

CHAPTER 60

ADMINISTRATIVE REGULATION FOR THE VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

Part I

Definitions

16VAC25-60-10. Definitions.

The following words and terms, when used in these regulations, shall have the following meaning, unless the context clearly indicates otherwise:

"Abatement period" means the period of time defined or set out in the citation ~~permitted~~ for correction of a violation.

"Board" means the Safety and Health Codes Board.

"Bureau of Labor Statistics" means the Bureau of Labor Statistics of the United States Department of Labor.

"Citation" means the notice to an employer that the commissioner has found a condition or conditions that violate Title 40.1 of the Code of Virginia or the standards, rules or regulations established by the commissioner or the board.

"Commissioner" means the Commissioner of Labor and Industry. Except where the context clearly indicates the contrary, any such reference ~~to the commissioner~~ shall include his authorized representatives.

"Commissioner of Labor and Industry" means only the individual who is Commissioner of Labor and Industry.

"De minimis violation" means a violation which has no direct or immediate relationship to safety and health.

"Department" means the Virginia Department of Labor and Industry.

"Employee" means an employee of an employer who is employed in a business of his employer.

"Employee representative" means a person specified by employees to serve as their representative.

"Employer" means any person or entity engaged in business who has employees but does not include the United States.

"Establishment" means, for the purpose of record keeping requirements, a single physical location where business is conducted or where services or industrial operations are performed, e.g., factory, mill, store, hotel, restaurant, movie theater, farm, ranch, bank, sales office, warehouse, or central administrative office. Where distinctly separate activities are performed at a single physical location, such as contract activities operated from the same physical location as a lumberyard; each activity is a separate establishment. In the public sector, an establishment is either (a) a single physical location where a specific governmental function is performed; or (b) that location which is the lowest level where attendance or payroll records are kept for a group of employees who are in the same specific organizational unit, even though the activities are carried on at more than a single physical location.

"Failure to abate" means that the employer has failed to correct a cited violation within the period permitted for its correction.

"FOIA" means the Freedom of Information Act.

"Imminent danger condition" means any condition or practice in any place of

employment such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through standard enforcement procedures provided by Title 40.1 of the Code of Virginia.

"OSHA" means the Occupational Safety and Health Administration of the United States Department of Labor.

"Other violation" means a violation which is not, by itself, a serious violation within the meaning of the law but which has a direct or immediate relationship to occupational safety or health.

"Person" means ~~one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons~~ any individual, corporation, partnership, association, cooperative, limited liability company, trust, joint venture, government, political subdivision, or any other legal or commercial entity and any successor, representative, agent, agency, or instrumentality thereof.

"Public employee" means any employee of a public employer. Volunteer members of volunteer fire departments, pursuant to §27-42 of the Code of Virginia, members of volunteer rescue squads who serve without pay, and other volunteers pursuant to the Virginia State Government Volunteers Act are not public employees. Prisoners confined in jails controlled by any political subdivision of the Commonwealth and prisoners in institutions controlled by the Department of Corrections are not public employees unless employed by a public employer in a work-release program pursuant to §53.1-60 or §53.1-131 of the Code of Virginia.

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

"Recordable occupational injury and illness" means (i) a fatality, regardless of the time between the injury and death or the length of illness; (ii) a nonfatal case that results in lost work days; or (iii) a nonfatal case without lost work days which results in transfer to another job or termination of employment, which requires medical treatment other than first aid, or involves loss of consciousness or restriction of work or motion. This category also includes any diagnosed occupational illness which is reported to the employer but is not otherwise classified as a fatality or lost work day case.

"Repeated violation" means a violation deemed to exist in a place of employment that is substantially similar to a previous violation of a law, standard or regulation that was the subject of a prior final order against the same employer. A repeated violation results from an inadvertent or accidental act, since a violation otherwise repeated would be willful.

"Serious violation" means a violation deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. The term "substantial probability" does not refer to the likelihood that illness or injury will result from the violative condition but to the likelihood that, if illness or injury does occur, death or serious physical harm will be the result.

