Employer Responsibilities and Courses of Action Following a VOSH Inspection

THE VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

Visit our website: www.doli.virginia.gov ***REVISED: September 2018***

Dear Employer:

As part of our continuing efforts to assist employers in providing a safe and healthful workplace for every Virginia worker, the Virginia Occupational Safety and Health (VOSH) program has developed this document, *Employer Responsibilities and Courses of Action Following a VOSH Inspection*. This document contains important information regarding your responsibilities and opportunities to respond to the attached citation(s) and notification of penalty.

Generally, the rights and responsibilities discussed in this document apply to all employers. Differences exist for public sector and political subdivision employers, and are explained in the *VOSH Administrative Regulation Manual*.

Thank you for your help and cooperation in our joint effort to protect the occupational safety and health of Virginia's workers.

C. Ray Davenport

C. Ray Davenport

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INTRODUCTION

Your workplace was recently inspected under the authority granted by Va. Code § 40.1-49.8. The inspection revealed conditions which we believe to be in violation of the law as detailed in the attached citation(s) and notification of penalty form. All items listed on the citation were discussed by the Compliance Safety and Health Officer (CSHO) with your representative at the closing conference.

This document, *Employer Responsibilities and Courses of Action Following a VOSH Inspection*, is provided to further explain your rights and responsibilities and to provide guidance for responding to this notice and any necessary future action.

For added information not covered here, or for answers to any questions you may have, please contact the appropriate VOSH Regional or Field Office. See locations for VOSH regional and field offices at the end of this document. Please refer to the VOSH inspection number located on the enclosed documents in all correspondence.

1. EMPLOYER COURSES OF ACTION

As an employer, you must take one of the following courses of action:

a. If you agree to the citation and notification of penalty, you must:

(1) Correct the condition by the date set in the citation; and,
(2) Pay the penalty, if one is proposed.

b. If you do not agree and wish to contest, you must do so within 15 working days of your receipt of the citation(s) and notification of penalty form, or your citation becomes final. You must specifically contest **in writing** any or all of the following:

(1) Citation;
(2) Penalty; and/or
(3) Abatement date.

c. If you choose to contest, you must do so within 15 working days or your citation becomes a final order of the Commissioner, and cannot be appealed.

NOTE: *For details on how to contest a citation, penalty, or abatement date, see Section 9 of this document and Sections 270 and 310 of the VOSH Administrative Regulation Manual (16VAC25-60-270 & 16VAC25-60-310).*

2. TYPES OF VIOLATIONS

***Serious Violation*:** This is a violation in which an accident or illness could occur which would most likely result in death or serious physical harm, unless the employer did not know or could not have known of the violation. The maximum penalty is $12,726 per violation.

***Other-than-Serious Violation*:** This is a violation that has a direct relationship to job safety and health, which is not a serious violation. The maximum penalty is $12,726 per violation.

Repeat Violation: A violation is repeated if there has been a prior final order against the same employer for the same or a substantially similar violation of a standard, rule, or regulation, within the past three years. The maximum penalty is $127,254 per violation.

Willful Violation: This is a violation in which: (1), the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer was conscious that what he was doing constituted a violation, or (2), the employer, even though not consciously committing a violation, was aware that a hazardous condition existed and made no reasonable effort to eliminate the condition. The maximum penalty is $127,254 per violation.

Criminal-Willful Violation: This is the same as willful but it results in the death of an employee. The maximum penalty is $70,000 per violation and/or imprisonment for up to six (6) months. The fines and imprisonment can be doubled for a second conviction. In cases where an employer's negligent or unlawful conduct is egregious, a more severe criminal penalty is warranted. In these cases, the Commissioner of Labor and Industry has the authority to recommend that the local Commonwealth's Attorney bring a charge of manslaughter against the violator.

De Minimis Violation: This violation has no direct or immediate relationship to safety and health. A citation is not issued for this type of violation, nor a penalty proposed.

3. Proposed Penalties: Penalty Adjustment Factors

If your company received proposed penalties, those penalties were calculated in accordance with penalty adjustment factors for the size of the company, the gravity of the violation, the good faith of the employer and the history of previous violations. *(See Va. Code §40.1-49.4.A.4(a))*.

