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## Final Regulation Agency Background Document

<b>Agency name</b>	Department of Labor and Industry
<b>Virginia Administrative Code (VAC) Chapter citation(s)</b>	16VAC15-60 – new regulation Chapter 60
<b>VAC Chapter title(s)</b>	Regulation Governing On-The-Job Training Programs or Other Training Programs
<b>Action title</b>	Promulgate New Regulation Governing On-The-Job Training Programs or Other Training Programs
<b>Date this document prepared</b>	October 31, 2023

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 19 (2022) (EO 19), any instructions or procedures issued by the Office of Regulatory Management (ORM) or the Department of Planning and Budget (DPB) pursuant to EO 19, the Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

### Brief Summary

*Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.*

The Governing On-The-Job Training Programs or Other Training Programs regulation became effective on May 1, 2021, as an Emergency Regulation which expired on October 31, 2022, and was extended until April 29, 2023. This regulation sets forth the standards required for any on-the-job training or other training program that an employer must establish if the employer wishes to pay its employees a reduced rate not less than the federal minimum wage or 75 percent of the Virginia minimum wage provided for in the regulation, whichever is greater, for the duration of the 90-day training period.

This chapter is promulgated pursuant to **§ 40.1-28.10 of the Code of Virginia**. Its purpose is to provide the standards required for any employer on-the-job training program or other training program established in accordance with § 40.1-28.10. This regulation is required by § 40.1-28.10.A.2. The goal of this regulation is to set forth the standards required for any on-the-job training or other training program that

an employer must establish if the employers would like to pay its employees the reduced rate not less than the federal minimum wage or 75 percent of the Virginia minimum wage provided for in the regulation, whichever is greater, rate for the duration of the 90-day training period.

### Acronyms and Definitions

*Define all acronyms used in this form, and any technical terms that are not also defined in the “Definitions” section of the regulation.*

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Commissioner – Commissioner of the Department of Labor and Industry  
DOLI - Department of Labor and Industry  
Department - Department of Labor and Industry  
General Assembly – Virginia General Assembly

### Statement of Final Agency Action

*Provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.*

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On December 6, 2023, the Department of Labor and Industry submitted the final regulation for executive branch review and public comment period in the Final Stage of the regulatory process.

### Mandate and Impetus

*List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding the mandate for this regulatory change, and any other impetus that specifically prompted its initiation. If there are no changes to previously reported information, include a specific statement to that effect.*

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The proposed regulation text was amended to add a definition section, 16VAC15-60.10, to the final regulation text as requested by the Department of Budget and Planning (DPB).

### Legal Basis

*Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency’s overall regulatory authority.*

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The Commissioner is authorized by Title 40.1-6(3) to “make such rules and regulations as may be necessary for the enforcement of this title...”

During the 2020 General Session, the General Assembly passed SB 7 and HB 395, amending VA Code §40.1-28.10, Minimum Wages. See <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+SB7> and <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=201&typ=bil&val=hb395>.

The amended Va. Code §40.1-28.10.A.2 specifically directs and authorizes the Commissioner of the Department of Labor and Industry to set regulations to provide standards for on-the job training or other training programs. The relevant language states; “Beginning May 1, 2021, every employer shall pay to each of his employees at a rate not less than the federal minimum wage or 75 percent of the Virginia minimum wage provided for in this section, whichever is greater. For the purposes of this subdivision “employee” means any person or individual who is enrolled in an established employer on-the-job or other training program for a period not to exceed 90 days which meets standards set by regulations adopted by the Commissioner.

Va. Code § 40.1-28.10. A.2 ; Va. Code § 40.1-6 (3 )

**Purpose**

*Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety, or welfare of citizens, and (3) the goals of the regulatory change and the problems it is intended to solve.*

This regulation is required by amended Va. Code §40.1-28-10.A.2 which directs the Commissioner of the Department of Labor and Industry to set regulations to provide standards for on-the job training or other training programs that can use the training wage provided in that law. The purpose of this final stage is to make the emergency regulation permanent as required by statute.