"Standard" means an occupational safety and health standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

"VOSH" means Virginia Occupational Safety and Health.

"Willful violation" means a violation deemed to exist in a place of employment where (i) 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 (ii) 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.

"Working days" means Monday through Friday, excluding legal holidays, Saturday, and Sunday.

Part II

General Provisions

16VAC25-60-20. Jurisdiction.

All Virginia statutes, standards, and regulations pertaining to occupational safety and health shall apply to every employer, employee and place of employment in the Commonwealth of Virginia except where:

1 A. The United States is the employer or exercises exclusive jurisdiction;

2 B. The federal Occupational Safety and Health Act of 1970 does not apply by virtue of § 4(b)(1) of that Act. The commissioner shall consider federal OSHA case law in determining where jurisdiction over specific working conditions has been preempted by the regulations of a federal agency; or,

3 C. The employer is a public employer, as that term is defined in these regulations. In such cases, the Virginia laws, standards and regulations governing occupational safety and health are applicable as stated including §§ 16VAC25-60-10, 16VAC25-60-30, 16VAC25-60- 280,

16VAC25-60-290, and 16VAC25-60-300 of these regulations.

16VAC25-60-30. Applicability to public employers.

A. All occupational safety and health standards adopted by the board shall apply to public employers and their employees in the same manner as to private employers.

B. All sections of these regulations shall apply to public employers and their employees. Where specific procedures are set out for the public sector, such procedures shall take precedence.

C. The following portions of Title 40.1 of the Code of Virginia shall apply to public employers: §§ 40.1-10, 40.1-49.4.A(1), 40.1-49.8, 40.1-51, 40.1-51.1, 40.1-51.2, 40.1-51.2:1, 40.1-51.3, 40.1-51.3:2, and 40.1-51.4:2.

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.

E. Sections 40.1-49.4 F, 40.1-49.9, 40.1-49.10, 40.1-49.11, 40.1-49.12, and 40.1-51.2:2 of the Code of Virginia shall apply to public employers other than the Commonwealth and its agencies.

F. If the commissioner determines that an imminent danger situation, as defined in §40.1-49.4 F of the Code of Virginia, exists for an employee of the Commonwealth or one of its agencies, and if the employer does not abate that imminent danger immediately upon request, the Commissioner of Labor and Industry shall forthwith petition the governor to direct that the imminent danger be abated.

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 manner provided in these regulations.

16VAC25-60-40. Notification and posting requirements.

Every employer shall post and keep posted any notice or notices, as required by the commissioner, including the Job Safety and Health Protection Poster which shall be available from the department. Such notices shall inform employees of their rights and obligations under the safety and health provisions of Title 40.1 of the Code of Virginia and these regulations.

Violations of notification or posting requirements are subject to citation and penalty.

1 A. Such notice or notices, including all citations, notices of contest, petitions for variances or extensions of abatement periods, orders, and other documents of which employees are required to be informed by the employer under statute or by these regulations, shall be delivered by the employer to any authorized employee representative, and shall be posted at a conspicuous place where notices to employees are routinely posted and shall be kept in good repair and in unobstructed view. The document must remain posted for 10 working days unless a different period is prescribed elsewhere in Title 40.1 of the *Code of Virginia* or these regulations.

2 B. A citation issued to an employer, or a copy thereof, shall remain posted in a conspicuous place and in unobstructed view at or near each place of alleged violation for three working days or until the violation has been abated, whichever is longer.

3 C. A copy of any written notice of contest shall remain posted until all proceedings concerning the contest have been completed.

4 D. Upon receipt of a subpoena, the employer shall use the methods set forth in this section to further notify his employees and any authorized employee representative of their rights to party

status. This written notification shall include both the date, time and place set for court hearing, and any subsequent changes to hearing arrangements. The notification shall remain posted until commencement of the hearing or until an earlier disposition.

16VAC25-60-80. Access to employee medical and exposure records.

