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## Proposed Regulation Agency Background Document

<b>Agency name</b>	Virginia Department of Labor and Industry/Safety and Health Codes Board
<b>Virginia Administrative Code (VAC) citation(s)</b>	16 VAC25-60-30, 16 VAC25-60-90, 16VAC25-60-110, 16VAC25-60-120, 16VAC25-60-130, 16VAC25-60-140, 16VAC25-60-150, 16VAC25-60-245, and 16VAC25-60-260
<b>Regulation title(s)</b>	Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program
<b>Action title</b>	Proposed Regulation to Amend the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program
<b>Date this document prepared</b>	March 24, 2016

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.*

The Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program is the promulgated rules and procedures under which the Commonwealth carries out its obligations, as prescribed by Title 40.1 of the Code of Virginia and the Virginia State Plan for Occupational Safety and Health, as approved by the U.S. Department of Labor.

Changes proposed include:

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

Clarification of anti-retaliation safeguards for public sector employees, 16VAC25-60-30. Allowing Commonwealth’s Attorney to act on behalf of the Commissioner for public sector employers, 16VAC25-60-30.F. Allowing the Commissioner to petition the Cabinet Secretary and then the Executive regarding resolution of anti-retaliation violations with a state agency, 16VAC25-60-30.G.

Virginia Freedom of Information Act requirements in regard to the Voluntary Protection Program, 16VAC25-60-90.

Change in terminology from occupational discrimination or anti-retaliation to "whistleblower". Clarifies that the Commissioner can request penalties or fines for occupational discrimination or anti-retaliation cases at the litigation stage, 16VAC25-60-110.

Change in terminology to reflect that the Commissioner's authority to take and preserve testimony and administer oaths is an administrative subpoena, 16VAC25-60-245.

Clarifying that the “burden of proof” in VOSH court cases is by a “preponderance of the evidence”, 16VAC25-60-260. Clarifying that the burden for proving an affirmative defense to a citation lies with the employer, 16VAC25-60-260.

## Acronyms and Definitions

*Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the “Definition” section of the regulations.*

“ARM” means Administrative Regulations Manual;

“MUTCD” means Manual on Uniform Traffic Control Devices which is a manual published by the Federal Department of Transportation and incorporated by reference as an OSHA regulation;

“OSHA” means Occupational Safety and Health Administration

“VDOT” means Virginia Department of Transportation;

“VOSH” means Virginia Occupational Safety and Health;

## Legal basis

*Please identify the state and/or federal legal authority to promulgate this proposed regulation, including:*

1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable; and 2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person's overall regulatory authority.

The Safety and Health Codes Board is authorized by Title 40.1-22(5) 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 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."

## Purpose

*Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Describe the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.*

The purpose of amending the Administrative Regulation is to make certain substantive, procedural and clarifying changes that reflect current VOSH policy and protect and promote the safety and health of employees in the workplace:

1. Amendment to 16VAC25-60-130 allows VOSH to enforce the Virginia Department of Transportation (VDOT) Work Area Protection Manual in lieu of the federal Manual on Uniform Traffic Control Devices (Part VI of the MUTCD, 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition) in any contract for construction, repair or maintenance between either the Commonwealth or one of its local governments and an employer, when such contract provides that the parties assure compliance with the VDOT Work Area Protection Manual. A housekeeping change to renumber all paragraphs in §§16VAC25-60-120 through 16VAC25-60-150 correctly is also proposed here.

Although the federal MUTCD has been adopted by OSHA and VOSH in §§1926.200 through

1926.202, a significant amount of the language provisions therein are merely recommended and non-compulsory, i.e., the terms “should” or “may” are used rather than the mandatory “must” or “shall” for desired activities and procedures, and are therefore not enforceable in a compliance setting. To mitigate this problem, VDOT has adopted its own Work Area Protection Manual which contains fewer “shoulds” and “mays”. VDOT routinely specifies language in its contracts with employers that requires employer compliance with the VDOT Work Area Protection Manual.

2. Amendment to 16VAC25-60-30.D clarifies whistleblower anti-retaliation safeguards for public sector employees other than the Commonwealth and its agencies, e.g., political subdivisions such as city and county governments.

Va. Code §40.1-2.1 provides that:

**“The provisions of this title and any rules and regulations promulgated pursuant thereto shall not apply to the Commonwealth or any of its agencies, institutions, or political subdivisions, or any public body, unless, and to the extent that, coverage is extended by specific regulation of the Commissioner or the Safety and Health Codes Board.** The Commissioner is authorized to establish and maintain an effective and comprehensive occupational safety and health program applicable to employees of the Commonwealth, its agencies, institutions, political subdivisions, or any public body. Such program shall be subject to any State plan submitted to the federal government for State enforcement of the Federal Occupational Safety and Health Act of 1970 (P.L. 91-596), or any other regulation promulgated under Title 40.1. The Commissioner shall establish procedures for enforcing the program which shall include provisions for fair hearings including judicial review and sanctions to be applied for violations.” *(Emphasis added.)*

The VOSH ARM defines the term "public employer" in §16VAC25-60-10 as:

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

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

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

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

Section 16VAC25-60-30.E provides that the following sections of the Code of Virginia apply to public employers other than the Commonwealth and its agencies, and are actions that would need the assistance of local Commonwealth's Attorneys:

- a. Commissioner's authority to seek injunctive relief in certain situations, §40.1-49.4.F.
  - b. Commissioner's authority to obtain administrative search warrants under §§40.1-49.9 through -49.12 of the *Code of Virginia*.
4. Amendment to 16VAC25-60-30.G clarifies that when seeking to resolve whistleblower anti-retaliation cases involving the Commonwealth and its agencies, the Commissioner will petition the appropriate state official in a manner similar to that specified in 16VAC25-60-300.B, which outlines the process for resolving failure to abate issues involving the Commonwealth and its agencies.

