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Emergency Regulation and Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Department of Labor and Industry
Virginia Administrative Code (VAC) Chapter citation(s)	16VAC15-60
VAC Chapter title(s)	Regulation Governing On-the-Job Training Programs or Other Training Programs
Action title	On-the-Job Training Program or Other Training Program Requirements in Accordance with §40.1-28.10.
Date this document prepared	February 4, 2021

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of the subject matter, intent, and goals 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 or changes. If applicable, generally describe the existing regulation.

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

This regulation is required by § 40.1-28.10.A.2.

Acronyms and Definitions

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

DOLI- Department of Labor and Industry

Mandate and Impetus (Necessity for Emergency)

Explain why this rulemaking is an emergency situation in accordance with § 2.2-4011 A and B of the Code of Virginia. In doing so, either:

- a) Indicate whether the Governor's Office has already approved the use of emergency regulatory authority for this regulatory change.*
- b) Provide specific citations to Virginia statutory law, the appropriation act, federal law, or federal regulation that require that a regulation be effective in 280 days or less from its enactment.*

As required by § 2.2-4011, also describe the nature of the emergency and of the necessity for this regulatory change. In addition, delineate any potential issues that may need to be addressed as part of this regulatory change

The Governor's Office has approved the use of emergency regulatory authority for this regulatory change.

Section 40.1-28.10.A.2. allows businesses with an established employer on the job or other training program to pay its employees in the training program not less than the federal minimum wage or 75% of the Virginia minimum wage for the first 90 days after the start of an employee's employment *if* that training program conforms to the standards put forth in a regulation adopted by the Commissioner pursuant to 40.1-28.10.

The statutory changes allowing for the reduced wages while employees are in an approved 90-day training program goes into effect on May 1, 2021.

If DOLI is unable to adopt an emergency regulation to take effect by May 1, 2021, putting forth the standards required for training programs, employers wishing to take advantage of paying a lower wage to their trainees would not know whether they are able to take advantage of the provision. Likewise, employees would not know if their employer is appropriately paying them at a reduced wage.

Legal Basis

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

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

The Chapter numbers of the legislation is 1242 and 1204: <https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP1242> and <https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP1204+pdf> becoming effective May 1, 2021.

The amended Va. Code §40.1-28.10.A.2 specifically directs and authorizes the Commissioner of the Department of Labor and Industry to set regulations to provide standards for on-the-job training or other training programs. The relevant language states:

Beginning May 1, 2021, every employer shall pay to each of his employees at a rate not less than the federal minimum wage or 75 percent of the Virginia minimum wage provided for in this section, whichever is greater. For the purposes of this subdivision "employee" means any person or individual who is enrolled in an established employer on-the-job or other training program for a period not to exceed 90 days which meets standards set by regulations adopted by the Commissioner. (Bold added for emphasis)

Overall, Va. Code §40.1-6(3) grants the Commissioner of Labor and Industry the authority to “make such rules and regulations as may be necessary for the enforcement of this title...”

Purpose

Describe the specific reasons why the agency has determined that this regulation is essential to protect the health, safety, or welfare of citizens. In addition, explain any potential issues that may need to be addressed as the regulation is developed.

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

Substance

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

See “Detail of Changes” below. This is a brand new regulation that sets forth the standards required for any on-the-job training or other training program that an employer must establish if the employers wishes to pay its employees the reduced rate for the duration of the 90 day training period.

Issues

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

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

The Department will be able to adequately monitor compliance with the training wage provision of the minimum wage law.

Alternatives to Regulation

Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. 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 regulatory change.

There are no alternatives to this regulation because it is mandated by state law.

Periodic Review and Small Business Impact Review Announcement

This NOIRA is not being used to announce a periodic review or a small business impact review.

Public Participation

The Department of Labor and Industry provided an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal, (ii) any alternative approaches, and (iii) the potential impacts of the regulation.

The comment forum is located here: <https://townhall.virginia.gov/L/comments.cfm?generalnoticeid=1183>

A public hearing will not be held following the publication of the proposed stage of this regulatory action.

Detail of Changes

List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.

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

Self Explanatory

- B. Beginning May 1, 2021, an employee enrolled in an established on-the-job or other training program may, for the **first 90 calendar days after start of employment**, be paid a training wage of not less than **75 percent** of the minimum hourly wage specified at §40.1-28.10, provided the following conditions are met:

This language makes clear that the period for which the employee can be paid the training wage begins on the first day of their employment and runs for the statutory 90 day period. From May 1, 2021 until

January 1, 2022 the lowest the employer could pay would be the federal minimum wage of \$7.25 per hour as 75 percent of the Virginia minimum wage of \$9.50 per hour would be less than that.

