the mobile crew is designated and adequately trained to render immediate first aid and CPR during all workshifts; or

2. Make written arrangements with another contractor/employer on the same job site to provide designated employees to serve as first aid responders.

C. Clarifying that employers of individual mobile employees (i.e., an employee who travels alone to more than one worksite per day), that assign employees to travel to worksites or engage in work activities that could potentially expose those employees to serious physical harm or death shall either:

1. Assure that the mobile employee is adequately trained to self-administer first aid;

2. Make written arrangements with another contractor/employer on the same job site to provide designated employees to serve as first aid responders; or

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

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

1. The Department recommends amending the proposed regulatory text to extend the mobile communication option for single employees to employers with worksites where only one employee is permanently stationed, as there is no rationale for treating them differently from single mobile employees.

2. The Department recommends amending the proposed regulatory text to add definitions for the terms “serious physical harm” and “serious workplace hazard.”

3. The Department recommends the term “job classification” be deleted from the proposed regulation.

4. The Department recommends in proposed §§ 16 VAC 25-95.C and 16 VAC 25-177.D that the word “designated” be replaced with the word “selected”, that the word “render” be replaced with the word “administer”, and that the word

"immediate" be deleted. These changes will clarify that it is not the intent of the Department to apply the full provisions of the Bloodborne Pathogens Standard to employees trained under the final first aid/CPR regulation.

IV. Basis, Purpose and Impact of the Proposed Rulemaking.

A. Basis for Proposed Action.

1. Existing Federal Identical Standards Are Insufficient.

The existing general industry and construction first aid standards do not assure that adequate first aid attention for employees will be provided in certain hazardous situations. It should be noted that based on long years of injury and illness rates, the Construction Industry, is considered by federal OSHA to be a high hazard industry. Also, the existing general industry standard is overly inclusive in that it requires first aid training in certain occupational settings where there is no occupational exposure to hazards that could cause serious physical harm or death, such as in an office setting.

These federal identical standards do not include a requirement for training to include CPR as well as first aid; nor do they clearly state that designated first aid providers will be available at each work location and workshift. The current standards could potentially allow an employer to opt to physically move an employee who had suffered a head or spinal injury by transporting them to a medical facility in an area where emergency medical responders were not available within the prescribed 3 to 4 minute time limit, in lieu of having a trained first aid responder present.

In addition, both existing standards are confusing as written and difficult for the VOSH Program to enforce. The standards do not define the terms "near proximity" and "reasonably accessible," which have been formally interpreted by federal OSHA to mean a 3 to 4 minute response time for life threatening injuries and up to 15 minutes for non-life threatening injuries.

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

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

Statewide Response Time Statistics by Year

"Response time" defined as "Arrived at Scene" minus "Dispatched"

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

Statewide Response Time Statistics by Year for Industrial Sites Only

"Response time" defined as "Arrived at Scene" minus "Dispatched"

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

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

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

As the more recent statistics above indicate, the average EMS response time for all cases statewide has been approximately 9 minutes for the last three years (more than twice the 3-4 minute response time required by OSHA for life threatening injuries), while the average response time to industrial sites falls between 7 and 7.5 minutes, which is 75% above the 3-4 minute requirement. Furthermore, the chart demonstrates that for all cases statewide, only 12.5 to 13% of the responses occur within the 3-4 minute requirement for life threatening injuries, while from 19 to 21% of the responses occur to industrial sites within the 3-4 minute requirement.

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

In addition, the response time for emergency responders will vary widely around the state and is dependant upon factors as whether the establishment or worksite is in an urban or rural location, and whether the medical/emergency response facility is staffed 24 hours a day. This response time is further impacted by such variables as traffic congestion, road construction and weather. Therefore, injured employees are unlikely to receive timely, reliable and consistent first aid CPR response to injuries suffered on the job especially in cases of life threatening injuries under current regulatory requirements and actual response times.

During calendar year 2005, out of a total of 3,379 inspections conducted by the VOSH Program, 17 violations of §1910.151(b) in General Industry and 424 violations of §1926.50(c) in the Construction Industry for a total of 541 first aid violations. A total of 16 % of all VOSH inspections received first aid violations under the current regulations).

DOLI does not have the capability to provide statistics to indicate what percentage of the remaining 2,838 VOSH inspections that did not receive first aid violations were indeed located in close enough proximity to medical facilities to assure a 3 to 4 minute response time. However, based on the above EMS figures, the Department believes that most establishments and sites in Virginia cannot meet the 3 to 4 minute requirement under the current regulations.

Finally, from an enforcement standpoint, the VOSH Program is faced under the current regulations with having to determine and document whether an infirmary, clinic or hospital is, or would have been, accessible within the required 3 to 4 minutes, often by going to such lengths as having to drive from the inspection site to the facility and trying to realistically estimate the impact of the above mentioned variables at the time of the injury.

2. Similar Requirements Exist in Other Specific Standards.

The current regulations do not provide the same level of first aid and CPR protection for employees in different general industry and construction settings who are exposed to similar kinds of serious and life threatening workplace hazards. For instance, a number of current industry specific regulations require general industry and construction employers to assure that one or more employees trained in first aid and CPR are present at each worksite and workshift:

a.. General Industry Standards.

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

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

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

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

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

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

b. Construction Industry Standards.

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

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

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

3. Board Authorization and Mandate.

The Safety and Health Codes Board is authorized to regulate occupational safety and health under Title 40.1-22(5) of the *Code of Virginia* to:

> "... adopt, alter, amend, or repeal rules and regulations to further, protect and promote the safety and health of employees in places of employment over which it has jurisdiction and to effect compliance with the federal OSH Act of 1970...as may be necessary to carry out its functions established under this title".

In this same statutory section, the Board is further mandated:

> "In making such rules and regulations to protect the occupational safety and health of employees, the Board shall adopt the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence that no employee will suffer material impairment of health or functional capacity".
>
> "However, such standards shall be at least as stringent as the standards promulgated by the federal OSH Act of 1970 (P.L.91-596). In addition to the attainment of the highest degree of health and safety protection for the

employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experiences gained under this and other health and safety laws."

B. Purpose.

The purpose of the final regulation is to provide additional first aide/CPR services to employees exposed to serious occupational hazards in construction and general industry and provide employers with some flexibility to make arrangements for first aid/CPR services on individual work sites. Current regulations do not require CPR training for designated first aid providers, and the final regulations would correct this oversight. The final regulations will also exclude work sites from the requirement to provide first aid and CPR training where no serious occupational hazards are present. In addition, the final regulations will also clarify requirements for employers of mobile crews and individual mobile and permanently assigned employees.

C. Impact on Employers.

Employers covered by the final regulations would be required to have at each job site and for each workshift at least one employee trained in first aid and CPR. While many employers in construction and general industry already assure that some employees are trained in first aid and CPR, some employers would have to incur the additional cost of securing such training. As an example, the Central Virginia Chapter of the American Red Cross currently charges $73.00 for adult first aid/CPR training (2009).

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

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

As Virginia Employment Commission 2005 statistics demonstrate (see chart), there are a significant number of employers who will now be exempt from the current regulations because they operate work sites where no serious occupational hazards are present. These sectors include[1]:

[1]Please note however that any of the listed industries that have individual locations with hazards that pose a threat of serious physical harm or death would be covered by the final regulation.

Sector	Number of establishments
Information	3,991
Financial Activities	20,120
Professional and Business Services	41,574
Leisure and Hospitality	16,438
Public Administration	3,918
	86,041

These approximately 86,000 establishments constitute roughly 40 % of all industries that would be otherwise impacted by unamended regulations. The Department believes that the majority of General Industry employers that were cited under the current regulations would also be covered by the final regulations.

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

Other issues that are addressed in the final regulations include:

1. Allowing an employer to make written arrangements with another contractor/employer on the same job site to provide designated employees to serve as first aid responders, to lessen the cost of compliance with the standard;

2. Clarifying that only worksites containing workplace hazards that would expose employees to serious physical harm or death would be required to provide immediate access to first aid and CPR;

3. Clarifying that employers of mobile work crews (i.e. crews that travel to more than one worksite per day) of two or more employees that assign employees to travel to worksites or engage in work activities that could potentially expose those employees to serious physical harm or death shall either:

a. Assure that at least one employee on the mobile crew is designated and adequately trained to render immediate first aid and CPR during all workshifts; or

b. Make written arrangements with another contractor/employer on the same job site to provide designated employees to serve as first aid responders.

4. Clarifying that employers of individual mobile employees (i.e. an employee who travels alone to more than one worksite per day) that assign employees to travel to worksites or engage in work activities that could potentially expose those employees to serious physical harm or death shall either:

a. Assure that the mobile employee and adequately trained to self-administer first aid;

b. Make written arrangements with another contractor/employer on the same job site to provide designated employees to serve as first aid responders; or

c. Assure that their employee has access to a communication system that will allow them to immediately request medical assistance through a 911 emergency call or comparable communication system.

5. The Department recommends amending the proposed regulatory text to extend the mobile communication option for single employees to employers with worksites where only one employee is permanently stationed, as there is no rationale for treating them differently from single mobile employees.

D. Impact on Employees.

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

E. Impact on the Department of Labor and Industry.

No significant regulatory or fiscal impact is anticipated on the Department beyond the cost of promulgating this regulation.

V. Comments From Notice of Intended Regulatory Authority Comment Period

The Notice of Intended Regulatory Action (NOIRA) was approved by the Board for this action at its March 7, 2006, meeting. The associated 30-day public comment period extended from October 16, 2006, through November 16, 2006.

Commenter 1: Gregory Stull, Health & Safety Specialist, Air Products & Chemicals, Inc. (e-mail inquiry)

1. Mr. Stull made the following inquiry about the NOIRA:

"I am seeking clarification as to the intended application of the new regulation concerning "Medical Services and First Aid". If this new regulation is intended to cover all "general industry" is there a minimum on site employee requirement? The reason I ask is the company I represent has several "one man" facilities located in Virginia. The facilities are not manned on a daily basis. These facilities are located on our customers sites and we rely on the emergency services of these customers. Our company has several policies and standards that cover lone workers. This includes a "call out" systems that is activated when the employee is on site. It is time based and can be manually activated in the event our employee becomes incapacitated or injured. Any clarification you can offer on this matter would be greatly appreciated."

Agency Response:

The language in the proposed amendments address the issue of "one man facilities" by providing the employer with the option of either training the employee in first aid, making written arrangements with other employers or contractors at the worksite to provide first aid and CPR, or assuring that their employee has access to a communication system that will allow them to immediately request medical assistance through a 911 emergency call or comparable communication system.

This issue is particularly problematic from a regulatory standpoint. The optimal solution for assuring prompt delivery of first aid and CPR services, and the one presented in the proposed regulations, is the presence of a trained individual at the worksite. However, it is the nature of these "one man facilities" that they often work alone or in remote areas. Obviously a single employee cannot administer CPR to himself or treat certain other injuries or illnesses. However, an individual trained in first aid can self-administer first aid to serious cuts resulting in loss of blood, wrap or set a broken bone, apply a tourniquet, etc. The rationale for giving employers the above options is a recognition of the difficulties posed in providing safety protections for one man facilities, and an attempt to provide some regulatory flexibility to such employers.

Commenter 2: Donald L. Hall, President, Virginia Automobile Dealer's Association (VADA)

1. Mr. Hall stated that the VADA is very proud of their safety record in their dealership operations as a whole and in their service departments specifically and has been very active in promoting worker safety. VADA and its members do not disagree with the general principal of improving already safe workplaces. However, VADA is very concerned the proposed changes will have unintentioned and costly consequences for Virginia motor vehicle dealers.

Agency Response:

While some VADA members will have employees already trained in first aid and CPR, some employers would have to incur the additional cost of securing such training if their worksite is classified as one where employees are exposed to occupational hazards which could result in serious physical harm or death.

2. Mr. Hall stated the following:

"Motor vehicle dealer service departments are not hazardous occupations under existing federal or Virginia regulations. See 16 VAC 15-30-10, et seq."

Agency Response:

The Department's VOSH Program has not, through regulation or statute, defined the term "hazardous occupations". VOSH does use federal OSHA's annual determination of what are the highest hazard industries based on reported national injury and illness data. This data is used for statewide general industry inspection targeting purposes.

The regulation cited by the commenter, 16 VAC 15-30-10, et seq., is promulgated by the Commissioner of Labor and Industry for the enforcement of child labor laws in the Commonwealth and has applicability to child labor only. This child labor regulation is **not** part of the body of statutes and regulation that is applicable to occupational safety and health enforcement in the Commonwealth by VOSH. All occupational safety and health standards, rules and regulations for Virginia's OSHA State Plan are required to be promulgated by the Safety and Health Codes Board which is the mandated rulemaking body *(see Code of Virginia §40.1-22)*.

3. Mr. Hall stated the following:

"...(Y)our Department has taken the enforcement position that motor vehicle service departments are highly hazardous occupations and that first aid and CPR training is required. The apparent basis for this position is the Department's publication of a list which includes automobile mechanics among the most hazardous occupations in Virginia. See Most Hazardous Occupations, Virginia, 2000, http://www.doli.virginia.gov/whatwedo/enforcement/mosthaz.htm (Oct. 11, 2006). Publication of a list by your Department is not an appropriate basis for this classification. Where neither federal agencies nor state agencies have found auto dealer occupations to be hazardous, such a designation by your (D)epartment requires specific rulemaking. We are concerned that your proposal is simply a bootstrap to a list that was never developed in formal rulemaking. Identifying motor vehicle dealer occupations as hazardous cannot be done without a formal rulemaking designating such dealer occupations to be hazardous."

Agency Response:

The commenter's assertion that the Department has assumed that motor vehicle service departments are highly hazardous occupations is in error. Our website listing of the most hazardous occupations, simply notes the occupations with the greatest number of fatalities in the Commonwealth that year for general informational purposes. It has not been used in determining our emphasis programs or general inspection program priorities. Nor has it been used to date as a method to compile a list of hazardous occupations.

A review of fatal and catastrophic accidents for the period 1996 to 2006 involving mechanics (not limited to VADA members or auto dealerships as a whole) and auto and truck dealerships revealed the following descriptions of the accidents:

* An employee at a truck dealership was killed while using a forklift when it overturned.
* A driver was killed while attempting to off load a full-sized pickup truck from a tractor trailer full of vehicles. The victim became caught between the truck door and the cab post.
* A mechanic at a truck repair shop was killed while looking for the part number on an air bag for brakes underneath a tractor trailer. The driver went to move the trailer and ran over the victim.
* A mechanic was killed while attempting to install wooden blocks under the belly pan of a bulldozer when the hydraulic system failed, causing the bulldozer to fall on the victim.
* Three employees were killed at auto repair shop while welding near a 275 gallon fuel oil tank.
* Two mechanics in an auto repair shop were killed while working in a pit changing a fuel pump on a van when some of the fuel was ignited by an unidentified ignition source.
* Mechanic killed when elevated bulldozer he was working on fell on him.
* Mechanic killed at auto repair shop was repairing a gasoline tank on a van when the gasoline fumes were apparently ignited by an LPG gas heater, resulting in a fire and explosion.
* Three employees serious injured at automotive garage when employees used gasoline as accelerant to start a rubbish fire.
* Auto dealership employee killed while working on a sign from an aerial lift when the lift contacted an overhead high voltage line.
* Mechanic killed when he was backed over by a dump truck after servicing the vehicle

As a point of clarification, upon identification of a certain specific hazardous procedure or occupation, such as pick-up truck bed spray-in liners, they may be then specifically targeted and inspected under national or local emphasis programs either (or both federal OSHA and VOSH). This may indeed be done without requirements of formal rulemaking.

4. Mr. Hall stated the following:

"...VADA is very concerned that the Department's proposed extension of the §1910.151 standard to 'employees in hazardous occupations' and to worksites containing job classifications or workplace hazards that would 'expose employees to serious physical harm or death' will have unintended and costly consequences for Virginia motor vehicle dealers."

Agency Response:

All general industry occupations, including those such as auto mechanics, auto body repairmen, general office workers, parts clerks, sales staff, customer service associates, and building maintenance personnel are already covered by the §1910.151 standard and have been so covered since the § 1910.151 standard's initial inception by federal OSHA for its then direct enforcement in 1974 *(See 39 Fed Reg 33466).* One impact of the proposed regulation would be that worksites covered by the current regulations that do not contain occupational hazards which could result in serious physical harm or death will be exempted from first aid and CPR requirements under the proposed regulation.

5. Mr. Hall stated the following:

"We question the necessity of the proposal.....VADA members....generally have business locations in metropolitan and more populous areas. These dealerships enjoy ready access to emergency services, should an incident occur."..... Many dealers have personnel trained in first aid and CPR on staff. However, a regulation that imposes additional designated first aid and CPR responders to be on duty at all times to an industry that is located where timely emergency service in nearly universal will be highly burdensome and a potentially serious personnel problem.

Agency Response:

VOSH concurs that many dealerships have personnel trained in first aid and CPR. However, such training presently by individuals is voluntary and done out of personal responsibility and for the intrinsic humanitarian value of having such skills. Therefore the incidence of such training across the general industry workforce is self-selective and does not provide the assurance of uniform availability and coverage (assuming adequate skill level and refreshers) that the proposed regulatory amendments will provide. According to statistics from the Department of Emergency Medical Services (EMS) for 2003, EMS providers arrived at the scene of 522,345 calls with an average response time of approximately 12 minutes. Approximately 72 % of all reported calls were provided in less than 10 minutes, and approximately 87 % of all reported calls were provided in less than 15 minutes.

The response time for emergency responders will vary widely around the state and is dependant upon factors as whether the establishment or worksite is in an urban or rural location, and whether the medical/emergency response facility is staffed 24 hours a day. This response time is further impacted by such variables as traffic congestion, road construction and weather. Therefore, injured employees are unlikely to receive timely, reliable and consistent first aid CPR response to injuries suffered on the job especially in cases of life threatening injuries under current regulatory requirements and actual response times.

6. Mr. Hall stated the following:

"We ask that any proposed rulemaking proceeding eliminate motor vehicle dealers from consideration"

Agency Response:

The comments offered by VADA fail to provide a substantive argument for exempting automotive dealerships from the proposed regulatory amendments. There does not appear to be a rationale to provide less protection to auto dealership employees than would be provided to similarly situated employees in other industries.

VI. Comments From Sixty-Day Comment Period and Public Hearing

The proposed regulation was published on September 29, 2008, with a 60-day comment period ending on November 29, 2008. A public hearing was held by the Board on November 20, 2008.

Commenter 1: October 14, 2008 Mark Whiting, Vice President, Greater Richmond Chapter, American Red Cross

"The Center for Community and Corporate Education at the Greater Richmond Chapter of the American Red Cross fully supports these proposed regulatory amendments. As Sudden Cardiac Arrest (SCA) is a leading killer of all Virginian's, we commend DOLI's commitment to a safe workplace by requiring CPR training for those at a higher SCA risk due to occupational hazards."

Agency Response: None.

Commenter 2: November 16, 2008 **Teressa**

"If ever in the situation to save a life….do it…it might be yours!"

Agency Response: None.

Commenter 3: November 24, 2008 **Linda L. Cannon, Directorate of Safety, MSDS**

"The Occupational Safety and Health Administration of the United States Government has produced Publication 3317-2006 (Best Practices Guide: Fundamentals of a Workplace First-Aid Program). Page 13 of this publication states the following – "Training for first aid is offered by the American Heart Association, the American Red Cross, the National Safety Council, and other nationally recognized and private educational organizations." 16VAC25-95-10B states " The designated person or persons shall have a valid, current certificate in first aid and CPR training from the U.S. Bureau of Mines, the American Red Cross, or the National Safety Council, or equivalent training that can be verified by documentary evidence…"

Our firm offers first aid training from the American Heart Association. It has been our recent experience that organizations are hesitant to subscribe to training offered under the American Heart Association standard, as it is not directly stated in the proposed regulation. As it currently stands, the American Heart Association is the ONLY of the 3 major organizations listed in the Federal OSHA best practice guidelines that is not listed in 16VAC25-95-10.

I would make the request that, at the very least, the American Heart Association is listed verbatim in this proposed regulation, along with the American Red Cross and the National Safety Council, in order to maintain continuity with Federal OSHA best practice listings. Otherwise, organizations offering one or the other training programs could be at an advantage or disadvantage when marketing services to industry."

Agency Response:

The Department has added the American Heart Association to the list of recognized first aid/CPR providers in the final regulation. Following is a link to federal OSHA's "Best Practices Guide: Fundamentals of a Workplace First-Aid Program":

http://www.osha.gov/Publications/OSHA3317first-aid.pdf

On page 13, federal OSHA lists the American Heart Association, American Red Cross, and the National Safety Council as recognized first aid/CPR training providers, and indicates that other "nationally recognized and private educational organizations" provide first aid training. The Department will accept any first aid/CPR training provider that federal OSHA recognizes.

Commenter 4: November 28, 2008 **Pam Carter, RN COHNS American Association of Occupational Health Nurses**

"The American Association of Occupational Health Nurses, Inc. (AAOHN), a nursing specialty association dedicated to the promotion of health, safety and productivity of workers and worker populations, nationally and internationally, fully supports the Virginia Department of Labor and Industry's efforts to promote safe and healthful work and community environments. Given that, we support VOSH's effort to seek the amendment of medical services and first aid regulations for general industry, §16 VAC 25-90-1910.151(a)-(c), and the construction industry, §16 VAC 25-175-1926.50 (a)-(g), to require employers to train employee(s) to render first aid and cardio pulmonary resuscitation (CPR) when employees are exposed to occupational hazards which could result in serious physical harm or death.

First aid is the immediate care given to an injured or suddenly ill worker. The outcome usually depends on the immediate rendering of care. This is especially important when employees are exposed to high risk hazards in their work environment.

As a national association committed to innovative and business compatible solutions for workplaces and worker health and safety, the American Association of Occupational Health Nurses, Inc. appreciates the opportunity to state our views and recommendations to the Virginia Department of Labor and Industry's on the *Medical Standards and First Aid Standards for General Industry and for the Construction Industry."*

Agency Response: None.

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

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

Agency Response:

While the Department is sympathetic to the argument that the requirement for training in first aid/CPR for mobile crews - in the absence of the employer being able to make arrangements with another contractor on site - poses both scheduling and cost concerns for small employers, it does

not recommend expanding the mobile communication option, available to single mobile employees, to mobile work crews of multiple employees.

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

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

> "eliminate inequities contained in the existing regulations by assuring all construction and general industry employees exposed to hazards that could cause death or serious physical harm equal access to first aid and CPR services, regardless of their specific industrial or construction setting, or the geographical location of their work."
> [Townhall Agency Background Document, Form TH-02, p. 9, September 4, 2008].

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

However, as a result of the above analysis, the Department does recommend amending the proposed regulatory text to extend the mobile communication option to employers with worksites where only one employee is permanently stationed, as there is no rationale for treating them differently from single mobile employees. Accordingly, the following language changes are recommended (new language in brackets and deleted language struck through):

> F. Employers of individual [employees assigned to a permanent work location; or individual] mobile employees (i.e., an employee who travels alone to more than one worksite per day) ~~that assign employees to travel to worksites or engage in~~ [whose] work activities ~~that~~ could potentially expose those employees to serious physical harm or death shall either:
>
> 1. assure that the ~~mobile~~ employee is adequately trained to self-administer first aid;
>
> 2. comply with section ~~C.~~ [D.] above; or
>
> 3. assure that their employee has access to a communication system that will

allow them to immediately request medical assistance through a 911 emergency call or comparable communication system."

Commenter 6: November 29, 2008 Thomas A. Lisk, LeClair Ryan

COMMENTS (Part I) REGARDING DRAFT REGULATIONS GOVERNING MEDICAL SERVICES & FIRST AID STANDARDS FOR THE GENERAL & CONSTRUCTION INDUSTRY

"On behalf of the Virginia Retail Merchants Association ("VRMA"), the Virginia Hospitality & Travel Association ("VHTA"), the Virginia Manufacturers Association ("VMA"), and the National Federation of Independent Business ("NFIB"), we appreciate the opportunity to comment on the Draft Regulations Governing Medical Services and First Aid Standards for the General and Construction Industry ("Proposed Regulations"). Our comments will address two problematic aspects of your proposed regulations: 1) lack of regulatory clarity; and 2) an incomplete fiscal analysis including a general misunderstanding of the applicability of such an all encompassing regulatory change for all businesses in Virginia.