- **SIZE: A maximum penalty reduction of up to 70 percent is permitted for small businesses:**

Number of Employees	Percent Reduction
1 – 25	70% reduction
26 – 100	40% reduction
101 – 250	20% reduction
251 or more	zero reduction

- **GRAVITY OF THE VIOLATION**: Generally, violations that are determined to be of high gravity, i.e., more hazardous and more likely to result in an employee injury or illness, will carry a higher penalty, while those determined to be of low gravity will carry a lower penalty. Violations that are determined to have resulted in the death of or non-fatal but serious physical harm to an employee will carry the maximum allowable statutory penalty with no reduction factors applied.

- **GOOD FAITH**: A penalty reduction of up to 25 percent is permitted in recognition of an employer's "good faith" in increments of 0%, 5%, 10%, 15%, 20% and 25%. The maximum allowable good faith reduction for "primary considerations" (as referenced in the VOSH Field Operations Manual) is 15%. The maximum allowable good faith reduction for written safety and health programs is 10%.

- **HISTORY**: A reduction of 10 percent may be given to employers who have not been cited by VOSH for any serious, willful or repeated violations in the past three years.

Please note that neither a penalty calculation factor, i.e., probability assessment factors, nor penalty adjustment factors such as the gravity of the violation, size of the business, good faith of the employer, or the employer's history of previous violations shall materially affect the final penalty calculation if it would tend to dilute the penalty excessively.

4. Posting Requirements for the Citation

The citation, or a copy of it, must be posted at or near the place each violation occurred or other areas where employee notices are posted and available to all employees. It must remain posted for three (3) working days, or until the violation is corrected, whichever is longer. Saturdays, Sundays, as well as state and federal holidays are not counted as working days. In addition, the employee representative, if there is one, must be notified upon receipt of any citation.

5. VOSH Must be Advised of Any Corrective Action Taken

For violations that you choose not to contest, you must promptly notify VOSH by returning the completed *Report on Correction of Violations* form indicating that you have corrected the cited conditions by the abatement date set in the citation.

Your abatement report must explain the specific action taken with regard to each violation and the approximate date the corrective action was completed, and must include a copy of a receipt for the

completed work, or a photograph showing that it was corrected. When the citation permits an extended time for abatement, you must ensure that employees are adequately protected during this time. For example, the citation may require the immediate use of personal protective equipment by employees while engineering controls are being installed. If your corrective actions take place during a lengthy abatement period, i.e., 90 days or more, periodic reports should be submitted to indicate progress.

Please see the sample "Abatement Plan or Progress Report" in the *Administrative Regulation Manual (16VAC25-60)*. This report is to be sent to the Department of Labor and Industry office in your region. Addresses and telephone numbers of regional offices are listed at the end of this document.

6. Penalty Payments

The penalties itemized on the enclosed citation(s) and notification of penalty for items which are not contested become a final order of the Commissioner and must be paid within 15 working days after your receipt of the citation and notification of penalty. If, however, you contest your citation(s) in good faith, you need not pay for those items contested until a final decision is rendered. The final decision would be in the form of either a settlement agreement with VOSH resulting in a final order of the Commissioner, or a review of your case by the circuit court resulting in a court order which would uphold, modify, or eliminate the penalties. Please keep in mind that contested citations not settled by an agreement will go to court. For public sector and political subdivision employers, please refer to Section 280 of the *Administrative Regulation Manual (16VAC25-60-280)* regarding penalty assessment.

When paying a penalty, your check or money order is to be made payable to: "Treasurer of Virginia."

Payment of uncontested penalties should be mailed to:

Accounting Office
Dept. of Labor and Industry
Main Street Centre
600 East Main Street, Suite 207
Richmond, Virginia 23219-2430

A self-addressed envelope to mail your penalty payment will be furnished with the citation.

7. Interest and Collection Costs

Pursuant to Va. Code § 40.1-49.4.A.4.(a), the Commissioner of the Department of Labor and Industry shall have the authority to assess interest on all past-due penalties and administrative costs incurred in the collection of penalties for violations of VOSH laws and standards.

Interest charges are assessed at an annual rate in accordance with Va. Code § 2.2-4805. Interest shall

accrue from the date on which the citation and penalty, as proposed or adjusted, became a final order of the Commissioner, i.e., 15 working days from your receipt of the citation and proposed penalty, unless you file a notice of contest. Interest charges shall be waived if the full amount owed is paid within 30 calendar days of the final order date.

