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Final Regulation 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, 16 VAC25-60-90, 16VAC25-60-110, 16VAC25-60-120, 16VAC25-60-130, 16VAC25-60-140, 16VAC25-60-150, 16VAC25-60-245, and 16VAC25-60-260
Regulation title(s)	Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program
Action title	Final Regulation to Amend the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program
Date this document prepared	August 16, 2017

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*.

Brief summary

Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

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.

Changes proposed include:

Allowing VOSH to enforce the requirements of the Virginia Department of Transportation (VDOT) Work Area Protection Manual in lieu of the federal Manual on Uniform Traffic Control Devices, i.e., Part VI of the MUTCD, 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition, in any contract for construction, repair, or maintenance between either the Commonwealth or one of its local governments and an employer, where such contract stipulates employer compliance with the VDOT Work Area Protection Manual.

Clarification of anti-retaliation safeguards for public sector employees, 16VAC25-60-30. Allowing Commonwealth’s Attorney to act on behalf of the Commissioner for public sector employers, 16VAC25-60-30.F. Allowing 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 in terminology from occupational discrimination or anti-retaliation to "whistleblower". Clarifies that the Commissioner can request penalties or fines for occupational discrimination or anti-retaliation cases at the litigation stage, 16VAC25-60-110.

Change in terminology to reflect that the Commissioner's authority to take and preserve testimony and administer oaths is an administrative subpoena, 16VAC25-60-245.

Clarifying that the “burden of proof” in VOSH court cases is by a “preponderance of the evidence”, 16VAC25-60-260. Clarifying that the burden for proving an affirmative defense to a citation lies with the employer, 16VAC25-60-260.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the “Definition” section of the regulations.

- “ARM” means Administrative Regulations Manual;
- “MUTCD” means Manual on Uniform Traffic Control Devices which is a manual published by the Federal Department of Transportation and incorporated by reference as an OSHA regulation;
- “OSHA” means Occupational Safety and Health Administration
- “VDOT” means Virginia Department of Transportation;
- “VOSH” means Virginia Occupational Safety and Health.

Statement of final agency action

Please provide a statement of the final action taken by the agency including:1) the date the action was taken;2) the name of the agency taking the action; and 3) the title of the regulation.

On July 27, 2017, the Safety and Health Codes Board adopted 16VAC25-60, Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program, as a final regulation of the Board.

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 Act 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 explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Describe the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The purpose of amending the Administrative Regulation is to make certain substantive, procedural and clarifying changes that reflect current VOSH policy:

1. Amendment to 16VAC25-60-130 allows VOSH to enforce the Virginia Department of Transportation (VDOT) Work Area Protection Manual in lieu of the federal Manual on Uniform Traffic Control

Devices (Part VI of the MUTCD, 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition) in any contract for construction, repair or maintenance between either the Commonwealth or one of its local governments and an employer, when such contract provides that the parties assure compliance with the VDOT Work Area Protection Manual. A housekeeping change to renumber all paragraphs in §§16VAC25-60-120 through 16VAC25-60-150 correctly is also proposed here.

Although the federal MUTCD has been adopted by OSHA and VOSH in §§1926.200 through 1926.202, a significant amount of the language provisions therein are merely recommended and non-compulsory, i.e., the terms “should” or “may” are used rather than the mandatory “must” or “shall” for desired activities and procedures, and are therefore not enforceable in a compliance setting. To mitigate this problem, VDOT has adopted its own Work Area Protection Manual which contains fewer “shoulds” and “mays”. VDOT routinely specifies language in its contracts with employers that requires employer compliance with the VDOT Work Area Protection Manual.

- 2. Amendment to 16VAC25-60-30.D clarifies whistleblower anti-retaliation safeguards for public sector employees other than the Commonwealth and its agencies, e.g., political subdivisions such as city and county governments.