VRMA, VHTA, VMA and NFIB all agree with the expressed concerns regarding the provision of rapid medical services to critically injured employees, the need for clear and unambiguous regulations, and the need to clarify the regulations for employers of mobile work crews. We cannot, however, agree to that the proposed changes accomplish any of those goals. In fact, our analysis indicates that your language may actually lessen the number of employers in ultra hazardous industries who have to provide medical care on site, while at the same time unwittingly trapping many others who very rarely have employees exposed to workplace hazards that would cause serious physical harm or death. Specifically, our primary concern is that the Proposed Regulations are overreaching in terms of regulating all businesses in Virginia and, given the state of the Virginia economy, if implemented, will make the costs of compliance a business ending decision for some employers. Thus, in light of the foregoing concerns VRMA, VHTA, VMA and NFIB offer the following recommendations.

I. Regulatory Clarity:

VRMA, VHTA, VMA and NFIB all support safe workplace environments and we support clarity in regulations. The proposed regulations, as proposed, would actually lessen the safety for some individuals in the workplace and add additional undefined and confusing regulatory language to what was heretofore a balanced, targeted, industry specific federal regulatory scheme. Under the current regulatory system, those employees in hazardous industries (logging, electric power, welding, telecommunications, labor camps, commercial dive operations, and underground construction) receive per se heightened protections. Under your proposed regulation, certain construction and general industry employers, regardless of the type of industry, would not have to provide on site medical assistance if the worksite did not contain job classifications or workplace hazards that potentially expose employees to serious physical harm or death. The exception you are creating is swallowing the general, current, common sense rule that mandates heightened industry specific protections. Our current existing regulations, modeled after the federal

requirements, contain no such exception for either general industry or construction employees and therefore provide a safer working environment to the thousands of individuals currently employed in these trades. While your proposed scheme seems to be diametrically opposed to current federal regulations, we will refrain, at this time, from commenting on the wisdom of creating state regulatory exemptions that an incongruent with existing federal law.

Additionally, the Proposed Regulation is confusing since it contains two different "triggers" for employers to determine when they need to have someone trained in CPR. First, in proposed 16 VAC25-95-10 (A), the standard test or "trigger" would be hazards that "could potentially expose" employees to the enumerated harms. Later in the same regulation, in paragraph (F), there is an exemption for all employers that do not have workplace hazards that actually expose employees to serious harm or death. Employers will be confused by this standard, is the test a worksite that "potentially" exposes an employee to the harms or a worksite that actually exposes the employee to one of the harms. Within our organization we have many employers who will not be able to logically determine if they are required to provide the services this Proposed Regulation is attempting to mandate. What will be the test to determine whether a retailer or other employer with a loading dock, an on site meat grinder, or a forklift has to comply with this regulation. What if an employer only occasionally uses these implements? What if they only use them once or twice a year? The proposed regulation provides much less clarity than the current regulatory framework."

Agency Response: The Department does not believe that the proposed regulatory language provides two different "triggers" for determining when its provisions apply as the phrase "could potentially expose" is used numerous times throughout the proposed regulation and the term "actually expose" is never used. However, it does appear that in the paragraph referenced by the commenter (proposed § 16 VAC 25-95.F) and in one other place (proposed §16 VAC 25-177.G), it would be appropriate to amend the language as follows, to assure that there is no confusion:

16 VAC 25-95.F:

F. Sections A. through E. of this regulation do not apply to worksites that do not contain job classifications or workplace hazards that [could potentially] expose employees to serious physical harm or death.

16 VAC 25-177.G:

G. Sections A. through F. of this regulation do not apply to worksites that do not contain job classifications or workplace hazards that [could potentially] expose employees to serious physical harm or death.

Commenter 6, Continued:

"Although you state that the current OSHA requirements are "overreaching," this Proposed Regulation suffers from that exact problem. While we see general statements contained in your description that the proposed regulation will exclude worksites that "do not contain such serious hazards," your regulation, once again, provides little of no definitional guidance as to what that means and in fact, addresses additional sites that could "potentially" expose employees to such harm. As we have explained, many of our retailers and other employers have mixed use sites where there may actually be hazards of some small degree. Whether the hazard is of such a degree as to be classified as one that causes "serious physical harm" is a question of interpretation. Under the current regulatory framework, certain industrial classifications are clearly required to provide enhanced medical services on site. Your proposed change confuses what has been a logical, industry wide, risk specific framework, and creates a new regulatory scheme which is not even clear to various state agencies. For example, the Department of Planning and Budget disagrees with your offices general interpretation that this regulation will not apply to many retailers. As DPB states:

> *The proposed amendments will affect all employers in Virginia. . . . Within a particular industry that is normally considered to be low hazard, there may be some specific work sites or portions of the establishments that have job classifications or workplace hazards that would fall under the more stringent requirements of the proposed regulation. For example, a large department store that has service personnel who deal directly with customers who would not be exposed to serious or life-threatening hazards may also have warehouse personnel who operate forklifts and are therefore exposed to such hazards. As another example, a supermarket may have retail clerks who are not exposed to serious hazards, but may also have personnel using potentially dangerous equipment, such as a meat slicing machine. Therefore, although some businesses in the areas of Retail or Wholesale Trade may only have office workers, the section could not be considered exempt from the proposed regulation.* (emphasis added).

Your office has already opined that the general regulation will NOT affect most retailers. Our retail members would thus be faced with a compliance dilemma if this regulation goes forward in its current form. Should such employers spend the time, effort and financial resources (possibly closing there doors while they are trying to obtain the mandated training) to comply if they might have a hazard, or should they comply only if DOLI determines they have a hazard that causes "serious" physical harm, or what about the case where they "potentially" may have a hazard, or even the case where they don't actually expose an employee to these harms, but yet the harms are somewhere in the workplace. What is the definition under this regulation of "potentially?"

Agency Response: The Department respectfully disagrees with the commenter's suggestion that the Department of Planning and Budget (DPB) is confused about how the proposed regulation will be applied. The language cited by DPB is this Department's interpretive language from the Townhall Agency Background Document posted on the Townhall along with the regulatory text. The commenter appears to be confused about how the current federal identical OSHA first aid standards are applied. As demonstrated in this language from the below federal OSHA

interpretation, employers currently have to evaluate their worksite to determine if "serious accidents such as those involving falls, suffocation, electrocution, or amputation are possible," to determine which response time applies (3 to 4 minutes for potential serious accidents; 15 minutes where the potential for serious accidents is less likely):

> "OSHA stated in a letter of interpretation dated January 16, 2007 to Mr. Charles F. Brogan: "The primary requirement addressed by these first aid standards is that an employer must ensure prompt first aid treatment for injured employees, either by providing for the availability of a trained first aid provider at the worksite, or by ensuring that emergency treatment services are within reasonable proximity of the worksite." The employer must ensure that ". . . adequate first aid is available in the critical minutes between the occurrence of an injury and the availability of physician or hospital care for the injured employee."
>
> The letter further explains: "While the first aid standards do not prescribe a number of minutes, OSHA has long interpreted the term 'near proximity' to mean that emergency care must be available within no more than 3-4 minutes from the workplace. Medical literature establishes that, for serious injuries such as those involving stopped breathing, cardiac arrest, or uncontrolled bleeding, first aid treatment must be provided within the first few minutes to avoid permanent medical impairment or death. Accordingly, in workplaces where serious accidents such as those involving falls, suffocation, electrocution, or amputation are possible, emergency medical services must be available within 3-4 minutes, if there is no employee on the site who is trained to render first aid.
>
> OSHA does exercise discretion in enforcing the first aid requirements in particular cases. For example, OSHA recognizes that in workplaces, such as offices, where the possibility of such serious work-related injuries is less likely, a longer response time of up to 15 minutes may be reasonable."
> [Interpretation Issued to Brian F. Bisland, March 23, 2007.]

While the Department does not dispute that application of the final regulation may require additional interpretive guidance, as all regulations do, it does not believe it is any more burdensome then the current federal identical first aid regulation, and in fact believes it is less burdensome. As stated in the Department's Townhall Agency Background Document, the final regulatory language will eliminate the necessity under the current federal identical OSHA first aid regulation to make a determination of whether EMS/hospital providers can meet the response time requirements:

> "Finally, to assure compliance with the current regulations, both employers and the VOSH Program are often faced with having to document whether an infirmary, clinic or hospital would be accessible within 3-4 minutes or 15 minutes. This may include going to such lengths as having to drive from the inspection site to the facility, or by contacting the nearest rescue squad to determine what the normal response time would be to the specific worksite. Even in such cases where response time information may be readily available, the response time for emergency responders to a particular site can vary widely from day to day depending on such factors as whether the worksite is in an urban or rural location (see discussion below on geographic differences in EMS response times around the state), whether the medical/emergency response facility is staffed 24 hours a day or not, and such vagaries as traffic congestion, road construction and weather. For these reasons under the current regulations, the vast majority of injured employees cannot receive timely, reliable

and consistent first aid response to injuries suffered on the job if there is no trained first aid responder on site."
[Townhall Agency Background Document, Form TH-02, p. 5, September 4, 2008]

Commenter 6, Continued:

"Finally, some of your comments to the regulation are confusing and do not match the proposed regulatory framework. For example you appear to state that your "proposed regulation will exclude worksites that do not contain such 'serious' hazards," yet the regulation is written in terms of exposure of employees to serious physical harm or death." Is the standard to be applied one of "serious hazards" or one "serious physical harm." Does serious physical harm equate with serious hazard, if so, why is that standard not written into the regulation? The regulation speaks in terms of workplace hazards not serious workplace hazards. Are all non serious workplace hazards thus excluded from this regulation. We also wonder about job classifications. Is the Department going to classify some job classifications as "serious" and would that classification equate to only those that expose employees to "serious harm or death?" Once again, we feel the regulation is not providing any clarity to our members in what had been a fairly simple regulation based on industry specific criteria."

Agency Response: The Department agrees that further definitional guidance would be of benefit to the regulated community in applying the final regulation. In developing revised language the Department consulted the following sources:

Va. Code §40.1-49.3 contains a definition of "Serious violation" as follows:

> "means a violation deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment…."

The VOSH Administrative Regulations Manual, 16 VAC 25-60-10, contains a definition of "Serious violation" as follows:

> "means a violation deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment…. 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."

The Federal OSHA Field Operations Manual (FOM), 2009, defines "serious physical harm" as:

> Impairment of the body in which part of the body is made functionally useless or is substantially reduced in efficiency on or off the job. Such impairment may be permanent or

temporary, chronic or acute. Injuries involving such impairment would usually require treatment by a medical doctor or other licensed health care professional.

a. Injuries that constitute serious physical harm include, but are not limited to:

- Amputations (loss of all or part of a bodily appendage);
- Concussion;
- Crushing (internal, even though skin surface may be intact);
- Fractures (simple or compound);
- Burns or scalds, including electric and chemical burns;
- Cuts, lacerations, or punctures involving significant bleeding and/or requiring suturing;
- Sprains and strains
- Musculoskeletal disorders.

b. Illnesses that constitute serious physical harm include, but are not limited, to:

- Cancer;
- Respiratory illnesses (silicosis, asbestosis, byssinosis, etc.);
- Hearing impairment;
- Central nervous system impairment;
- Visual impairment; and
- Poisoning.

The Department recommends amending the proposed regulatory text to add definitions for the terms "serious physical harm" and "serious workplace hazard":

[A. The following words and terms when used in this regulation shall have the following meanings unless the context clearly indicates otherwise:

"Serious physical harm" means impairment of the body in which part of the body is made functionally useless or is substantially reduced in efficiency on or off the job. Such impairment may be permanent or temporary, chronic or acute. Injuries and illnesses involving such impairment would usually require treatment by a medical doctor or other licensed health care professional. Injuries that constitute serious physical harm include, but are not limited to, amputations (loss of all or part of a bodily appendage); concussion; crushing (internal, even though skin surface may be intact); fractures (simple or compound); burns or scalds, including electric and

chemical burns; cuts, lacerations, or punctures involving significant bleeding and/or requiring suturing; sprains and strains. Illnesses that constitute serious physical harm include, but are not limited to, cancer; respiratory illnesses; hearing impairment; central nervous system impairment; visual impairment; and poisoning. "Serious workplace hazard" means a hazard deemed to exist in a place of employment where there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment. The 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.].

The Department also agrees with the commenter that use of the term **"job classification"** might result in some unnecessary confusion for the regulated community and recommends the term be deleted from the proposed regulation.

COMMENTS (Part II) REGARDING DRAFT REGULATIONS GOVERNING MEDICAL SERVICES & FIRST AID STANDARDS FOR THE GENERAL & CONSTRUCTION INDUSTRY

"On behalf of the Virginia Retail Merchants Association ("VRMA"), the Virginia Hospitality & Travel Association ("VHTA"), the Virginia Manufacturers Association ("VMA"), and the National Federation of Independent Business ("NFIB"), we appreciate the opportunity to comment on the Draft Regulations Governing Medical Services and First Aid Standards for the General and Construction Industry ("Proposed Regulations").

II. DOLI fiscal analysis:

VRMA, VHTA, VMA and NFIB believe that the DOLI fiscal analysis of the proposed regulation grossly underestimates the number and degree to which this proposed regulation will affect existing small and large businesses in Virginia. There appears to have been little, if any, realistic cost benefit analysis performed or documented before this regulation was published. As your comments clearly state, a "disadvantage is that some employers would have to incur the additional cost of securing such training" and as DPB recognizes "there is insufficient data to accurately compare the magnitude of the benefits versus the costs.

There also is a tremendous difference in the number of businesses affected by the current federally imposed regulation and the number that will be affected by the proposed DOLI change. As DPB explained "[i]n sum, under current regulations, most firms…are required to have a first-aid-trained employee on site only if medical attention…is not in near proximity or reasonably accessible." (emphasis added). The new proposal, according to DPB, "*will affect all employers in Virginia*" (emphasis added). To force such a sweeping change, with little or no cost data, on Virginia employers is extremely problematic. Given the current state of economic affairs in the Commonwealth such a change evidences an extreme disregard and disrespect for the financial health and well-being of all Virginia businesses and for the people who are trying to make every dollar count by providing jobs to Virginians in this time of unprecedented economic downturn."

Furthermore, reading through the explanation provided, one could surmise that the regulation was intended to primarily affect industrial users. Most of the sited data analyzes only response times for industrial sites. Many businesses in Virginia, however, are not "industrial sites" but are simply small businesses. The associated cost of implementing this regulation to these businesses seems to have been given little or no weight in proposing the current regulatory scheme. As DPB mentions, there are reasonable alternatives to the single mandate contained in this proposal, including a requirement that medical services be provided only if a business could not meet the current delineated four and fifteen minute thresholds.

II. Conclusion:

While VMRA, VHTA, VMA and NFIB all agree in principal with creating a safer workplace for all employees and clarity in government regulations, we do not agree with the promulgation of a confusing regulatory scheme in troubling economic times. What Virginia employers need are precise rules and guidance. This proposed regulation provides neither. What it does do is add costly, unclear, and potentially weaker regulations to many large and small businesses at a time when government should be helping to remove additional costs and burdens on the citizens of this Commonwealth. We respectfully ask that you reconsider the implementation of this regulation, in its current form or at least provide for some common sense alternatives to the training and personnel expenditures contained in your proposed regulation."

Agency Response: The Department respectfully disagrees with the commenter's suggestion that little cost benefit analysis was performed for the proposed regulation. A sixteen page economic impact analysis was conducted by DPB and can be found at:

http://www.townhall.state.va.us/L/GetFile.cfm?File=E:\townhall\docroot\92\2039\4149\EIA_DOLI_4149_v4.pdf

The Department is well aware of current economic conditions and has attempted to take a balanced approach by assuring that the costs of compliance will be minimized as much as possible by eliminating compliance costs for approximately 27% of Virginia's employers covered by the current federal identical OSHA regulation (approximately 59,000 of the estimated 215,201 employers in Virginia); and by maximizing the benefits of the final regulation by targeting those worksites that pose the highest risk of serious injury and illness for employees.

It is the Department's position that the estimate of **exempted** employers should be larger than 27%, and perhaps by a significant amount. In preparing the above estimates, the Department used a conservative approach in determining which employers should meet the exemption. For instance, even though the Department believes that most retail establishments should be exempt from the regulation, it nonetheless did not include retail establishments (26,800 or 12.5%) in the exempt category because of the previously mentioned example of a large department store having a warehouse operation where forklifts are used, which would require compliance with the final regulation. Most small to midsized retail establishments do not have any warehouse or similar operations that would involve potential exposure to serious workplace hazards. Nor did the Department include such industries as wholesale establishments (12,580 establishments or 5.8%); information (NAICS 51, 4,078 establishments or 1.9%); other services, except public administration (NAICS 81, 23,030 establishments or 10.7%); or arts, entertainment and recreation (NAICS 71, 2,748 establishments or 1.3 %) in the count of potential exempt employers, even though many of those workplaces will not contain serious workplace hazards.

In addition, the data the Department used in counting offices that would be exempt from the final regulation is what we would refer to as "soft" data and is most likely to be under-inclusive. As an example, under NAICS 53, Real Estate and Rental Leasing, the Department was able to identify NAICS 5312, Offices of Real Estate Agents and Brokers, as a subset of employers that should be exempt because the NAICS description indicates that only office work is involved. However, the

Department could not break out anything under NAICS 5311, Lessors of Real Estate 6,152 establishments or 2.8%), even though many individual worksites would only consist of office workers, because there may be some worksites in that industry that do have maintenance personnel for the leased property (maintenance personnel can be exposed to hazards posing a risk of serious physical harm or death because the will do such tasks as work on electrical related issues, work around boilers, air conditioners, etc., all of which pose a risk of electrocution, or caught-in hazards).

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

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

Commenter 7: November 10, 2008 **Laurie Peterson Aldrich, President, Virginia Retail Merchants Association**

"I received a call from a retailer that was concerned that these regulatory changes would apply to them. From my reading, it does not apply, however it is always best to verify with the source. Can you verify that this regulatory change would NOT impact general retailers in their day to day business?"

Agency Response: Unlike the current federal identical first aid regulation, the final First Aid regulation will not apply to the large majority of retail establishments because they do not generally have "occupational hazards which could result in serious physical harm or death," which is the "trigger event" for worksites where the proposed regulation would apply. However, there will be some retail worksites that would be covered by the final regulation. Following is a discussion on the issue given in the briefing document for the final regulation:

> "However, it should be noted that within a particular industry that is normally considered to be low hazard, there may be some specific worksites or portions of establishments that have job classifications or workplace hazards that could trigger application of the proposed regulation (e.g., a large department store that has service personnel who deal directly with customers who would not be exposed to serious or life threatening hazards, may also have

warehouse personnel who operate forklifts who are exposed to such hazards; a large grocery or supermarket will have retail clerks who would not be covered by the proposed regulations, but may have forklift operators, or other employees that use potentially dangerous equipment such as a meat slicing machine).

Commenter 8: November 13, 2008 **P. Dale Bennett, Executive Vice President, Virginia Trucking Association**

"The following comments about the above-referenced proposed regulation are submitted on behalf of the members of the Virginia Trucking Association.

Introduction

The Virginia Trucking Association (VTA) is the statewide trade association representing the trucking industry in Virginia. Our membership includes large and small-sized for-hire trucking companies and private carriers that operate trucks to transport their own products and materials as well as suppliers of goods and services to truck fleet operators. These companies are either headquartered in Virginia, have terminals here or operate trucks in the Commonwealth.

Comments

Our most significant concern is in regard to the application of the provisions governing employers of mobile work crews to trucking operations. The proposed regulation defines a mobile work crew as a crew that travels to more than one worksite per day and consists of two or more employees. The proposed regulation requires employers of mobile work crews to either:

1. Assure that at least on employee on the mobile crew is designated and adequately trained to render immediate first aid and CPR during all workshifts; or

2. Comply with subsection C of this section, which allows covered employers to enter into an agreement with and rely on another employer at the same worksite to provide first aid and CPR responder services for its mobile work crew employees.

We believe this provision of the proposed regulation was drafted without proper consideration of how it would be applied or the burden it would create for trucking fleets that utilize team drivers in their operations.

Some trucking operations utilize employees in what are referred to as "team operations" in which two drivers are sent out to deliver a load. In these operations, used mainly for long-distance trips, two drivers take turns driving the same truck in shifts to complete a particular trip, which may involve picking up and delivering freight at several locations, i.e., worksites, along the way. As we read the proposed regulations, these team driving operations would be considered mobile work crews.

Few, if any, employers of such team operations would be able to practically utilize Option 2 to comply with requirements in paragraph D because their shipping and delivery customers are not

always the same on a daily basis. Thus, their only option to comply with paragraph D would be to train a significant number of its drivers to render first aid and CPR. This would impose an added cost to an industry that can ill afford it during these difficult economic conditions. This year's record-high fuel prices and soft freight demand have taken the deepest ever toll on the trucking industry with a record number of companies failing in the first three quarters of 2008. According to one leading trucking analyst, "the first three quarters of 2008 have already established a new record for the amount of capacity pulled from production within a single year.

Never have more trucks been pulled off the road in a shorter period of time than in the first three quarters of this year." A total of 2,690 companies located throughout the U.S. with 5 or more trucks went out of business between January and September. Imposition of any level of regulatory compliance costs at this time could have a significant negative impact on Virginia's trucking industry.

However, we recommend that the proposed regulations be amended to allow for an alternative compliance option for trucking industry employers that utilize team operations that would be much less expensive. Specifically, we recommend that the proposed regulations be amended to allow trucking industry employers that utilize team operations the option of paragraph E.2. to comply with the requirements of paragraph D.

The vast majority of truck drivers maintain a means to communicate with their employers and the "outside world" while in their vehicles through devices such as cell phones, on-board computers, satellite communication systems and CB radios. Since this option would be allowed for single drivers, we do not believe there is adequate justification to disallow it simply because there is one additional driver in the vehicle.

Thus, we respectfully request that the Safety and Health Codes Board consider amending the proposed regulations with language similar to the following:

Add the following provision to 16VAC25-95-10, paragraph D:

> *"3. Assure that mobile work crews that consist of two drivers of a commercial vehicle have access to a communication system that will allow them to immediately request medical assistance through a 911 emergency call or comparable communication system."*

Agency Response: The commenter was asked the following questions before the Department initially responded:

1. With your example are we just talking about delivery of the vehicle to the destination or do the drivers sometimes have the added responsibility of loading/unloading the trucks? If the latter, could you give me a few examples (e.g., furniture delivery, etc.,).

2. If the latter in 1. above, is it at all common that the drivers might use a forklift or other piece of equipment to assist in loading/unloading the vehicle.

The Commenter provided the following responses to the above questions:

“1. With your example are we just talking about delivery of the vehicle to the destination or do the drivers sometimes have the added responsibility of loading/unloading the trucks? If the latter, could you give me a few examples (e.g., furniture delivery, etc.,).

Although our industry is collectively referred to as the "trucking industry," we are made up of many different segments with different types of trucks and operations. Thus, delivery requirements vary widely.

In LTL (less than truckload) operation, team drivers rarely, if ever, load or unload the freight. Team drivers are used in line-haul operations to move trailers between terminals. Once they drop a trailer at a terminal, a solo, local driver will then make the deliveries of the freight.

In TL (truckload) operations, team drivers spend most of their working time behind the wheel but also may occasionally have to load or unload their cargo. This is especially common when drivers haul specialty cargo because they may be the only ones at the destination familiar with procedures or certified to handle the materials. I'm not sure to what extent team operations are used in the following examples. Auto-transport drivers position cars on the trailers at the manufacturing plant and remove them at the dealerships. Drivers delivering furniture and household goods (movers) may participate in loading and/or unloading.

In the food and grocery delivery business, drivers are not allowed on the dock at some places. Most, if not all, unloading is done by the customer or a lumper service (persons hired or contracted with by the customer to unload freight).

There are receivers of freight that do not have personnel on hand for unloading and expect the driver's labor to be part of the delivery process. Some receivers, and even shippers, use the threat of unpaid detention and delay as coercion to get free labor. Since over-the-road drivers are paid by the mile, it is always in the drivers' interest to get loaded/unloaded quickly and keep moving. Thus drivers may participate in loading and/or unloading even when not required to do so. In addition, the federal hours of service regulations make it in the drivers' best interest to not spend a lot of his "on-duty" time being involved in loading and unloading the truck.

2. If the latter in 1. above, is it at all common that the drivers might use a forklift or other piece of equipment to assist in loading/unloading the vehicle.

If a driver uses power equipment (fork trucks, tractors, platform lift trucks, motorized hand trucks, and other specialized industrial trucks powered by electric motors or internal combustion engines) to load or unload, the driver has to be certified on the type of equipment being used. (See OSHA Regulations at 29 CFR 1910.178(1)) Any shipper or receiver who requires a driver to use such equipment should satisfy themselves that the driver has been properly trained and certified.