A. An employee and his authorized representative shall have access to his exposure and medical records required to be maintained by the employer.

B. When required by a standard, a health care professional under contract to the employer or employed by the employer shall have access to the exposure and medical records of an employee only to the extent necessary to comply with the requirements of the standard and shall not disclose or report without the employee's express written consent to any person within or outside the workplace except as required by the standard.

C. Under certain circumstances it may be necessary for the commissioner to obtain access to employee exposure and medical records to carry out statutory and regulatory functions.

However, due to the substantial personal privacy interests involved, the commissioner shall seek to gain access to such records only after a careful determination of the need for such information and only with appropriate safeguards described at 29 CFR 1913.10(i) in order to protect individual privacy. In the event that the employer requests the commissioner to wait 24 hours for the presence of medical personnel to review the records, the commissioner will do so on presentation of an affidavit that the employer has not and will not modify or change any of the records. The commissioner's examination and use of this information shall not exceed that which is necessary to accomplish the purpose for access. Personally identifiable medical information

shall be retained only for so long as is needed to carry out the function for which it was sought. Personally identifiable information shall be kept secure while it is being used and shall not be released to other agencies or to the public except under certain narrowly defined circumstances outlined at 29 CFR 1913.10(m).

D. In order to implement the policies described in subsection C of this section, the rules and procedures of 29 CFR Part 1913.10, Rules of Agency Practice and Procedure Concerning Access to Employee and Medical Records, are hereby expressly incorporated by reference. When these rules and procedures are applied to the commissioner the following federal terms should be considered to read as below:

FEDERAL TERM	VOSH EQUIVALENT
Agency	Virginia Department of Labor and Industry
OSHA	VOSH
Assistant Secretary	Commissioner
Office of the Solicitor of Labor	Office of the Attorney General
Department of Justice	Office of the Attorney General
Privacy Act	§§ 2.1-377 through 2.1-386 <u>2.2-3800 to 2.2-3809</u> of the Code of Virginia

16VAC25-60-90. Release of information and disclosure pursuant to requests under the Virginia Freedom of Information Act and subpoenas.

A. Pursuant to the Virginia Freedom of Information Act (FOIA) and with the exceptions stated in subsections B through H of this section, employers, employees and their representatives shall

have access to information gathered in the course of an inspection.

B. Interview statements of employers, owners, operators, agents, or employees given to the commissioner in confidence pursuant to §40.1-49.8 of the Code of Virginia shall not be disclosed for any purpose, except to the individual giving the statement.

C. All file documents contained in case files which are under investigation, and where a citation has not been issued, are not disclosable until:

1. The decision has been made not to issue citations; or,
2. Six months has lapsed following the occurrence of an alleged violation.

D. Issued citations, orders of abatement and proposed penalties are public documents and are releasable upon a written request. All other file documents in cases where a citation has been issued are not disclosable until the case is a final order of the commissioner or the court ; except that once a copy of file documents in a contested case has been provided to legal counsel for the employer in response to a request for discovery, or to a third party in response to a subpoena duces tecum, such documents shall be releasable upon a written request, subject to the exclusions in this regulation and the Virginia Freedom of Information Act.

E. Information required to be kept confidential by law shall not be disclosed by the commissioner or by any employee of the department. In particular, the following specific information is deemed to be nondisclosable:

1. The identity of and statements of an employee or employee representative who has complained of hazardous conditions to the commissioner;
2. The identities of employers, owners, operators, agents or employees interviewed during inspections and their interview statements;

3. Employee medical and personnel records obtained during VOSH inspections. Such records may be released to the employee or his duly authorized representative upon a written, and endorsed request; and

4. Employer trade secrets, commercial, and financial data.

F. The commissioner may decline to disclose a document that is excluded from the disclosure requirements of the Virginia FOIA, particularly documents and evidence related to criminal investigations, writings protected by the attorney-client privilege, documents compiled for use in litigation and personnel records.

