



# Virginia Department of Planning and Budget **Economic Impact Analysis**

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## **16 VAC 15-60 Regulation Governing On-The-Job Training Programs or Other Training Programs**

**Department of Labor and Industry**

**Town Hall Action/Stage: 5701 / 9489**

May 2, 2022

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The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia (Code) and Executive Order 14 (as amended, July 16, 2018). The analysis presented below represents DPB's best estimate of these economic impacts.<sup>1</sup>

### **Summary of the Proposed Amendments to Regulation**

As the result of a 2020 legislative mandate, the Department of Labor and Industry (DOLI) proposes to make permanent an emergency regulation that establishes on-the-job training program standards for an employer to pay a reduced training wage.

### **Background**

#### *Federal Law*

The United States Fair Labor Standards Act<sup>2</sup> establishes the federal minimum wage for covered nonexempt employees. The current federal minimum wage is \$7.25 per hour.

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<sup>1</sup> Code § 2.2-4007.04 requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the analysis should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

<sup>2</sup> See <https://www.dol.gov/agencies/whd/flsa>

### *Legislative Mandate*

Chapters 1204<sup>3</sup> and 1242<sup>4</sup> of the 2020 Acts of Assembly (identical bills) amended the Virginia Minimum Wage Act to incrementally increase the Virginia minimum wage beginning May 1, 2021. The legislation also created a training wage for employees in on-the-job training programs lasting less than 90 days. The Virginia training wage (VA training wage) is the higher of either the federal minimum wage or 75 percent of the Virginia minimum wage. The table below shows the effective VA training wage for different time periods, assuming that the federal minimum wage remains at \$7.25.

#### **Calculation of the VA Training Wage under the 2020 Legislative Mandate\***

BEGIN DATE	END DATE	VA Minimum Wage	Federal Minimum Wage*	75 percent of VA Minimum Wage	VA Training Wage*
< May 1, 2021	May 1, 2021	federal minimum wage	\$7.25	N/A	N/A
May 1, 2021	January 1, 2022	\$9.50	\$7.25	\$7.13	\$7.25
January 1, 2022	January 1, 2023	\$11.00	\$7.25	\$8.25	\$8.25
January 1, 2023	January 1, 2025	\$12.00	\$7.25	\$9.00	\$9.00
January 1, 2025	January 1, 2026	\$13.50	\$7.25	\$10.13	\$10.13
January 1, 2026	January 1, 2027	\$15.00	\$7.25	\$11.25	\$11.25

\*The VA training wage in this table assumes that the federal minimum wage would remain at \$7.25.

Employers can of course choose to pay more than the VA Training Wage to employees who are in an on-the-job training program.

### *Standards for On-The-Job Training Programs*

The legislation specifies that the VA training wage applies to all persons who are, “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.” The *Regulation Governing On-The-Job Training Programs or Other Training Programs* (16 VAC 15-60) is a new regulation proposed by DOLI to set such standards. It became effective as an emergency regulation on May 1, 2021. The emergency regulation is scheduled to expire on October 31, 2022. DOLI now proposes to make the regulation permanent.

<sup>3</sup> See <https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP1204>

<sup>4</sup> See <https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP1242>

The proposed standards of the regulation are that 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 the VA training wage provided the following conditions are met:

The employee:

1. Must not have previous similar or related experience in the occupation;
2. Can only undergo one on-the-job training program or other training program established in accordance with § 40.1-28.10 per employer; and,

The employer:

3. Must not use the employee in a manner that causes, induces, encourages, or assists any displacement or partial displacement of any currently employed worker;
4. Must make a good faith effort to continue to employ the employee after the training period expires;
5. Must 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;
6. May not apply the reduced training wage to seasonal or temporary employees; and,
7. May not place an employee in another on-the-job training program or other training program established in accordance with § 40.1-28.10 when an employer requires the employee to change employment classification or duties.

The occupation:

8. Must require a sufficient degree of technical skill to necessitate a learning period.

The training program:

9. Must not be for the purpose of acquiring manual dexterity and high production speed in repetitive operations;
10. 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; and,
11. Must describe, in writing, the nature and extent of the instruction and supervision provided.

The employee could be placed in another on-the-job training program, or in another training program established in accordance with § 40.1-28.10 with a subsequent employer, if the employee does not have previous similar or related experience in the occupation.