**Substance**

*Briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the “Detail of Changes” section below.*

This regulation sets forth the standards required for any on-the-job training or other training program that an employer must establish if the employers wish to pay its employees the reduced rate not less than the federal minimum wage or 75 percent of the Virginia minimum wage provided for in the regulation, whichever is greater, for the duration of the 90-day training period. The final regulation text was amended from the Emergency Regulation to clarify the regulation by adding a definition section and removing some confusing language.

**A. This chapter is promulgated pursuant to § 40.1-28.10 of the Code of Virginia. Its purpose is to provide the standards required for any employer on-the-job training program or other training program established in accordance with § 40.1-28.10.**

This language makes clear that the period for which the employee can be paid the training wage begins on the first day of their employment and runs for the statutory 90-day period. From May 1, 2021, until January 1, 2022, the lowest the employer could pay would be the federal minimum wage of \$7.25 per hour as 75 percent of the Virginia minimum wage of \$9.50 per hour would be less than that. An employee who is trained or substantially trained to do the job does not need the training and the employer should not be able to pay reduced wages simply by calling the first 90 days of employment a training period.

### Issues

*Identify the issues associated with the regulatory change, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, include a specific statement to that effect.*

Employers wishing to take advantage of paying a lower wage to their trainees will know whether they are able to take advantage of the provision. They will know their requirements and responsibilities in having such a training program. There will be some costs involved in having a written description of the training program. Employers who do not utilize the training wage will know that their competitors that do have one are not getting an undue competitive advantage. Employees will know if their employer is appropriately paying them at a reduced wage. The Department will be able to adequately monitor compliance with the training wage provision of the minimum wage law.

### Requirements More Restrictive than Federal

*List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any requirement of the regulatory change which is more restrictive than applicable federal requirements. If there are no changes to previously reported information, include a specific statement to that effect.*

There are no applicable federal requirements, or no requirements that exceed applicable federal requirements.

### Agencies, Localities, and Other Entities Particularly Affected

*List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any other state agencies, localities, or other entities that are particularly affected by the regulatory change. If there are no changes to previously reported information, include a specific statement to that effect.*

Other State Agencies Particularly Affected

**No state agencies are particularly affected by this regulation unless electing to benefit from the use of the on the job training wage program.**

Localities Particularly Affected

**No localities are particularly affected by this regulation unless electing to benefit from the use of the on the job training wage program.**

Other Entities Particularly Affected

**No other entities are particularly affected by this regulation unless electing to benefit from the use of the on the job training wage program.**

## Public Comment

*Summarize all comments received during the public comment period following the publication of the previous stage, and provide the agency’s response. Include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. If no comment was received, enter a specific statement to that effect.*

Commenter	Comment	Agency response
n/a	No comments received	n/a

## Detail of Changes Made Since the Previous Stage

*List all changes made to the text since the previous stage was published in the Virginia Register of Regulations and the rationale for the changes. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. \* Put an asterisk next to any substantive changes.*

Current chapter-section number	New chapter-section number, if applicable	New requirement from previous stage	Updated new requirement since previous stage	Change, intent, rationale, and likely impact of updated requirements
16VAC15-60-10		n/a	<u>“Approved apprenticeship program” means any program that has received approval from a federal or state apprenticeship agency.</u>	Definition of “approved apprenticeship program” was added to the definition section for clarification purposes. No new requirement or impact on substance of the regulation.
16VAC15-60-20.2.d		n/a	<u>Removal of 2. d. By relocating operations resulting in a loss of employment at a previous workplace; or</u>	This condition was removed because it was confusing and unnecessary. No new impact on the substance of the regulation.

## Detail of All Changes Proposed in this Regulatory Action

List all changes proposed in this action and the rationale for the changes. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. \* Put an asterisk next to any substantive changes.