Va. Code §40.1-2.1 provides that:

“The provisions of this title and any rules and regulations promulgated pursuant thereto shall not apply to the Commonwealth or any of its agencies, institutions, or political subdivisions, or any public body, unless, and to the extent that, coverage is extended by specific regulation of the Commissioner or the Safety and Health Codes Board. The Commissioner is authorized to establish and maintain an effective and comprehensive occupational safety and health program applicable to employees of the Commonwealth, its agencies, institutions, political subdivisions, or any public body. Such program shall be subject to any State plan submitted to the federal government for State enforcement of the Federal Occupational Safety and Health Act of 1970 (P.L. 91-596), or any other regulation promulgated under Title 40.1. The Commissioner shall establish procedures for enforcing the program which shall include provisions for fair hearings including judicial review and sanctions to be applied for violations.” *(Emphasis added.)*

The VOSH ARM defines the term "public employer" in §16VAC25-60-10 as:

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

The current wording of §16VAC25-60-30.D applies §40.1-51.2:2.A of the *Code of Virginia* to all public employers, i.e., both state and local government; but states that the Commissioner shall not bring an action in Circuit Court for a violation involving a public employer. This language appears to conflict with paragraph §16VAC25-60-30.E's comprehensive application of §40.1-51.2:2. of the *Code of Virginia* to political subdivisions or public bodies (which allows the Commissioner to litigate such a violation in Circuit Court).

Prior to proposing this amendment, it has been the Department's position that the right of the Commissioner to litigate a violation against a political subdivision or public body in §16VAC25-60-30.E, takes precedence over §16VAC25-60-30.D, because paragraph E. is the more specific provision in that it specifically applies §40.1-51.2:2 to a subset of the broader category of the term "public employer". The proposed amendment will eliminate this conflict.

3. Amendment to 16VAC25-60-30.E applies §40.1-7 of the *Code of Virginia* to public employers other than the Commonwealth and its agencies, which will allow Commonwealth's Attorneys to act on behalf of the Commissioner in certain situations involving those public sector employers.

Section 16VAC25-60-30.E provides that the following sections of the *Code of Virginia* apply to public employers other than the Commonwealth and its agencies, and are actions that would need the assistance of local Commonwealth's Attorneys:

- a. Commissioner's authority to seek injunctive relief in certain situations, §40.1-49.4.F.
 - b. Commissioner's authority to obtain administrative search warrants under §§40.1-49.9 through - 49.12 of the *Code of Virginia*.
4. Amendment to 16VAC25-60-30.G clarifies that when seeking to resolve whistleblower anti-retaliation cases involving the Commonwealth and its agencies, the Commissioner will petition the appropriate state official in a manner similar to that specified in 16VAC25-60-300.B, which outlines the process for resolving failure to abate issues involving the Commonwealth and its agencies.

Section 16VAC25-60-300.B provides:

"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 normally 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."

5. Amendment to 16VAC25-60-90 clarifying Virginia Freedom of Information Act (FOIA) requirements in regard to the Voluntary Protection Program, §40.1-49.13 of the *Code of Virginia*. The proposed amendment tracks federal OSHA's FOIA provisions for the federal VPP and provides that the following documents are releasable pursuant to an FOIA request:

- § Participant applications and amendments;
 - § Onsite evaluation reports;
 - § Annual self-evaluations;
 - § Agency staff correspondence containing recommendations to the Commissioner;
 - § Approval letters; and
 - § Notifications to compliance staff removing the participants from the general inspection list, Related formal correspondence.
6. Amendment to 16VAC25-60-110 specifies that occupational safety and health anti-discrimination cases will also be referred to as "whistleblower" cases. This terminology change reflects changes implemented by federal OSHA to refer to employees who allege discriminatory practices by an employer when the employees have engaged in activities protected by §11(c) of the OSH Act of 1970, as "whistleblowers".
 7. Amendment to 16VAC25-60-110 clarifies that the Commissioner may request penalties that would be paid to the employee for occupational whistleblower discrimination or anti-retaliation cases at the litigation stage pursuant to §40.1-51.2:2.

Section 40.1-51.2:1 prohibits employers from discriminating against employees who have exercised their safety and health rights under Title 40.1. Section 40.1-51.2:2.A provides that the Commissioner shall bring an action in Circuit Court when it is determined that a violation of 40.1-51.2:1 has occurred and attempts at conciliation have failed. Section §40.1-51.2:2.A further provides that the court "...shall have jurisdiction, for cause shown, to restrain violations and order appropriate relief...."

The amendment clarifies that the court's authority to "restrain violations and order appropriate relief" includes the ability to issue penalties or fines to the employer which would be payable to the employee.

