



Exempt Action Final Regulation Agency Background Document

Agency name	Department of Labor and Industry
Virginia Administrative Code (VAC) citation(s)	16 VAC25-60-260
Regulation title(s)	Administrative Regulation Manual
Action title	Administrative Regulation Manual: Correction of Technical Error
Final agency action date	March 5, 2020
Date this document prepared	March 11, 2020

While a regulatory action may be exempt from executive branch review pursuant to § 2.2-4002 or § 2.2-4006 of the *Code of Virginia*, the agency is still encouraged to provide information to the public on the Regulatory Town Hall using this form. However, the agency may still be required to comply with the Virginia Register Act, Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1 VAC7-10), and the *Virginia Register Form, Style, and Procedure Manual for Publication of Virginia Regulations*.

Brief Summary

Please 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.

This action is necessary to correct a technical error and is therefore exempt from the requirements of the Administrative Process Act (APA) under §2.2-4006.A.3.

The purpose of amending the Administrative Regulation is to update regulatory language to reflect a legislative change that took effect on July 1, 2016.

Action by the General Assembly during the 2016 Session amended §40.1-51.1.D of the *Code of Virginia*, to match the federal OSHA regulatory changes to 29CFR1904.39(a)(2) which required employers:

“Within twenty-four (24) hours after the in-patient hospitalization of one or more employees or an employee's amputation or an employee's loss of an eye, as a result of a work-related incident, you must report the in-patient hospitalization, amputation, or loss of an eye to OSHA.”

Governor McAuliffe signed the legislation with an effective date of July 1, 2016. The legislation mirrors the language contained in 29CFR1904.39:

“§ 40.1-51.1. Duties of employers.

....

D. Every employer shall report to the Virginia Department of Labor and Industry within eight hours any work-related incident resulting in a fatality or within 24 hours any work-related incident resulting in (i) the inpatient hospitalization of one or more persons, (ii) an amputation, or (iii) the loss of an eye, as prescribed in the rules and regulations of the Safety and Health Codes Board.”

VOSH’s Administrative Regulation contained one reference to §40.1-51.1.D which has never been updated to reflect the 2016 legislative change:

“16VAC25-60-260. Issuance of citation and proposed penalty.

....

A.

....

3. Notwithstanding subdivision 1 of this subsection, if an employer fails to notify the commissioner of any work-related incident resulting in a fatality **or in the in-patient hospitalization of three or more persons within eight hours** of such occurrence as required by § 40.1-51.1 D of the Code of Virginia, the six-month timeframe shall not be deemed to commence until the commissioner receives actual notice of the incident.” (Emphasis added).

The final regulation, 16VAC25-60-260.A.3, is amended to reflect the 2016 legislative change to §40.1-51.1.D as follows:

3. Notwithstanding subdivision 1 of this subsection, if an employer fails to notify the commissioner **within eight hours** of any work-related incident resulting in a fatality or **within 24 hours of any work-related incident resulting** in **(i) the in-patient hospitalization of ~~three~~ one** or more persons, **(ii) an amputation, or (iii) the loss of any eye,** ~~within eight hours of such occurrence~~ as required by § [40.1-51.1](#) D of the Code of Virginia, the six-month timeframe shall not be deemed to commence until the commissioner receives actual notice of the incident.

Mandate and Impetus

Please identify the mandate for this regulatory change, and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, internal staff review, petition for rulemaking, periodic review, board decision, etc.). "Mandate" is defined as "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."

Under 29 CFR 1953.5(a), where a Federal program change is a new permanent standard, or a more stringent amendment to an existing permanent standard, the State shall promulgate a State standard adopting such new Federal standard, or more stringent amendment to an existing Federal standard, or an at least as effective equivalent thereof, within six months of the date of promulgation of the new Federal standard or more stringent amendment.

Statement of Final Agency Action

Please 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.