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of updated requirements
16 VAC15-60	16VAC15-60-10 (Definition section added)	<p><u>Beginning May 1, 2021, an employee enrolled in an established on-the-job or other training program may, for the first 90 calendar days after start of employment, be paid a training wage of not less than 75% of the minimum hourly wage specified at § 40.1-28.10 of the Code of Virginia, provided the following conditions are met:</u></p> <p><u>1. The employee has been hired in and is receiving training for an occupation in which the employee has no previous similar or related experience;</u></p> <p><u>2. The employer is not utilizing the employee being paid the training wage in a manner that causes, induces, encourages, or assists any displacement or partial displacement of any currently employed worker, including:</u></p> <p><u>a. By displacing any previous recipient of the training wage;</u></p> <p><u>b. By reducing hours of a currently employed worker;</u></p> <p><u>c. By replacing a current or laid off employee with a trainee;</u></p> <p><u>d. By relocating operations resulting in a loss of employment at a previous workplace; or</u></p>	<p>This definition section below was added during the proposed stage at the request of the Department of Planning and Budget:</p> <p><b><u>16VAC15-60-10 Definitions</u></b>  <u>The following words and terms when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise:</u></p> <p><u>"Approved apprenticeship program" means any program that has received approval from a federal or state apprenticeship agency.</u></p> <p><u>"Employee" means any person or individual who is enrolled in an established employer on-the-job training program for a period not to exceed 90 days that meets standards set by this chapter.</u></p> <p><u>"Employer" means any individual, partnership, association, corporation, or business trust or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee. "Employer" includes the Commonwealth, any of its agencies, institutions, or political subdivisions, and any public body.</u></p> <p><u>"Good faith effort" means done honestly, objectively, and with no deliberate intent to defraud.</u></p> <p><u>"Limited responsibility" means job duties that are substantially less than the</u></p>

	<p>16VAC15-60.20.2.d</p>	<p><u>e. In a manner that replaces, supplants, competes with, or duplicates any approved apprenticeship program.</u></p> <p><u>3. The occupation for which the employee is receiving training must require a sufficient degree of technical skill to necessitate a learning period. The training must not be for the purpose of acquiring manual dexterity and high production speed in repetitive operations;</u></p> <p><u>4. Such a training program must involve either formal instruction or on-the-job training during a period when the learners are entrusted with limited responsibility and are under supervision or guidance;</u></p> <p><u>5. Such a training program shall describe in writing the nature and extent of the instruction and supervision provided;</u></p> <p><u>6. The employer makes a good faith effort to continue to employ the employee after the period of the training wage expires;</u></p> <p><u>7. The employer shall not hire the employee at the training wage unless there is a reasonable expectation that there will be employment, paying at or above the effective minimum wage, for the trainee upon the successful completion of the period of the training wage. The training wage shall not be applied to:</u></p> <p><u>a. Seasonal employees; or</u></p> <p><u>b. Temporary employees; and</u></p> <p><u>8. An employee can only undergo one on-the-job training program or other training program established in accordance with § 40.1-28.10 per employer.</u></p> <p><u>A. A change in employment classification or duties required by the employer of the employee would not allow an employer to place that employee in another on-the-job training program or other</u></p>	<p><u>expectations for a worker who has achieved a sufficient degree of technical skill and has completed a job training program.</u></p> <p><u>"Reasonable expectation" means a fair and sensible belief that something will happen.</u></p> <p><u>"Seasonal employee" means an employee in an occupation that can be carried out only at certain seasons or fairly definite periods of the year and that does not include such occupations as may be carried on through an entire year.</u></p> <p><u>"Similar or related experience" means knowledge or skill in a particular job or activity gained because the person has done that job or activity or a comparable job or activity for a meaningful period of time.</u></p> <p><u>"Sufficient degree of technical skill" means the ability to use the processes, practices, techniques, or tools of a particular area of expertise enough to meet the purpose and requirements of the job.</u></p> <p><u>"Temporary employee" means an employee supplied to a host employer and paid by a staffing agency whether or not the job is actually temporary.</u></p> <p><del><u>2.d. By relocating operations resulting in a loss of employment at a previous workplace; or</u></del></p> <p>This condition was removed because it was confusing and unnecessary. No new impact on the substance of the regulation.</p>
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		<p><u>training program established in accordance with § 40.1-28.10.</u></p> <p><u>b. An employee may be placed in another on-the-job training program or other training program established in accordance with § 40.1-28.10 with a subsequent employer so long as placing that employee in the on-the-job training program or other training program established in accordance with § 40.1-28.10 would not violate subdivision 1 of this subsection.</u></p>	
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