### **Estimated Benefits and Costs**

Presumably the intent of having a time-limited training wage that is below the minimum wage is to encourage employers to hire inexperienced individuals when they might not otherwise do so. There is the possibility that the introduction of the training wage could lower wages in some situations when the individuals would have been hired anyway. Since there are no provisions for enrollment or registration of employers that wish to use a training wage, DOLI does not collect information on the number of participating employers and employees. Since the emergency regulation became effective, DOLI has received one payment of wage complaint about an employer who raised the defense that they were using the training wage, which DOLI determined was an inappropriate use of the training wage. The employer ceased the inappropriate use and paid the damages to fourteen of its employees to whom they had paid a training wage. Given the paucity of information on use of the training wage, the impact of the establishment of the VA training wage is not currently known.

The proposed standards in the regulation are likely beneficial for employees in that they may: somewhat reduce the potential occurrences where the training wage is paid when the individual would have been hired anyway, help limit the use of the training wage for only when there is intent to employ the individual more than temporarily, help ensure that actual training occurs when the training wage is paid, and reduce the likelihood that other employees would be displaced, etc.

On the other hand, there is the possibility that the proposed conditions could stop an employee from being hired who otherwise would have received a desired offer if the employer could have paid the VA training wage. For example, say that Company A is known for producing the best-trained people in an occupation and also the best services that that occupation provides. Moreover, Company A is willing to hire at the VA training wage, but not the minimum wage for the training program. If a person applies who has some experience in that occupation, the proposed condition that the employee not have previous similar or related experience in the occupation could exclude his participation in the training program. However, because no data are

collected on the use of the program, it is not possible to determine whether this potential situation would actually occur.

Likewise, the proposed standards may reduce potential cost savings for some employers who would have chosen to pay the VA training wage if not prohibited by one or more of the proposed standards. For example, if firms could pay the training wage to seasonal or temporary employees, for jobs that do not require technical skills, or to displace a current higher-paid worker, such firms could potentially save on payroll while hiring their preferred candidates.

### **Businesses and Other Entities Affected**

The proposed regulation potentially affects firms in the Commonwealth with training programs that may wish to pay less than the Virginia minimum wage, as well as individuals who may wish to participate in such training programs. Data is not available to estimate the number of entities.

The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.<sup>5</sup> An adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined. As noted above, the discretionary proposals described are beneficial for workers, but prevent potential cost savings for employers. Thus, an adverse impact is indicated. Practically speaking, an adverse impact would inevitably need to be indicated however these requirements were designed. If there were to be no limits beyond what is in statute for when a training wage could be paid, then potential cost savings for employers would not be prevented, but overall at least some subset of workers would likely be worse off.

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<sup>5</sup> Pursuant to Code § 2.2-4007.04(D): In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance. Statute does not define “adverse impact,” state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation.

## **Small Businesses<sup>6</sup> Affected:<sup>7</sup>**

### Types and Estimated Number of Small Businesses Affected

The proposed regulation potentially affects small firms in the Commonwealth with training programs that may wish to pay less than the Virginia minimum wage. Data is not available to estimate the number.

### Costs and Other Effects

The proposed standards may reduce potential cost savings for some small businesses who would have chosen to pay the VA training wage if not prohibited by one or more of the proposed standards.

### Alternative Method that Minimizes Adverse Impact

There are no clear alternative methods that both reduce adverse impact and meet the intended policy goals.

## **Localities<sup>8</sup> Affected<sup>9</sup>**

The proposed regulation neither disproportionately affects particular localities, nor affects costs for local governments.

## **Projected Impact on Employment**

The proposed regulation is not likely to have a substantive effect on total employment.

## **Effects on the Use and Value of Private Property**

The proposed standards may prevent some firms from paying the VA training wage to trainees, which could prevent some modest cost savings. To the extent this occurs, this could

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<sup>6</sup> Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as “a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.”

<sup>7</sup> If the proposed regulatory action may have an adverse effect on small businesses, Code § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to Code § 2.2-4007.1, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

<sup>8</sup> “Locality” can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

<sup>9</sup> § 2.2-4007.04 defines “particularly affected” as bearing disproportionate material impact.

potentially produce a very modest reduction in the value of some firms. The proposed regulation does not affect real estate development costs.