Section 16VAC25-60-300.B provides:

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

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

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

6. Amendment to 16VAC25-60-110 specifies that occupational safety and health anti-discrimination cases will also be referred to as "whistleblower" cases. This terminology change reflects changes implemented by federal OSHA to refer to employees who allege discriminatory practices by an employer when the employees have engaged in activities protected by §11(c) of the OSH Act of 1970, as "whistleblowers".
7. Amendment to 16VAC25-60-110 clarifies that the Commissioner may request penalties that would be paid to the employee for occupational whistleblower discrimination or anti-retaliation cases at the litigation stage pursuant to §40.1-51.2:2.

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

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

8. Amendment to 16VAC25-60-245 clarifies that the Commissioner's authority in Subdivision 4 of § 40.1-6 of the Code of Virginia to take and preserve testimony, examine witnesses and administer oaths constitutes an administrative subpoena power.
9. Amendment to 16VAC25-60-260 clarifies that the Commissioner's burden of proving the basis for a VOSH citation, penalty and order of abatement is by a "preponderance of the evidence". While the Virginia Court of Appeals has ruled that the burden of proof for the Commissioner in a VOSH case is by a preponderance of the evidence (*Nat'l Coll. of Bus. & Tech., Inc. v. Davenport*, 57 Va. App. 677, 685, 705 S.E. 2d 519, 523 (2011)), the issue has not been definitively ruled on by the Virginia Supreme Court.
10. Amendment to 16VAC25-60-260 clarifies that the burden for proving an affirmative defense to a citation lies with the defendant. While it is generally accepted in case law that the burden for proving an affirmative defense to an OSHA/VOSH citation lies with the employer, it is not conclusively so. For instance the Fourth Circuit Court of Appeals has ruled that the burden of proving unforeseeable and unpreventable employee misconduct lies with the government (*Ocean Electric Corp. v. Sec of Labor*, 594 F. 2d 396 (4<sup>th</sup> Cir. 1979); and *L.R. Willson & Sons, Inc. v. Occupational Safety and Health Review Comm'n*, 134 F. 3d 1235 (4<sup>th</sup> Cir.), cert denied, 525 U. S. 962 (1998). While the Virginia Court of Appeals has ruled that the burden of proof on the issue of employee misconduct lies with the employer in Virginia (*Magco of Maryland, Inc., v. Barr*, 33 Va. App. 78, 531 S. E. 2d 614 (2000)), the issue has not been definitively ruled on by the Virginia Supreme Court.

## Substance

*Please 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 proposed amendment addresses certain issues in regard to the Administrative Regulation of the VOSH Program:

Substantive changes proposed include:

- § Allowing VOSH to enforce the requirements of the Virginia Department of Transportation (VDOT) Work Area Protection Manual in lieu of the federal Manual on Uniform Traffic Control Devices, i.e., Part VI of the MUTCD, 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition, in any contract for construction, repair, or maintenance between either the Commonwealth or one of its local governments and an employer, where such contract stipulates employer compliance with the VDOT Work Area Protection Manual.
- § Clarification of anti-retaliation safeguards for public sector employees, *16VAC25-60-30*. Allowing Commonwealth's Attorney to act on behalf of the Commissioner for public sector employers, *16VAC25-60-30.F*. Allowing the Commissioner to petition the Cabinet Secretary and then the Executive regarding resolution of anti-retaliation violations with a state agency, *16VAC25-60-30.G*.
- § Virginia Freedom of Information Act requirements in regard to the Voluntary Protection Program, *16VAC25-60-90*.
- § Change in terminology from occupational discrimination or anti-retaliation to "whistleblower". Clarifies that the Commissioner can request penalties or fines for occupational discrimination or anti-retaliation cases at the litigation stage, *16VAC25-60-110*.
- § Change in terminology to reflect that the Commissioner's authority to take and preserve testimony and administer oaths is an administrative subpoena, *16VAC25-60-245*.
- § Clarifying that the "burden of proof" in VOSH court cases is by a "preponderance of the evidence", *16VAC25-60-260*. Clarifying that the burden for proving an affirmative defense to a citation lies with the employer, *16VAC25-60-260*.

## Issues

*Please identify the issues associated with the proposed regulatory action, 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, please indicate.*

The amendment to 16VAC25-60-130, which allows VOSH to enforce the Virginia Department of Transportation (VDOT) Work Area Protection Manual will subject employers to the potential for VOSH citations and penalties should they violate requirements in the VDOT Manual. However, by the terms of the regulation, such violations and penalties will only be issued in situations where the employer violates a contract freely and voluntarily entered into with a public sector body. Since such an employer is bound

contractually to comply with the VDOT Work Area Protection Manual and incur the costs associated with compliance, the proposed regulation will place no additional financial burden on the employer for compliance with the VDOT requirements.

Employers could accrue increased costs in cases where the commissioner files a complaint in Circuit Court alleging that an employer discriminated against a whistleblower employee should the commissioner request and the court grant additional penalties or fines under its authority to restrain violations and order appropriate relief. The fiscal impact is very limited as VOSH whistleblower court cases average less than one per year.

Employees should be provided with additional safety and health protections in construction work zones as the amendment to 16VAC25-60-130 will permit VOSH to enforce the VDOT Work Area Protection manual in certain situations in lieu of enforcing §§1926.200 through 1926.202 which incorporate by reference Part VI of the Manual of Uniform Traffic Control Devices (MUTCD), 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition.

Employees should benefit from the amendment to 16VAC25-60-110 which clarifies that the Commissioner may request penalties or fines that would be paid to the employee for occupational whistleblower discrimination or anti-retaliation cases at the litigation stage, pursuant to §40.1-51.2:2. Although litigated cases are infrequent, the possibility that a court could restrain violations by adding additional fines or penalties should serve to deter discriminatory conduct by employers.