Finally, if a driver is loading or unloading freight at a shipper/receiver's facility in Virginia, that shipper or receiver will be required under the proposed regulations to designate an employee and adequately train him or her to render immediate first aid and CPR during all workshifts on worksites with hazards that could potentially expose employees to serious physical harm or death. For traditional businesses and industries that use mobile work crews, the contracting option may not impose an unreasonable burden. However, for trucking companies there can be a constant change in pick up and delivery locations that may not be known until hours or a few days at most before the customer request for a pick up or delivery is made. This short time frame would make it difficult for the trucking company to enter into a written agreement for the provision of first aid and CPR. This would be especially true for "brokered" loads where there may be only a few hours notice for a pick up or delivery.

Finally, I pass along a comment from one of our members that I found to be an interesting viewpoint. He said, "If I were a member of a 2 person mobile work crew, wouldn't it be in my best interest to not be the one trained in first aid and CPR. Think about it. If I am the one trained and something happens to me, I am out of luck."

The Department responds as follows:

If LTL (Less Than Truckload) trucking operations consist of either a single driver or a two person driving team, and all they are doing is over-the-road driving (i.e., the only serious hazard they are exposed to is a traffic accident), the final First Aid regulation will not apply, since VOSH does not investigate traffic accidents.

For TL (Truckload) trucking operations where there is a single driver, and the driver is potentially exposed to serious workplace hazards, the communication system option is available to the employer instead of having the employee trained in first aid.

For TL trucking operations where there are two drivers potentially exposed to serious workplace hazards, the current proposed regulation provides that at least one of the drivers must be trained in first aid/CPR or the employer must make written arrangements with contractor or employer on the same job site or establishment to provide first aid/CPR. The Department does not recommend adopting the commenter's recommendation to amend the proposed regulation as follows:

> "3. Assure that mobile work crews that consist of two drivers of a commercial vehicle have access to a communication system that will allow them to immediately request medical assistance through a 911 emergency call or comparable communication system."

See Department's response to Commenter 5, which addresses a request to extend the communication systems option to mobile work crews of 2 or 3 people.

Commenter 9: November 20, 2008 **Donald Hall, President, Virginia Automobile Dealers Association**

VADA believes that the Proposed Regulations are an impermissible departure from federal OSHA regulations and require further modifications to ensure compliance.

Preemption by Federal Law

Because the Proposed Regulations appear to conflict with current federal OSHA rules, they are subject to pre-emption. "It is a familiar and well-established principle that the Supremacy Clause, U.S. Const. Art. VI, cl. 2, invalidates state laws that 'interfere with or are contrary to federal law.'" Hillsborough Cty., Florida v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713 (1985). State law is nullified to the extent that it actually conflicts with federal law." Id. "Federal regulations have no less pre-emptive effect than federal statutes." Nat'l City Bank of Indiana v. Turnbaugh, 463 F.3d 325, 330 n.3 (4th Cir. 2006); Donmar Enterprises, Inc. v. Southern Nat'l Bank of North Carolina, 64 F.3d 944, 949 (4th Cir. 1995). Preemption may be either express or implied, and it "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Gade v. Nat'l Solid Wastes Management Ass'n, 505 U.S. 88, 98 (1992) (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

In 1970, Congress passed the Occupational Safety and Health Act ("OSHA"), 29 U.S.C. § 651 *et seq.*, in order to provide every working person with a safe and healthy workplace. 29 U.S.C. § 651(b). OSHA preempts state regulation of an occupational safety or health issue where a federal standard has already been established, unless a state plan has been submitted and approved by the U.S. Secretary of Labor pursuant to OSHA §18(e). 29 U.S.C. § 667. State OSHA rules and regulations control over federal OSHA rules and regulations once the Secretary of Labor determines that the state has promulgated standards comparable to federal OSHA and has an adequate enforcement plan. Id. A state health and safety plan must meet specific criteria in order to obtain approval from the Secretary of Labor. 29 C.F.R. § 1902.3(a). With respect to a state plan's health and safety standards, a state may either adopt the federal OSHA standards or promulgate "standards which are or will be ***at least as effective*** as those promulgated under [29 U.S.C. § 655 of OSHA]." 29 C.F.R. § 1902.3(c)(1) (emphasis added). Thus, State OSHA standards may be more, but not less, stringent than federal OSHA standards. See OSHA interpretation letter, Richard Fairfax to Charles Brogan (January 16, 2007). Virginia obtained final OSHA § 18(e) approval of its health and safety plan by the Secretary of Labor on November 30, 1988. 29 C.F.R. § 1952.374(a); see Va. Code Ann. § 40.1-22 *et seq.*

"Federal OSHA approval of a State plan under section 18(b) of the OSH Act in effect removes the barrier of Federal preemption, and permits the State to adopt and enforce State standards and other requirements regarding occupational safety or health issues regulated by OSHA." 29 C.F.R. § 1953.3(a). "A State with an approved plan may modify or supplement the requirements contained in its plan, and may implement such requirements under State law, without prior approval of the plan change by Federal OSHA." Id. "Changes to approved State plans are subject to subsequent OSHA review."[a] Id. Federal regulations provide potential consequences when a state alters a health and safety regulation which does not conform to OSHA requirements. "If OSHA finds reason to reject a State plan change, and this determination is upheld after an adjudicatory proceeding, the plan change would then be excluded from the State's Federally-approved plan." Id.

Under 29 U.S.C. § 667, a proposed change to a state OSHA regulation which is not "as effective as" the corresponding federal OSHA regulation is preempted. Such a regulation would not qualify under federal regulations to meet the specific criteria required of a federally-approved OSHA state plan. 29 C.R.F. § 1902.3(c)(1). Federal regulations require that components of a state plan be measured against "indicies of effectiveness" in determining whether an alternative regulation is "at least as effective as the Federal program." 29 C.F.R. § 1902.4(a)(2). Two such indicies are relevant with respect to the Proposed Regulations. First, federal law requires that state OSHA regulations be developed and promulgated "by such means as ... obtaining the best available evidence through research, demonstrations, experiments, and experience under this and other safety and health laws." 29 C.F.R. § 1902.4(b)(i). In addition, federal regulations require state plans to provide for variances from state OSH standards which are similar to federal variances. State OSHA regulations must "[p]rovide[] authority for the granting of variances from State standards, upon application of an employer or employers which correspond to variances authorized under the Act." 29 C.F.R. § 1902.4(b)(iv).

Based on these effectiveness requirements, the Proposed Regulations fail to meet federal standards and are preempted. First, the Proposed Regulations eliminate the federal safety requirements with respect to white collar workplaces such as offices. Proposed 16 Va. Admin. Code § 25-95-10(F). Under OSHA's interpretation of 29 C.F.R. § 1910.151(b), office workplaces require employees trained in first aid if they are located more than 15 minutes from an infirmary, clinic, or hospital. See OSHA interpretation letter from Richard Fairfax to Brian Bisland (March 23, 2007). The Proposed Regulations are less effective in providing occupational health and safety than 29 C.F.R. § 1910.151(b) because they eliminate the employee first aid training requirement, even if the office workplace is located more than 15 minutes from emergency medical responders. Proposed 16 Va. Admin. Code § 25-95-10(F). Thus, Virginia office workers in more remote locations will be less safe under the Proposed Regulations. Indeed, the Department of Labor and Industry estimates that for about 65,000 Virginia employers the Proposed Regulation will be "less stringent" than the federal regulations. 25 Va. Reg. Regs. 286. Since the Proposed Regulations are less effective than the federal regulations, they cannot conform to federal law regarding approved state health and safety plans; they are thus preempted.

[a] "Whenever a State makes a change to its ... regulations [or] standards ... which affect the operation of the State plan, the State shall provide written notification to OSHA. When the change differs from a corresponding Federal program component, the State shall submit a formal, written plan supplement." 29 C.F.R. § 1953.3(a).

Agency Response: The Department generally agrees with the commenter's summary of the law with regard to the issue of preemption of state occupational safety and health standards and the federal regulations that apply to review of unique state plan regulations. As noted by the commenter, it is federal OSHA, and by extension not this Department, the Safety and Health Codes Board, nor the commenter, who is charged with the responsibility of making the determination of whether a unique state regulation is "as effective as" the current federal OSHA identical regulation. OSHA will not undertake to make such a determination until after the proposed regulation becomes final and is submitted by the VOSH Program as an amendment to the Virginia State Plan, so the commenter's argument that the regulation should not go forward based on a failure to meet the "as effective as" requirement is premature. That argument can be made when federal OSHA undertakes its review of the eventual final regulation.

With regard to the commenter's substantive argument that because portions of the proposed regulation could be technically determined to be less stringent then a corresponding federal requirement (e.g., exemption of white collar offices from coverage under the standard), the entire proposed regulation would be not "as effective as" the federal, the Department respectfully disagrees. The Department is of the opinion that the regulation will be found to be "as effective as" current federal identical regulations.

By way of analogy, as recently as 2005, federal OSHA approved the Oregon State Plan's unique fall protection regulation, even though for some activities Oregon maintains a 10 foot fall protection requirement, while the federal OSHA regulations contains a 6 foot fall protection requirement (see http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEDERAL_REGISTER&p_id=18343):

> **"**For many work activities Oregon's fall protection standards mirror the federal standard and require employers to provide fall protection for employees working at heights of 6 feet and higher. OAR 437-003-1501(1)-(4). For some tasks, however, Oregon OSHA has a 10-foot trigger for fall protection requirements. OAR 437-003-1501. But while the federal standard often permits employers to utilize alternative measures, e.g., a controlled access zone with a safety monitor, at heights of 10 feet and above, OR-OSHA regularly requires the use of conventional fall protection at those more dangerous heights. Oregon has represented to federal OSHA that employers in that state virtually never raise infeasibility as a basis or defense for not providing conventional fall protection, and that infeasibility has not been a successful argument in a contested case or recognized in settlement agreements. Therefore, OSHA has determined that the Oregon standards are as strict or stricter than the federal standard with respect to those activities for which the state maintains a 6-foot trigger height and for all work done at heights of 10 feet or higher. With respect to those few fall hazards between 6 and 10 feet that are not otherwise covered by Oregon's fall protection standard, the state has assured OSHA that it will consider the issuance of citations or orders to correct under its general duty clause (ORS 654.010, 654.015), or the posting of red warning notices (ORS 654.082). Accordingly, OSHA believes that Oregon's fall protection program is at least as effective as the federal program."

Commenter 9, Continued

Second, the Proposed Regulations are preempted under federal law because they are not the product of "the best available evidence through research, demonstrations, experiments, and experience." 29 C.F.R. § 1902.4(b)(i). The Department promulgated the Proposed Regulations based on certain statistics about the average response times for emergency medical services (EMS) in Virginia. See 25 Va. Reg. Regs. 278-280. Current federal law requires that "in workplaces where serious accidents such as those involving falls, suffocation, electrocution, or amputation are possible, emergency medical services must be available within 3-4 minutes, if there is no employee on the site who is trained to render first aid." OSHA interpretation letter from Richard Fairfax to Brian Bisland (March 23, 2007). In non-dangerous worksites, such as offices, a longer response time of up to 15 minutes may be reasonable. Id. The Department concluded based on its average EMS response time data that "the large majority of employers in Virginia fail to meet the three to four minute exemption contained in the interpretations for the current VOSH first aid regulations." 25 Va. Reg. Regs. 279.

However, average EMS response times are not a good basis to reject the federal first aid regulations. Under the Proposed Regulations, employers located across the street from hospitals and medical facilities are required to pay for the same first aid training expenses as businesses located in rural outlying areas distant from such services. In addition, communities which incur the added expense of providing more comprehensive EMS service coverage cannot offer their local businesses the cost savings of no longer needing to train all of their employees in first aid and CPR. Thus, businesses which are adequately served by the local community, and are currently in compliance with federal law, will bear the significant cost of compliance with the Proposed Regulations without meaningfully increasing workplace safety. Although OSHA covers a wide range of workplace injuries, it is not "designed to require employers to provide absolutely risk-free workplaces." Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 641 (1980). The Department has made no meaningful showing that Virginia has a need for a different standard than that contained in the current regulations.

Agency Response: As noted above, it is federal OSHA, and by extension not this Department, the Board, nor the commenter, who is charged with the responsibility of making the determination of whether a unique state regulation meets the requirements of the OSH Act. OSHA will not undertake to make such a determination until after the proposed regulation becomes final and is submitted by the VOSH Program as an amendment to the Virginia State Plan, so the commenter's argument that the regulation should not go forward based on a failure to meet the requirements of the OSH Act is premature.

In addition, we respectfully disagree with the commenter's conclusion that EMS response times are not an appropriate source of evidence to consider in support of the final regulation. As noted in the Department's Townhall Agency Background Document:

> "As the more recent statistics above indicate, the average EMS response time for all cases statewide has been approximately 9 minutes for the last three years (more than twice the 3-4 minute response time required by OSHA for life threatening injuries), while the average response time to industrial sites falls between 7 and 7.5 minutes, which is 75% above the 3-4 minute requirement. Furthermore, the chart demonstrates that for all cases statewide, only 12.5 to 13% of the responses occur within the 3-4 minute requirement for life threatening injuries, while from 19 to 21% of the responses occur to industrial sites within the 3-4 minute requirement.

> The above statistics graphically demonstrate that the large majority of employers in Virginia fail to meet the 3-4 minute exemption contained in the interpretations for the current VOSH first aid regulations for construction and general industry that would allow them to avoid having a trained first aid provider on site (the OSHA 3-4 minute interpretation applies to worksites with hazards that could cause life threatening injuries).
> **….**
>
> Finally, to assure compliance with the current regulations, both employers and the VOSH Program are often faced with having to document whether an infirmary, clinic or hospital would be accessible within 3-4 minutes or 15 minutes. This may include going to such lengths as having to drive from the inspection site to the facility, or by contacting the nearest rescue squad to determine what the normal response time would be to the specific worksite. Even in such cases where response time information may be readily available, the response time for emergency responders to a particular site can vary widely from day to day depending on such factors as whether the worksite is in an urban or rural location (see discussion below on geographic differences in EMS response times around the state), whether the medical/emergency response facility is staffed 24 hours a day or not, and such vagaries as traffic congestion, road construction and weather. For these reasons under the current regulations, the vast majority of injured employees cannot receive timely, reliable and consistent first aid response to injuries suffered on the job if there is no trained first aid responder on site.
> ….
>
> In addition, the current regulations allow an employer to physically move an employee who had suffered a head/spinal injury or other serious injury by transporting them to a medical facility that is within 3 to 4 minutes driving distance, in lieu of having a trained first aid responder on site to administer first aid and CPR while Emergency Response Personnel are in route."
> [Townhall Agency Background Document, Form TH-02, pp. 5-6, September 4, 2008].

The commenter also noted the following above:

> "In addition, communities which incur the added expense of providing more comprehensive EMS service coverage cannot offer their local businesses the cost savings of no longer needing to train all of their employees in first aid and CPR."

To the extent that the above quote by the commenter implies that the final regulation requires covered employers to train **all employees** in first aid and CPR, the Department wants to clarify that the final regulation only requires covered employers to provide one employee per workshift trained in first aid and CPR.

Commenter 9, Continued

Third, the Proposed Regulations are less effective than the federal OSHA regulations because they fail to "provide for variances from state OSH standards which are similar to federal variances." 29 C.F.R. § 1902.4(b)(iv). As shown above, under the federal regulations,

employers located within 3-4 minutes of emergency medical services need not provide an employee on the site who is trained to render first aid. OSHA interpretation letter from Richard Fairfax to Brian Bisland (March 23, 2007). This variance is permitted to employers who can demonstrate that providing first-aid-trained employees is redundant given the close proximity of EMS. The Proposed Regulations, however, allow for no such variance as in federal law even though the Proposed Regulations are very similar to the federal OSHA regulations. As a result, the Proposed Regulations are more costly and less effective than the corresponding federal regulations. Federally-compliant state regulations must provide the variances permitted employers under federal law. Since the Proposed Regulations do not have a mechanism to grant such variances, they are preempted by federal law.

Agency Response: The Department and VOSH Program has its own variance procedures as provided for in Va. Code §40.1-6(9):

> "The Commissioner shall:
> ….
> "Make rules and regulations governing the granting of temporary or permanent variances from all standards promulgated by the Board under this title. Any interested or affected party may appeal to the Board, the Commissioner's determination to grant or deny such a variance. The Board may, as it sees fit, adopt, modify or reject the determination of the Commissioner."

Regulations containing applicable procedures are contained in the VOSH Administrative Regulations Manual, 16 VAC 25-60-210, which can be found at: http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+16VAC25-60-210

Commenter 9, Continued

Moreover, the Proposed Regulations utterly fail to define "job classifications or workplace hazards that expose employees to serious harm or death." As a result, the Proposed Regulations are constitutionally void for vagueness. A statute is void for vagueness if it "either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application" Roberts v. U.S. Jaycees, 468 U.S. 609, 629 (1984) (citing Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)); see also Waynesboro v. Keiser, 213 Va. 229, 234, 191 S.E.2d 196, 199 (1972) (striking down a statute that permitted a court to make property tax adjustments "if the court in its discretion [found that] the ends of justice would be met by making an adjustment"); Norfolk 302, LLC v. Vassar, 524 F. Supp.2d 728, 739-40 (E.D. Va. 2007) (enjoining enforcement of statute where the "General Assembly failed to tie the word 'noisy' to 'any explicit standard[] for enforcement' and statute encourage[s] arbitrary and discriminatory selective enforcement"). "The Due Process Clause requires that laws be crafted with sufficient clarity to 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited,' and to 'provide explicit standards for those who apply them.'" Gen. Media Communications, Inc. v. Cohen, 131 F.3d 273, 286 (2d Cir. 1997) (citing Grayned v. City of Rockford, 408 U.S. 104, 108, (1972)).

In this case, although it is clear that the Proposed Regulations do not apply to white collar office worksites, they nevertheless provide no additional guidance as to what constitutes "workplace hazards that expose employees to serious harm or death." See Proposed 16 Va. Admin. Code § 25-95-10(F). This is extremely problematic because the vast majority of Virginia employers do not fall into the white-collar-office classification. See 25 Va. Reg. Regs. 286. The Proposed Regulations' use of the term "workplace hazards" seems to be just as vague as the term "noisy conduct" which was prohibited by the statute invalidated in Norfolk 302, LLC. 524 F. Supp.2d at 739-40. Under the Proposed Regulations, the Department of Labor and Industry is given almost limitless discretion to determine which employers are required to designate CPR-trained employees and which do not. This is essentially the same unbounded discretion granted by the invalid statute in Waynesboro which gave the court unfettered power to make property tax adjustments. 213 Va. at 234. It is truly impossible for an employer, or other persons of common intelligence, to know whether the Proposed Regulations apply to them or not. Given the significant potential expense involved in complying with the Proposed Regulations, it is essential that the Department of Labor and Industry give Virginia employers "a reasonable opportunity to know what is prohibited" and the "explicit standards" that apply. The Proposed Regulations fail to provide such necessary standards. They therefore cannot survive constitutional scrutiny.

Agency Response: The Department respectfully disagrees with the commenter's contention that the proposed regulation is vague (see response to Commenter 6). However, as noted in its response to Commenter 6, the Department is recommending that the term "job classification" be removed from the proposed regulation; and that definitions be added for the terms "serious physical harm" and "serious workplace hazard."

Commenter 9, Continued

Unfunded Mandate

The Proposed Regulations create an enormous unfunded mandate for many Virginia businesses, including motor vehicle dealerships. While many dealers have personnel trained in first aid and CPR on staff, demanding that designated first aid and CPR responders be on duty at all times is highly burdensome and extremely expensive. Employees may be late appearing for work, may call in sick, be on vacation, or change jobs. In order to ensure compliance with the Proposed Regulations at all times, it will essentially become necessary for many businesses to provide the required training to all of their employees. Such a policy simply does not make sense for most of VADA's members who are either located in metropolitan or well-populated areas where timely emergency service access is available. Based on the text of the Proposed Regulations, this unjustified mandate will likely be applicable to the vast majority of workers in Virginia.

Agency Response: With regard to the Commenter's argument that the proposed regulation is an "unfunded mandate," this is essentially a cost of compliance argument which was raised by Commenter 6 and previously addressed by the Department (see response to Commenter 6).

With regard to motor vehicle dealerships, and as noted in the Department's Townhall Agency Background Document:

> **"**Any VADA member with a vehicle maintenance or repair facility that engages in the activities of welding, cutting or brazing (e.g. for removal, fabrication, and installation of exhaust systems and mufflers), are required by current regulations to render first aid until medical attention can be provided, §16 VAC 25-90-1910.252(c)(13), Welding, Cutting and Brazing.

To the extent that any motor vehicle dealership engages in the above activities, they have been required for decades by federal identical regulations to have employees trained in first aid available for each workshift. Accordingly, the Commenter's representation that the regulation represents an unfunded mandate to such dealerships for first aid training costs is not supported by the record (NOTE: CPR is not referenced in §16 VAC 25-90-1910.252(c)(13), so that training would constitute a potential added cost under the final regulation).

With regard to a situation when an employer is faced with an unforeseen situation, for example when a first aid trained employee is late for work, calls in sick, or changes jobs; or a foreseeable situation when a first aid trained employee is on vacation, the Department will review those situations on a case-by-case basis. As with any VOSH inspection, in deciding whether or not to take enforcement action, the Department will take into account mitigating circumstances (e.g., sickness, job changes, cancellation of scheduled first aid classes, etc.). The final regulation was purposely drafted to allow employer's some level of flexibility in achieving compliance, and as with all VOSH regulations, each employer must determine how it can most effectively and efficiently meet the requirements of the final regulation.

Finally, the Commenter's representation that VADA members located in metropolitan or well-populated areas have access to "timely" emergency services, is not supported by the record. As noted in the Basis for Proposed Action section above, and the Agency Background Document:

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

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

As the more recent statistics above indicate, the average EMS response time for all cases statewide has been approximately 9 minutes for the last three years [2004-2006] (more than twice the 3-4 minute response time required by OSHA for life threatening injuries), while the average response time to industrial sites falls between 7 and 7.5 minutes, which is 75% above the 3-4 minute requirement. Furthermore, the chart demonstrates that for all cases statewide, only 12.5 to 13% of the responses occur within the 3-4 minute requirement for life threatening injuries, while from 19 to 21% of the responses occur to industrial sites within the 3-4 minute requirement.

The above statistics graphically demonstrate that the large majority of employers in Virginia fail to meet the 3-4 minute exemption contained in the interpretations for the current VOSH first aid regulations for construction and general industry that would allow them to avoid having a trained first aid provider on site (the OSHA 3-4 minute interpretation applies to worksites with hazards that could cause life threatening injuries)." (Emphasis added).
[Townhall Agency Background Document, Form TH-02, p. 9, September 4, 2008].

Commenter 9, Continued

Finally, requiring all Virginia employers to designate and train first aid responders will also result in additional costs for compliance with related federal law. For example, an employee trained in first aid and identified by the employer as responsible for rendering medical assistance as part of his job duties is covered by the federal bloodborne pathogen standard. 29 C.F.R. § 1910.1030(a) ("Occupational Exposure means reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials that may result from the performance of an employee's duties."); Enforcement Procedures for the Occupational Exposure to Bloodborne Pathogens, OSHA Directive CPL 02-02-069 (11/27/2001), XIII(A)(3)(c) ("If an employee is trained in first aid and identified by the employer as responsible for rendering medical assistance **as part of his/her job duties**, that employee is covered by the standard. … An employee who routinely provides first aid to fellow employees with the knowledge of the employer may also fall, **de facto**, under this designation even if the employer has not officially designated this employee as a first aid provider.") (emphasis in original); see also OSHA Interpretation Letter from Richard Fairfax to Murray Buchanan (May 25, 2004). Employers with designated first aid providers are required to develop annual pathogen exposure control plans and provide the hepatitis B vaccine to these designated employees prior to exposure at no cost to the employee. 29 C.F.R. § 1910.1030(a), (f); OSHA Interpretation Letter from Richard Fairfax to Murray Buchanan (May 25, 2004). The Proposed Regulations fail to address the significant resulting additional costs which will be imposed upon Virginia employers who will now be required to comply with the bloodborne pathogen standard for many of their employees. Indeed, the Department fails to account for these costs in its estimated economic impact of the Proposed Regulations. See 25 Va. Reg. Regs. 282-87.

VADA members are very proud of their safety record in their dealership operations as a whole and in their service departments specifically. VADA has been active in promoting worker safety. In fact, VADA has an affiliated group providing worker's compensation insurance coverage for new car dealer employees that has an active and effective loss control plan. VADA and its members do not disagree with the general principal of improving already safe workplaces. However, VADA is very concerned that the Department's Proposed Regulations will have unintended and costly consequences for Virginia motor vehicle dealers.