After 30 calendar days from the final order date, the debt shall be considered past-due unless a satisfactory payment arrangement has been made. If the debt remains unpaid for more than 90 calendar days, it will be deemed delinquent and referred either to the Office of the Attorney General, or to an appropriate collection agency. Interest and administrative costs will also be assessed.

8. Informal Conference and Settlement

Each employer is given the opportunity to request an informal conference before deciding whether to contest the citation(s). You are encouraged to have an informal conference if you foresee any difficulties in complying with any part of the citation. You may use the informal conference as an opportunity to:

- Obtain a clearer understanding of the specific standards which apply;
- Obtain a better explanation of the violation(s) cited;
- Discuss ways to correct the violation(s);
- Discuss questions concerning any proposed penalty;
- Discuss how the penalty is calculated and any mitigating circumstances which might affect the proposed penalty;
- Discuss problems with abatement dates;
- Discuss problems concerning employee safety and health practices; and
- Obtain answers to any other related questions you may have.

You are strongly urged to request this informal conference no later than five (5) working days from the receipt of the citation(s).

A request for an informal conference will not extend the 15 working day period from the date you receive the citation and notification of penalty within which you must either pay the penalties or elect to contest. You may request an informal conference through the VOSH Regional Office from the contact person shown on the transmittal letter that forwarded the citation(s) and notification of penalty. If you do not agree with the citation or any part of it, you have the right to contest any portion of the citation, notification of penalty, or abatement date.

An employee representative shall be given the opportunity to participate in the informal conference process requested by the employer. This same right will be extended to the employer when an

informal conference is requested by the employees. It is the duty of the employer, who has requested an informal conference, to notify employees and the employee representative about the conference as soon as the time and place of the conference have been established.

Public sector employers should consult Sections 280, 290, and 300 of the *Administrative Regulation Manual (16VAC25-60-280, 16VAC25-60-290 and 16VAC25-60-300)* for the applicable informal conference procedures for the public sector.

Neither VOSH regional management nor the Commissioner can amend or change a citation or penalty that has become a final order.

Please keep in mind that once a citation becomes a final order, VOSH may only either extend the time you need to abate a violation, or advise you on abatement methods. Please refer to Section 320 of the *Administrative Regulation Manual (16VAC25-60-320)* for additional information regarding the extension of abatement time.

Following the filing of a notice of contest, if the employer and VOSH cannot reach a settlement, a complaint will be prepared by VOSH and filed by the Commonwealth's Attorney in the jurisdiction where the inspection occurred to set the case for trial before the circuit court. If you wish to settle the case after the complaint has been filed, your attorney must contact that office of the Commonwealth's Attorney and indicate your desire to settle the case. A notice of contest may be withdrawn, resulting in the implementation of both the original citation and notification of penalty.

9. How to Contest

To contest, you must notify the contact person at the DOLI regional office address indicated in the transmittal letter that forwarded the citation(s) and notification of penalty. VOSH must be notified in writing within 15 working days after receipt of a citation and notification of penalty. Please note that Saturdays, Sundays, and state holidays are not counted as working days. This written notification, or notice of a contest, must clearly state what is being contested, e.g., the citation, the penalty, the abatement date, or any combination of these. For example, you could state, "I wish to contest the citation and penalty issued for items three and four of the citation issued May 19, 2015."

If you decide to contest a citation, you must do so within 15 working days from the receipt of the citation or the citation will become a final order.

The purpose of filing a notice of contest is to reach an agreement with VOSH regarding the citation, the penalty, and/or abatement date, and to preserve your legal right to a trial should a settlement not be reached. In addition, please note that your contest must be made in good faith. A contest filed solely to avoid your responsibilities of abatement or payment of penalties will not be considered a good faith contest. The written notice of contest must be posted in a conspicuous place at or near where each

violation occurred or other areas where employee notices are routinely posted and available to all employees and shall be kept in good repair and in unobstructed view. In accordance with Section 40 C. of the *Administrative Regulation Manual* (16VAC25-60-40), the notice of contest shall remain posted until all proceedings concerning the contest have been completed.

As previously stated, if your notice of contest is properly filed and the matter is not settled, VOSH will initiate judicial proceedings by referring the contested issues to the appropriate Commonwealth's Attorney who will file a complaint with the circuit court of the jurisdiction in which the violation occurred. The clerk will issue a summons requiring you to appear in circuit court. Should you fail to answer the complaint; a default judgment will be entered against you. A proper contest of any item of an alleged violation suspends your obligation to abate the cited hazard and pay the penalty until the item contested has been judicially resolved. If only the penalty is contested, the abatement requirements must be met. If only some items on the citation are contested, the other items must be corrected and the corresponding penalties paid.