No adverse impacts to employees are anticipated from the adoption of the proposed amendments.

Other than training DOLI employees on the changes to the regulation, no additional fiscal or other programmatic impacts are anticipated for the department from the adoption of the proposed amendments.

### Requirements more restrictive than federal

*Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.*

The amendment to 16VAC25-60-130, which allows VOSH to enforce the Virginia Department of Transportation (VDOT) Work Area Protection Manual will subject employers to the potential for VOSH citations and penalties should they violate requirements in the VDOT Manual. This could occur in certain situations where the MUTCD would not have been enforceable because the provisions in that document might constitute recommendations and not mandatory requirements. However, by the terms of the regulation, such violations and penalties will only be issued in situations where the employer violates a contract freely and voluntarily entered into with a public sector body. Since such an employer is bound contractually to comply with the VDOT Work Area Protection Manual and incur the costs associated with compliance, the proposed regulation will place no additional financial burden on the employer for compliance with the VDOT requirements. Adoption of the amendment will allow VOSH to protect employees from situations identified by VDOT as potentially hazardous/dangerous in their Work Area Protection Manual.

### Localities particularly affected



*Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.*

There are no localities that are particularly affected by the proposed regulation.

### Public participation

*Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.*

In addition to any other comments, the Safety and Health Codes Board is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the board is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments for the public comment file may do so by mail, email or fax to Mr. Jay Withrow, Director, Legal Support, VPP, ORA, OPP, and OWP, Department of Labor and Industry, Main Street Centre, 600 East Main Street, Suite 207, Richmond, VA 23219; (804) 786-9873; (804) 786-8184 (fax); [withrow.jay@dol.gov](mailto:withrow.jay@dol.gov) Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at: <http://www.townhall.virginia.gov>. Written comments must include the name and address of the commenter. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

A public hearing will be held following the publication of this stage and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<http://www.townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://www.virginia.gov/connect/commonwealth-calendar>). Both oral and written comments may be submitted at that time.

### Economic impact

*Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.*

<p><b>Projected cost to the state to implement and enforce the proposed regulation, including:</b>  <b>a) fund source / fund detail; and</b>  <b>b) a delineation of one-time versus on-going expenditures</b></p>	<p>Other than training DOLI employees on the changes to the regulation, no additional fiscal or other programmatic impacts are anticipated for the Department as a result of the adoption of the proposed amendments.</p>
<p><b>Projected cost of the new regulations or changes to existing regulations on localities.</b></p>	<p>No significant cost is anticipated for any locality.</p>
<p><b>Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.</b></p>	<p>Private and public sector employers and employees that fall within VOSH jurisdiction.</p>

	<p>Employers and employees involved in any contract for construction, repair, or maintenance between either the Commonwealth or one of its local governments where such contract stipulates employer compliance with the VDOT Work Area Protection Manual.</p>
<p><b>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected.</b> Small business means a business entity, including its affiliates, that:  a) is independently owned and operated and;  b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>The Virginia State Plan applies to all public and private sector places of employment in the state, with the exception of federal workers, the United States Postal Service, private sector maritime, federal military facilities, and other federal enclaves where the state has ceded jurisdiction to the federal government.</p> <p>VOSH jurisdiction covers approximately 234,644 establishments employing 3,685,797 employees. Source: Virginia Employment Commission, Quarterly Census of Employment and Wages, Fourth Quarter, 2014</p>
<p><b>All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs including:</b>  a) the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; and  b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</p>	<p>The amendment to 16VAC25-60-130, which allows VOSH to enforce the Virginia Department of Transportation (VDOT) Work Area Protection Manual will subject employers to the potential for VOSH citations and penalties should they violate requirements in the Manual. However, by the terms of the regulation, such violations and penalties will only be issued in situations where the employer violates a contract freely and voluntarily entered into with a public sector body. Since such an employer is bound contractually to comply with the VDOT Work Area Protection Manual and incur the costs associated with compliance, the proposed regulation will place no additional financial burden on the employer for compliance with the VDOT requirements.</p> <p>VOSH estimates an annual cost in penalties of approximately \$12,880. Estimate based on 14 violations cited in 12 inspections with an average</p>

	<p>current serious penalty of \$920. Estimate includes 100% increase in inspections and penalties over federal fiscal year statistics for FFY 2015.</p> <p>Employers could accrue increased costs in cases where the Commissioner files a complaint in Circuit Court alleging that an employer discriminated against a whistleblower employee should the Commissioner request and the Court grant additional penalties or fines under its authority to restrain violations and order appropriate relief. The fiscal impact is very limited as VOSH Whistleblower court cases average less than one per year.</p> <p>VOSH estimates an annual cost in penalties of approximately \$7,000 (one litigation case per year with estimated one penalty imposed by court – the maximum penalty for serious and other than serious VOSH violations is \$7,000, Va. Code §§40.1-49.4.H and -49.4.I).</p> <p>No additional impacts on employers are anticipated.</p>
<p><b>Beneficial impact the regulation is designed to produce.</b></p>	<p>Proposed regulation will allow VOSH to enforce the requirements of the Virginia Department of Transportation (VDOT) Work Area Protection Manual, in lieu of the federal Manual on Uniform Traffic Control Devices, i.e., Part VI of the MUTCD, 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition, in any contract for construction, repair, or maintenance between either the Commonwealth or one of its local governments and an employer, where such contract stipulates employer compliance with the VDOT Work Area Protection Manual. VDOT routinely specifies language in its contracts with employers that requires employer compliance with the VDOT Work Area Protection Manual. Adoption of the amendment will allow VOSH to protect employees from situations identified by VDOT as potentially hazardous/dangerous in their Work Area Protection Manual.</p> <p>Clarifying Virginia Freedom of Information Act requirements in regard to the Voluntary Protection Program, 16VAC25-60-90 will provide</p>