We urge the Department of Labor and Industry to reconsider the Proposed Regulations and revise them to provide additional detail concerning the types of industry and employee risks to which the new rules are applicable. Employers should be given a safe harbor for compliance by limiting the number of potential employees who must be first-aid trained to a reasonable number, and allowing exceptions for unforeseen employee absences. We also believe that it is necessary to allow employers (such as VADA's members) who are not engaged in hazardous activities to have the option of electing compliance with either the new Virginia or the current federal regulatory schemes.

Agency Response: In VOSH Directive 06-002, Designated First Aid Providers - Applicability of Bloodborne Pathogens Standard in General Industry, the Department interprets the current federal identical General Industry First Aid regulation, 16 VAC 25-90-1910.151(b) concerning first aid requirements for employers in the absence of an infirmary, clinic or hospital in near proximity to the workplace if emergency rescue services are not available within a 3 - 4 minute response time, to:

> "require employers to provide employees first aid training and to designate at least one employee per work location and workshift to render first aid in response to an accident.

….
Employees designated under the above standards to provide first aid are covered by the Bloodborne Pathogens Standards, §1910.1030. See VOSH Program Directive 02-400A, Enforcement Procedures for the Occupational Exposure to Bloodborne Pathogens Standard, 1910.1030, for citation policy.

[NOTE: VOSH will not cite an employer when a designated first aid responder fails to render proper first aid, or refuses to render first aid in response to an "exposure incident" as defined in §1910.1030(b).]"

Although an employer may choose to do so on its own, it is not the intent of the Department in revising the first aid/CPR regulations in general industry and the construction industry to apply the full provisions of the Bloodborne Pathogens Standard to employees trained under the proposed first aid/CPR regulation. This should help to reduce the cost of complying with the proposed regulation, since current compliance costs associated with the Bloodborne Pathogen's standard applicability to first aid responders would, for the most part, be eliminated.

[NOTE: The Bloodborne Pathogen Standard can still apply in a first aid-related setting if an employer requires the first aid responder, or janitor, or other employee, as part of their job duties, to clean up blood residue after an accident, instead of having an outside contractor conduct the clean-up, see federal OSHA interpretations:

"'Good Samaritan' acts are not covered under the standard regardless of the particular type of injury involved. The work- relatedness of the injury is not the determining factor; rather coverage is invoked when, as stated above, an employee is expected to render assistance as part of his or her job duties."
….

"Occupational exposure" is defined as the reasonable anticipation of contact with blood or other potentially infectious materials as a result of performing one's job duties and is not limited to employees who experience occupational exposure by virtue of the fact that they render certain health care services. An employee whose job includes the cleaning and decontaminating of contaminated areas or surfaces would be considered to have occupational exposure."
….

"While OSHA does not generally consider maintenance personnel and janitorial staff employed in non-health care facilities to have occupational exposure, it is the employer's responsibility to determine which job classifications or specific tasks and procedures involve occupational exposure. For example, OSHA expects products such as discarded sanitary napkins to be discarded into waste containers which are lined in such a way as to prevent contact with the contents. But at the same time, the employer must determine if employees can come into contact with blood during the normal handling of such products from initial pick-up through disposal in the outgoing trash. If OSHA determines, on a case-by-case basis, that sufficient evidence of reasonably anticipated exposure exists, the employer will be held responsible for providing the protections of 29 CFR 1910.1030 to the employees with occupational exposure."

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=21010

Accordingly, the Department is recommending that the word "designated" in the proposed regulations be replaced with the word "selected", that the word "render" be replaced with the word "administer", and that the word "immediate" be deleted, as in the following example:

16 VAC 25-95

~~B.~~ [C.] A person or persons shall be ~~designated~~ [selected] by the employer and adequately trained to ~~render immediate~~ [administer] first aid and cardio pulmonary resuscitation (CPR) during all workshifts on worksites containing ~~job classifications or~~ [serious] workplace hazards that could potentially expose employees to serious physical harm or death. The ~~designated~~ person or persons [selected] shall have a valid, current certificate in first aid and CPR training from the U. S. Bureau of Mines, the American Red Cross, the National Safety Council, [American Heart Association,] or equivalent training that can be verified by documentary evidence, and shall be available at the worksite to ~~render~~ [administer] first aid and CPR to injured or ill employees.

Commenter 10: November 20, 2008 Mark Whiting, Vice President, Center for Community and Corporate Education, Greater Richmond Chapter, American Red Cross

Last year, the Center for Community and Corporate Education provided life saving training to over 38,000 individuals in the greater Richmond region – 80% of those people were trained at their workplace.

The inclusion of a CPR requirement for high-risk workplaces is yet one more step to help save lives in our community. In fact, in many cases individuals trained in the workplace used their lifesaving skills to save the life of a family member, friend or in some cases, a perfect stranger.

This regulatory change is fully supported by the Greater Richmond Chapter of the American Red Cross and we commend the Virginia Department of Labor and Industry for taking this measure.

One note, there has recently been an increase in firms that provide on-line computer based training in CPR and first aid. Some, including the Red Cross provide on-line training in conjunction with instructor-led, hands-on skills practice. Others do not. It is simple pay your money, take a test, and print your certification card. The Red Cross believes this is not an ideal teaching method and is in fact dangerous. If possible, an amendment to the proposed regulations to not accept on-line only training would be recommended.

The Red Cross motto is "Trained-Empowered-Prepared." This proposed regulation will indeed help business and industry across the Commonwealth be just that, "Trained-Empowered-Prepared."

Agency Response: The Department shares the commenter's concern about the quality and effectiveness of some on-line training sources. However, it is OSHA and VOSH policy that we do not certify first aid training programs, instructors or trainees:

> "Each employer using any first aid course must satisfy him/herself that the course adequately covers the type of injuries/illnesses likely to be encountered in the workplace."

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=21434

Because of changing training techniques and technologies, the Department is hesitant to endorse or prohibit specific practices in regulatory language. The final regulation specifies that the selected first aid trainee must be "adequately trained" and that the trainee must have a "valid, current certificate in first aid and CPR training from the U. S. Bureau of Mines, the American Red Cross, the National Safety Council, the American Heart Association **or equivalent training**." (Emphasis added.). The Department is of the opinion that use of the qualifying language "adequately trained", and "equivalent training" to that of well-recognized and respected training organizations as the American Red Cross, National Safety Council and American Heart Association, provides sufficient guidance for employees and the regulated community to assess whether a particular training organization is legitimate or an unscrupulous organization that might try to sell inadequate or ineffective training modules. If further guidance is needed by the regulated community, individual issues can be address by official agency interpretations.

Contact Person:

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RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board consider for adoption the final regulations to amend the medical services and first aid standards for general industry, 16 VAC 25-95, and for the construction industry, 16 VAC 25-177, to require employers to train employee(s) to render first aid and cardio pulmonary resuscitation (CPR), when employees are exposed to serious workplace hazards which could result in serious physical harm or death.

The Department also recommends that the Board state in any motion it may make to amend this regulation that it will receive, consider and respond to petitions by any interested person at any time with respect to reconsideration or revision of this or any other regulation.

16 VAC 25-95, Final Regulation to Amend the Medical Services and First Aid Standards for General Industry, §1910.151(b)

and

16 VAC 25-177, Final Regulation to Amend the Medical Services and First Aid Standards for the Construction Industry, §1926.50(c)

As Adopted by the

Safety and Health Codes Board

Date: _____

VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: _____

16 VAC 25-95, Final Regulation to Amend the Medical Services and First Aid Standards for General Industry, §1910.151(b); and

16 VAC 25-177, Final Regulation to Amend the Medical Services and First Aid Standards for Construction Industry, §1926.50(c)

~~a. The employer shall ensure the ready availability of medical personnel for advice and consultation on matters of plant health.~~

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

~~c. Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.~~

[A. The following words and terms when used in this regulation shall have the following meanings unless the context clearly indicates otherwise:

"Serious physical harm" means impairment of the body in which part of the body is made functionally useless or is substantially reduced in efficiency on or off the job. Such impairment may be permanent or temporary, chronic or acute. Injuries and illnesses involving such impairment would usually require treatment by a medical doctor or other licensed health care professional. Injuries that constitute serious physical harm include, but are not limited, to amputations (loss of all or part of a bodily appendage); concussion; crushing (internal, even though skin surface may be intact); fractures (simple or compound); burns or scalds, including electric and chemical burns; cuts, lacerations, or punctures involving significant bleeding and/or requiring suturing; sprains and strains. Illnesses that constitute serious physical harm include, but are not limited, to cancer; respiratory illnesses; hearing impairment; central nervous system impairment; visual impairment; and poisoning.

"Serious workplace hazard" means a hazard deemed to exist in a place of employment where there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment. The 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.].

~~A.~~[B.] The employer shall ensure the ready availability of medical personnel for advice and consultation on matters of plant health.

~~B.~~ [C.] A person or persons shall be ~~designated~~ [selected] by the employer and adequately trained to

~~render immediate~~ [administer] first aid and cardio pulmonary resuscitation (CPR) during all workshifts on worksites containing ~~job classifications or~~ [serious] workplace hazards that could potentially expose employees to serious physical harm or death. The ~~designated~~ person or persons [selected] shall have a valid, current certificate in first aid and CPR training from the U. S. Bureau of Mines, the American Red Cross, the National Safety Council, [the American Heart Association,] or equivalent training that can be verified by documentary evidence, and shall be available at the worksite to ~~render~~ [administer] first aid and CPR to injured or ill employees.

~~C.~~ [D.] Covered employers are permitted to make written arrangements with and reasonably rely on another contractor or employer on the same job site or establishment to provide ~~designated~~ [selected] employees to serve as first aid and CPR responders for employees of the covered employer.

~~D.~~ [E.] Employers of mobile work crews (i.e., crews that travel to more than one worksite per day) of two or more employees that assign employees to travel to worksites or engage in work activities that could potentially expose those employees to serious physical harm or death shall either:

1. assure that at least one employee on the mobile crew is ~~designated~~ [selected]and adequately trained to ~~render immediate~~ [administer] first aid and CPR during all workshifts; or
2. comply with section ~~C.~~ [D.] above.

~~E.~~ [F.] Employers of individual [employees assigned to a permanent work location; or individual] mobile employees (i.e., an employee who travels alone to more than one worksite per day) ~~that assign employees to travel to worksites or engage in~~ [whose] work activities ~~that~~ could potentially expose those employees to serious physical harm or death shall either:

1. assure that the ~~mobile~~ employee is adequately trained to self-administer first aid;
2. comply with section ~~C.~~ [D.] above; or

3. assure that their employee has access to a communication system that will allow them to immediately request medical assistance through a 911 emergency call or comparable communication system.

~~F.~~ [G.] Sections ~~A.~~ [C.] through ~~E.~~ [F.] of this regulation do not apply to worksites that do not contain ~~job classifications or~~ [serious] workplace hazards that [could potentially] expose employees to serious physical harm or death.

~~G.~~ [H.] Adequate first aid supplies shall be readily available.

~~H.~~ [I.] Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

~~a. The employer shall insure the availability of medical personnel for advice and consultation on matters of occupational health.~~

~~b. Provisions shall be made prior to commencement of the project for prompt medical attention in case of serious injury.~~

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

~~d.(1) First aid supplies shall be easily accessible when required.~~

~~d.(2) The contents of the first aid kit shall be placed in a weatherproof container with individual sealed packages for each type of item, and shall be checked by the employer before being sent out on each job and at least weekly on each job to ensure that the expended items are replaced.~~

~~e. Proper equipment for prompt transportation of the injured person to a physician or hospital, or a communication system for contacting necessary ambulance service, shall be provided.~~

~~f. In areas where 911 is not available, the telephone numbers of the physicians, hospitals, or ambulances shall be conspicuously posted.~~

~~g. Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.~~

[A. The following words and terms when used in this regulation shall have the following meanings unless the context clearly indicates otherwise:

"Serious physical harm" means impairment of the body in which part of the body is made functionally useless or is substantially reduced in efficiency on or off the job. Such impairment may be permanent or temporary, chronic or acute. Injuries and illnesses involving such impairment would usually require treatment by a medical doctor or other licensed health care professional. Injuries that constitute serious physical harm include, but are not limited, to amputations (loss of all or part of a bodily appendage); concussion; crushing (internal, even though skin surface may be intact); fractures (simple or compound); burns or scalds, including electric and chemical burns; cuts, lacerations, or punctures involving significant bleeding and/or requiring suturing; sprains and strains. Illnesses that constitute serious physical harm include, but are not limited, to cancer; respiratory illnesses; hearing impairment; central nervous system impairment; visual impairment; and poisoning.

"Serious workplace hazard" means a hazard deemed to exist in a place of employment where there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment. The 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.].

~~A.~~ [B.] The employer shall insure the availability of medical personnel for advice and consultation on matters of occupational health.

~~B.~~ [C.] Provisions shall be made prior to commencement of the project for prompt medical attention in case of serious injury.

~~C.~~ [D.] A person or persons shall be ~~designated~~ [selected] by the employer and adequately trained to ~~render immediate~~ [administer] first aid and cardio pulmonary resuscitation (CPR) during all workshifts on worksites containing ~~job classifications or~~ [serious] workplace hazards that could potentially expose employees to serious physical harm or death. The ~~designated~~ person or persons [selected] shall have a valid, current certificate in first aid and CPR training from the U. S. Bureau of Mines, the American Red Cross, the National Safety Council, [the American Heart Association,] or equivalent training that can be verified by documentary evidence, and shall be available at the worksite to ~~render~~ [administer] first aid and CPR to injured or ill employees.

~~D.~~ [E.] Covered employers are permitted to make written arrangements with and reasonably rely on another contractor or employer on the same job site or establishment to provide ~~designated~~ [selected] employees to serve as first aid and CPR responders for employees of the covered employer.

~~E.~~ [F.] Employers of mobile work crews (i.e., crews that travel to more than one worksite per day) of two or more employees that assign employees to travel to worksites or engage in work activities that could potentially expose those employees to serious physical harm or death shall either:

1. assure that at least one employee on the mobile crew is ~~designated~~ [selected] and adequately trained to ~~render immediate~~ [administer] first aid and CPR during all workshifts; or

2. comply with section ~~D.~~ [E.] above.

~~F.~~ [G.] Employers of individual [employees assigned to a permanent work location; or individual] mobile employees (i.e., an employee who travels alone to more than one worksite per day) ~~that~~

~~assign employees to travel to worksites or engage in~~ [whose] work activities ~~that~~ could potentially expose those employees to serious physical harm or death shall either:

1. assure that the ~~mobile~~ employee is adequately trained to self-administer first aid;

2. comply with section ~~D.~~ [E.] above; or

3. assure that their employee has access to a communication system that will allow them to immediately request medical assistance through a 911 emergency call or comparable communication system.

~~G.~~ [H.] Sections ~~A.~~ [C.] through ~~F.~~ [G.] of this regulation do not apply to worksites that do not contain ~~job classifications or~~ [serious] workplace hazards that [could potentially]expose employees to serious physical harm or death.

~~H.~~ [I.] Adequate first aid supplies shall be readily available.

~~I.~~ [J.] The contents of the first aid kit shall be placed in a weatherproof container with individual sealed packages for each type of item, and shall be checked by the employer before being sent out on each job and at least weekly on each job to ensure that the expended items are replaced.

~~J.~~ [K.] A communication system for contacting necessary ambulance service, shall be provided.

~~K.~~ [L.] In areas where 911 is not available, the telephone numbers of the physicians, hospitals, or ambulances shall be conspicuously posted.

~~L.~~ [M.]Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

For April 16, 2009

Electrical Standard, Subpart S of Part 1910, §§1910.303 and 1910.304; Final Rule; Clarifications and Correcting Amendments

I. Action Requested.

The Virginia Occupational Safety and Health (VOSH) Program requests the Safety and Health Codes Board to consider for adoption clarifications and correcting amendments to federal OSHA's final rule on the Electrical Standard, Subpart S of Part 1910, as published in 73 FR 64202 on October 29, 2008.

The proposed effective date is July 15, 2009.

II. Summary of the Amendment.

On February 14, 2007, federal OSHA published a revision of its electrical installation standard for general industry, 29 CFR part 1910, subpart S, which the Board subsequently adopted at its June 26, 2007 meeting. In this current action, federal OSHA corrected two typographical errors in Table S-3 of §1910.303 of the final rule as well as correcting "2.81" and "9.01," the first entries under the column heads "m" and "ft," to read "2.8" and "9.0", respectively.

Following the promulgation of the final rule in 2007, federal OSHA received questions from the public concerning the application of §1910.304(b)(3)(ii), questions stemming from the structure of the text of the provision, questions concerning whether the standard recognizes all forms of ground-fault protection devices, and questions about whether the standard requires Ground Fault Circuit Interrupters (GFCI) to be used with branch circuits supplying temporary lighting.

As originally published, the introductory text to §1910.304(b)(3)(ii) read as follows:

> "The following requirements apply to temporary wiring installations that are used during maintenance, remodeling, or repair of buildings, structures, or equipment or during similar construction-like activities."

Federal OSHA explained that because Part 1910 does not apply to construction, it removed "construction" from the list of activities specifically mentioned in NFPA 70E and changed "similar activities" to "similar construction-like activities." It did not, however, intend to deviate from the underlying intent of the NFPA 70E provision, which is to limit its application to activities that were construction-like in nature. Federal OSHA was concerned that the regulatory text of §1910.304(b)(3)(ii) may be read to include activities that are not "construction-like". What federal OSHA considers "construction-like activities" applies only to the use of this term in subpart S – not all maintenance, remodeling, or repair work is construction-like.

To clarify its intent as to the application of §1910.304(b)(3)(ii), federal OSHA revised the introductory text of §1910.304(b)(3)(ii) to read as follows:

> "The following requirements apply to temporary wiring installations that are used during construction-like activities, including certain maintenance, remodeling, or repair activities, involving buildings, structures or equipment."

In this current action, federal OSHA also clarifies the scope of §1910.304(b)(3)(ii) by explaining that §1910.304(b)(3)(ii) was taken from Section 2-2.4.2 of the 2000 edition of National Fire Protection Association's (NFPA) 70E and that both are intended to apply to temporary wiring installations used during the performance of construction-like activities. Section 2-2.4.2 reads, in relevant part, as follows:

> "2-2.4.2 Ground -Fault Protection for Personnel. Ground-fault protection for personnel for all temporary wiring installations shall be provided to comply with 2-2.4.2.1 or 2-2.4.2.2 below. This section shall apply only to temporary wiring installations used to supply temporary power to equipment used by personnel during construction, remodeling, maintenance, repair, or demolition of buildings, structures, equipment or similar activities."

When determining whether the provisions of §1910.304(b)(3)(ii) apply, employers must determine

whether a particular activity is "construction-like" in nature. Construction-like activities fall into two general categories: 1) activities that would be covered under federal OSHA's construction standards but for the fact that they are specifically covered by other federal OSHA standards, which includes the vast majority of activities covered under subpart S; and 2) all other activities that do not qualify as construction but involve electrical hazards similar to those typically found in construction work. This category includes certain "maintenance, remodeling, or repair activities involving buildings, structures, or equipment" that pose electrical hazards similar to those typically found in construction work, e.g., damage to a cord set from rough use; exposure to wet, damp, or conductive conditions.

In response to questions about temporary wiring, federal OSHA stated that, for purposes of §1910.304(b)(3)(ii), it will consider as "temporary wiring" the use of more than one extension cord (connected in series or otherwise) to a permanent outlet, or the temporary connection of more than one piece of utilization equipment to an extension cord set that is connected to a permanent receptacle outlet. Federal OSHA notes that this temporary wiring would only be covered by §1910.304(b)(3)(ii) if it is used during "construction-like activities."

Additionally, in response to questions concerning whether §1910.304(b)(3)(ii) applies to all receptacles or only those on branch circuits, federal OSHA decided that §1910.304(b)(3)(ii) does not apply to all receptacles but applies only to branch circuits, which are "the circuit conductors between the final overcurrent device (circuit breaker or fuse) protecting the circuit and the outlets".

It also determined that §1910.304(b)(3)(ii)(A) requires ground-fault circuit interrupters (GFCI) for personnel protection and as electric equipment which must be approved by nationally recognized testing laboratories (NRTL).

Federal OSHA determined that the standard requires GFCI protection for temporary circuits supplying lighting only when those circuits also supply receptacles.

III. Basis, Purpose and Impact of the Amendment.

A. Basis.

Following the promulgation of the final rule in 2007, federal OSHA received questions from the public regarding 29 CFR 1910.304 (b)(3)(ii).

During its August 2007 meeting in Oakland, CA, the Maritime Advisory Committee on Occupational Safety and Health (MACOSH) discussed 29 CFR 1910.304 (b)(3)(ii) and expressed its uncertainty about the extent of the application of this provision to shipyard employment and had questions as to how federal OSHA would interpret the rule. MACOSH recommended that federal OSHA use the best available means to assist employers in complying with the requirements of the provision and that federal OSHA delay the effective date of §1910.304(b)(3)(ii) for six (6) months or until the federal OSHA can clarify the standard.

Federal OSHA addressed the questions in this action and made one change to the regulatory text of §1910.304(b)(3)(ii) to clarify that this provision applies only to construction-like activities, including certain maintenance, remodeling, or repair activities, involving buildings, structures or equipment. This change more accurately reflects the intention of both OSHA's final rule and that of NFPA 70E where temporary wiring installations are used during the performance of "construction-like" activities.

B. Purpose.

The purpose of these amendments is to make minor clarifications and typographical corrections that do not affect the substantive requirements, intent or coverage of the standards involved. Additionally, the clarifications respond to requests for formal guidance to assist employers in complying with the existing standards.

C. Impact on Employers.

Employers will benefit from the standard's improved clarity to assist them in complying with certain previously ambiguous section of language. This change does not alter the substantive existing rights and obligations of affected parties and it does not create new rights and obligations.

D. Impact on Employees.

These revisions are not anticipated to have any additional impact on employees beyond the benefit of any effect of increased compliance by the employer with the standard.

E. Impact on the Department of Labor and Industry.

The Department of Labor and Industry will not be impacted by the changes. The amendments are minor clarifications and typographical corrections that do not affect the substantive requirements or coverage of the standards involved.

Federal regulations 29 CFR 1953.23(a) and (b) require that Virginia, within six months of the occurrence of a federal program change, to adopt identical changes or promulgate equivalent changes which are at least as effective as the federal change. The Virginia Code reiterates this requirement in § 40.1-22(5). Adopting these revisions will allow Virginia to conform to the federal program change.

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RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board adopt the clarifications and correcting amendments to §§1910.303 and 1910.304 of the final rule for the Electrical Standard, Subpart S of Part 1910, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of July 15, 2009.

The Department also recommends that the Board state in any motion it may make to amend this regulation that it will receive, consider and respond to petitions by any interested person at any time with respect to reconsideration or revision of this or any other regulation which has been adopted in accordance with the above-cited subsection A.4(c) of the Administrative Process Act.

Electrical Standard, Subpart S of Part 1910, Final Rule;
Clarifications and Correcting Amendments

As Adopted by the

Safety and Health Codes Board

Date: _____

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: _____

16 VAC 25-90-1910.303, General, §1910.303

16 VAC 25-90-1910.304, Wiring Design and Protection, §1910.304

When the regulations, as set forth in the clarifications and correcting amendments to the final rule for the Electrical Standard, Subpart S of Part 1910, §§1910.303 and 1910.304, are applied to the Commissioner of the Department of Labor and Industry and/or to Virginia employers, the following federal terms shall be considered to read as below:

Federal Terms	VOSH Equivalent
29 CFR	VOSH Standard
Assistant Secretary	Commissioner of Labor and Industry
Agency	Department
October 29, 2008	July 15, 2009

Part 1910 of Title 29 of the Code of Federal Regulations is amended as follows:

PART 1910—[AMENDED]

Subpart S—[Amended]

■ 1. The authority citation for subpart S is revised to read as follows:

Authority: Secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 8–76 (41 FR 25059), 1–90 (55 FR 9033), 5–2002 (67 FR 65008), 5–2007 (72 FR 31160), as applicable; 29 CFR part 1911.

§ 1910.303 General.

■ 2. Amend Table S–3 by correcting "2.81" and "9.01," the first entries under the column heads "m" and "ft," to read "2.8" and "9.0," respectively.

■ 3. Revise the introductory text to § 1910.304(b)(3)(ii) to read as follows:

§ 1910.304 Wiring design and protection.

* * * * *

(b) * * *

(3) * * *

(ii) The following requirements apply to temporary wiring installations that are used during construction-like activities, including certain maintenance, remodeling, or repair activities, involving buildings, structures or equipment.