8. Amendment to 16VAC25-60-245 clarifies that the Commissioner's authority in Subdivision 4 of § 40.1-6 of the *Code of Virginia* to take and preserve testimony, examine witnesses and administer oaths constitutes an administrative subpoena power.
9. Amendment to 16VAC25-60-260 clarifies that the Commissioner's burden of proving the basis for a VOSH citation, penalty and order of abatement is by a "preponderance of the evidence". While the Virginia Court of Appeals has ruled that the burden of proof for the Commissioner in a VOSH case is by a preponderance of the evidence (*Nat'l Coll. of Bus. & Tech., Inc. v. Davenport*, 57 Va. App. 677, 685, 705 S.E. 2d 519, 523 (2011)), the issue has not been definitively ruled on by the Virginia Supreme Court.
10. Amendment to 16VAC25-60-260 clarifies that the burden for proving an affirmative defense to a citation lies with the defendant. While it is generally accepted in case law that the burden for proving an affirmative defense to an OSHA/VOSH citation lies with the employer, it is not conclusively so. For instance the Fourth Circuit Court of Appeals has ruled that the burden of proving unforeseeable and unpreventable employee misconduct lies with the government (*Ocean Electric Corp. v. Sec of Labor*, 594 F. 2d 396 (4th Cir. 1979); and *L.R. Willson & Sons, Inc. v.*

Occupational Safety and Health Review Comm'n, 134 F. 3d 1235 (4th Cir.), cert denied, 525 U. S. 962 (1998). While the Virginia Court of Appeals has ruled that the burden of proof on the issue of employee misconduct lies with the employer in Virginia (*Magco of Maryland, Inc., v. Barr*, 33 Va. App. 78, 531 S. E. 2d 614 (2000)), the issue has not been definitively ruled on by the Virginia Supreme Court.

Substance

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

This proposed amendment addresses certain issues in regard to the Administrative Regulation of the VOSH Program:

Substantive changes proposed include:

- § Allowing VOSH to enforce the requirements of the Virginia Department of Transportation (VDOT) Work Area Protection Manual in lieu of the federal Manual on Uniform Traffic Control Devices, i.e., Part VI of the MUTCD, 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition, in any contract for construction, repair, or maintenance between either the Commonwealth or one of its local governments and an employer, where such contract stipulates employer compliance with the VDOT Work Area Protection Manual.
- § Clarification of anti-retaliation safeguards for public sector employees, *16VAC25-60-30*. Allowing Commonwealth's Attorney to act on behalf of the Commissioner for public sector employers, *16VAC25-60-30.F*. Allowing 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 in terminology from occupational discrimination or anti-retaliation to "whistleblower". Clarifies that the Commissioner can request penalties or fines for occupational discrimination or anti-retaliation cases at the litigation stage, *16VAC25-60-110*.
- § Change in terminology to reflect that the Commissioner's authority to take and preserve testimony and administer oaths is an administrative subpoena, *16VAC25-60-245*.
- § Clarifying that the "burden of proof" in VOSH court cases is by a "preponderance of the evidence", *16VAC25-60-260*. Clarifying that the burden for proving an affirmative defense to a citation lies with the employer, *16VAC25-60-260*.

Issues

Please identify the issues associated with the proposed regulatory action, 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, please indicate.

The amendment to 16VAC25-60-130, which allows VOSH to enforce the Virginia Department of Transportation (VDOT) Work Area Protection Manual will subject employers to the potential for VOSH citations and penalties should they violate requirements in the VDOT Manual. However, by the terms of the regulation, such violations and penalties will only be issued in situations where the employer violates a contract freely and voluntarily entered into with a public sector body. Since such an employer is bound contractually to comply with the VDOT Work Area Protection Manual and incur the costs associated with compliance, the proposed regulation will place no additional financial burden on the employer for compliance with the VDOT requirements.

Employers could accrue increased costs in cases where the Commissioner files a complaint in Circuit Court alleging that an employer discriminated against a whistleblower employee should the Commissioner request and the Court grant additional penalties or fines under its authority to restrain violations and order appropriate relief. The fiscal impact is very limited as VOSH whistleblower court cases average less than one per year.