	<p>transparency to the program.</p> <p>Clarifying that the Commissioner can request penalties or fines for occupational discrimination or anti-retaliation cases at the litigation stage, <i>16VAC25-60-110</i> may provide deterrent effect to those employers who consider discriminating against employees for engaging in safety and health activities protected by VOSH laws and regulations.</p> <p>To the extent that the proposed changes encourage employers to comply with VOSH laws and regulations which in turn reduce the number of occupational safety and health injuries suffered by working men and women in Virginia, both employers and employees will benefit.</p> <p>The cost of workplace accidents is devastating to families and co-workers of victims and places an enormous burden on the viability of those businesses that suffer a tragic workplace accident. The human toll is the loss of loved ones, parents, children, close friends, breadwinners and may mean financial ruin for families.</p> <p>For businesses, many times a serious injury or fatality is the primary cause of bankruptcy or closure. In addition to the obvious direct costs, workers' compensation and insurance costs, downtime, investigation, training, property damage, and legal fees can be devastating, not to mention the lasting financial costs to the family and overall costs to our society and our economy. A safe and healthy workplace becomes essential in keeping families whole, managing costs and growing as a successful employer.</p> <p>Employers that take proactive steps to improve safety and health protections for employees can realize significant savings and avoided costs associated with workplace injuries and illnesses. In 2015, the National Safety Council reported that the average cost of a medically consulted occupational injury in 2013 was \$42,000. In 2013, the Washington Post reported that the</p>
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	average net profit margin for all U.S. companies was 8.2 percent. With a net profit margin of 8.2%, a business would need to generate \$512,195 in new revenues to simply pay for the cost of that single injury.
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### Alternatives

*Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.*

There are no known alternatives to these amendments which are necessary to comply with changes to statutory law or that address procedural or other administrative changes that have occurred since the Administrative Regulations Manual was last revised.

### Regulatory flexibility analysis

*Pursuant to § 2.2-4007.1B of the Code of Virginia, please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.*

The proposed regulation does not contain any reporting requirements. The additional compliance requirements anticipated with allowing VOSH to enforce the VDOT Work Area Protection Manual place no additional practical burden on VDOT contractors since VDOT routinely specifies language in its contracts with employers that requires compliance with the VDOT Work Area Protection Manual. These contracts are bid on by employers and voluntarily entered into.

### Periodic review and small business impact review report of findings

*If you are using this form to report the result of a periodic review/small business impact review that was announced during the NOIRA stage, please indicate whether the regulation meets the criteria set out in Executive Order 17 (2014), e.g., is necessary for the protection of public health, safety, and welfare, and is clearly written and easily understandable. In addition, as required by 2.2-4007.1 E and F, please include a discussion of the agency’s consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation from the public; (3) the complexity of the regulation; (4) the extent to the which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.*

These proposed amendments are not the result of a periodic review/small business impact review that was announced during the NOIRA stage.

### Public comment

*Please summarize all comments received during the public comment period following the publication of the NOIRA, and provide the agency response.*

Commenter	Comment	Agency response

There were no comments received during the initial public comment period.

### Family impact

*Please assess the impact of this regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.*

To the extent that the proposed changes deter employers from violating VOSH laws and regulations which in turn reduce the number of occupational safety and health injuries suffered by working men and women in Virginia, families will be positively impacted.

### Detail of changes

*Please list all changes that are being proposed and the consequences of the proposed changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action. If the proposed regulation is intended to replace an emergency regulation, please follow the instructions in the text following the three chart templates below.*

For changes to existing regulation(s), please use the following chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
16VAC25-60-30		Part II General Provisions  16VAC25-60-30. Applicability to public employers. ....	Part II General Provisions  16VAC25-60-30. Applicability to public employers. ....