G. An effective program of investigation and conciliation of complaints of discrimination requires confidentiality. Accordingly, disclosure of records of such complaints, investigations, and conciliations will be presumed to not serve the purposes of Title 40.1 of the Code of Virginia, except for statistical and other general information that does not reveal the identities of particular employers or employees.

H. All information gathered through participation in Consultation Services or Training Programs of the department shall be withheld from disclosure except for statistical data which does not identify individual employers.

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 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.

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.

16VAC25-60-100. Complaints.

A. ~~An employee or other~~ Any person who believes that a safety or health hazard exists in a workplace may request an inspection by giving notice to the commissioner. ~~Written complaints signed by an employee or an authorized representative will be treated as formal complaints. Complaints by persons other than employees and authorized representatives and unsigned complaints by employees or authorized representatives shall be treated as nonformal complaints. Nonformal complaints will generally be handled by letter and formal complaints will generally result in an inspection.~~

B. For purposes of this section and §40.1-51.2(b) of the Code of Virginia, the representative(s) that will be recognized as authorized ~~by~~ to act for employees ~~for such action shall~~ can be:

1. A representative of the employee bargaining unit;
2. Any member of the employee's immediate family acting on behalf of the employee; or
3. A lawyer or physician retained by the employee.

C. A written complaint may be preceded by an oral complaint at which time the commissioner will either give instructions for filing the written complaint or provide forms for that purpose.

Section 40.1-51.2(b) of the Code of Virginia stipulates that the written complaint follow an oral complaint by no more than two working days. However, if an oral complaint gives the

commissioner reasonable grounds to believe that a serious condition or imminent danger situation exists, the commissioner may cause an inspection to be conducted as soon as possible without waiting for a written complaint.

D. A complaint should allege that a violation of safety and health laws, standards, rules, or regulations has taken place. The violation or hazard should be described with reasonable particularity.

E. A complaint will be ~~classified as formal or nonformal and~~ be evaluated to determine whether there are reasonable grounds to believe that the violation or hazard complained of exists.

1. If the commissioner determines that there are no reasonable grounds for believing that the violation or hazard exists, the employer and the complainant shall be informed in writing of the reasons for this determination.

2. An employee or authorized representative may obtain review of the commissioner's determination that no reasonable grounds for believing that the violation or hazard exists by submitting a written statement of his position with regard to the issue. Upon receipt of such written statement a further review of the matter will be made which may include a requested written statement of position from the employer, further discussions with the complainant or an informal conference with complainant or employer if requested by either party. After review of the matter, the commissioner shall affirm, modify or reverse the original determination and furnish the complainant and the employer written notification of his decision.

F. ~~If the commissioner determines that the complaint is formal and offers reasonable grounds to believe that a hazard or violation exists, then an inspection will be conducted as soon as possible. Valid nonformal complaints may be resolved by letter or may result in an inspection if the~~

~~commissioner determines that such complaint establishes probable cause to conduct an inspection.~~ The commissioner's response to a complaint will either be in the form of an onsite inspection or an investigation which does not involve onsite response by the Commissioner.

1. Onsite inspections will normally be conducted in response to complaints alleging the following:

a. The complaint was reduced to writing, is signed by a current employee or employee representative, and states the reason for the inspection request with reasonable particularity. In addition, there are reasonable grounds to believe that a violation of a safety or health standard has occurred.

b. Imminent danger hazard;

c. Serious hazard, which in the discretion of the commissioner requires an onsite inspection;

d. Permanently disabling injury or illness related to a hazard potentially still in existence;

e. The establishment has a significant history of non-compliance with VOSH laws and standards;

f. The complaint identifies an establishment or an alleged hazard covered by a local or national emphasis inspection program;

g. A request from a VOSH/OSHA discrimination investigator to conduct an inspection in response to a complaint initially filed with the investigator;

h. The employer fails to provide an adequate response to a VOSH investigation contact, or the complainant provides evidence that the employer's response is false, incorrect, incomplete or does not adequately address the hazard.

2. A complaint investigation, which does not involve onsite activity, shall normally be conducted for all complaints that do not meet the criteria listed in subdivision 1 of this subsection.