* * * * *

[FR Doc. E8–25789 Filed 10–28–08; 8:45 am]
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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

For April 16, 2009

Clarification of Employer Duty to Provide Personal Protective Equipment (PPE) and Train Each Employee; Final Rule; Parts 1910, 1915; 1917; 1918; and 1926; and Correction

I. Action Requested.

The Virginia Occupational Safety and Health (VOSH) Program requests the Safety and Health Codes Board to consider for adoption federal OSHA's Clarification of its final rule on Employer Duty to Provide Personal Protective Equipment (PPE) and Train Each Employee and the correction, as published in 73 FR 75568 on December 12, 2008, and as published in 74 FR 858 on January 9, 2009, respectively.

The proposed effective date is July 15, 2009.

II. Summary of the Amendments.

OSHA revised the language of the initial respirator paragraphs, adopted in the 1998 respiratory protection rule, in its general industry, maritime and construction standards (Parts 1910, 1915, 1917, 1918 and 1926) to add language clarifying that the PPE and training requirements in safety and health standards in these parts impose a compliance duty to each and every employee covered

by the standards and that non-compliance may expose the employer to liability on a per-employee basis.

The amendments revised the language of those initial training paragraphs that required the employer to institute or provide a training program to explicitly state that the employer must train each employee. This revision added a new section to the introductory Subparts of each Part to clarify that standards requiring the employer to provide PPE, including respirators, or to provide training to employees, impose a separate compliance duty to each employee covered by the requirement and that each instance of an employee who does not receive the required PPE or training may be considered a separate violation.

Following the December 12, 2009, publication of the final rule for the Clarification of Employer Duty to Provide Personal Protective Equipment and Train Each Employee (73 FR 75568), federal OSHA discovered an error in the amendatory language of that final rule. The correction, located in §1926.1101 on page 75589, in the first column, Subpart Z, item 44, consisted of substituting "(h)(2)(i)" for "(h)(2)". The corrected language now reads as follows: "In section 1926.1101, paragraphs (h)(1) introductory text, (h)(2)(i), and (k)(9)(i) are revised to read as follows:…"

The amendments added no new compliance obligations.

III. Basis, Purpose and Impact of the Amendments.

A. Basis.

This action, which is in accord with OSHA's longstanding position, was taken in response to recent decisions of the Occupational Safety and Health Review Commission (OSHRC) indicating that differences in wording among the various PPE and training provisions in federal OSHA safety and health standards affect federal OSHA's ability to treat an employer's failure to provide PPE or training to each covered employee as a separate violation.

The amendment stems largely from a decision of the Occupational Safety and Health Review Commission (OSHRC) in the case of Erik K. Ho, a Houston businessman who hired 11 undocumented Mexican workers to handle asbestos but failed to provide them with respirators.

Mr. Ho originally was charged with separate violations for each employee not provided a respirator, as well as separate violations for each of the employees not offered training. The OSHRC vacated all but one of the respirator violations and all but one of the training violations, claiming that "the plain language of the standard addresses employees in the aggregate, not individually."

OSHRC's decision was later affirmed by the U.S. Court of Appeals for the Fifth Circuit, which found that the secretary of labor did not have the authority to charge employers with per-employee citations given the plain language of OSHA's standard (37 OSHR 1100, 12/6/07).

The final rule stated that "[t]he Secretary believes that the Commission majority's analysis in *Ho* is fundamentally flawed for several reasons". The commission's decision did not follow precedent prior to *Ho* because "the requirement to provide respirators because of environmental hazards involves a separate discrete act for each employee exposed to the hazard."

B. Purpose.

Federal OSHA has amended the standards in Parts 1910, 1915, 1917, 1918 and 1926 to provide additional clarity and consistency about the individualized nature of the employer's duty to provide training and personal protective equipment (including eye, hand, face, head, foot and hearing protection, respirators, and other forms of PPE) under standards in these parts. The final rule revised existing regulatory language and added new sections to the introductory subparts to Parts 1910 through 1926.

C. Impact on Employers.

Employers benefit from greater consistency in the regulatory text of the various respirator and training provisions in Parts 1910 through 1926. Employers will be provided with clearer notice of the nature of their duty under existing PPE and training provisions.

Employers will not be required to provide any new type of PPE or training, to provide PPE nor training to any employee not already covered by the existing requirements, nor to provide PPE or training in a different manner than that already required. The amendments simply clarify that the standards apply to each employee.

Federal OSHA's PPE and training requirements apply to all employers covered under the OSH Act, including those with short-term employees, whether referred to as temporary employees, piece workers, seasonal employees, hiring hall employees, labor pool employees, or transient employees. If an employer-employee relationship is established, then the employer must ensure that PPE is provided, used, and maintained in a sanitary and reliable condition, as required by §§1910.132(a) (for general industry) and 1926.95(a) (for construction).

As a result of these amendments, employers who have to provide respirators must give a separate respirator to each individual employee. Where training is required, the employer must give specific hazard information to each individual employee. To fully comply with the PPE and training requirements, the employer must take as many abatement actions as there are employees to be protected. By having to comply with PPE and training provisions, employers are required to account for differences among individual employees. By having to comply with training requirements, the employer must ensure that each employee receives the required information. Employers must account for factors, such as when individual employees commence work subject to the training requirement and when they are available for training. Individual language differences also play a role.

D. Impact on Employees.

Employees benefit from greater consistency in the regulatory text of the various respirator and training provisions in Parts 1910 through 1926. The amendments make it clear that each covered employee is required to receive personal protective equipment and training. Each instance when an employee who is subject to a PPE or training requirement does not receive the required PPE or training may be considered a separate violation subject to a separate penalty.

E. Impact on the Department of Labor and Industry.

The revised final rule has no significant impact on the Department. Despite minor differences in their wording, all PPE and training provisions in safety and health standards impose the same basic duty on the employer to protect employees individually – by providing PPE, such as a respirator, or by communicating hazard information through training. The individualized nature of the duty to comply does not change because of the presence or absence of the words "each employee," or other words explicitly stating that the employer's duty runs to each individual employee. Thus, the existing PPE provisions may be cited separately for each employee who requires PPE but does not receive it, and the training provisions may be cited separately for each employee who requires training but does not receive it.

Federal regulations 29 CFR 1953.23(a) and (b) require that Virginia, within six months of the occurrence of a federal program change, to adopt identical changes or promulgate equivalent changes which are at least as effective as the federal change. The Virginia Code reiterates this requirement in § 40.1-22(5). Adopting these revisions will allow Virginia to conform to the federal program change.

F. Technology Feasibility

Since the amendments merely clarify the obligations under the existing PPE and training provisions and add no additional requirements, federal OSHA does not need to show that these amendments are technologically feasible. Federal OSHA has determined that it met its burden of showing feasibility in promulgating the existing PPE and training requirements.

G. Benefit/Cost

The amendments provide a positive benefit/cost to the final rule in that they provide additional clarification of the existing and unchanged obligations under the existing PPE and training provisions for the employer and add no additional requirements or costs.

Federal OSHA concluded that the additions and changes to the affected rules have no costs

for two reasons: 1) the revisions do not represent any change in federal OSHA policy, but instead, make explicit the existing policy and warn employers of the potential cost and penalties of violations; and 2) these changes do not impose any additional employer responsibility for providing respiratory protection, respiratory programs, or training for employees beyond what they currently should be doing.

Although the revisions to the final rule may change the frequency or number of violations and amount of fines assessed, these changes are not material for estimating new costs to comply with a standard. Federal OSHA noted that it examines the economic feasibility of its standards assuming full compliance, and therefore any and all costs of compliance with existing PPE and training standards have already been considered.

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RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board adopt the Clarification to the Final Rule on Employer Duty to Provide Personal Protective Equipment (PPE) and Train Each Employee and its correction, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of July 15, 2009.

The Department also recommends that the Board state in any motion it may make to amend this regulation that it will receive, consider and respond to petitions by any interested person at any time with respect to reconsideration or revision of this or any other regulation which has been adopted in accordance with the above-cited subsection A.4(c) of the Administrative Process Act.

Clarification of Employer Duty to Provide Personal Protective Equipment (PPE) and Train Each Employee; Final Rule; Parts 1910, 1915; 1917; 1918; and 1926; and Correction

As Adopted by the

Safety and Health Codes Board

Date: _____

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: _____

16 VAC 25-90-1910.9, Compliance duties owed to each employee, 1910.9;
16 VAC 25-90-1910.95, Occupational noise exposure, 1910.95;
16 VAC 25-90-1910.134, Respiratory protection, 1910.134;
16 VAC 25-90-1910.156, Fire brigades, 1910.156;
16 VAC 25-90-1910.1001, Asbestos, 1910.1001;
16 VAC 25-90-1910.1003, 13 Carcinogens (4-Nitrobiphenyl, etc.), 1910.1003;
16 VAC 25-90-1910.1017, Vinyl chloride, 1910.1017;
16 VAC 25-90-1910.1018, Inorganic arsenic, 1910.1018;
16 VAC 25-90-1910.1025, Lead, 1910.1025;
16 VAC 25-90-1910.1026, Chromium (VI), 1910.1027;
16 VAC 25-90-1910.1027, Cadmium, 1910.1027;
16 VAC 25-90-1910.1028, Benzene, 1910.1028;
16 VAC 25-90-1910.1029, Coke oven emissions, 1910.1029;
16 VAC 25-90-1910.1030, Bloodborne pathogens, 1910.1030;
16 VAC 25-90-1910.1043, Cotton dust, 1910.1043;
16 VAC 25-90-1910.1044, 1,2-dibromo-3-chloropropane, 1910.1044;
16 VAC 25-90-1910.1045, Acrylonitrile, 1910.1045;
16 VAC 25-90-1910.1047, Ethylene oxide, 1910.1047;
16 VAC 25-90-1910.1048, Formaldehyde, 1910.1048;
16 VAC 25-90-1910.1050, Methylenedianiline, 1910.1050;
16 VAC 25-90-1910.1051, Butadiene, 1910.1051;

16 VAC 25-90-1910.1052, Methylene chloride, 1910.1052;
16 VAC 25-100-1915.9, Compliance duties owed to each employee, 1915.9;
16 VAC 25-100-1915.1001, Asbestos, 1915.1001;
16 VAC 25-100-1915.1026, Chromium (IV), 1915.1026;
16 VAC 25-120-1917.5, Compliance duties owed to each employee, 1917.5;
16 VAC 25-130-1918.5, Compliance duties owed to each employee, 1918.5;
16 VAC 25-175-1926.20, General safety and health provisions, 1926.20;
16 VAC 25-175-1926.60, Methylenedianiline, 1926.60
16 VAC 25-175-1926.62, Lead, 1926.62
16 VAC 25-175-1926.761, Training, 1926.76;
16 VAC 25-175-1926.1101, Asbestos, 1926.1101;
16 VAC 25-175-1926.1126, Chromium (IV), 1926.1126; and
16 VAC 25-175-1926.1127, Cadmium, 1926.1127

When the regulations, as set forth in the Clarification to the final rule on Employer Duty to Provide Personal Protective Equipment and Train Each Employee, are applied to the Commissioner of the Department of Labor and Industry and/or to Virginia employers, the following federal terms shall be considered to read as below:

Federal Terms	VOSH Equivalent
29 CFR	VOSH Standard
Assistant Secretary	Commissioner of Labor and Industry
Agency	Department
January 11, 2009	July 15, 2009

The Final Standard

■ Parts 1910, 1915, 1917, 1918 and 1926 of Title 29 of the Code of Federal Regulations are hereby amended as follows:

PART 1910—[AMENDED]

Subpart A—[Amended]

■ 1. The authority citation for subpart A of 29 CFR part 1910 is revised to read as follows:

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), and 5–2007 (72 FR 31159), as applicable.

Sections 1910.7, 1910.8, and 1910.9 also issued under 29 CFR Part 1911. Section 1910.7(f) also issued under 31 U.S.C. 9701, 29 U.S.C. 9a, 5 U.S.C. 553; Pub. L. 106–113 (113 Stat. 1501A–222); and OMB Circular A–25 (dated July 8, 1993) (58 FR 38142, July 15, 1993).

■ 2. A new section 1910.9 is added, to read as follows:

§ 1910.9 Compliance duties owed to each employee.

(a) *Personal protective equipment.* Standards in this part requiring the

employer to provide personal protective equipment (PPE), including respirators and other types of PPE, because of hazards to employees impose a separate compliance duty with respect to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(b) *Training.* Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty with respect to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

Subpart G—[Amended]

■ 3. The authority citation for subpart G of 29 CFR part 1910 is revised to read as follows:

Authority: Secs. 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 50017), or 5–2007 (72 FR 31159) as applicable; and 29 CFR part 1911.

■ 4. In section 1910.95, paragraph (k)(1) is revised to read as follows:

§ 1910.95 Occupational noise exposure.

* * * * *

(k) * * *

(1) The employer shall train each employee who is exposed to noise at or above an 8-hour time weighted average of 85 decibels in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

Subpart I—[Amended]

■ 5. The authority citation for subpart I of 29 CFR part 1910 is revised to read as follows:

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (72 FR 31160), as applicable, and 29 CFR Part 1911.

■ 6. In section 1910.134, paragraph (a)(2) is revised to read as follows:

§ 1910.134 Respiratory protection.

* * * * *

(a) * * *

(2) A respirator shall be provided to each employee when such equipment is necessary to protect the health of such employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protection program, which shall include the requirements outlined in paragraph (c) of this section. The program shall cover each employee required by this section to use a respirator.

* * * * *

Subpart L—[Amended]

■ 7. The authority citation for subpart L of 29 CFR part 1910 is revised to read as follows:

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (72 FR 31160), as applicable, and 29 CFR Part 1911.

■ 8. In section 1910.156, paragraph (f)(1)(i) is revised to read as follows:

§ 1910.156 Fire brigades.

* * * * *

(f)* * *

(1)* * *

(i) The employer must ensure that respirators are provided to, and used by, each fire brigade member, and that the respirators meet the requirements of 29 CFR 1910.134 for each employee required by this section to use a respirator.

* * * * *

Subpart Z—[Amended]

■ 9. The authority citation for subpart Z of 29 CFR part 1910 is revised to read as follows:

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (72 FR 31160), as applicable.

All of subpart Z issued under section 6(b) of the Occupational Safety and Health Act, except those substances that have exposure limits listed in Tables Z–1, Z–2, and Z–3 of 29 CFR 1910.1000. The latter were issued under section 6(a) (29 U.S.C. 655(a)).

Section 1910.1000, Tables Z–1, Z–2, and Z–3 also issued under 5 U.S.C. 553, Section 1910.1000 Tables Z–1, Z–2, and Z–3 but not under 29 CFR part 1911 except for the arsenic (organic compounds), benzene, cotton dust, and chromium (VI) listings.

Section 1910.1001 also issued under section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3704) and 5 U.S.C. 553.

Section 1910.1002 also issued under 5 U.S.C. 553 but not under 29 U.S.C. 655 or 29 CFR part 1911.

Sections 1910.1018, 1910.1029 and 1910.1200 also issued under 29 U.S.C. 653.

Section 1910.1030 also issued under Pub. L. 106–430, 114 Stat. 1901.

■ 10. In section 1910.1001, paragraphs (g)(1) introductory text, (g)(2)(i), and (j)(7)(i) are revised to read as follows:

§ 1910.1001 Asbestos.

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with 29 CFR 134 (b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(j) * * *

(7) * * *

(i) The employer shall train each employee who is exposed to airborne concentrations of asbestos at or above the PEL and/or excursion limit in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 11. In section 1910.1003, paragraphs (c)(4)(iv) and (d)(1) are revised to read as follows:

§ 1910.1003 13 Carcinogens (4-Nitrobiphenyl, etc.).

* * * * *

(c) * * *

(4) * * *

(iv) Each employee engaged in handling operations involving the carcinogens addressed by this section must be provided with, and required to wear and use, a half-face filter type respirator for dusts, mists, and fumes. A

respirator affording higher levels of protection than this respirator may be substituted.

* * * * *

(d) * * *

(1) *Respiratory program.* The employer must implement a respiratory protection program in accordance with § 1910.134 (b), (c), (d) (except (d)(1)(iii) and (iv), and (d)(3)), and (e) through (m), which covers each employee required by this section to use a respirator.

* * * * *

■ 12. In section 1910.1017, paragraphs (g)(1) and (g)(2) are revised to read as follows:

§ 1910.1017 Vinyl chloride.

* * * * *

(g) *Respiratory protection.* (1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph.

(2) *Respirator program.* The employer must implement a respiratory protection program in accordance § 1910.134 (b) through (d) (except (d)(1)(iii), and (d)(3)(iii)(B)(1) and (2)), and (f) through (m) which covers each employee required by this section to use a respirator.

* * * * *

■ 13. In section 1910.1018, paragraphs (h)(1) introductory text, and (h)(2)(i), and (o)(1)(i) are revised to read as follows:

§ 1910.1018 Inorganic arsenic.

* * * * *

(h) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(o) * * *

(l) * * *

(i) The employer shall train each employee who is subject to exposure to inorganic arsenic above the action level without regard to respirator use, or for whom there is the possibility of skin or eye irritation from inorganic arsenic, in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 14. In section 1910.1025, paragraphs (f)(1) introductory text, (f)(2)(i), and (l)(1)(ii) are revised to read as follows:

§ 1910.1025 Lead.

* * * * *

(f) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(l) * * *

(1) * * *

(ii) The employer shall train each employee who is subject to exposure to lead at or above the action level, or for whom the possibility of skin or eye irritation exists, in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 15. In section 1910.1026, paragraphs (g)(1) introductory text and (g)(2) are revised to read as follows:

§ 1910.1026 Chromium (VI).

* * * * *

(g) * * *

(1) *General.* Where respiratory protection is required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respiratory protection is required during:

* * * * *

(2) *Respiratory protection program.* Where respirator use is required by this section, the employer shall institute a respiratory protection program in accordance with § 1910.134, which covers each employee required to use a respirator.

* * * * *

■ 16. In section 1910.1027, paragraphs (g)(1) introductory text, (g)(2)(i), and (m)(4)(i) are revised to read as follows:

§ 1910.1027 Cadmium.

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(m) * * *

(4) * * *

(i) The employer shall train each employee who is potentially exposed to cadmium in accordance with the requirements of this section. The employer shall institute a training program, ensure employee participation in the program, and maintain a record of the contents of such program.

* * * * *

■ 17. In section 1910.1028, paragraph (g)(1) introductory text and (g)(2)(i) are revised to read as follows:

§ 1910.1028 Benzene.

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii), (d)(3)(iii)(b)(1) and (2)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

■ 18. In section 1910.1029, paragraphs (g)(1) introductory text, (g)(2) and (k)(1)(i) are revised to read as follows:

§ 1910.1029 Coke oven emissions.

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) *Respirator program.* The employer must implement a respiratory protection

program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(k) * * *

(1) * * *

(i) The employer shall train each employee who is employed in a regulated area in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 19. In section 1910.1030, paragraph (g)(2)(i) is revised to read as follows:

§ 1910.1030 Bloodborne pathogens.

* * * * *

(g) * * *

(2) * * *

(i) The employer shall train each employee with occupational exposure in accordance with the requirements of this section. Such training must be provided at no cost to the employee and during working hours. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 20. In section 1910.1043, paragraphs (f)(1) introductory text, (f)(2)(i), and (i)(1)(i) are revised to read as follows:

§ 1910.1043 Cotton dust.

* * * * *

(f) * * *

(1) *General.* For employees who are required to use respirators by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(i) * * *

(1) * * *

(i) The employer shall train each employee exposed to cotton dust in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 21. In section 1910.1044, paragraphs (h)(1) introductory text, (h)(2), and (n)(1)(i) are revised to read as follows:

§ 1910.1044 1,2-dibromo-3-chloropropane.

* * * * *

(h) * * *

(1) *General.* For employees who are required to use respirators by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) *Respirator Program.* The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(n) * * *

(1) * * *

(i) The employer shall train each employee who may be exposed to DBCP in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 22. In section 1910.1045, paragraphs (h)(1) introductory text, (h)(2)(i), and (o)(1)(i) are revised to read as follows:

§ 1910.1045 Acrylonitrile.

* * * * *

(h) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii), (d)(3)(iii)(b)(1), and (2)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(o) * * *

(1) * * *

(i) The employer shall train each employee exposed to AN above the action level, each employee whose exposures are maintained below the action level by engineering and work practice controls, and each employee subject to potential skin or eye contact with liquid AN in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 23. In section 1910.1047, paragraph (g)(1) introductory text and (g)(2) are revised to read as follows:

§ 1910.1047 Ethylene oxide.

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) *Respirator program.* The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(i)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

■ 24. In section 1910.1048, paragraphs (g)(1) introductory text and (g)(2)(i) are revised to read as follows:

§ 1910.1048 Formaldehyde.

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii), (d)(3)(iii)(b)(1), and (2)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

■ 25. In section 1910.1050, paragraphs (h)(1) introductory text and (h)(2) are revised to read as follows:

§ 1910.1050 Methylenedianiline.

* * * * *

(h) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) *Respirator program.* The employer must implement a respiratory protection program in accordance with § 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each

employee required by this section to use a respirator.

* * * * *

■ 26. In section 1910.1051, paragraphs (h)(1) introductory text, (h)(2)(i), and (l)(2)(ii) are revised to read as follows:

§ 1910.1051 Butadiene.

* * * * *

(h) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii), (d)(3)(iii)(B)(1), and (2)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(l) * * *

(2) * * *

(i) * * *

(ii) The employer shall train each employee who is potentially exposed to BD at or above the action level or the STEL in accordance with the requirements of this section. The employer shall institute a training program, ensure employee participation in the program, and maintain a record of the contents of such program.

* * * * *

■ 27. In section 1910.1052, paragraphs (g)(1) introductory text and (g)(2)(i) are revised to read as follows:

§ 1910.1052 Methylene chloride.

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.13(b) through (m) (except (d)(1)(iii)), which covers each employee required by this section to use a respirator.

* * * * *

PART 1915—[AMENDED]

■ 28. The authority citation for part 1915 is revised to read as follows:

Authority: Section 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); Sections. 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (72 FR 31160) as applicable; 29 CFR Part 1911.

Subpart A—[Amended]

■ 29. A new section 1915.9 is added, to read as follows:

§ 1915.9 Compliance duties owed to each employee.

(a) *Personal protective equipment.* Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators and other types of PPE, because of hazards to employees impose a separate compliance duty with respect to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(b) *Training.* Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty with respect to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

Subpart Z—[Amended]

■ 30. In section 1915.1001, paragraphs (h)(1) introductory text, (h)(3)(i), and (k)(9)(i), are revised to read as follows:

§ 1915.1001 Asbestos.

* * * * *

(h) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used in the following circumstances:

* * * * *

(3) * * *

(i) Where respirator use is required by this section, the employer shall institute a respiratory protection program in accordance with § 1910.134(b), (d), (e), and (f), which covers each employee required by this section to use a respirator.

* * * * *

(k) * * *

(9) * * *

(i) The employer shall train each employee who is likely to be exposed in excess of a PEL and each employee who performs Class I through IV asbestos operations in accordance with the requirements of this section. Training shall be provided at no cost to the employee. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 31. In section 1915.1026, paragraphs (f)(1) introductory text and (f)(2) are revised to read as follows:

§ 1915.1026 Chromium (IV).

* * * * *

(f) * * *

(1) *General.* Where respiratory protection is required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respiratory protection is required during:

* * * * *

(2) *Respiratory Protection Program.* Where respirator use is required by this section, the employer shall institute a respiratory protection program in accordance with § 1910.134, which covers each employee required to use a respirator.

* * * * *

PART 1917—[AMENDED]

■ 32. The authority citation for part 1917 is revised to read as follows:

Authority: Section 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (72 FR 31160) as applicable; 29 CFR Part 1911.

Subpart A—[Amended]

■ 33. A new section 1917.5 is added, to read as follows:

§ 1917.5 Compliance duties owed to each employee.

(a) *Personal protective equipment.* Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators and other types of PPE, because of hazards to employees impose a separate compliance duty with respect to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an

employee may be considered a separate violation.

(b) *Training.* Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty with respect to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

PART 1918—[AMENDED]

■ 34. The authority citation for part 1918 is revised to read as follows:

Authority: Section 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (72 FR 31160) as applicable; 29 CFR Part 1911.

Subpart A—[Amended]

■ 35. A new section 1918.5 is added, to read as follows:

§ 1918.5 Compliance duties owed to each employee.

(a) *Personal protective equipment.* Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators and other types of PPE, because of hazards to employees impose a separate compliance duty with respect to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(b) *Training.* Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty with respect to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

PART 1926—[AMENDED]

Subpart C—[Amended]

■ 36. The authority citation for subpart C of 29 CFR part 1926 is revised to read as follows:

Authority: Sec. 3704, Contract Work Hours and Safety Standards Act (40 U.S.C. 333); secs. 4, 6, and 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 6–96 (62 FR 111), or 5–2007 (72 FR 31160) as applicable; and 29 CFR part 1911.