		<p>D. Section 40.1-51.2:2.A of the Code of Virginia shall apply to public employers except that the commissioner shall not bring action in circuit court in the event that a voluntary agreement cannot be obtained.</p> <p>....</p> <p>E. Sections 40.1-49.4 F, 40.1-49.9, 40.1-49.10, 40.1-49.11, 40.1-49.12, and 40.1-</p>	<p>D. Section 40.1-51.2:2.A of the Code of Virginia shall apply to <del>public employers</del> <u>the Commonwealth and its agencies</u> except that the commissioner shall not bring action in circuit court in the event that a voluntary agreement cannot be obtained.</p> <p><u>Rationale:</u> Amendment to 16VAC25-60-30.D clarifies whistleblower anti-retaliation safeguards for public sector employees other than the Commonwealth and its agencies, e.g., political subdivisions such as city and county governments.</p> <p>The VOSH ARM defines the term "public employer" in §16VAC25-60-10 as:</p> <p>"Public employer" means the Commonwealth of Virginia, including its agencies, authorities, or instrumentalities or any political subdivision or public body.</p> <p>The current wording of §16VAC25-60-30.D applies §40.1-51.2:2.A of the Code of Virginia to all public employers, i.e., both state and local government, but states that the Commissioner shall not bring an action in Circuit Court for a violation involving a public employer. This language appears to conflict with paragraph §16VAC25-60-30.E's comprehensive application of §40.1-51.2:2. of the Code of Virginia to political subdivisions or public bodies, which allows the Commissioner to litigate such a violation in Circuit Court.</p> <p>Prior to proposing this amendment, it has been the Department's position that the right of the Commissioner to litigate a violation against a political subdivision or public body in §16VAC25-60-30.E, takes precedence over §16VAC25-60-30.D, because paragraph E. is the more specific provision in that it specifically applies §40.1-51.2:2 to a subset of the broader category of the term "public employer". The proposed amendment will eliminate this apparent conflict.</p> <p>....</p> <p>E. Sections <del>40.1-7</del>, 40.1-49.4 F, 40.1-49.9, 40.1-49.10, 40.1-49.11, 40.1-49.12, and 40.1-51.2:2 of the Code of Virginia</p>
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		<p>51.2:2 of the Code of Virginia shall apply to public employers other than the Commonwealth and its agencies.</p> <p>....</p> <p>G. If the commissioner is unable to obtain a voluntary agreement to resolve a violation of § 40.1-51.2:1 of the Code of Virginia by the Commonwealth or one of its agencies, the Commissioner of Labor and Industry shall petition for redress in the same manner as provided in this chapter.</p>	<p>shall apply to public employers other than the Commonwealth and its agencies.</p> <p><u>Rationale:</u> Amendment to 16VAC25-60-30.E applies §40.1-7 of the Code of Virginia to public employers other than the Commonwealth and its agencies, which will allow Commonwealth's Attorneys to act on behalf of the Commissioner in certain situations involving those public sector employers.</p> <p>Section 16VAC25-60-30.E provides that the following sections of the Code of Virginia apply to public employers other than the Commonwealth and its agencies, and are actions that would need the assistance of local Commonwealth's Attorneys:</p> <p>a. §40.1-49.4.F - Commissioner's authority to seek injunctive relief in certain situations.</p> <p>b. Commissioner's authority to obtain administrative search warrants under §§40.1-49.9 through -49.12 of the Code of Virginia.</p> <p>....</p> <p>G. If the commissioner is unable to obtain a voluntary agreement to resolve a violation of § 40.1-51.2:1 of the Code of Virginia by the Commonwealth or one of its agencies, the Commissioner of Labor and Industry shall petition for redress in the same manner as provided in <del>this chapter</del> <u>16VAC25-60-300.B</u>.</p> <p><u>Rationale:</u> Amendment to 16VAC25-60-30.G. clarifies that when seeking to resolve whistleblower anti-retaliation cases involving the Commonwealth and its agencies, the Commissioner will petition the appropriate state official in a manner similar to that specified in 16VAC25-60-300.B, which outlines the process for resolving failure to abate issues involving the Commonwealth and its agencies.</p> <p>Section 16VAC25-60-300.B provides:          "B. Whenever the Commonwealth or any of its agencies fails to abate a violation</p>
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<p>16VAC25-90</p>		<p>16VAC25-90. Release of information and disclosure pursuant to requests under the Virginia Freedom of Information Act and subpoenas.                  ....                  I. The commissioner, in response to a subpoena, order, or other demand of a court or other authority in connection with a proceeding to which the department is</p>	<p>within the time provided in an appropriate final order, the Commissioner of Labor and Industry shall normally petition for redress as follows: For violations in the Department of Law, to the Attorney General; for violations in the Office of the Lieutenant Governor, to the Lieutenant Governor; for violations otherwise in the executive branch, to the appropriate cabinet secretary; for violations in the State Corporation Commission, to a judge of the commission; for violations in the Department of Workers' Compensation, to the Chairman of the Workers' Compensation Commission; for violations in the legislative branch of government, to the Chairman of the Senate Committee on Commerce and Labor; for violations in the judicial branch, to the chief judge of the circuit court or to the Chief Justice of the Supreme Court. Where the violation cannot be timely resolved by this petition, the commissioner shall bring the matter to the Governor for resolution.”</p> <p>16VAC25-90. Release of information and disclosure pursuant to requests under the Virginia Freedom of Information Act and subpoenas.                  ....                  I. <u>All information gathered through participation in voluntary protection programs of the department pursuant to §40.1-49.13 of the Code of Virginia shall be withheld from disclosure except for statistical data which does not identify individual employers and the following:</u>                  1. <u>Participant applications and amendments, onsite evaluation reports, and annual self-evaluations;</u>                  2. <u>Agency staff correspondence containing recommendations to the Commissioner, approval letters, notifications to compliance staff removing the participants from the general inspection list, and related formal correspondence.</u></p> <p>±J. The commissioner, in response to a subpoena, order, or other demand of a court or other authority in connection with a proceeding to which the department is not a party, shall not disclose any information or produce any material</p>
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<p>16VAC25-60-110</p>		<p>not a party, shall not disclose any information or produce any material acquired as part of the performance of his official duties or because of his official status without the approval of the Commissioner of Labor and Industry.</p> <p>J. The commissioner shall disclose information and statistics gathered pursuant to the enforcement of Virginia's occupational safety and health laws, standards, and regulations where it has been determined that such a disclosure will serve to promote the safety, health, and welfare of employees. Any person requesting disclosure of such information and statistics should include in his written request any information that will aid the commissioner in this determination.</p> <p>16VAC25-60-110. Whistleblower discrimination;</p>	<p>acquired as part of the performance of his official duties or because of his official status without the approval of the Commissioner of Labor and Industry.</p> <p><del>J.K.</del> The commissioner shall disclose information and statistics gathered pursuant to the enforcement of Virginia's occupational safety and health laws, standards, and regulations where it has been determined that such a disclosure will serve to promote the safety, health, and welfare of employees. Any person requesting disclosure of such information and statistics should include in his written request any information that will aid the commissioner in this determination.</p> <p><u>Rationale:</u> Amendment to 16VAC25-60-90 clarifies Virginia Freedom of Information Act (FOIA) requirements in regard to the Voluntary Protection Program, §40.1-49.13 of the Code of Virginia. The proposed amendment tracks federal OSHA's FOIA provisions for the federal VPP and provides that the following documents are releasable pursuant to an FOIA request:</p> <ul style="list-style-type: none"> <li>• Participant applications and amendments;</li> <li>• Onsite evaluation reports;</li> <li>• Annual self-evaluations;</li> <li>• Agency staff correspondence containing recommendations to the Commissioner;</li> <li>• Approval letters; and</li> <li>• Notifications to compliance staff removing the participants from the general inspection list, Related formal correspondence.</li> </ul> <p>Housekeeping changes proposed to renumber paragraphs after new paragraph was inserted.</p> <p>16VAC25-60-110. <u>Whistleblower discrimination</u>; <del>Discrimination</del>; discharge or retaliation; remedy for retaliation.</p>