3. The commissioner reserves the right, for good cause shown, to initiate an inspection with regard to certain complaints that don't meet the criteria listed in subdivision 1 of this subsection; as well as to decline to conduct an inspection and instead conduct an investigation, for good cause shown, when certain complaints are found to otherwise meet the criteria listed in subdivision 1 of this subsection.

G. If there are several complaints to be investigated, the commissioner may prioritize them by considering such factors as the gravity of the danger alleged and the number of exposed employees.

H. At the beginning of the inspection the employer shall be provided with a copy of the written complaint. The complainant's name shall be deleted and any other information which would identify the complainant shall be reworded or deleted so as to protect the complainant's identity.

I. An inspection pursuant to a complaint may cover the entire operation of the employer, particularly if it appears to the commissioner that a full inspection is warranted. However, if there has been a recent inspection of the worksite or if there is reason to believe that the alleged violation or hazard concerns only a limited area or aspect of the employer's operation, the inspection may be limited accordingly.

J. After an inspection based on a complaint, the commissioner shall inform the complainant in writing whether a citation has been issued and briefly set forth the reasons if not. The commissioner shall provide the complainant with a copy of any resulting citation issued to the employer.

Part III

Occupational Safety and Health Standards

16VAC25-60-120. General industry standards.

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.

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 1910. The use of any machinery, vehicle, tool, material or equipment which 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.

16VAC25-60-130. Construction industry standards.

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.

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 1926. The use of any machinery, vehicle, tool, material or equipment which 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.

1. 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 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, ~~tunnelling~~ 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.

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.

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.

16VAC25-60-140. Agriculture standards.

The occupational safety or health standards adopted as rules or regulations by the board either directly, or by reference, from 29 CFR Part 1928 and 29 CFR Part 1910 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.

For the purposes of applicability of such Part 1928 and Part 1910 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 § 130.A. of this regulation; 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.

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 1928 or Part 1910. The use of any machinery, vehicle, tool, material or equipment which 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.

16VAC25-60-150. Maritime standards.

The occupational safety or health standards adopted as rules or regulations by the board either directly, or by reference, from 29 C.F.R. Part 1915, ~~and~~ 29 C.F.R. Part 1917, 29 C.F.R. Part 1918 and 29 C.F.R. 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.

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 Parts 1915, 1917, 1918 or 1919. The use of any machinery, vehicle, tool, material or equipment which 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.

Part IV

Variances

16VAC25-60-190. General provisions.

A. Any employer or group of employers desiring a permanent or temporary variance from a standard or regulation pertaining to occupational safety and health may file with the

commissioner a written application which shall be subject to the following policies:

1. A request for a variance shall not preclude or stay a citation or bill of complaint for violation of a safety or health standard;

2. No variances on record keeping requirements required by the U.S. Department of Labor shall be granted by the commissioner;

3. An employer, or group of employers, who has applied for a variance from the U.S.

Department of Labor, and whose application has been denied on its merits, shall not be granted a variance by the commissioner unless there is a showing of changed circumstances significantly affecting the basis upon which the variance was originally denied;

4. An employer to whom the U.S. Secretary of Labor has granted a variance under OSHA provisions shall document this variance to the commissioner. In such cases, unless compelling local circumstances dictate otherwise, the variance shall be honored by the commissioner without the necessity of following the formal requirements which would otherwise be applicable.

In addition, the commissioner will not withdraw a citation for violation of a standard for which the Secretary of Labor has granted a variance unless the commissioner previously received notice of and decided to honor the variance; and

5. Incomplete applications will be returned within 30 days to the applicant with a statement indicating the reason or reasons that the application was found to be incomplete.