1. The employee has been hired in, and is receiving training for, an occupation in which the employee has no previous similar or related experience;

An employee who is trained or substantially trained to do the job does not need the training and the employer should not be able to pay reduced wages simply by calling the first 90 days of employment a training period.

2. The employer is not utilizing the employee being paid the training wage in a manner that causes, induces, encourages, or assists any displacement or partial displacement of any currently employed worker, including:

- a. By displacing any previous recipient of the training wage;
- b. By reducing hours of a currently employed worker;
- c. By replacing a current or laid off employee with a trainee;
- d. By relocating operations resulting in a loss of employment at a previous workplace; or
- e. In a manner that replaces, supplants, competes with, or duplicates any approved apprenticeship program;

An employer should not be able to reduce its labor costs simply by reducing the work of or firing current employees and replacing them with trainees at the reduced wage. An established training program is one that contemplates continued employment after the employee is fully trained. If the employer only keeps their training employees for ninety days and replaces them with new trainees the employer does not have a real training program and is simply using it as a cost reduction strategy. Other employers who are not churning employees in this manner may be at a competitive disadvantage. Virginia's well established registered apprenticeship program deserves to be protected as well.

3. The occupation for which the employee is receiving training must require a sufficient degree of technical skill to necessitate a learning period. The training must not be for the purpose of acquiring manual dexterity and high production speed in repetitive operations;

The training program must not be simply for payment of a reduced wage but to enhance the skills and abilities of the employee and the employer's workforce. If the job is one that the new employee can be trained on in one or two days, there is no need for a 90 day training period. Training an employee to use a shovel to dig a hole does not require an extended period.

4. Such a training program must involve either formal instruction or on-the-job training during a period when the learners are entrusted with limited responsibility and are under supervision or guidance;

If an employee in the training program does not get formal instruction or on-the-job training during that 90 day period there is not really a program deserving of reduced wages. If the employer entrusts the employee in training with full responsibility and does not provide supervision or guidance the employer has recognized that the employee does not actually need the training and should not be able to pay them at the lower rate.

5. Such a training program shall describe in writing the nature and extent of the instruction and supervision provided;

A written training program ensures that it is an established program that the employer, trainees and other employees can understand and support. It also allows the Department to adequately investigate a complaint about the program.

6. The employer makes a good faith effort to continue to employ the employee after the period of the training wage expires;

An established training program is one that contemplates continued employment after the employee is fully trained. The employer is not required to keep their training employees at the end of the ninety days. If they were not good employees or circumstances changed so that they are no longer needed they can be let go. If all trainees over a period on time are let go without getting a job it is evidence that the employer does not have a real training program and is simply using it as a cost reduction strategy.

7. The employer shall not hire the employee at the training wage unless there is a reasonable expectation that there will be regular employment, paying at or above the effective minimum wage, for the trainee upon the successful completion of the period of the training wage. The training wage shall not be applied to:

- a. Seasonal employees; or
- b. Temporary employees; and

An established training program is one that contemplates continued employment after the employee is fully trained. Hiring an employee at the training wage with the knowledge that the employee will not be kept on after the ninety day period is evidence the employer does not have a real training program and is simply using it as a cost reduction strategy. Explicitly stating seasonal employees and temporary employees are not eligible for the training wage reinforces the prohibition against using the training program as merely a cost reduction strategy.

8. An employee can only undergo one on-the-job training program or other training program established in accordance with §40.1-28.10 per employer.

a. A change in employment classification or duties required by the employer of the employee would not allow an employer to place that employee in another on-the-job training program or other training program established in accordance with §40.1-28.10.

b. Any employee may be placed in another on-the-job training program or other training program established in accordance with §40.1-28.10 with a subsequent employer so long as placing that employee in the on-the-job training program established in accordance with §40.1-28.10 would not violate subdivision 1 of this subsection.

An employer should not pay an employee the training wage past the first 90 calendar day period of the employee's employment under the pretense that the employee is undergoing a subsequent training program with the same employer. More than one on-the-job training program for each employee per employer is prohibited. However if an employee undergoes one 90 calendar day training program with one employer then secures employment with a different employer and the employment duties required by the new employer include a new technical skill the employee does not possess, that employee could be enrolled in a new 90 calendar day on the job training program with the new employer.