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		<p>discharge or retaliation; remedy for retaliation. .... A. .... Employee activities, protected by § 40.1-51.2:1 of the Code of Virginia include, but are not limited to:</p>	<p>....  Employee <u>whistleblower</u> activities, protected by § 40.1-51.2:1 of the Code of Virginia include, but are not limited to: ....  <u>C. Section 40.1-51.2:2.A provides that the Commissioner shall bring an action in Circuit Court when it is determined that a violation of 40.1-51.2:1 has occurred and attempts at conciliating a voluntary agreement could not be obtained. Section 40.1-51.2:2.A further provides that the court "...shall have jurisdiction, for cause shown, to restrain violations and order appropriate relief...."</u> The court's authority to "restrain violations and order appropriate relief" includes the ability to issue penalties or fines to the employer which would be payable to the employee. In determining the appropriate level of penalties or fines, the court may look to §§40.1-49.4.G, H, I and J.  <u>Rationale:</u> Amendment to 16VAC25-60- 110 specifies that occupational safety and health anti-discrimination cases will also be referred to as "whistleblower" cases. This terminology change reflects changes implemented by federal OSHA to refer to employees who allege discriminatory practices by an employer when the employees have engaged in activities protected by §11(c) of the OSH Act of 1970, as "whistleblowers". It also clarifies that the Commissioner can request penalties or fines for occupational discrimination or anti-retaliation cases at the litigation stage pursuant to §40.1- 51.2:2.  Section 40.1-51.2:1 prohibits employers from discriminating against employees who have exercised their safety and health rights under Title 40.1. Section 40.1-51.2:2.A provides that the Commissioner shall bring an action in Circuit Court when it is determined that a violation of 40.1-51.2:1 has occurred and attempts at conciliation have failed.</p>
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<p>16VAC25-60-120</p>		<p>Part III Occupational Safety and Health Standards</p> <p>16VAC25-60-120. General Industry Standards</p> <p>The occupational safety or health standards adopted as rules or regulations by the board either directly or by reference, from 29 CFR Part 1910 shall apply by their own terms to all employers and employees at places of employment covered by the Virginia State Plan for Occupational Safety and Health.</p> <p>The employer shall comply with the manufacturer's specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment, unless specifically superseded by a more stringent corresponding requirement in 29 CFR Part 1910. The use of any machinery, vehicle, tool, material or equipment that is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be identified by the employer as unsafe by</p>	<p>Section §40.1-51.2:2.A further provides that the court "...shall have jurisdiction, for cause shown, to restrain violations and order appropriate relief...."</p> <p>The amendment clarifies that the court's authority to "restrain violations and order appropriate relief" includes the ability to issue penalties or fines to the employer which would be payable to the employee.</p> <p>Part III Occupational Safety and Health Standards</p> <p>16VAC25-60-120. General Industry Standards</p> <p><u>A.</u> The occupational safety or health standards adopted as rules or regulations by the board either directly or by reference, from 29 CFR Part 1910 shall apply by their own terms to all employers and employees at places of employment covered by the Virginia State Plan for Occupational Safety and Health.</p> <p><u>B.</u> The employer shall comply with the manufacturer's specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment, unless specifically superseded by a more stringent corresponding requirement in 29 CFR Part 1910. The use of any machinery, vehicle, tool, material or equipment that is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable or be physically removed from its place of use or operation.</p> <p><u>Rationale:</u> A housekeeping change to renumber all paragraphs in §16VAC25-60-120 correctly is proposed here.</p>
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<p>16VAC25-60-130</p>		<p>tagging or locking the controls to render them inoperable or be physically removed from its place of use or operation.</p> <p>16VAC25-60-130. Construction Industry standards.</p> <p>The occupational safety or health standards adopted as rules or regulations by the Virginia Safety and Health Codes Board either directly, or by reference, from 29 CFR Part 1926 shall apply by their own terms to all employers and employees engaged in either construction work or construction related activities covered by the Virginia State Plan for Occupational Safety and Health.</p> <p>The employer shall comply with the manufacturer's specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment, unless specifically superseded by a more stringent corresponding requirement in 29 CFR Part 1926. The use of any machinery, vehicle, tool, material or equipment that is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable or be physically removed from its place of use or operation.</p> <p>1. For the purposes of the applicability of such Part 1926 standards, the key criteria utilized to make such</p>	<p>16VAC25-60-130. Construction Industry standards.</p> <p><u>A.</u> The occupational safety or health standards adopted as rules or regulations by the Virginia Safety and Health Codes Board either directly, or by reference, from 29 CFR Part 1926 shall apply by their own terms to all employers and employees engaged in either construction work or construction related activities covered by the Virginia State Plan for Occupational Safety and Health.</p> <p><u>B.</u> The employer shall comply with the manufacturer's specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment, unless specifically superseded by a more stringent corresponding requirement in 29 CFR Part 1926. The use of any machinery, vehicle, tool, material or equipment that is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable or be physically removed from its place of use or operation.</p> <p><u>4.C.</u> For the purposes of the applicability of such Part 1926 standards, the key criteria utilized to make such a decision shall be the activities taking place at the worksite, not the primary business of the</p>
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		<p>a decision shall be the activities taking place at the worksite, not the primary business of the employer. Construction work shall generally include any building, altering, repairing, improving, demolishing, painting or decorating any structure, building, highway, or roadway; and any draining, dredging, excavation, grading or similar work upon real property. Construction also generally includes work performed in traditional construction trades such as carpentry, roofing, masonry work, plumbing, trenching and excavating, tunneling, and electrical work. Construction does not include maintenance, alteration or repair of mechanical devices, machinery, or equipment, even when the mechanical device, machinery or equipment is part of a pre-existing structure.</p> <p>2. Certain standards of 29 CFR Part 1910 have been determined by federal OSHA to be applicable to construction and have been adopted for this application by the board.</p>	<p>employer. Construction work shall generally include any building, altering, repairing, improving, demolishing, painting or decorating any structure, building, highway, or roadway; and any draining, dredging, excavation, grading or similar work upon real property. Construction also generally includes work performed in traditional construction trades such as carpentry, roofing, masonry work, plumbing, trenching and excavating, tunneling, and electrical work. Construction does not include maintenance, alteration or repair of mechanical devices, machinery, or equipment, even when the mechanical device, machinery or equipment is part of a pre-existing structure.</p> <p><u>D. The employer shall comply with the Virginia Department of Transportation (VDOT) Work Area Protection Manual in lieu of the federal Manual on Uniform Traffic Control Devices (Part VI of the MUTCD, 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition - referenced in 1926.200 through 1926.202), when working under any contract for construction, repair or maintenance between the employer and the Commonwealth, its agencies, authorities, or instrumentalities, or any political subdivision or public body; when such contract stipulates employer compliance with the VDOT Work Area Protection Manual in effect at the time of contractual agreement.</u></p> <p><del>2-E.</del> Certain standards of 29 CFR Part 1910 have been determined by federal OSHA to be applicable to construction and have been adopted for this application by the board.</p> <p><del>3-F.</del> The standards adopted from 29 CFR</p>