B. In addition to the information specified in 16VAC25-60-200 A and 16VAC25-60-210 A, every variance application shall contain the following:

1. A statement that the applicant has informed affected employees of the application by delivering a copy of the application to their authorized representative, if there is one, as well as having posted, in accordance with 16VAC25-60-40, a summary of the application which

indicates where a full copy of the application may be examined;

2. A statement indicating that the applicant has posted, with the summary of the application described above, the following notice: "Affected employees or their representatives have the right to petition the Commissioner of Labor and Industry for an opportunity to present their views, data, or arguments on the requested variance, or they may submit their comments to the commissioner in writing. Petitions for a hearing or written comments should be addressed to the Commissioner of Labor and Industry, Powers-Taylor Building, 13 South Thirteenth Street, Richmond, VA ~~23219~~ 23219-4101. Such petitions will be accepted if they are received within 30 days from the posting of this notice or within 30 days from the date of publication of the commissioner's notice that public comments concerning this matter will be accepted, whichever is later.";

3. A statement indicating whether an application for a variance from the same standard or rule has been made to any federal agency or to an agency of another state. If such an application has been made, the name and address of each agency contacted shall be included.

C. Upon receipt of a complete application for a variance, the commissioner shall publish a notice of the request in a newspaper of statewide circulation within 30 days after receipt, advising that public comments will be accepted for 30 days and that an informal hearing may be requested in conformance with subsection D of this section. Further, the commissioner may initiate an inspection of the establishment in regard to the variance request.

D. If within 30 days of the publication of notice the commissioner receives a request to be heard on the variance from the employer, affected employees, the employee representative, or other employers affected by the same standard or regulation, the commissioner will schedule a hearing with the party or parties wishing to be heard and the employer requesting the variance. The

commissioner may also schedule a hearing upon his own motion. The hearing will be held within a reasonable time and will be conducted informally in accordance with §§2.2-4019 and 2.2-4021 of the Code of Virginia unless the commissioner finds that there is a substantial reason to proceed under the formal provisions of §2.2-4020 of the Code of Virginia.

E. If the commissioner has not been petitioned for a hearing on the variance application, a decision on the application may be made promptly after the close of the period for public comments. This decision will be based upon the information contained in the application, the report of any variance inspection made concerning the application, any other pertinent staff reports, federal OSHA comments or public records, and any written data and views submitted by employees, employee representatives, other employers, or the public.

F. The commissioner will grant a variance request only if it is found that the employer has met by a preponderance of the evidence, the requirements of either 16VAC25-60-200 B 4 or 16VAC25-60-210 B 4 of these regulations.

1. The commissioner shall advise the employer in writing of the decision and shall send a copy to the employee representative if applicable. If the variance is granted, a notice of the decision will be published in a newspaper of statewide circulation.

2. The employer shall post a copy of the commissioner's decision in accordance with 16VAC25-60-40 of these regulations.

G. Any party may within 15 days of the commissioner's decision file a notice of appeal to the board. Such appeal shall be in writing, addressed to the board, and include a statement of how other affected parties have been notified of the appeal. Upon notice of a proper appeal, the commissioner shall advise the board of the appeal and arrange a date for the board to consider the appeal. The commissioner shall advise the employer and employee representative of the time

and place that the board will consider the appeal. Any party that submitted written or oral views or participated in the hearing concerning the original application for the variance shall be invited to attend the appeal hearing. If there is no employee representative, a copy of the commissioner's letter to the employer shall be posted by the employer in accordance with the requirements of 16VAC25-60-40 of these regulations.

H. The board shall sustain, reverse, or modify the commissioner's decision based upon consideration of the evidence in the record upon which the commissioner's decision was made and the views and arguments presented as provided above. The burden shall be on the party filing the appeal to designate and demonstrate any error by the commissioner which would justify reversal or modification of the decision. The issues to be considered by the board shall be those issues that could be considered by a court reviewing agency action in accordance with §2.2-4027 of the Code of Virginia. All parties involved shall be advised of the board's decision within 10 working days after the hearing of the appeal.

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 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.