■ 37. In section 1926.20, a new paragraph (f) is added to read as follows:

§ 1926.20 General safety and health provisions.

* * * * *

(f) *Compliance duties owed to each employee.* (1) *Personal protective equipment.* Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators and other types of PPE, because of hazards to employees impose a separate compliance duty with respect to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(2) *Training.* Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty with respect to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

Subpart D—[Amended]

■ 38. The authority citation for subpart D of 29 CFR part 1926 is revised to read as follows:

Authority: Section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 *et seq.*); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Orders 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (62 FR 50017), 5–2002 (67 FR 65008); or 5–2007 (72 FR 31160) as applicable; and 29 CFR part 1911.

Sections 1926.58, 1926.59, 1926.60, and 1926.65 also issued under 5 U.S.C. 553 and 29 CFR part 1911.

Section 1926.62 of 29 CFR also issued under section 1031 of the Housing and Community Development Act of 1992 (42 U.S.C. 4853).

Section 1926.65 of 29 CFR also issued under section 126 of the Superfund Amendments and Reauthorization Act of 1986, as amended (29 U.S.C. 655 note), and 5 U.S.C. 553.

■ 39. In section 1926.60, paragraph (i)(1) introductory text, and (i)(2) are revised to read as follows:

§ 1926.60 Methylenedianiline.

* * * * *

(i) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) *Respirator program.* The employer must implement a respiratory protection program in accordance with § 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

■ 40. In section 1926.62, paragraphs (f)(1) introductory text, (f)(2)(i), and (l)(1)(ii) are revised to read as follows:

§ 1926.62 Lead.

* * * * *

(f) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(l) * * *

(ii) The employer shall train each employee who is subject to exposure to lead at or above the action level on any day, or who is subject to exposure to lead compounds which may cause skin or eye irritation (*e.g.*, lead arsenate, lead azide), in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

Subpart R—[Amended]

■ 41. The authority citation for subpart R of 29 CFR part 1926 is revised to read as follows:

Authority: Sec. 3704, Contract Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 333); Sec. 4, 6, and 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 3–2000 (65 FR 50017), No. 5–2002 (67 FR 65008), or No. 5–2007 (72 FR 31160) as applicable; and 29 CFR part 1911.

■ 42. In section 1926.761, paragraph (b) is revised to read as follows:

§ 1926.761 Training.

* * * * *

(b) *Fall hazard training.* The employer shall train each employee exposed to a fall hazard in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

Subpart Z—[Amended]

■ 43. The authority citation for subpart Z of 29 CFR part 1926 is revised to read as follows:

Authority: Section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 et seq.); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Orders 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (62 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (71 FR 31160), as applicable; and 29 CFR part 11.

Section 1926.1102 of 29 CFR not issued under 29 U.S.C. 655 or 29 CFR part 1911; also issued under 5 U.S.C. 553.

■ 44. In section 1926.1101, paragraphs (h)(1) introductory text, (h)(2), and (k)(9)(i) are revised to read as follows:

§ 1926.1101 Asbestos.

* * * * *

(h) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(k) * * *

(9) * * *

(i) The employer shall train each employee who is likely to be exposed in excess of a PEL, and each employee who performs Class I through IV asbestos operations, in accordance with the requirements of this section. Such training shall be conducted at no cost to the employee. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 45. In section 1926.1126, paragraphs (f)(1) introductory text and (f)(2) are revised to read as follows:

§ 1926.1126 Chromium (IV).

* * * * *

(f) * * *

(1) *General.* Where respiratory protection is required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respiratory protection is required during:

* * * * *

(2) *Respiratory protection program.* Where respirator use is required by this section, the employer shall institute a respiratory protection program in accordance with § 1910.134, which covers each employee required to use a respirator.

* * * * *

■ 46. In section 1926.1127, paragraphs (g)(1) introductory text, (g)(2)(i), and (m)(4)(i) are revised to read as follows:

§ 1926.1127 Cadmium.

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(m) * * *

* * * * *

(4) * * *

(i) The employer shall train each employee who is potentially exposed to cadmium in accordance with the requirements of this section. The employer shall institute a training program, ensure employee participation in the program, and maintain a record of the contents of the training program.

* * * * *

[FR Doc. E8–29122 Filed 12–9–08; 4:15 pm]

BILLING CODE 4510–26–P

Correction of Publication

In FR Doc. E8–29122 appearing on page 75568 in the **Federal Register** of Friday, December 12, 2008, the following correction is made:

§ 1926.1101 [Corrected]

■ On page 75589, in the first column, Subpart Z, item 44, the instruction "In section 1926.1101, paragraphs (h)(1) introductory text, (h)(2), and (k)(9)(i) are revised to read as follows:" is corrected to read "In section 1926.1101, paragraphs (h)(1) introductory text, (h)(2)(i), and (k)(9)(i) are revised to read as follows":

Signed at Washington, DC, this 6th day of January 2009.

Thomas M. Stohler,

Acting Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. E9–311 Filed 1–8–09; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1910, 1915, 1917, 1918 and 1926

[Docket No. OSHA–2008–0031]

RIN 1218–AC42

Clarification of Employer Duty To Provide Personal Protective Equipment and Train Each Employee

AGENCY: Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

ACTION: Final rule; correction.

SUMMARY: OSHA is correcting an error in the final rule published in the **Federal Register** on December 12, 2008, clarifying employers' duty to provide personal protective equipment and to train each employee.

DATES: Effective January 12, 2009.

FOR FURTHER INFORMATION CONTACT: Contact Ms. Jennifer Ashley, Director, Office of Communications, OSHA, U.S. Department of Labor, Room N–3647, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–1999 or fax (202) 693–1634.

SUPPLEMENTARY INFORMATION: On December 12, 2008 (73 FR 75568), OSHA issued a final rule entitled "Clarification of Employer Duty To Provide Personal Protective Equipment and Train Each Employee." Subsequently, an error was discovered in the amendatory language of that **Federal Register** notice. This notice is being published to correct that language.

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

FOR April 16, 2009

Longshoring and Marine Terminals; Vertical Tandem Lifts, §§1917.71 and 1918.85, Public Sector Only; Final Rule

I. Action Requested.

The Virginia Occupational Safety and Health (VOSH) Program requests the Safety and Health Codes Board to consider for adoption federal OSHA's final rule on Longshoring and Marine Terminals; Vertical Tandem Lifts, Parts 1917 and 1918, Public Sector Only, as published in 73 FR 75245 on December 10, 2008.

The proposed effective date is July 15, 2009.

II. Summary of the Final Standard.

Federal OSHA revised the Marine Terminals Standard and related sections of the Longshoring Standard by issuing new provisions in the Marine Terminals Standard (29 CFR 1917) to regulate the use of Vertical Tandem Lifts ("VTLs"). The Longshoring Standard (29 CFR 1918) incorporates those requirements by reference. The new requirements are related to the practice of a container crane lifting two intermodal containers together, one on top of the other, connected by semiautomatic twistlocks (SATLs). This practice is known as a vertical tandem lift. SATLs were designed to connect and secure intermodal containers that are stowed on the deck of a vessel. The final standard permits VTLs of no more than two empty containers provided certain safeguards are

followed.

The final rule includes additional provisions limiting the type of crane that may be used in VTLs, requiring a prelift, prohibiting handling containers below deck as a VTL, limiting VTL operations in windy conditions, and prohibiting VTLs of platform containers. The final rule also contains new requirements for employee training and the safe ground transport of vertically coupled containers. Lastly, the final rule contains specifications on the strength of interbox connectors used in VTLs.

III. Basis, Purpose and Impact of the Standard/Amendment.

A. Basis.

The issue of vertical tandem lifting was first raised to federal OSHA in 1986 when Matson Terminals, Inc., requested permission to perform VTLs. At that time, federal OSHA regulations did not directly address or prohibit this practice. In November 1986, federal OSHA responded with a letter allowing VTLs with two empty containers or with automobiles.

In 1993, federal OSHA responded to a request from Sea-Land Service, Inc., by allowing VTLs with two empty containers under certain conditions, requiring: inspection of containers for visible defects; verification of that both containers are empty; assurance that containers are properly marked; assurance that the load does not exceed the capacity of the crane; assurance that the containers are lifted vertically; having available for inspection manufacturers' documents that verify the capacities of the SATLs and corner castings; and directing employees to stay clear of the lifting.

In 1994, federal OSHA addressed VTLs briefly in the preamble to the proposed revises to the Marine Terminals and Longshoring Standards. During the comment period, a number of comments addressed the proposed changes to the Marine Terminals and Longshoring standards, but they did not address VTLs. Federal OSHA received a late, posthearing submission from the International Longshoremen's Association, however, that alerted OSHA to what might be a serious problem with this type of lift, citing several incidents at U.S. ports where failures had occurred.

The final rule was published in July 1997, reserving the VTL issue for future consideration. Also, in October 1997, federal OSHA reopened the VTL record and announced a public meeting on the safety, risk, and feasibility issues associated with VTLs. The following year, federal OSHA held the public meeting on the safety, risk, and feasibility issues associated with VTLs.

In 2003, federal OSHA published a proposed rule permitting VTLs of no more than two containers with a maximum load of 20 tons. Federal OSHA held a public hearing on the proposed rule on VTLs in 2004.

B. Purpose.

OSHA updated its standards to establish safe limits and work practices for employees during the transport of VTLs between ship and shore, as well as VTL-related operations within marine terminals. It determined that unregulated VTLs operations caused a significant risk of injury to workers in the longshoring and marine terminal industries, for example: not all interbox connectors properly engage creating the risk of partial or complete separations; the industry acknowledged that there were potential hazards associated with VTL operations in that VTLs were riskier than single lifts; the handling of individual containers had been determined to include risk, e.g., VTLs introduce additional risk because more equipment can fail (twistlocks, corner castings, the container itself).

Although there is currently no public sector maritime-related activity in Virginia, these regulations will be in place as required by the State Plan Agreement with federal OSHA should that status change.

C. Impact on Employers.

There is no impact on public sector employers in Virginia resulting from the adoption of these revised standards because there is currently no public sector maritime-related activity in Virginia. If, however, such activity should occur, employers will benefit from the revised, more comprehensive VTLs standards. OSHA determined that, with full compliance under this more protective final rule, the probability of injuries or fatalities while performing VTLs will be greatly reduced. The final rule reflects incremental changes from existing VTLs procedures already in use within the industry. Employers already performing VTLs should be capable of implementing the revised procedures reasonably quickly.

D. Impact on Employees.

There is no impact on public sector employees in Virginia resulting from the adoption of these revised standards because currently there is no public sector maritime-related activity in Virginia. If, however, such activity should occur, Virginia employees will benefit from the revised, more comprehensive VTLs standards which should decrease the likelihood of death or injury due to such VTL operations. The final rule will ensure that employees who are involved in VTL operations have the training needed to perform their tasks safely (safety-related work practices), perform their VTL-associated tasks so as to comply with the standard (safety procedures) and competently perform the inspections and determinations required by the final rule.

E. Impact on the Department of Labor and Industry.

There is no impact on the Department resulting from the adoption of these revised final rules because there is currently no public sector maritime activity in Virginia; however, if such public sector maritime activity were to be initiated, minimal costs would exist for training compliance staff.

Federal regulations 29 CFR 1953.23(a) and (b) require that Virginia, within six months of the occurrence of a federal program change, to adopt identical changes or promulgate equivalent changes which are at least as effective as the federal change. The Virginia Code reiterates this requirement in § 40.1-22(5). Adopting these revisions will allow Virginia to conform to the federal program change.

F. Technology Feasibility

The final standard sets many conditions that must be met for VTLs to be performed, including requirements for: employee training, limits on wind speeds, type of crane, interbox connectors' strength and locking mechanisms, inspections of connectors and container corner castings, and a plan for handling VTLs on shore. All of these conditions can be met by stevedores where VTLs are currently being performed. As such, federal OSHA has determined that the final standard is technologically feasible.

G. Benefit/Cost

Federal OSHA's estimates of compliance costs and benefits show that there is a net economic benefit, i.e., cost savings, to performing VTLs. Because there are positive net benefits to VTLs, federal OSHA, therefore, concluded that the final standard as it applies to VTLs of two empty containers is economically feasible. However, even if the cost of performing VTLs exceeded benefits, the practice would not be economically infeasible since the standard only permits but does not require VTLs.

The final standard permits but does not require VTLs, therefore, it does not impose any net compliance costs on any small employer small. Federal OSHA certifies that the final standard does not substantially impact a significant number of small entities.

Contact Person:

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RECOMMENDED ACTION

Staff of the Department of Labor and Industry recommends that the Safety and Health Codes Board adopt the Final Rule for Longshoring and Marine Terminals; Vertical Tandem Lifts, §§1917.71and 1918.85, Public Sector Only, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of July 15, 2009.

The Department also recommends that the Board state in any motion it may make to amend this regulation that it will receive, consider and respond to petitions by any interested person at any time with respect to reconsideration or revision of this or any other regulation which has been adopted in accordance with the above-cited subsection A.4(c) of the Administrative Process Act.

Longshoring and Marine Terminals; Vertical Tandem Lifts, §§1917.71 and 1918.85, Public Sector Only; Final Rule

As Adopted by the

Safety and Health Codes Board

Date: _____

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: _____

16 VAC 25-120-1917.71, Terminals handling intermodal containers or roll-on roll-off operations; Marine Terminals Standard, Public Sector Only, §1917.71

16 VAC 25-130-1918.85, Containerized cargo operations, Longshoring, Public Sector Only, §1918.85

When the regulations, as set forth in the final rule for Longshoring and Marine Terminals; Vertical Tandem Lifts, §§1917.71 and 1918.85, Public Sector Only, are applied to the Commissioner of the Department of Labor and Industry and/or to Virginia employers, the following federal terms shall be considered to read as below:

Federal Terms	VOSH Equivalent
29 CFR	VOSH Standard
Assistant Secretary	Commissioner of Labor and Industry
Agency	Department
April 9, 2009	July 15, 2009

■ Accordingly, OSHA amends 29 CFR parts 1917 and 1918 as follows:

PART 1917—MARINE TERMINALS

■ 1. The authority citation for Part 1917 is revised to read as follows:

Authority: Section 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); secs. 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 6–96 (62 FR 111), 5–2002 (67 FR 65008), or 5–2007 (72 FR 31160), as applicable; and 29 CFR 1911.

Section 1917.28, also issued under 5 U.S.C. 553.

Section 1917.29, also issued under Sec. 29, Hazardous Materials Transportation Uniform Safety Act of 1990 (49 U.S.C. 1801–1819 and 5 U.S.C. 553).

■ 2. Section 1917.71 is amended by adding new paragraphs (i), (j), and (k) to read as follows:

§ 1917.71 Terminals handling intermodal containers or roll-on roll-off operations.

* * * * *

(i) *Vertical tandem lifts.* The following requirements apply to operations involving the lifting of two or more intermodal containers by the top container (vertical tandem lifts or VTLs).

(1) Each employee involved in VTL operations shall be trained and competent in the safety-related work practices, safety procedures, and other requirements in this section that pertain to their respective job assignments.

(2) No more than two intermodal containers may be lifted in a VTL.

(3) Before the lift begins, the employer shall ensure that the two containers lifted as part of a VTL are empty.

Note to paragraph (i)(3): The lift begins immediately following the end of the prelift required by paragraph (i)(5) of this section. Thus, the weight may be determined during the prelift using a load indicating device meeting § 1917.46(a)(1)(i)(A) on the crane being used to lift the VTL.

(4) The lift shall be performed using either a shore-based container gantry crane or another type of crane that:

(i) Has the precision control necessary to restrain unintended rotation of the containers about any axis,

(ii) Is capable of handling the load volume and wind sail potential of VTLs, and

(iii) Is specifically designed to handle containers.

(5) The employer shall ensure that the crane operator pauses the lift when the vertically coupled containers have just been lifted above the supporting surface to assure that each interbox connector is properly engaged.

(6) Containers below deck may not be handled as a VTL.

(7) VTL operations may not be conducted when the wind speed exceeds the lesser of:

(i) 55 km/h (34 mph or 30 knots) or

(ii) The crane manufacturer's recommendation for maximum wind speed.

(8) The employer shall ensure that each interbox connector used in a VTL operation:

(i) Automatically locks into corner castings on containers but only unlocks manually (manual twistlocks or latchlocks are not permitted);

(ii) Is designed to indicate whether it is locked or unlocked when fitted into a corner casting;

(iii) Locks and releases in an identical direction and manner as all other interbox connectors in the VTL;

(iv) Has been tested and certificated by a competent authority authorized under § 1918.11 of this chapter (for interbox connectors that are part of a vessel's gear) or § 1917.50 (for other interbox connectors):

(A) As having a bad-bearing surface area of 800 mm^2 when connected to a corner casting with an opening that is 65.0 mm wide; and

(B) As having a safe working load of 98 kN (10,000 kg) with a safety factor of five when the load is applied by means of two corner castings with openings that are 65.0 mm wide or equivalent devices;

(v) Has a certificate that is available for inspection and that attests that the interbox connector meets the strength criteria given in paragraph (i)(8)(iv) of this section; and

(vi) Is clearly and durably marked with its safe working load for lifting and an identifying number or mark that will enable it to be associated with its test certificate.

(9) The employer shall ensure that each container and interbox connector used in a VTL and each corner casting to which a connector will be coupled is inspected immediately before use in the VTL.

(i) Each employee performing the inspection shall be capable of detecting defects or weaknesses and be able to assess their importance in relation to the safety of VTL operations.

(ii) The inspection of each interbox connector shall include: a visual examination for obvious structural defects, such as cracks; a check of its physical operation to determine that the lock is fully functional with adequate spring tension on each head; and a check for excessive corrosion and deterioration.

(iii) The inspection of each container and each of its corner castings shall include: a visual examination for obvious structural defects, such as cracks; a check for excessive corrosion and deterioration; and a visual examination to ensure that the opening to which an interbox connector will be connected has not been enlarged, that the welds are in good condition, and that it is free from ice, mud or other debris.

(iv) The employer shall establish a system to ensure that each defective or damaged interbox connector is removed from service.

(v) An interbox connector that has been found to be defective or damaged shall be removed from service and may not be used in VTL operations until repaired.

(vi) A container with a corner casting that exhibits any of the problems listed in paragraph (i)(9)(iii) of this section may not be lifted in a VTL.

(10) No platform container may be lifted as part of a VTL unit.

(j) *Transporting vertically coupled containers.* (1) Equipment other than cranes used to transport vertically connected containers shall be either specifically designed for this application or evaluated by a qualified engineer and determined to be capable of operating safely in this mode of operation.

(2) The employer shall develop, implement, and maintain a written plan for transporting vertically connected containers. The written plan shall establish procedures to ensure safe operating and turning speeds and shall address all conditions in the terminal that could affect the safety of VTL-related operations, including communication and coordination among all employees involved in these operations.

(k) *Safe work zone.* The employer shall establish a safe work zone within which employees may not be present when vertically connected containers are in motion.

(1) The safe work zone shall be sufficient to protect employees in the event that a container drops or overturns.

(2) The written transport plan required by paragraph (j)(2) of this section shall include the safe work zone and procedures to ensure that employees are not in this zone when a VTL is in motion.

PART 1918—SAFETY AND HEALTH REGULATIONS FOR LONGSHORING

■ 3. The authority citation for Part 1918 is revised to read as follows:

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 653, 655, 657; Sec. 41, Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 941; Secretary of Labor's Order No. 6–96 (62 FR 111), 5–2002 (67 FR 65008) , or 5–2007 (72 FR 31160), as applicable; and 29 CFR 1911.

Section 1918.90 also issued under 5 U.S.C. 553.

Section 1918.100 also issued under Sec. 29, Hazardous Materials Transportation Uniform Safety Act of 1990 (49 U.S.C. 1801–1819 and 5 U.S.C. 553).

■ 4. Section 1918.85 is amended by adding new paragraph (m) to read as follows:

§ 1918.85 Containerized cargo operations.

* * * * *

(m) *Vertical tandem lifts.* Operations involving the lifting of two or more intermodal containers by the top container shall be performed following § 1917.71(i) and (k)(1) of this chapter.

[FR Doc. E8–28644 Filed 12–9–08; 8:45 am]
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COMMONWEALTH of VIRGINIA

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VIRGINIA SAFETY AND HEALTH CODES BOARD

BRIEFING PACKAGE

for April 16, 2009

PERIODIC REVIEW OF EXISTING REGULATIONS

I. Background and Process

Governor Kaine issued Executive Order 36 (2006), "Development and Review of Regulations Proposed by State Agencies." This executive order governs the periodic review or re-evaluation of existing regulations and the regulatory process to promulgate new regulations or amend current regulations. All of the regulations promulgated by the Safety and Health Codes Board are included in the periodic review process at least once every four years.

At the Board meeting on November 20, 2008, the Board was notified that 10 regulations had been identified for periodic review. The review was to include (i) a review by the Attorney General to ensure statutory authority for regulations and (ii) a determination as to whether the regulations are necessary for the protection of public health, safety and welfare, and clearly written and easily understandable. For the periodic review, the Virginia Regulatory Town Hall website contains the review date, the specific and measurable goals established, the citations for the federal/state authority for the regulation, and a contact person for each regulation.

The periodic review for each regulation is required to be completed and a report prepared within 90 days after the commencement of the review. For any regulation recommended for amendment,

the specific areas to be amended must be outlined. The staff of the Department of Labor and Industry has reviewed the regulations. The reports attached to the briefing package contain a recommendation to retain or amend the regulation and the reasons to do so.

II. Current Status

Each of the following regulations was reviewed beginning on January 26, 2009:

16 VAC 25-30-10 *et seq.*, Regulations for Asbestos Emissions Standards for Demolition and Renovation Construction Activities and the Disposal of Asbestos-Containing Construction Wastes-Incorporation by Reference, 40 CFR 61.140 through 61.156;

16 VAC 25-35-10 *et seq.*, Regulation Concerning Certified Lead Contractors Notification, Lead Project Permits and Permit Fees;

16 VAC 25-40-10 *et seq.*, Standard for Boiler and Pressure Vessel Operator Certification;

16 VAC 25-70-10 *et seq.*, Virginia Confined Space Standard for the Telecommunications Industry;

16 VAC 25-80, Access to Employee Exposure and Medical Records;

16 VAC 25-140-10 *et seq.*, Virginia Confined Space Standard for the Construction Industry;

16 VAC 25-150-10, Underground Construction, Construction Industry;

16 VAC 25-160-10 *et seq.*, Construction Industry Standard for Sanitation

16 VAC 25-170-10 *et seq.*, Virginia Excavation Standard, Construction Industry; and

16 VAC 25-180-10, Virginia Field Sanitation Standard, Agriculture

The public comment period for these regulations began on January 5, 2009, with a notice of the periodic review published in *The Virginia Register* issue of January 5, 2009. This notice requested comment on the 10 regulations no later than January 26, 2009. The agency did not receive any public comments on any of the 10 regulations during that time period. The final reports on these regulations are due to be submitted to the Department of Planning and Budget via the Regulatory Town Hall no later than April 26, 2009.

III. Review and Analysis

A. With the exception of 16 VAC 25-80, Access to Employee Exposure and Medical Records, the review of the Department recommends retention of all of the above existing regulations in their current form.

B. For 16 VAC 25-80, VOSH has attached to the end of this package a side-by-side comparison of the old OSHA standard (1910.20) which is our Virginia unique regulation for approximately the last 18 years and the current OSHA standard at 29 CFR 1910.1020. From this review, there are a number of changes throughout, as can be seen, with two main areas where the newer regulation significantly differs.

First, in 1990, when the Board initially considered adoption of this OSHA identical change, it was reticent to adopt the revised standard for the following reasons: the federal revision no longer required first aid records to be retained by the employer; the retention of all records versus just those records specific to establishing baseline levels or detecting occupational illness; and that only chest x-rays were to be kept in original form and no records would be required to be kept of employees of less than one year's duration.

The advances of medical technology and digital records retention over the last 18 years have rendered many of the implicit record storage concerns moot. There is also the 18 year experience of OSHA in those states of direct federal enforcement to show that the effects of these 1990 changes have not been problematic.

Secondly, OSHA also noted in its initial regulatory preamble to this change that…. "it deemed it necessary to modify the regulation so as to strike a better balance between providing employees with information necessary to maintain the benefits established by the regulation and at the same time protect legitimate trade secrets." [53 FR 38158]

The numerous additional requirements in the current federal regulation as noted in the text in the right hand columns of pages 17 through 23 of the attached side-by-side comparison of the two standards highlight OSHA's significant effort to solve the regulatory dilimma caused by seeking to accommodate the competing interests between the need for chemical identity disclosure for medical treatment of a patient's health problems, which may be a result of chemical exposure, and trade secret protection for the employer that, once lost, cannot be fully recaptured.