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<p>16VAC25-60-140</p>		<p>3. The standards adopted from 29 CFR Part 1910.19 and 29 CFR Part 1910.20 containing respectively, special provisions regarding air contaminants and requirements concerning access to employee exposure and medical records shall apply to construction work as well as general industry.</p> <p>16VAC25-60-140. Agriculture standards.</p> <p>The occupational safety or health standards adopted as rules or regulations by the board either directly, or by</p>	<p>Part 1910.19 and 29 CFR Part 1910.20 containing respectively, special provisions regarding air contaminants and requirements concerning access to employee exposure and medical records shall apply to construction work as well as general industry.</p> <p><u>Rationale:</u> The amendment to 16VAC25-60-130 allows VOSH to enforce the Virginia Department of Transportation (VDOT) Work Area Protection Manual in lieu of the federal Manual on Uniform Traffic Control Devices (Part VI of the MUTCD, 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition) in any contract for construction, repair or maintenance between either the Commonwealth or one of its local governments and an employer, when such contract provides that the parties assure compliance with the VDOT Work Area Protection Manual.</p> <p>Although the federal MUTCD has been adopted by OSHA and VOSH in §§1926.200 through 1926.202, a significant amount of the language provisions therein are merely recommended and non-compulsory, i.e., the terms “should” or “may” are used rather than the mandatory “must” or “shall” for desired activities and procedures, and are therefore not enforceable in a compliance setting. To mitigate this problem, VDOT has adopted its own Work Area Protection Manual which contains fewer “shoulds” and “mays”. VDOT routinely specifies language in its contracts with employers that requires compliance with the VDOT Work Area Protection Manual.</p> <p>Also, a housekeeping change to renumber all paragraphs in §16VAC25-60-130 correctly is also proposed here.</p> <p>16VAC25-60-140. Agriculture standards.</p> <p><u>A.</u> The occupational safety or health standards adopted as rules or regulations by the board either directly, or by reference, from 29 CFR Part 1910 and 29 CFR Part 1928 shall apply by their own</p>
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		<p>reference, from 29 CFR Part 1910 and 29 CFR Part 1928 shall apply by their own terms to all employers and employees engaged in either agriculture or agriculture related activities covered by the Virginia State Plan for Occupational Safety and Health.</p> <p>For the purposes of applicability of such Part 1910 and Part 1928 standards, the key criteria utilized to make a decision shall be the activities taking place at the worksite, not the primary business of the employer. Agricultural operations shall generally include any operation involved in the growing or harvesting of crops or the raising of livestock or poultry, or activities integrally related to agriculture, conducted by a farmer or agricultural employer on sites such as farms, ranches, orchards, dairy farms or similar establishments. Agricultural operations do not include construction work as described in subdivision 1 of 16VAC25-60-130, nor does it include operations or activities substantially similar to those that occur in a general industry setting and are therefore not unique and integrally related to agriculture.</p> <p>The employer shall comply with the manufacturer's specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment, unless specifically superseded by a more stringent corresponding</p>	<p>terms to all employers and employees engaged in either agriculture or agriculture related activities covered by the Virginia State Plan for Occupational Safety and Health.</p> <p><u>B.</u> For the purposes of applicability of such Part 1910 and Part 1928 standards, the key criteria utilized to make a decision shall be the activities taking place at the worksite, not the primary business of the employer. Agricultural operations shall generally include any operation involved in the growing or harvesting of crops or the raising of livestock or poultry, or activities integrally related to agriculture, conducted by a farmer or agricultural employer on sites such as farms, ranches, orchards, dairy farms or similar establishments. Agricultural operations do not include construction work as described in subdivision 1 of 16VAC25-60-130, nor does it include operations or activities substantially similar to those that occur in a general industry setting and are therefore not unique and integrally related to agriculture.</p> <p><u>C.</u> The employer shall comply with the manufacturer's specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment, unless specifically superseded by a more stringent corresponding requirement in 29 CFR Part 1910 or 29 CFR Part 1928. The use of any machinery, vehicle, tool, material or equipment that is not in compliance with any applicable requirement of the</p>
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<p>16VAC25-60-150</p>		<p>requirement in 29 CFR Part 1910 or 29 CFR Part 1928. The use of any machinery, vehicle, tool, material or equipment that is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable or be physically removed from its place of use or operation.</p> <p>16VAC25-60-150. Maritime standards.</p> <p>The occupational safety or health standards adopted as rules or regulations by the board either directly, or by reference, from 29 CFR Part 1915, 29 CFR Part 1917, 29 CFR Part 1918 and 29 CFR Part 1919 shall apply by their own terms to all public sector employers and employees engaged in maritime related activities covered by the Virginia State Plan for Occupational Safety and Health.</p> <p>The employer shall comply with the manufacturer's specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment, unless specifically superseded by a more stringent corresponding requirement in Part 1915, 1917, 1918 or 1919. The use of any machinery, vehicle, tool, material or equipment that is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be identified by the employer as</p>	<p>manufacturer is prohibited, and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable or be physically removed from its place of use or operation.</p> <p><u>Rationale:</u> A housekeeping change to renumber all paragraphs in §16VAC25-60-140 correctly is proposed here.</p> <p>16VAC25-60-150. Maritime standards.</p> <p><u>A.</u> The occupational safety or health standards adopted as rules or regulations by the board either directly, or by reference, from 29 CFR Part 1915, 29 CFR Part 1917, 29 CFR Part 1918 and 29 CFR Part 1919 shall apply by their own terms to all public sector employers and employees engaged in maritime related activities covered by the Virginia State Plan for Occupational Safety and Health.</p> <p><u>B.</u> The employer shall comply with the manufacturer's specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment, unless specifically superseded by a more stringent corresponding requirement in Part 1915, 1917, 1918 or 1919. The use of any machinery, vehicle, tool, material or equipment that is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable or be physically removed from its place of use or operation.</p> <p><u>Rationale:</u> A housekeeping change to renumber all paragraphs in §16VAC25-</p>
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<p>16VAC25-60-245</p>		<p>unsafe by tagging or locking the controls to render them inoperable or be physically removed from its place of use or operation.</p> <p>Part V Inspections</p> <p>16VAC25-60-245. Take and preserve testimony, examine witnesses and administer oaths.</p>	<p>60-150 correctly is proposed here.</p> <p>Part V Inspections</p> <p>16VAC25-60-245. <u>Use of Administrative Subpoenas to take <del>Take</del> and preserve testimony, examine witnesses and administer oaths.</u></p> <p><u>Rationale:</u> This amendment clarifies that the Commissioner's authority in Subdivision 4 of §40.1-6 of the Code of Virginia to take and preserve testimony, examine witnesses and administer oath constitutes an administrative subpoena power.</p>
<p>16VAC25-60-260</p>		<p>Part VI Citation and Penalty</p> <p>....</p> <p>16VAC25-60-260. Issuance of citation and proposed penalty.</p>	<p>Part VI Citation and Penalty</p> <p>....</p> <p>16VAC25-60-260. Issuance of citation and proposed penalty.</p> <p><u>H. The Commissioner's burden of proving the basis for a VOSH citation, penalty or order of abatement is by a preponderance of the evidence.</u></p> <p><u>Rationale:</u> This amendment clarifies that the Commissioner's burden of proving the basis for a VOSH citation, penalty and order of abatement is by a "preponderance of the evidence". While the Virginia Court of Appeals has ruled that the burden of proof for the Commissioner in a VOSH case is by a preponderance of the evidence (Nat'l Coll. of Bus. &amp; Tech., Inc. v. Davenport, 57 Va. App. 677, 685, 705 S.E. 2d 519, 523 (2011)), the issue has not been definitively ruled on by the Virginia Supreme Court.</p> <p><u>I. The burden of proof in establishing an affirmative defense to a VOSH citation resides with the employer.</u></p>