You may withdraw your notice of contest at any time. However, withdrawing your notice of contest results in your obligation to pay the original penalties.

Public sector and political subdivision employers may contest citations, penalties, or abatement orders by so notifying the contact person at the DOLI regional office indicated in the transmittal letter that forwarded the citation(s) in writing within 15 working days from receipt of the citation. Contest procedures to be followed by public sector employers are in the VOSH *Administrative Regulation Manual*.

10. The Litigation Process

If the notice of contest has been filed within the required 15 working days, every effort will be made to reach a settlement between you and VOSH. As stated in Sections 8 and 9 of this document, if a settlement cannot be reached, a complaint will be filed to set the case for trial before the circuit court. A trial will be scheduled before the circuit court in the jurisdiction in which the violation occurred. Employees may participate in the abatement portion of the trial as well.

Circuit court generally requires that each party must be represented by an attorney. The litigation process may include pretrial discovery (providing documents, etc.), depositions, expert witnesses, pretrial motions and hearings. The trial will include the examination and cross-examination of witnesses. The judge may affirm, modify, or eliminate any contested item of the citation or penalty. Any party to the case may appeal the judge's ruling to the Court of Appeals.

Public sector and political subdivision employers may contest citations, penalties, or abatement orders by notifying the Commissioner in writing within 15 working days from receipt of such documents. This written notice of contest must be sent to the contact person at the regional office address indicated in the transmittal letter that forwarded the citation(s). If controversies or issues involving a citation

issued to a political subdivision of the Commonwealth cannot be resolved at an informal conference, the Commissioner shall then follow the applicable procedures set forth in the VOSH *Administrative Regulation Manual*.

11. Requests for Extension of Abatement Time

Abatement dates are assigned on the basis of the best available information at the time the citation was issued. When events beyond your control or other circumstances prevent an employer from meeting an abatement date, a request for extension of abatement may be appropriate. This procedure is used when the 15 working day contest period has expired and you have not contested the citation. It may be used when you have not been able to meet the abatement requirements of the citation due to circumstances beyond your control. If you have made a good faith effort to comply, you may submit a written request for an extension of abatement to the VOSH contact person at the DOLI regional office indicated in the transmittal letter that forwarded the citation(s).

As stated above, a request for an extension of abatement time must be in writing. It must include all of the following information:

- ✓ The steps you have taken so far in an effort to achieve compliance and the dates on which the steps were taken;
- ✓ The additional time period you need in order to comply;
- ✓ The reason why you need additional time;
- ✓ The interim steps you are taking to safeguard your employees against the cited hazard during the abatement period; and
- ✓ A statement that this request has been posted, and, if appropriate, provided to an authorized representative of the affected employees.

A copy of the request must remain posted for ten (10) days, during which your employees may file an objection. Further information on a request for an extension of abatement time may be obtained from Section 320 of the VOSH *Administrative Regulation Manual (16VAC25-60-320)* and from the VOSH contact person at the Regional Office indicated in the transmittal letter that forwarded the citation(s).

12. Follow-up Inspection and Failure to Abate

A follow-up inspection may be conducted by VOSH to verify that you have:

- ✓ Posted the citation as required;
- ✓ Corrected the violations as required in the citation; and
- ✓ Adequately protected employees during multi-step or lengthy abatement periods.

The law provides for penalties for failure to post the citations and for failure to correct violations. Failure to correct a violation may carry a penalty of up to $12,726 for each day during which the violation continues. You also have a continuing responsibility to comply with the law. Any new violations discovered during a follow-up inspection will be cited and penalized where appropriate. In order to achieve abatement by the date set forth in the citation, abatement efforts must be promptly initiated. Providing false information on your efforts to abate is punishable under the law by criminal fine, imprisonment, or both.

13. Employee Courses of Action

Employees, or their authorized representatives, may contest in writing any or all of the abatement dates set for violations if they believe them to be unreasonable. Employees have 15 working days from the date the employer received the citation and notification of penalty to contest. The citation which you, as the employer, must post, advises the employees to contact the person indicated in the transmittal letter forwarded with the citation(s) from the VOSH Regional Office, if they wish to contest. The filing of an employee contest does not suspend an employer's obligation to abate.