1. No citation may be issued after the expiration of six months following the occurrence of any alleged violation. The six month time frame 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 time frame for citation issuance, the following requirements shall apply:

a. The six month time frame begins to run on the day after the incident or event occurred or notice was received by the commissioner (as specified below), in accordance with Va. Code §1-210.A. The word “month” shall be construed to mean one calendar month in accordance with Va. Code §1-223.

b. 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.

c. Notwithstanding b. above, 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 Va. Code §40.1-51.1.D, the six month time frame shall not be deemed to commence until the commissioner receives actual notice of the incident.

d. Notwithstanding b. above, if the Commissioner is first notified of a work-related incident resulting in an injury or illness to an employee(s) through receipt of an Employer’s Accident Report (EAR) form from the Virginia Workers’ Compensation Commission as provided in Va. Code § 65.2-900, the six month time frame shall not be deemed to commence until the

commissioner actually receives the EAR form.

e. Notwithstanding b. above, if the Commissioner is first notified of a work-related hazard, or incident resulting in an injury or illness to an employee(s), through receipt of a complaint in accordance with § 100 of these regulations, or referral, the six month time frame shall not be deemed to commence until the commissioner actually receives the complaint or referral.

B. A citation issued under subsection A 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 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 record keeping, 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.

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);

3. The employer who has the responsibility for actually correcting the hazard (the correcting employer).

G. A citation issued under subsection F. 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 and/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.

16VAC25-60-300. Contest proceedings applicable to the Commonwealth.

A. Where the informal conference has failed to resolve any controversies arising from a citation issued to the Commonwealth or one of its agencies, and a timely notice of contest has been received, the Commissioner of Labor and Industry shall refer the case to the ~~Attorney General~~ Governor, whose written decision on the contested matter shall become a final order of the commissioner.

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 formally 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.

C. Where abatement of a violation will require the appropriation of funds, the commissioner shall cooperate with the appropriate agency head in seeking such an appropriation; where the commissioner determines that an emergency exists, the commissioner shall petition the governor for funds from the Civil Contingency Fund or other appropriate source.

16VAC25-60-320. Extension of abatement time.

A. Where an extension of abatement is sought concerning a final order of the commissioner or of a court, the extension can be granted as an exercise of the enforcement discretion of the commissioner. While the extension is in effect the commissioner will not seek to cite the employer for failure to abate the violation in question. The employer shall carry the burden of proof to show that an extension should be granted.

B. The commissioner will consider a written petition for an extension of abatement time if the petition is mailed to or received by the commissioner prior to the expiration of the established abatement time.

C. A written petition requesting an extension of abatement time shall include the following information:

1. All steps taken by the employer, and the dates such actions were taken, in an effort to achieve compliance during the prescribed abatement period;
2. The specific additional abatement time necessary in order to achieve compliance;
3. The reasons such additional time is necessary, such as the unavailability of professional or

technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date;

4. All available interim steps being taken to safeguard the employees against the cited hazard during the abatement period; and

5. A certification that a copy of the petition has been posted and served on the authorized representative of affected employees, if there is one, in accordance with 16VAC25-60-40 of these regulations, and a certification of the date upon which such posting and service was made.

D. A written petition requesting an extension of abatement which is filed with the commissioner after expiration of the established abatement time will be accepted only if the petition contains an explanation satisfactory to the commissioner as to why the petition could not have been filed in a timely manner.

1. The employer is to notify the commissioner as soon as possible.

2. Notification of the exceptional circumstances which prevents compliance within the original abatement period shall accompany a written petition which includes all information required in subsection C.

E. The commissioner will not make a decision regarding such a petition until the expiration of 15 working days from the date the petition was posted or served.

F. Affected employees, or their representative, may file a written objection to a petition for extension of abatement time. Such objections must be received by the commissioner within 10 working days of the date of posting of the employer's petition. Failure to object within the specified time period shall constitute a waiver of any right to object to the request.

G. When affected employees, or their representatives object to the petition, the commissioner will attempt to resolve the issue in accordance with 16VAC25-60-330 of these regulations. If the

matter is not settled or settlement does not appear probable, ~~the Commissioner of Labor and Industry will hear the objections~~ will be heard in the manner set forth at subsection I below.