			<p><u>Rationale:</u> This amendment clarifies that the burden for proving an affirmative defense to a citation lies with the employer. While it is generally accepted in case law that the burden for proving an affirmative defense to an OSHA/VOSH citation lies with the employer, it is not conclusively so. For instance the Fourth Circuit Court of Appeals has ruled that the burden of proving unforeseeable and unpreventable employee misconduct lies with the government (Ocean Electric Corp. v. Sec of Labor, 594 F. 2d 396 (4th Cir. 1979); and L.R. Willson &amp; Sons, Inc. v. Occupational Safety and Health Review Comm'n, 134 F. 3d 1235 (4th Cir.), cert denied, 525 U. S. 962 (1998). While the Virginia Court of Appeals has ruled that the burden of proof on the issue of employee misconduct lies with the employer in Virginia (Magco of Maryland, Inc., v. Barr, 33 Va. App. 78, 531 S. E. 2d 614 (2000)), the issue has not been definitively ruled on by the Virginia Supreme Court.</p>
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If an existing regulation or regulations (or parts thereof) are being repealed and replaced by one or more new regulations, please use the following chart:

Current chapter-section number	Proposed new chapter-section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements

If a new regulation is being promulgated, that is not replacing an existing regulation, please use this chart:

Section number	Proposed requirements	Other regulations and law that apply	Intent and likely impact of proposed requirements

If the proposed regulation is intended to replace an emergency regulation, and the proposed regulation is identical to the emergency regulation, please choose and fill out the appropriate chart template from the choices above. In this case “current section number” or “current chapter-section number” would refer to the **pre-emergency** regulation.

If the proposed regulation is intended to replace an emergency regulation, and the proposed regulation includes changes since the emergency regulation, please create two charts: 1) a chart describing changes from the **pre-emergency** regulation to the proposed regulation as described

in the paragraph above, and 2) a chart describing changes from the **emergency** regulation to the proposed regulation. For the second chart please use the following title: “Changes from the Emergency Regulation.” In this case “current section number” or “current chapter-section number” would refer to the **emergency** regulation.