The VOSH Program recommends that under this regulatory review opportunity the Board begin the APA process to repeal this one state unique regulation and adopt the current OSHA standard at 29 CFR 1910.1020. This will have the added benefit of providing consistency with adjacent jurisdictions for those employers who work across state lines.

IV. Action Requested.

The Virginia Occupational Safety and Health (VOSH) Program requests that the Safety and Health Codes Board approve the following attached nine reports Virginia unique regulations with the recommendation to retain these regulations without change:

16 VAC 25-30-10 *et seq.*, Regulations for Asbestos Emissions Standards for Demolition and Renovation Construction Activities and the Disposal of Asbestos-Containing Construction Wastes-Incorporation by Reference, 40 CFR 61.140 through 61.156;

16 VAC 25-35-10 *et seq.*, Regulation Concerning Certified Lead Contractors Notification, Lead Project Permits and Permit Fees;

16 VAC 25-40-10 *et seq.*, Standard for Boiler and Pressure Vessel Operator Certification;

16 VAC 25-70-10 *et seq.*, Virginia Confined Space Standard for the Telecommunications Industry;

16 VAC 25-140-10 *et seq.*, Virginia Confined Space Standard for the Construction Industry;

16 VAC 25-150-10, Underground Construction, Construction Industry;

16 VAC 25-160-10 *et seq.*, Construction Industry Standard for Sanitation;

16 VAC 25-170-10 *et seq.*, Virginia Excavation Standard, Construction Industry; and

16 VAC 25-180-10, Virginia Field Sanitation Standard, Agriculture

Further, the VOSH Program requests the Board to authorize the Department to initiate the regulatory process to delete the following Virginia Unique Regulation and begin the formal adoption process of federal-identical regulation 29 CFR1910.1020 to replace it in accordance with the Virginia Administrative Process Act (§2.2-4007):

16 VAC 25-80, Access to Employee Exposure and Medical Records

The Department also recommends that the Board state in any motion it may make to in regard to this regulatory action that it will receive, consider and respond to petitions by any interested person at any time with respect to reconsideration or revision of this or any other regulation which has been adopted in accordance with the applicable subsections of the Administrative Process Act.

Contact Person:

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VIRGINIA UNIQUE STANDARD 16VAC25-80-10.
ACCESS TO EMPLOYEE EXPOSURE
AND MEDICAL RECORDS;
(what was, generally, the old federal 29 CFR 1910.20).
[45 F.R. 54333, August 15, 1980.]

16VAC25-80-10.
(a) Purpose. The purpose of this chapter is to provide employees and their designated representatives a right of access to relevant exposure and medical records, and to provide representatives of the commissioner a right of access to these records in order to fulfill responsibilities under the Occupational Safety and Health Act. Access by employees, their representatives, and the commissioner is necessary to yield both direct and indirect improvements in the detection, treatment and prevention of occupational disease. Each employer is responsible for assuring compliance with this chapter, but the activities involved in complying with the access to medical records provisions can be carried out, on behalf of the employer, by the physician or other health care personnel in charge of employee medical records.
Except as expressly provided, nothing in this chapter is intended to affect existing legal and ethical obligations concerning the maintenance and confidentiality of employee medical information, the duty to disclose information to a patient/employee or any other aspect of the medical-care relationship, or affect existing legal obligations concerning the protection of trade secret information.

(b) Scope and application.
(1) This chapter applies to each general industry, maritime, and construction employer who makes, maintains, contracts for, or has access to employee exposure or medical records, or analyses thereof, pertaining to employees exposed to toxic substances or harmful physical agents.

(2) This chapter applies to all employee exposure and medical records, and analyses thereof, of employees exposed to toxic substances or harmful physical agents, whether or not the records are related to specific occupational safety and health standards.

(3) This chapter applies to all employee exposure and medical records, and analyses thereof, made or maintained in any manner, including on an in-house or contractual (e.g., fee-for-service) basis. Each employer shall assure that the preservation and access requirements of this section are complied with regardless of the

CURRENT 29 CFR 191
FEDERAL STANDARD
ACCESS TO EMPLOYEE E
AND MEDICAL RECO

29 CFR 1910.1020
1910.1020(a)

"Purpose." The purpose of this section is to their designated representatives a right of ac exposure and medical records; and to provid Assistant Secretary a right of access to these fulfill responsibilities under the Occupationa Act. Access by employees, their representati Secretary is necessary to yield both direct an improvements in the detection, treatment, an occupational disease. Each employer is resp compliance with this section, but the activiti complying with the access to medical record carried out, on behalf of the employer, by th health care personnel in charge of employee Except as expressly provided, nothing in thi affect existing legal and ethical obligations c maintenance and confidentiality of employe the duty to disclose information to a patient/ aspect of the medical-care relationship, or af obligations concerning the protection of trad

1910.1020(b) "Scope and application."
1910.1020(b)(1)
This section applies to each general indus construction employer who makes, maintain access to employee exposure or medical rec thereof, pertaining to employees exposed to harmful physical agents.

1910.1020(b)(2)
This section applies to all employee expos records, and analyses thereof, of such emplo the records are mandated by specific occupa standards.

1910.1020(b)(3)
This section applies to all employee expos records, and analyses thereof, made or main including on an in-house or contractual (e.g. Each employer shall assure that the preserva

manner in which records are made or maintained.

(c) Definitions.

(1) "Access" means the right and opportunity to examine and copy.

(2) "Analysis using exposure or medical records" means any compilation of data, or any research, statistical or other study based at least in part on information collected from individual employee exposure or medical records or information collected from health insurance claims records, provided that either the analysis has been reported to the employer or no further work is currently being done by the person responsible for preparing the analysis.

(3)"Designated representative" means any individual or organization to whom an employee gives written authorization to exercise a right of access. For the purposes of access to employee exposure records and analyses using exposure or medical records, a recognized or certified collective bargaining agent shall be treated automatically as a designated representative without regard to written employee authorization.

(4) "Employee" means a current employee, a former employee, or an employee being assigned or transferred to work where there will be exposure to toxic substances or harmful physical agents. In the case of a deceased or legally incapacitated employee, the employee's legal representative may directly exercise all the employee's rights under this chapter.

(5) "Employee exposure record" means a record containing any of the following kinds of information concerning employee exposure to toxic substances or harmful physical agents:

(i) environmental (workplace) monitoring or measuring, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to interpretation of the results obtained;

(ii) biological monitoring results which directly assess the

requirements of this section are complied wi
manner in which records are made or mainta

1910.1020(c) "Definitions."
1910.1020(c)(1)

"Access" means the right and opportunity

1910.1020(c)(2)
"Analysis using exposure or medical reco
compilation of data or any statistical study b
information collected from individual emplo
medical records or information collected fro
claims records, provided that either the anal
to the employer or no further work is curren
person responsible for preparing the analysi

1910.1020(c)(3)
"Designated representative" means any in
organization to whom an employee gives wr
exercise a right of access. For the purposes o
exposure records and analyses using exposu
recognized or certified collective bargaining
automatically as a designated representative
written employee authorization.

1910.1020(c)(4)
"Employee" means a current employee,
an employee being assigned or transferred to
be exposure to toxic substances or harmful p
case of a deceased or legally incapacitated e
employee's legal representative may directly
employee's rights under this section.

1910.1020(c)(5)
"Employee exposure record" means a rec
the following kinds of information:

1910.1020(c)(5)(i)
Environmental (workplace) monitoring or
substance or harmful physical agent, includi
wipe, or other form of sampling, as well as r
analytical methodologies, calculations, and
relevant to interpretation of the results obtai

1910.1020(c)(5)(ii)
Biological monitoring results which direc

absorption of a substance or agent by body systems (e.g., the level of a chemical in the blood, urine, breath, hair, fingernails, etc.) but not including results which assess the biological effect of a substance or agent;

absorption of a toxic substance or harmful p systems (e.g., the level of a chemical in the l hair, fingernails, etc.) but not including resu biological effect of a substance or agent or v employee's use of alcohol or drugs;

(iii) material safety data sheets; or

1910.1020(c)(5)(iii)
Material safety data sheets indicating that a hazard to human health; or

(iv) in the absence of the above, any other record which reveals the identity (e.g., chemical, common, or trade name) of a toxic substance or harmful physical agent.

1910.1020(c)(5)(iv)
In the absence of the above, a chemical in record which reveals where and when used a chemical, common, or trade name) of a toxi physical agent.

(6) (i) "Employee medical record" means a record concerning the health status of an employee which is made or maintained by a physician, nurse, or other health care personnel, or technician, including:

1910.1020(c)(6) 1910.1020(c)(6)(i)
"Employee medical record" means a rec health status of an employee which is made physician, nurse, or other health care person including:

(A) medical and employment questionnaires or histories (including job description and occupational exposures),

1910.1020(c)(6)(i)(A)
Medical and employment questionnaires job description and occupational exposures)

(B) the results of medical examinations (pre-employment, pre-assignment, periodic, or episodic) and laboratory tests (including X-ray examinations and all biological monitoring),

1910.1020(c)(6)(i)(B)
The results of medical examinations (pre- pre-assignment, periodic, or episodic) and la (including chest and other X-ray examinatio of establishing a base-line or detecting occu all biological monitoring not defined as an " record"),

(C) medical opinions, diagnoses, progress notes, and recommendations,

1910.1020(c)(6)(i)(C)
Medical opinions, diagnoses, progress no recommendations,

1910.1020(c)(6)(i)(D)
First aid records,

(D) descriptions of treatments and prescriptions, and

1910.1020(c)(6)(i)(E)
Descriptions of treatments and prescriptio

1910.1020(c)(6)(i)(F)

(E) employee medical complaints.

(ii) "Employee medical record" does not include the following:

(A) physical specimens (e.g., blood or urine samples which are routinely discarded as a part of normal medical practice, and are not required to be maintained by other legal requirements,

(B) records concerning health insurance claims if maintained separately from the employer's medical program and its records, and not accessible to the employer by employee name or other direct personal identifier (e.g., social security number, payroll number, etc.), or

(C) records concerning voluntary employee assistance programs (alcohol, drug abuse, or personal counseling programs) if maintained separately from the employer's medical program and its records.

(7) "Employer" means a current employer, a former employer, or a successor employer.

(8) "Exposure" or "exposed" means that an employee is subjected to a toxic substance or harmful physical agent in the course of employment through any route of entry (inhalation, ingestion, skin contact or absorption, etc.), and includes past exposure and potential (e.g., accidental or possible) exposure, but does not include situations where the employer can demonstrate that the toxic substance or harmful physical agent is not used, handled, stored, generated, or present in the workplace in any manner different from typical non-occupational situations.

Employee medical complaints.

1910.1020(c)(6)(ii)
"Employee medical record" does not inclu
in the form of:

1910.1020(c)(6)(ii)(A)
Physical specimens (e.g., blood or urine s
routinely discarded as a part of normal medi

1910.1020(c)(6)(ii)(B)
Records concerning health insurance clai
separately from the employer's medical prog
and not accessible to the employer by emplo
direct personal identifier (e.g., social securit
number, etc.), or

1910.1020(c)(6)(ii)(C)
Records created solely in preparation for
privileged from discovery under the applica
or evidence; or

1910.1020(c)(6)(ii)(D)
Records concerning voluntary employee a
(alcohol, drug abuse, or personal counseling
maintained separately from the employer's m
records.

1910.1020(c)(7)
"Employer" means a current employer, a
successor employer.

1910.1020(c)(8)
"Exposure" or "exposed" means that an em
a toxic substance or harmful physical agent
employment through any route of entry (inh
contact or absorption, etc.), and includes pas
potential (e.g., accidental or possible) expos
include situations where the employer can d
toxic substance or harmful physical agent is
stored, generated, or present in the workplac
different from typical non-occupational situa

1910.1020(c)(9)
"Health Professional" means a physician,

	nurse, industrial hygienist, toxicologist, or e providing medical or other occupational hea employees.
(9) "Record" means any item, collection, or grouping of information regardless of the form or process by which it is maintained (e.g., paper document, microfiche, microfilm, X-ray film, or automated data processing).	1910.1020(c)(10) "Record" means any item, collection, or g regardless of the form or process by which i paper document, microfiche, microfilm, X-r data processing).
	1910.1020(c)(11) "Specific chemical identity" means a chem Abstracts Service (CAS) Registry Number, o information that reveals the precise chemica substance.
(10) "Specific written consent" (i) Means a written authorization containing the following:	1910.1020(c)(12) 1910.1020(c)(12)(i) "Specific written consent" means a writte containing the following:
(A) the name and signature of the employee authorizing the release of medical information,	1910.1020(c)(12)(i)(A) The name and signature of the employee a of medical information,
(B) the date of the written authorization,	1910.1020(c)(12)(i)(B) The date of the written authorization,
(C) the name of the individual or organization that is authorized to release the medical information,	1910.1020(c)(12)(i)(C) The name of the individual or organizatio release the medical information,
(D) the name of the designated representative (individual or organization) that is authorized to receive the released information,	1910.1020(c)(12)(i)(D) The name of the designated representative organization) that is authorized to receive th
(E) a general description of the medical information that is authorized to be released,	1910.1020(c)(12)(i)(E) A general description of the medical infor authorized to be released,
(F) a general description of the purpose for the release of the medical information, and	1910.1020(c)(12)(i)(F) A general description of the purpose for t medical information, and
(G) a date or condition upon which the written authorization will expire (if less than one year).	1910.1020(c)(12)(i)(G) A date or condition upon which the writte expire (if less than one year).
(ii) A written authorization does not operate to authorize the release	1910.1020(c)(12)(ii)

of medical information not in existence on the date of written authorization, unless this is expressly authorized, and does not operate for more than one year from the date of written authorization.

A written authorization does not operate t
of medical information not in existence on th
authorization, unless the release of future in
authorized, and does not operate for more th
date of written authorization.

(iii) A written authorization may be revoked in writing prospectively at any time.

1910.1020(c)(12)(iii)
A written authorization may be revoked i
at any time.

(11) "Toxic substance or harmful physical agent" means any chemical substance, biological agent (bacteria, virus, fungus, etc.), or physical stress (noise, heat, cold, vibration, repetitive motion, ionizing and non-ionizing radiation, hypo- or hyperbaric pressure, etc.) which:

1910.1020(c)(13)
"Toxic substance or harmful physical ag
chemical substance, biological agent (bacter
or physical stress (noise, heat, cold, vibratio
ionizing and non-ionizing radiation, hypo - c
etc.) which:

(i) is regulated by a Federal law or rule due to a hazard to health,

(ii) is listed in the latest printed edition of the National Institute for Occupational Safety and Health (NIOSH) Registry of Toxic Effects of Chemical Substances (RTECS) (See Appendix B),

1910.1020(c)(13)(i)
Is listed in the latest printed edition of the
Occupational Safety and Health (NIOSH) R
of Chemical Substances (RTECS) which is i
reference as specified in Sec. 1910.6; or

(iii) has yielded positive evidence of an acute or chronic health hazard in human, animal, or other biological testing conducted by, or known to, the employer, or

1910.1020(c)(13)(ii)
Has yielded positive evidence of an acute
hazard in testing conducted by, or known to

(iv) has a material safety data sheet available to the employer indicating that the material may pose a hazard to human health.

1910.1020(c)(13)(iii)
Is the subject of a material safety data she
the employer indicating that the material ma
human health.

1910.1020(c)(14)

"Trade secret" means any confidential for
device, or information or compilation of inf
an employer's business and that gives the em
to obtain an advantage over competitors wh

1910.1020(d)

(d) Preservation of records.

"Preservation of records."

(1) Unless a specific occupational safety and health standard

1910.1020(d)(1)

provides a different period of time, each employer shall assure the preservation and retention of records as follows:

(i) Employee medical records. Each employee medical record shall be preserved and maintained for at least the duration of employment plus 30 years, except that health insurance claims records maintained separately from the employer's medical program and its records need not be retained for any specified period;

(ii) Employee exposure records. Each employee exposure record shall be preserved and maintained for at least 30 years, except that:

(A) background date to environmental (workplace) monitoring or measuring, such as laboratory reports and worksheets, need only be retained for one year so long as the sampling results, the collection methodology (sampling plan), a description of the analytical and mathematical methods used, and a summary of other background data relevant to interpretation of the results obtained, are retained for at least 30 years; and

(B) material safety data sheets and (c)(5)(iv) records concerning the identity of a substance or agent need not be retained for any specified period as long as some record of the identity (chemical name if known) of the substance or agent, where it was

Unless a specific occupational safety and
provides a different period of time, each em
preservation and retention of records as follo

1910.1020(d)(1)(i)
"Employee medical records." The medica
employee shall be preserved and maintained
of employment plus thirty (30) years, except
types of records need not be retained for any

1910.1020(d)(1)(i)(A)
Health insurance claims records maintain
employer's medical program and its records,

1910.1020(d)(1)(i)(B)
First aid records (not including medical h
treatment and subsequent observation of mi
burns, splinters, and the like which do not in
treatment, loss of consciousness, restriction
transfer to another job, if made on-site by a
maintained separately from the employer's m
records, and

1910.1020(d)(1)(i)(C)
The medical records of employees who ha
(1) year for the employer need not be retaine
employment if they are provided to the emp
termination of employment.

1910.1020(d)(1)(ii)
"Employee exposure records." Each empl
shall be preserved and maintained for at leas
except that:
1910.1020(d)(1)(ii)(A)
Background data to environmental (workp
measuring, such as laboratory reports and w
retained for one (1) year so long as the samp
collection methodology (sampling plan), a d
analytical and mathematical methods used, a
background data relevant to interpretation o
are retained for at least thirty (30) years; and

1910.1020(d)(1)(ii)(B)
Material safety data sheets and paragraph
concerning the identity of a substance or age
for any specified period as long as some rec

used, and when it was used is retained for at least 30 years; and

(iii) Analyses using exposure of medical records. Each analysis using exposure or medical records shall be preserved and maintained for at least 30 years.

(2) Nothing in this chapter is intended to mandate the form, manner, or process by which an employer preserves a record so long as the information contained in the record is preserved and retrievable, except that X-ray films shall be preserved in their original state.

(e) Access to records.

(1) General.

(i) Whenever an employee or designated representative requests access to a record, the employer shall assure that access is provided in a reasonable time, place, and manner, but in no event later than 15 days after the request for access is made.

(chemical name if known) of the substance
used, and when it was used is retained for at
(1); and

_____

Footnote(1) Material safety data sheets mu
chemicals currently in use that are effected b
Communication Standard in accordance wit
1910.1200(g).

1910.1020(d)(1)(ii)(C)
Biological monitoring results designated a
specific occupational safety and health stand
and maintained as required by the specific st

1910.1020(d)(1)(iii)
"Analyses using exposure or medical reco
using exposure or medical records shall be p
maintained for at least thirty (30) years.

1910.1020(d)(2)
Nothing in this section is intended to man
or process by which an employer preserves a
information contained in the record is preser
except that chest X-ray films shall be preser
state.

1910.1020(e)
"Access to records" -

1910.1020(e)(1)
"General."

1910.1020(e)(1)(i)
Whenever an employee or designated rep
access to a record, the employer shall assure
in a reasonable time, place, and manner. If t
reasonably provide access to the record with
days, the employer shall within the fifteen (1
apprise the employee or designated represen
record of the reason for the delay and the ea
record can be made available.

1910.1020(e)(1)(ii)
The employer may require of the requeste
as should be readily known to the requester
necessary to locate or identify the records be

(ii) Whenever an employee or designated representative requests a copy of a record, the employer shall, within the period of time previously specified, assure that either:

(A) a copy of the record is provided without cost to the employee or representative,

(B) the necessary mechanical copying facilities (e.g., photocopying) are made available without cost to the employee or representative for copying the record, or

(C) the record is loaned to the employee or representative for a reasonable time to enable a copy to be made.

(iii) Whenever a record has been previously provided without cost to an employee or designated representative, the employer may charge reasonable, non-discriminatory administrative costs (i.e., search and copying expenses but not including overhead expenses) for a request by the employee or designated representative for additional copies of the record, except that

(A) an employer shall not charge for an initial request for a copy of new information that has been added to a record which was previously provided; and

(B) an employer shall not charge for an initial request by a recognized or certified collective bargaining agent for a copy of an employee exposure record or an analysis using exposure or medical records.

(iv) Nothing in this chapter is intended to preclude employees and collective bargaining agents from collectively bargaining to obtain

dates and locations where the employee wor
period in question).

1910.1020(e)(1)(iii)
Whenever an employee or designated rep
copy of a record, the employer shall assure t

1910.1020(e)(1)(iii)(A)
A copy of the record is provided without
representative,

1910.1020(e)(1)(iii)(B)
The necessary mechanical copying facilit
are made available without cost to the emplo
for copying the record, or

1910.1020(e)(1)(iii)(C)
The record is loaned to the employee or r
reasonable time to enable a copy to be made

1910.1020(e)(1)(iv)
In the case of an original X-ray, the emplo
to on-site examination or make other suitabl
temporary loan of the X-ray.

1910.1020(e)(1)(v)
Whenever a record has been previously
to an employee or designated representative
charge reasonable, non-discriminatory admi
search and copying expenses but not includi
for a request by the employee or designated
additional copies of the record, except that

1910.1020(e)(1)(v)(A)
An employer shall not charge for an initia
new information that has been added to a re
previously provided; and

1910.1020(e)(1)(v)(B)
An employer shall not charge for an initia
recognized or certified collective bargaining
employee exposure record or an analysis usi
records.

1910.1020(e)(1)(vi)

access to information in addition to that available under this chapter.

Nothing in this section is intended to prec
collective bargaining agents from collectivel
access to information in addition to that avai

(2) Employee and designated representative access.

1910.1020(e)(2)
"Employee and designated representative

1910.1020(e)(2)(i)
"Employee exposure records."

(i) Employee exposure records. Each employer shall, upon request, assure the access of each employee and designated representative to employee exposure records relevant to the employee. For the purpose of this chapter, exposure records relevant to the employee consist of:

1910.1020(e)(2)(i)(A)
Except as limited by paragraph (f) of this
shall, upon request, assure the access to each
designated representative to employee expos
the employee. For the purpose of this sectio
relevant to the employee consists of:

(A) records of the employee's past or present exposure to toxic substances or harmful physical agents,

1910.1020(e)(2)(i)(A)(1)
A record which measures or monitors the
substance or harmful physical agent to whic
been exposed;

(B) exposure records of other employees with past or present job duties or working conditions related to or similar to those of the employee,

1910.1020(e)(2)(i)(A)(2)
In the absence of such directly relevant re
other employees with past or present job dut
conditions related to or similar to those of th
extent necessary to reasonably indicate the a
the toxic substances or harmful physical age
employee is or has been subjected, and

(C) records containing exposure information concerning the employee's workplace or working conditions, and
(D) exposure records pertaining to workplaces or working conditions to which the employee is being assigned or transferred.

1910.1020(e)(2)(i)(A)(3)
Exposure records to the extent necessary t
the amount and nature of the toxic substance
agents at workplaces or under working cond
employee is being assigned or transferred.

1910.1020(e)(2)(i)(B)
Requests by designated representatives fo
employee exposure records shall be in writi
with reasonable particularity:

1910.1020(e)(2)(i)(B)(1)
The record requested to be disclosed; and

1910.1020(e)(2)(i)(B)(2)
The occupational health need for gaining

(ii) Employee medical records.

1910.1020(e)(2)(ii)
"Employee medical records."

(A) Each employer shall, upon request, assure the access of each employee to employee medical records of which the employee is the subject, except as provided in subsection (e)(2)(ii)(D) below.

1910.1020(e)(2)(ii)(A)
Each employer shall, upon request, assure
employee to employee medical records of w
the subject, except as provided in paragraph
section.

(B) Each employer shall, upon request, assure the access of each designated representative to the employee medical records of any employee who has given the designated representative specific written consent. Appendix A to this chapter contains a sample form which may be used to establish specific written consent for access to employee medical records.

1910.1020(e)(2)(ii)(B)
Each employer shall, upon request, assure
designated representative to the employee m
employee who has given the designated repr
written consent. Appendix A to this section
which may be used to establish specific wri
to employee medical records.

(C) Whenever access to employee medical records is requested, a physician representing the employer may recommend that the employee or designated representative:

1910.1020(e)(2)(ii)(C)
Whenever access to employee medical re
physician representing the employer may re
employee or designated representative:

(1) consult with the physician for the purposes of reviewing and discussing the records requested,

1910.1020(e)(2)(ii)(C)(1)
Consult with the physician for the purpos
discussing the records requested,

(2) accept a summary of material facts and opinions in lieu of the records requested, or

1910.1020(e)(2)(ii)(C)(2)
Accept a summary of material facts and o
records requested, or

(3) accept release of the requested records only to a physician or other designated representative.