H. The employer or an affected employee may seek review of an adverse decision regarding the petition for extension of abatement to the Commissioner of Labor and Industry within five working days after receipt of the commissioner's decision.

I. An employee's objection not resolved under subsection G of this section or an employer or employee appeal under subsection H will be heard ~~by the Commissioner of Labor and Industry~~ using the procedures of §§2.2-4019 and 2.2-4021 of the Code of Virginia. Burden of proof for a hearing under subsection G shall lie with the employer. Burden of proof for an appeal under subsection H shall lie with the party seeking review.

1. All parties shall be advised of the time and place of the hearing by the commissioner.

2. ~~Within 15 working days of the hearing, all~~ All parties will be advised of the ~~Commissioner of Labor and Industry's decision~~ within 15 working days of the hearing.

3. ~~Since the issue is whether the Commissioner of Labor and Industry will exercise his enforcement discretion, no further appeal is available.~~

16VAC25-60-340. Settlement.

A. Settlement negotiations may be held for the purpose of resolving any dispute regarding an inspection, citation, order of abatement, proposed penalty, or any other matter involving potential litigation. Settlement is encouraged at any stage of a proceeding until foreclosed by an order becoming final. It is the policy of the commissioner that the primary goal of all occupational safety and health activity is the protection of worker safety, health and welfare; all settlements shall be guided by this policy.

B. Settlement negotiations will ordinarily take place in the medium of an informal conference. Employees shall be given notice of scheduled settlement discussions and shall be given opportunity to participate in the manner provided for in 16VAC25-60-330 E of these regulations.

C. Where a settlement with the employer is reached before the 15th working day after receipt of a citation, order of abatement, or proposed civil penalty, and no notice of contest has been filed, the commissioner shall forthwith ~~amend~~ prepare a settlement agreement noting any changes to the citation, order of abatement, or proposed civil penalty, as agreed. ~~The amended citation shall bear a title to indicate that it has been amended and the amended citation or an accompanying agreement shall contain a statement to the following effect: "This citation has been amended by agreement between the commissioner and the employer named above. As part of the written agreement, the employer has waived his right to file a notice of contest to this order. This agreement shall not be construed as an admission by the employer of civil liability for any violation alleged by the commissioner."~~

D. Following receipt of an employer's timely notice of contest, the commissioner will immediately notify the appropriate Commonwealth's Attorney and may delay the initiation of judicial proceedings until settlement opportunities have been exhausted.

1. During this period, the commissioner may agree to amend the citation, order of abatement, or proposed civil penalty, ~~through the issuance of an amended citation. Every such amended citation shall bear a title to indicate that it has been amended and the amended citation or the accompanying~~ The settlement agreement shall contain a statement to the following effect: ~~"This amended citation is being issued as a result of a settlement between the commissioner and the employer. The employer, by his signature below, agrees to withdraw his notice of contest filed in this matter and not to contest the amended citation. This agreement shall not be construed as an~~

admission by the employer of civil liability for any violation alleged by the commissioner."

2. At the end of this period, if settlement negotiations are not successful, the commissioner will initiate judicial proceedings by causing a bill of complaint to be filed and turning over the contested case to the Commonwealth's Attorney.

E. Employees or their representative have the right to contest abatement orders arising out of settlement negotiations if the notice is timely filed with the commissioner within 15 working days of issuance of the agreement ~~amended citation~~ and abatement order. Upon receipt of a timely notice of contest the commissioner will initiate judicial proceedings.

F. After a bill of complaint has been filed, any settlement shall be handled through the appropriate Commonwealth's Attorney and shall be embodied in a proposed order and presented for approval to the court before which the matter is pending. Every such order shall bear the signatures of the parties or their counsel; shall provide for abatement of any violation for which the citation is not vacated; shall provide that the employer's agreement not be construed as an admission of civil liability; and may permit the commissioner, when good cause is shown by the employer, to extend any abatement period contained within the order.