14. Prohibition on Discrimination or Retaliation Against Employees for Exercising "Whistleblower" Rights

Complaints from employees who believe they have been discriminated against, suffered retaliation, or been discharged for exercising their rights under the law will be investigated by VOSH authorities.

Virginia Code §§ 40.1-51.2:1 and 40.1-51.2:2 provide that no employer shall discharge or discriminate against an employee who has exercised his rights under this law, e.g., filing complaints with VOSH, or raising safety and health concerns with the employer.

If the investigation discloses probable violations of employee rights, the Commissioner will attempt to have the violation(s) corrected without economic loss to the employee through a voluntary agreement. If an agreement cannot be reached, the Commissioner will file an action in circuit court. The court, for cause shown, can restrain violations and order appropriate relief, including the rehiring or reinstatement of the employee to his former position with back pay plus interest of up to 8% per year. Employee activities protected by § 40.1-51.2:1 of the Code of Virginia include, but are not limited to:

- Making any complaint to his employer or any other person under or related to the safety and health provisions of Title 40.1 of the Code of Virginia;

- Instituting or causing to be instituted any proceeding under or related to the safety and health provisions of Title 40.1 of the Code of Virginia;

- Testifying or intending to testify in any proceeding under or related to the safety and health provisions of Title 40.1 of the Code of Virginia;

- Cooperating with or providing information to the commissioner during a worksite inspection; or

- Exercising on his own behalf or on behalf of any other employee any right afforded by the safety and health provisions of Title 40.1 of the Code of Virginia.

15. Consultative Assistance

Should you need consultative assistance in correcting the violations or help in improving your safety and health program, contact the Division of Cooperative Programs at 804.786.6613. This service is provided without charge. An on-site consultative visit shall not take place subsequent to a VOSH enforcement inspection until the employer has been notified that no citation will be issued, or if a citation is issued, an on-site consultation shall only take place with regard to those citation items which have become final orders. Again, citations become final orders if not contested in writing within 15 working days from receipt.

16. Notification of Fatalities, Amputations, Losses of an Eye, and Hospitalizations.

Virginia Code § 40.1-51.1.D states that:

- All employers, regardless of the number of their employees, shall report to the Department of Labor and Industry within eight (8) hours any work-related incident which results in the death of any employee

- All employers, regardless of the number of their employees, shall report to the Department of Labor and Industry within twenty-four (24) hours any amputation, loss of an eye, or inpatient hospitalization of one (1) or more employees.

Failure to notify the Department of Labor and Industry of the occurrence of any of the above will result in a $5,000 penalty.

NOTE: Employers should consult VOSH Regulation 16VAC25-85-1904, or 29 CFR 1904, Federal Identical Recording and Reporting Occupational Injuries and Illnesses, for complete notification requirements.

For further information:

Contact your nearest Virginia Department of Labor and Industry
regional or field office of the listed on the following page,
or
Visit our website: www.doli.virginia.gov.

VIRGINIA DEPARTMENT OF LABOR & INDUSTRY

REGIONAL OFFICES

Central Regional Office

North Run Business Park
1570 East Parham Road
Richmond, Virginia 23228
804.371.3104

Southwest Regional Office

Brammer Village
3013 Peters Creek Road
Roanoke, Virginia 24019
540.562.3580

Tidewater Regional Office

Interstate Corporate Center
Bldg. 6, Suite 101
6363 Center Dr.
Norfolk, Virginia 23502
757.455.0891

Northern Regional Office

9400 Innovation Drive
Suite 120
Manassas, Virginia 20110
703.392.0900

FIELD OFFICES

Abingdon Field Office

The Johnson Center
468 East Main St., Suite 114
Abingdon, Virginia 24210
276.676.5465

Lynchburg Field Office

3704 Old Forest Road, Suite B
Lynchburg, Virginia 24501
434.385.0806

Valley Field Office

201 Lee Highway
Verona, Virginia 24482
540.248.9280

Valley Mailing Address:

P. O. Box 77
Verona, Virginia 24482

HEADQUARTERS

Virginia Department of Labor and Industry

Main Street Centre

600 East Main Street, Suite 207

Richmond, Virginia 23219-2430

804.371.2327