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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Virginia Department of Labor and Industry/Safety and Health Codes Board
Virginia Administrative Code (VAC) citation(s)	16 VAC25-60-30, Applicability to Public Employers; 16 VAC25-60-90, Release of Information and Disclosure Pursuant to Requests Under the Virginia Freedom of Information Act and Subpoenas; 16VAC25-60-110, Discrimination; discharge or retaliation; remedy for retaliation; 16VAC25-60-245, Take and Preserve Testimony, Examine Witnesses and Administer Oaths; and 16VAC25-60-260, Issuance of Citation and Proposed Penalty
Regulation title(s)	Administrative Regulations for the Virginia Occupational Safety and Health Program
Action title	Proposed regulations to amend the Administrative Regulations for the Virginia Occupational Safety and Health Program
Date this document prepared	July 16, 2015

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Subject matter and intent

Please describe briefly the subject matter, intent, and goals of the planned regulatory action.

The Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program is the promulgated rules and procedures under which the Commonwealth carries out its obligations, as prescribed by Title 40.1 of the Code of Virginia and the Virginia State Plan for Occupational Safety and Health, as approved by the U.S. Department of Labor.

The NOIRA was requested to address several issues in regard to the Administrative Regulation of the VOSH Program. The proposed changes are intended to accommodate statutory changes to the Code of Virginia, strengthen anti-retaliation or “whistleblower” protections for both public and private sector employees, and to specify the burden of proof threshold for VOSH cases which go to Circuit Court. The goals of this regulatory action is to develop specific language covering the scope and range of each proposed change after these issues have been reviewed and analyzed by VOSH staff as well as input from the public during the initial 30-day public comment period.

Legal basis

Please identify the (1) the agency (includes any type of promulgating entity) and (2) the state and/or federal legal authority for the proposed regulatory action, including the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable. Your citation should include a specific provision, if any, authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency’s overall regulatory authority.

The Safety and Health Codes Board is authorized by Title 40.1-22(5) to: “... adopt, alter, amend, or repeal rules and regulations to further, protect and promote the safety and health of employees in places of employment over which it has jurisdiction and to effect compliance with the federal OSH Act of 1970...as may be necessary to carry out its functions established under this title”.

“In making such rules and regulations to protect the occupational safety and health of employees, the Board shall adopt the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence that no employee will suffer material impairment of health or functional capacity”.

“However, such standards shall be at least as stringent as the standards promulgated by the federal OSH of 1970 (P.L. 91-596). In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experiences gained under this and other health and safety laws.”

Purpose

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

The purpose of amending the Administrative Regulation for the VOSH Program is to accommodate statutory changes to the Code of Virginia, strengthen anti-retaliation or “whistleblower” protections for both public and private sector employees, and to specify the burden of proof threshold for VOSH cases which go to Circuit Court.

Substance

Please briefly identify and explain the new substantive provisions that are being considered, the substantive changes to existing sections that are being considered, or both.

The request to authorize a NOIRA is to accommodate several issues in regard to the Administrative Regulation of the VOSH Program. Such sections to be considered for review include, but may not be limited to, the following:

- § Applicability of anti-retaliation safeguards to public sector employees, *16VAC25-60-30*;
Application of Commonwealth’s Attorney to act on behalf of the Commissioner for public sector employers, *16VAC25-60-30*;
- § Allowance for the Commissioner to petition the Cabinet Secretary and then the Executive regarding resolution of anti-retaliation violations with a state agency, *16VAC25-60-30.G.*;
- § Virginia Freedom of Information Act requirements in regard to the Voluntary Protection Program, *16VAC25-60-90*;
- § Change of section title(s) to reflect recent terminology changes in occupational discrimination or anti-retaliation cases, *16VAC25-60-110*;
- § Provision of penalties for occupational discrimination or anti-retaliation cases at the litigation stage, *16VAC25-60-110*;
- § Title update to reflect prior statutory changes, *16VAC25-60-245*;
- § “Burden of Proof” in VOSH court cases to be specified as “preponderance of the evidence”, *16VAC25-60-260*; and
- § Burden for proving an affirmative defense to a citation lies with the defendant, *16VAC25-60-260*.

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. 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 regulation.

There are no known alternatives to these amendments which are necessary to comply with changes to statutory law or that address procedural or other administrative changes that have occurred since the Administrative Regulations Manual was last revised.

Public participation

Please indicate whether the agency is seeking comments on the intended regulatory action, including ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public hearing is to be held to receive comments. Please include one of the following choices: 1) a panel will be appointed and the agency's contact if you're interested in serving on the panel is _____; 2) a panel will not be used; or 3) public comment is invited as to whether to use a panel to assist in the development of this regulatory proposal.

The agency is seeking comments on this regulatory action, including but not limited to: ideas to be considered in the development of this proposal, the costs and benefits of the alternatives stated in this background document or other alternatives, and the potential impacts of the regulation.

The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include: projected reporting, recordkeeping, and other administrative costs; the probable effect of the regulation on affected small businesses; and the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit comments may do so via the Regulatory Town Hall website (<http://www.townhall.virginia.gov>), or by mail, email, or fax to [Mr. Jay Withrow, Director, Legal Support, VPP, ORA, OPP & OWP, Virginia Department of Labor and Industry, Main Street Centre, 600 East Main Street, Suite 207, Richmond, VA 23219; phone: (804) 786-9873; fax: (804) 786-8418; email address: Withrow.jay@dol.gov]. Written comments must include the name and address of the commenter. In order to be considered, comments must be received by midnight on the last day of the public comment period.

A public hearing will be held following the publication of the proposed stage of this regulatory action and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<http://www.townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://www.virginia.gov/connect/commonwealth-calendar>). Both oral and written comments may be submitted at that time.