1910.1020(e)(2)(ii)(C)(3)
Accept release of the requested records or
other designated representative.

(D) Whenever an employee requests access to his or her employee medical records, and a physician representing the employer believes that direct employee access to information contained in the records regarding a specific diagnosis of a terminal illness or a psychiatric condition could be detrimental to the employee's health, the employer may inform the employee that access will only be provided to a designated representative of the employee having specific written consent, and deny the employee's request for direct access to this information only. Where a designated representative with specific written consent requests access to information so withheld, the employer shall assure the access of the designated representative to this information, even when it is known that the designated representative will give the information to the employee.

1910.1020(e)(2)(ii)(D)
Whenever an employee requests access to
medical records, and a physician representin
that direct employee access to information c
regarding a specific diagnosis of a terminal i
condition could be detrimental to the emplo
employer may inform the employee that acc
provided to a designated representative of th
specific written consent, and deny the emplo
access to this information only. Where a des
with specific written consent requests access
withheld, the employer shall assure the acce
representative to this information, even whe

designated representative will give the infor

(E) Nothing in this chapter precludes a physician, nurse, or other responsible health care personnel maintaining employee medical records from deleting from requested medical records the identity of a family member, personal friend, or fellow employee who has provided confidential information concerning an employee's health status.

1910.1020(e)(2)(ii)(E)
A physician, nurse, or other responsible h
maintaining employee medical records may
medical records the identity of a family mem
fellow employee who has provided confiden
concerning an employee's health status.

(iii) Analyses using exposure or medical records.

1910.1020(e)(2)(iii)
Analyses using exposure or medical recor

(A) Each employer shall, upon request, assure the access of each employee and designated representative to each analysis using exposure or medical records concerning the employee's working conditions or workplace.

1910.1020(e)(2)(iii)(A)
Each employer shall, upon request, assure
employee and designated representative to e
exposure or medical records concerning the
conditions or workplace.

(B) Whenever access is requested to an analysis which reports the contents of employee medical records by either direct identifier (name, address, social security number, payroll number, etc.) or by information which could reasonably be used under the circumstances indirectly to identify specific employees (exact age, height, weight, race, sex, date of initial employment, job title, etc.), the employer shall assure that personal identifiers are removed before access is provided. If the employer can demonstrate that removal of personal identifiers from an analysis is not feasible, access to the personally identifiable portions of the analysis need not be provided.

1910.1020(e)(2)(iii)(B)
Whenever access is requested to an analys
contents of employee medical records by eit
(name, address, social security number, payr
information which could reasonably be used
circumstances indirectly to identify specific
height, weight, race, sex, date of initial empl
the employer shall assure that personal ident
before access is provided. If the employer ca
removal of personal identifiers from an anal
access to the personally identifiable portions
not be provided.

(3) OSHA access.

1910.1020(e)(3)
"OSHA access."

(i) Each employer shall, upon request, assure the immediate access of representatives of the Commissioner of the Department of Labor and Industry to employee exposure and medical records and to analyses using exposure or medical records. Rules of agency practice and procedure governing OSHA access to employee medical records are contained in 29 CFR 1913.10.

1910.1020(e)(3)(i)
Each employer shall, upon request, and w
any rights under the Constitution or the Occ
Health Act of 1970, 29 U.S.C. 651 "et seq.,"
chooses to exercise, assure the prompt acces
the Assistant Secretary of Labor for Occupa
to employee exposure and medical records a
exposure or medical records. Rules of agenc
procedure governing OSHA access to emplo
are contained in 29 CFR 1913.10.

(ii) Whenever VOSH seeks access to personally identifiable employee medical information by presenting to the employer a

1910.1020(e)(3)(ii)
Whenever OSHA seeks access to persona

written access order pursuant to 29 CFR 1913.10(d), the employer shall prominently post a copy of the written access order and its accompanying cover letter for at least 15 working days.

(f) Trade secrets.

(1) Except as provided in paragraph (f)(2) of this section, nothing in this section precludes an employer from deleting from records requested by an employee or designated representative any trade secret data which discloses manufacturing processes, or discloses the percentage of a chemical substance in a mixture, as long as the employee or designated representative is notified that information has been deleted. Whenever deletion of trade secret information substantially impairs evaluation of the place where or the time when exposure to a toxic substance or harmful physical agent occurred, the employer shall provide alternative information which is sufficient to permit the employee to identify where and when exposure occurred.

employee medical information by presenting
written access order pursuant to 29 CFR 191
shall prominently post a copy of the written
accompanying cover letter for at least fifteen

1910.1020(f)
"Trade secrets."

1910.1020(f)(1)
Except as provided in paragraph (f)(2) of
this section precludes an employer from dele
requested by a health professional, employee
representative any trade secret data which di
processes, or discloses the percentage of a ch
mixture, as long as the health professional, e
representative is notified that information ha
Whenever deletion of trade secret informatio
evaluation of the place where or the time wh
substance or harmful physical agent occurre
provide alternative information which is suf
requesting party to identify where and when

1910.1020(f)(2)
The employer may withhold the specific c
including the chemical name and other speci
toxic substance from a disclosable record pr

1910.1020(f)(2)(i)
The claim that the information withheld is
supported;

1910.1020(f)(2)(ii)
All other available information on the pro
the toxic substance is disclosed;

1910.1020(f)(2)(iii)
The employer informs the requesting part
chemical identity is being withheld as a trad

1910.1020(f)(2)(iv)
The specific chemical identity is made av
professionals, employees and designated rep
accordance with the specific applicable prov
paragraph.

(2) Notwithstanding any trade secret claims, whenever access to records is requested, the employer shall provide access to chemical or physical agent identities including chemical names, levels of exposure, and employee health status data contained in the requested records.

(3) Whenever trade secret information is provided to an employee or designated representative, the employer may require, as a condition of access, that the employee or designated representative agree in writing not to use the trade secret information for the purpose of commercial gain and not to permit misuse of the trade secret information by a competitor or potential competitor of the employer.

1910.1020(f)(3)
Where a treating physician or nurse deter
emergency exists and the specific chemical
substance is necessary for emergency or firs
employer shall immediately disclose the spe
of a trade secret chemical to the treating phy
regardless of the existence of a written state
confidentiality agreement. The employer ma
statement of need and confidentiality agreen
the provisions of paragraphs (f)(4) and (f)(5
circumstances permit.

1910.1020(f)(4)
In non-emergency situations, an employe
disclose a specific chemical identity, otherw
withheld under paragraph (f)(2) of this secti
professional, employee, or designated repres

1910.1020(f)(4)(i)
The request is in writing;

1910.1020(f)(4)(ii)
The request describes with reasonable det
following occupational health needs for the

1910.1020(f)(4)(ii)(A)
To assess the hazards of the chemicals to
be exposed;

1910.1020(f)(4)(ii)(B)
To conduct or assess sampling of the wor
determine employee exposure levels;

1910.1020(f)(4)(ii)(C)
To conduct pre-assignment or periodic m
exposed employees;

1910.1020(f)(4)(ii)(D)
To provide medical treatment to exposed

1910.1020(f)(4)(ii)(E)
To select or assess appropriate personal p
exposed employees;

1910.1020(f)(4)(ii)(F)
To design or assess engineering controls

measures for exposed employees; and

1910.1020(f)(4)(ii)(G)
To conduct studies to determine the healt

1910.1020(f)(4)(iii)
The request explains in detail why the dis
chemical identity is essential and that, in lie
of the following information would not enab
professional, employee or designated repres
occupational health services described in pa
section;

1910.1020(f)(4)(iii)(A)
The properties and effects of the chemica

1910.1020(f)(4)(iii)(B)
Measures for controlling workers' exposu

1910.1020(f)(4)(iii)(C)
Methods of monitoring and analyzing wo
chemical; and

1910.1020(f)(4)(iii)(D)
Methods of diagnosing and treating harm
chemical;

1910.1020(f)(4)(iv)
The request includes a description of the
maintain the confidentiality of the disclosed

1910.1020(f)(4)(v)
The health professional, employee, or des
and the employer or contractor of the servic
professional or designated representative ag
confidentiality agreement that the health pro
designated representative will not use the tra
for any purpose other than the health need(s
to release the information under any circums
OSHA, as provided in paragraph (f)(7) of th
authorized by the terms of the agreement or

1910.1020(f)(5)
The confidentiality agreement authorized
of this section:
1910.1020(f)(5)(i)
May restrict the use of the information to

indicated in the written statement of need;

1910.1020(f)(5)(ii)
May provide for appropriate legal remedi
breach of the agreement, including stipulatio
pre-estimate of likely damages; and,

1910.1020(f)(5)(iii)
May not include requirements for the pos

1910.1020(f)(6)
Nothing in this section is meant to preclu
pursuing non-contractual remedies to the ex

1910.1020(f)(7)
If the health professional, employee or de
receiving the trade secret information decide
disclose it to OSHA, the employer who prov
shall be informed by the health professional
time as, such disclosure.

1910.1020(f)(8)
If the employer denies a written request fo
specific chemical identity, the denial must:

1910.1020(f)(8)(i)
Be provided to the health professional, em
representative within thirty days of the requ

1910.1020(f)(8)(ii)
Be in writing;

1910.1020(f)(8)(iii)
Include evidence to support the claim that
identity is a trade secret;

1910.1020(f)(8)(iv)
State the specific reasons why the request

1910.1020(f)(8)(v)
Explain in detail how alternative informat
specific medical or occupational health need
specific chemical identity.

1910.1020(f)(9)
The health professional, employee, or des

whose request for information is denied und
this section may refer the request and the wr
request to OSHA for consideration.

1910.1020(f)(10)
When a health professional, employee, or
representative refers a denial to OSHA unde
this section, OSHA shall consider the evider

1910.1020(f)(10)(i)
The employer has supported the claim tha
identity is a trade secret;

1910.1020(f)(10)(ii)
The health professional employee, or desi
has supported the claim that there is a medic
health need for the information; and

1910.1020(f)(10)(iii)
The health professional, employee or desi
has demonstrated adequate means to protect
1910.1020(f)(11) 1910.1020(f)(11)(i)
If OSHA determines that the specific chem
under paragraph (f)(4) of this section is not a
secret, or that it is a trade secret but the requ
professional, employee or designated repres
legitimate medical or occupational health ne
has executed a written confidentiality agreem
adequate means for complying with the term
the employer will be subject to citation by O

1910.1020(f)(11)(ii)
If an employer demonstrates to OSHA tha
confidentiality agreement would not provide
against the potential harm from the unautho
trade secret specific chemical identity, the A
issue such orders or impose such additional
conditions upon the disclosure of the reques
information as may be appropriate to assure
health needs are met without an undue risk o

1910.1020(f)(12)
Notwithstanding the existence of a trade s
employer shall, upon request, disclose to the
any information which this section requires
available. Where there is a trade secret claim
made no later than at the time the informatio

Assistant Secretary so that suitable determin
status can be made and the necessary protec
implemented.

1910.1020(f)(13)

Nothing in this paragraph shall be construe
disclosure under any circumstances of proce
mixture information which is a trade secret.

(g) Employee information.

1910.1020(g)
"Employee information."

(1) Upon an employee's first entering into employment, and at least annually thereafter, each employer shall inform employees exposed to toxic substances of harmful physical agents of the following:

1910.1020(g)(1)
Upon an employee's first entering into em
annually thereafter, each employer shall info
covered by this section of the following:

(i) the existence, location, and availability of any records covered by this section;

1910.1020(g)(1)(i)
The existence, location, and availability o
by this section;

(ii) the person responsible for maintaining and providing access to records; and

1910.1020(g)(1)(ii)
The person responsible for maintaining an
records; and

(iii) each employee's rights of access to these records.

1910.1020(g)(1)(iii)
Each employee's rights of access to these

(2) Each employer shall make readily available to employees a copy of this chapter and its appendices, and shall distribute to employees any informational materials concerning this chapter which are made available to the employer by the Commissioner of the Department of Labor and Industry.

1910.1020(g)(2)
Each employer shall keep a copy of this s
appendices, and make copies readily availab
employees. The employer shall also distribu
any informational materials concerning this
available to the employer by the Assistant S
Occupational Safety and Health.

(h) Transfer of records.

1910.1020(h)
"Transfer of records."

(1) Whenever an employer is ceasing to do business, the employer shall transfer all records ....[subject [2]]....to this section to the successor employer. The successor employer shall receive and maintain these records.

Footnote [(2)] - the word "subject' appears to have been inadvertently left out during promulgation as a VA regulation.

1910.1020(h)(1)
Whenever an employer is ceasing to do bu
shall transfer all records subject to this secti
employer. The successor employer shall rec
records.

(2) Whenever an employer is ceasing to do business and there is no successor employer to receive and maintain the records subject to

1910.1020(h)(2)

this chapter, the employer shall notify affected employees of their rights of access to records at least 3 months prior to the cessation of the employer's business.

(3) Whenever an employer either is ceasing to do business and there is no successor employer to receive and maintain the records, or intends to dispose of any records required to be preserved for at least 30 years, the employer shall:

(i) transfer the records to the Director of the National Institute for Occupational Safety and Health (NIOSH) if so required by a specific occupational safety and health standard; or

(ii) notify the Director of NIOSH in writing of the impending disposal of records at least 3 months prior to the disposal of the records.

(4) Where an employer regularly disposes of records required to be preserved for at least 30 years, the employer may, with at least 3 months notice, notify the Director of NIOSH on an annual basis of the records intended to be disposed of in the coming year.

(i) Appendices. The information contained in the Appendices to this chapter is not intended, by itself, to create any additional obligations not otherwise imposed by this chapter nor detract from any existing obligation.

(j) Effective date. This section shall become effective on August 21, 1980. All obligations of this chapter commence on the effective date except that the employer shall provide the information required under paragraph (g)(1) of this section to all current employees within 60 days after the effective date.

Statutory Authority
§ 40.1-22(5) of the Code of Virginia.
Historical Notes
Eff. May 1, 1981.
prev | next | new search | table of contents | home

APPENDIX A.

Whenever an employer is ceasing to do bu
successor employer to receive and maintain
this standard, the employer shall notify affec
of their rights of access to records at least th
the cessation of the employer's business.

1910.1020(h)(3)
Whenever an employer either is ceasing t
is no successor employer to receive and mai
intends to dispose of any records required to
least thirty (30) years, the employer shall:

1910.1020(h)(3)(i)
Transfer the records to the Director of the
Occupational Safety and Health (NIOSH) if
specific occupational safety and health stand

1910.1020(h)(3)(ii)
Notify the Director of NIOSH in writing o
disposal of records at least three (3) months
the records.

1910.1020(h)(4)
Where an employer regularly disposes of
preserved for at least thirty (30) years, the e
least (3) months notice, notify the Director o
basis of the records intended to be disposed

1910.1020(i)
"Appendices." The information contained
to this section is not intended, by itself, to cr
obligations not otherwise imposed by this se
any existing obligation.

[61 FR 5507, Feb. 13, 1996; 61 FR 9227,
31427, June 20, 1996; 71 FR 16673, April 3

Sample authorization letter for the release of employee medical record information to designated representative.

I, _____ (full name of worker/patient) hereby authorize _____ (individual or organization holding the medical records) to release to _____ (individual or organization authorized to receive the medical information), the following medical information from my personal medical records:

_____
_____
_____
_____
_____

(Describe generally the information desired to be released).

I give my permission for this medical information to be used for the following purpose:

_____,

but I do not give permission for any other use or re-disclosure of this information.

(Note. - Several extra lines are provided below so that you can place additional restrictions on this authorization letter if you want to. You may, however, leave these lines blank. On the other hand, you may want to (1) specify a particular expiration date for this letter (if less than one year); (2) describe medical information to be created in the future that you intend to be covered by this authorization letter; or (3) describe portions of the medical information in your records which you do not intent to be released as a result of this letter.)

_____
_____
_____
_____
_____
_____
_____

Full name of Employee of Legal Representative

_____

Signature of Employee or Legal Representative

APPENDIX A OF 1910.

Sample authorization letter for the release of
record information to a designated represent

I, _____, (full name of worker/patient) he
_____ (individual or organization hold
records) to release to _____ (individual
authorized to receive the medical informatio
medical information from my personal medi

_____
_____
_____
_____
_____

(Describe generally the information desired

I give my permission for this medical infor
the following purpose: _____

_____

but I do not give permission for any other us
this information.

(Note: Several extra lines are provided belo
additional restrictions on this authorization l
You may, however, leave these lines blank.
maywant to (1) specify a particular expiratio
less than one year); (2) describe medical inf
in the future that you intend to be covered b
letter; or (3) describe portions of the medica
records which you do not intend to be releas
letter.)

_____
_____
_____
_____
_____
_____
_____

Full name of Employee or Legal Representa

_____

_____

Date of Signature

APPENDIX B.

Availability of NIOSH Registry of Toxic Effects of Chemical Substances (RTECS)[1]

The final standard, 29 CFR 1910.20, applies to all employee exposure and medical records, and analyses thereof, of employees exposed to toxic substances or harmful physical agents (paragraph (b)(2)). The term "toxic substance or harmful physical agent" is defined by paragraph (c)(11) to encompass chemical substances, biological agents, and physical stresses for which there is evidence of harmful health effects. The standard uses the latest printed edition of the National Institute for Occupational Safety and Health (NIOSH) Registry of Toxic Effects of Chemical Substances (RTECS) as one of the chief sources of information as to whether evidence of harmful health effects exists. If a substance is listed in the latest printed RTECS, the standard applies to exposure and medical records (and analyses of these records) relevant to employees exposed to the substance.

It is appropriate to note that the final standard does not require that employers purchase a copy of RTECS, and many employers need not consult RTECS to ascertain whether their employee exposure or medical records are subject to the standard. Employers who do not currently have the latest printed edition of the NIOSH RTECS, however, may desire to obtain a copy. The RTECS is issued in an annual printed edition as mandated by section 20(a)(6) of the Occupational Safety and Health Act (29 USC § 669(a)(6)).

The 1978 edition is the most recent printed edition as of May 1, 1980. Its Foreword and Introduction describes the RTECS as follows:

"The annual publication of a list of known toxic substances is a NIOSH mandate under the Occupational Safety and Health Act of 1970. It is intended to provide basic information on the known toxic and biological effects of chemical substances for the use of employers, employees, physicians, industrial hygienists,

Signature of Employee or Legal Representat

_____

Date of Signature

[61 FR 31427, June 20, 1996]

APPENDIX B OF 1910.

Availability of NIOSH registry of toxic substances (RTECS)(Non-ma

The final standard, 29 CFR 1910.1020, appl exposure and medical records, and analyses exposed to toxic substances or harmful phys (b)(2)). The term "toxic substance or harmfu defined by paragraph (c)(13) to encompass biological agents, and physical stresses for v of harmful health effects. The regulation use edition of the National Institute for Occupati (NIOSH) Registry of Toxic Effects of Chem (RTECS) as one of the chief sources of info evidence of harmful health effects exists. If the latest printed RTECS, the regulation app medical records (and analyses of these recor employees exposed to the substance.

It is appropriate to note that the final regulat that employers purchase a copy of RTECS, need not consult RTECS to ascertain whethe exposure or medical records are subject to th do not currently have the latest printed editi RTECS, however, may desire to obtain a co issued in an annual printed edition as manda of the Occupational Safety and Health Act (

The introduction to the 1980 printed edition as follows:

"The 1980 edition of the Registry of Toxic E Substances, formerly known as the Toxic Su ninth revision prepared in compliance with t Section 20(a)(6) of the Occupational Safety (Public Law 91-596). The original list was c

toxicologists, researchers, and, in general, anyone concerned with the proper and safe handling of chemicals. In turn, this information may contribute to a better understanding of potential occupational hazards by everyone involved and ultimately may help to bring about a more healthful workplace environment." (p. iii)

"This Registry contains 124,247 listings of chemical substances: 33,929 are names of different chemicals with their associated toxicity data and 90,318 are synonyms. This edition includes approximately 7,500 new chemical compounds that did not appear in the 1977 Registry." (p. xiii)

"The Registry's purposes are many, and it serves a variety of users. It is a single source document for basic toxicity information and for other data, such as chemical identifiers and information necessary for the preparation of safety directives and hazard evaluations for chemical substances. The various types of toxic effects linked to literature citations provide researchers and occupational health scientists with an introduction to the toxicological literature, making their own review of the toxic hazards of a given substance easier. By presenting data on the lowest reported doses that produce effects by several routes of entry in various species, the Registry furnishes valuable information to those responsible for preparing safety data sheets for chemical substances in the workplace. Chemical and production engineers can use the Registry to identify the hazards which may be associated with chemical intermediates in the development of final products, and thus can more readily select substitutes or alternate processes which may be less hazardous." (p. xiii)

"In this edition of the Registry, the editors intend to identify "all known toxic substances' which may exist in the environment and to provide pertinent data on the toxic effects from known doses entering an organism by any route described. Data may be used for the evaluation of chemical hazards in the environment, whether they be in the workplace, recreation area, or living quarters." (p. xiii)

"It must be reemphasized that the entry of a substance in the Registry does not automatically mean that it must be avoided. A

1971, and has been updated annually in boo
October 1977, quarterly revisions have been
microfiche.

This edition of the Registry contains 168,09
substances; 45,156 are names of different ch
associated toxicity data and 122,940 are syn
includes approximately 5,900 new chemical
appear in the 1979 Registry.(p. xi)

"The Registry's purposes are many, and it se
It is a single source document for basic toxic
other data, such as chemical identifiers and i
for the preparation of safety directives and h
chemical substances. The various types of to
literature citations provide researchers and o
scientists with an introduction to the toxicol
making their own review of the toxic hazard
easier. By presenting data on the lowest repo
effects by several routes of entry in various
furnishes valuable information to those resp
safety data sheets for chemical substances in
Chemical and production engineers can use
the hazards which may be associated with ch
the development of final products, and thus
substitutes or alternate processes which may

Some organizations, including health agenc
companies, have included the NIOSH Regis
with the listing of chemicals in their files to
information associated with those chemicals
language chemical names, a start has been m
rapid identification of substances produced i

"In this edition of the Registry, the editors in
known toxic substances" which may exist in
provide pertinent data on the toxic effects fr
entering an organism by any route described

"It must be reemphasized that the entry of a
Registry does not automatically mean that it

listing does mean, however, that the substance has the document potential of being harmful if misused, and care must be exercised to prevent tragic consequences." (p. xiv)

listing does mean, however, that the substan
potential of being harmful if misused, and ca
prevent tragic consequences.

Thus the Registry lists many substances that
everyday life and are in nearly every househ
States. One can name a variety of such dang
prescription and non-prescription drugs; foo
concentrates, sprays, and dusts; fungicides;
glazes, dyes; bleaches and other household c
and various solvents and diluents. The list is
chemicals have become an integral part of o

The RTECS 1978 printed edition may be purchased from the Superintendent of Documents, U.S. Government Printing Office (GPO), Washington, D.C. 20402 (202-783-3238) (Order GPO Stock No. 017-033-00346-7). The 1979 printed edition is anticipated to be issued in the summer of 1980.

The RTECS printed edition may be purchase
Superintendent of Documents, U.S. Governm
(GPO), Washington, DC 20402 (202-783-32

Some employers may also desire to subscribe to the quarterly update to the RTECS which is published in a microfiche edition. An annual subscription to quarterly microfiche may be purchased from the GPO (Order the "Microfiche Edition, Registry of Toxic Effects of Chemical Substances").

Some employers may desire to subscribe to
the RTECS which is published in a microfic
subscription to the quarterly microfiche may
GPO (Order the "Microfiche Edition, Regist
Chemical Substances").

Both the printed edition and the microfiche edition of RTECS are available for review at many university and public libraries throughout the country. The latest RTECS editions may also be examined at the OSHA Technical Data Center, Room N2439-Rear, United States Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210 (202-523-9700), or at any OSHA Regional or Area Office (See major city telephone directories under United States Government-Labor Department).

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examined at the OSHA Technical Data Cent
United States Department of Labor, 200 Co
N.W., Washington, DC 20210 (202-523-970
Regional or Area Office (See, major city tel
under United States Government - Labor De

1 On April 24, 1980, the Director of the Federal Register approved for incorporation by reference into 29 CFR 1910, the 1978 edition of the National Institute for Occupational Safety and Health Registry of Toxic Effects of Chemical Substances (the Registry). See CFR 1910.20(c)(11)(ii)).

[53 FR 38163, Sept. 29, 1988; 53 FR 49981
amended at 54 FR 24333, June 7, 1989; 55 I
1990; 61 FR 5507, Feb. 13, 1996; 61 FR 92
FR 31427, June 20, 1996]