On March 5, 2020 the Safety and Health Codes Board adopted, as a final regulation of the Board, the attached final amendments to 16VAC25-60-260.A.3, Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program, Duties of employers, in accordance with the authority of the Board under §40.1-22(5) and the requirements of the Administrative Process Act §2.2-4000, *et seq.*

**16VAC25-60-260, Administrative Regulation for the
Virginia Occupational Safety and Health (VOSH) Program, Miscellaneous Changes**

As Adopted by the
Safety and Health Codes Board

Date: March 5, 2020



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: May 1, 2020

**16VAC25-60-260, Administrative Regulation for the
Virginia Occupational Safety and Health (VOSH) Program**

Part VI
Citation and Penalty

16VAC25-60-260. Issuance of citation and proposed penalty.

A. Each citation shall be in writing and describe with particularity the nature of the violation or violations, including a reference to the appropriate safety or health provision of Title 40.1 of the Code of Virginia or the appropriate rule, regulation, or standard. In addition, the citation must fix a reasonable time for abatement of the violation. The commissioner shall have authority to propose penalties for cited violations in accordance with § [40.1-49.4](#) of the Code of Virginia and this chapter. The citation will contain substantially the following: "NOTICE: This citation will become a final order of the commissioner unless contested within fifteen working days from the date of receipt by the employer." The citation may be delivered to the employer or his agent by the commissioner or may be sent by certified mail or by personal service to an officer or agent of the employer or to the registered agent if the employer is a corporation.

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

1. The six-month timeframe begins to run on the day after the incident or event occurred or notice was received by the commissioner (as specified in subdivisions 1 through 5 of this subsection), in accordance with § [1-210](#) A of the Code of Virginia. The word "month" shall be construed to mean one calendar month in accordance with § [1-223](#) of the Code of Virginia.
2. An alleged violation is deemed to have "occurred" on the day it was initially created by commission or omission on the part of the creating employer, and every day thereafter that it remains in existence uncorrected.
3. Notwithstanding subdivision 1 of this subsection, if an employer fails to notify the commissioner **within eight hours** of any work-related incident resulting in a fatality or **within 24 hours of any work-related incident resulting** in **(i) the in-patient hospitalization of three one** or more persons, **(ii) an amputation, or (iii) the loss of any eye,** ~~within eight hours of such~~

~~occurrence~~ as required by § [40.1-51.1](#) D of the Code of Virginia, the six-month timeframe shall not be deemed to commence until the commissioner receives actual notice of the incident.

4. Notwithstanding subdivision 1 of this subsection, if the commissioner is first notified of a work-related incident resulting in an injury or illness to an employee or employees through receipt of an Employer's Accident Report (EAR) form from the Virginia Workers' Compensation Commission as provided in § [65.2-900](#) of the Code of Virginia, the six-month timeframe shall not be deemed to commence until the commissioner actually receives the EAR form.

5. Notwithstanding subdivision 1 of this subsection, if the commissioner is first notified of a work-related hazard, or incident resulting in an injury or illness to an employee or employees, through receipt of a complaint in accordance with [16VAC25-60-100](#) or referral, the six-month timeframe shall not be deemed to commence until the commissioner actually receives the complaint or referral.

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

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

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

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

E. In determining the amount of the proposed penalty for a violation the commissioner will ordinarily be guided by the system of penalty adjustment set forth in the VOSH Field Operations

Manual. In any event the commissioner shall consider the gravity of the violation, the size of the business, the good faith of the employer, and the employer's history of previous violations.

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

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

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

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

1. The employer did not create the hazard;
2. The employer did not have the responsibility or the authority to have the hazard corrected;
3. The employer did not have the ability to correct or remove the hazard;
4. The employer can demonstrate that the creating, the controlling or the correcting employers, as appropriate, have been specifically notified of the hazards to which his employees were exposed;

5. The employer has instructed his employees to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it;
 6. Where feasible, an exposing employer must have taken appropriate alternative means of protecting employees from the hazard; and
 7. When extreme circumstances justify it, the exposing employer shall have removed his employees from the job.
- H. The commissioner's burden of proving the basis for a VOSH citation, penalty, or order of abatement is by a preponderance of the evidence.
- I. The burden of proof in establishing an affirmative defense to a VOSH citation resides with the employer.