Employees should be provided with additional safety and health protections in construction work zones as the amendment to 16VAC25-60-130 will permit VOSH to enforce the VDOT Work Area Protection manual in certain situations in lieu of enforcing §§1926.200 through 1926.202 which incorporate by reference Part VI of the Manual of Uniform Traffic Control Devices (MUTCD), 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition.

Employees should benefit from the amendment to 16VAC25-60-110 which clarifies that the Commissioner may request penalties or fines that would be paid to the employee for occupational whistleblower discrimination or anti-retaliation cases at the litigation stage, pursuant to §40.1-51.2:2. Although litigated cases are infrequent, the possibility that a court could restrain violations by adding additional fines or penalties should serve to deter discriminatory conduct by employers.

No adverse impacts to employees are anticipated from the adoption of the proposed amendments.

Other than training DOLI employees on the changes to the regulation, no additional fiscal or other programmatic impacts are anticipated for the Department from the adoption of the proposed amendments.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

The amendment to 16VAC25-60-130, which allows VOSH to enforce the Virginia Department of Transportation (VDOT) Work Area Protection Manual will subject employers to the potential for VOSH citations and penalties should they violate requirements in the VDOT Manual. This could occur in certain situations where the MUTCD would not have been enforceable because the provisions in that document might constitute recommendations and not mandatory requirements. However, by the terms of the regulation, such violations and penalties will only be issued in situations where the employer violates a contract freely and voluntarily entered into with a public sector body. Since such an employer is bound contractually to comply with the VDOT Work Area Protection Manual and incur the costs associated with compliance, the proposed regulation will place no additional financial burden on the employer for compliance with the VDOT requirements. Adoption of the amendment will allow VOSH to protect employees from situations identified by VDOT as potentially hazardous/dangerous in their Work Area Protection Manual.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

There are no localities that are particularly affected by this proposed regulation.

Family impact

Please assess the impact of this regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

To the extent that the proposed changes deter employers from violating VOSH laws and regulations which in turn reduce the number of occupational safety and health injuries suffered by working men and women in Virginia, families will be positively impacted.

Changes made since the proposed stage

*Please list all changes that made to the text of the proposed regulation and the rationale for the changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. *Please put an asterisk next to any substantive changes.*

Section number	Requirement at proposed stage	What has changed	Rationale for change

No changes were made to the text of the proposed regulation.

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate. Please distinguish between comments received on Town Hall versus those made in a public hearing or submitted directly to the agency or board.

Commenter	Comment	Agency response

No comments were received during the public comment period.

All changes made in this regulatory action

Please list all changes that are being proposed and the consequences of the proposed changes. Describe new provisions and/or all changes to existing sections. Explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
Part II General Provisions ... 16VAC25-60-30		Part II General Provisions ... 16VAC25-60-30 Applicability to public employers. 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.	Part II General Provisions ... 16VAC25-60-30 Applicability to public employers. D. Section 40.1-51.2:2.A of the Code of Virginia shall apply to public employers <u>the Commonwealth and its agencies</u> except that the commissioner shall not bring action in circuit court in the event that a voluntary agreement cannot be obtained. <u>Rationale:</u> Amendment to 16VAC25-60-30.D clarifies whistleblower anti-retaliation safeguards for public sector employees other than the Commonwealth and its agencies, e.g., political subdivisions such as city and county governments. The VOSH ARM defines the term "public employer" in §16VAC25-60-10 as:

		<p>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.</p>	<p>"Public employer" means the Commonwealth of Virginia, including its agencies, authorities, or instrumentalities or any political subdivision or public body.</p> <p>The current wording of §16VAC25-60-30.D applies §40.1-51.2:2.A of the Code of Virginia to all public employers, i.e., both state and local government, but states that the Commissioner shall not bring an action in Circuit Court for a violation involving a public employer. This language appears to conflict with paragraph §16VAC25-60-30.E's comprehensive application of §40.1-51.2:2. of the Code of Virginia to political subdivisions or public bodies, which allows the Commissioner to litigate such a violation in Circuit Court.</p> <p>Prior to proposing this amendment, it has been the Department's position that the right of the Commissioner to litigate a violation against a political subdivision or public body in §16VAC25-60-30.E, takes precedence over §16VAC25-60-30.D, because paragraph E. is the more specific provision in that it specifically applies §40.1-51.2:2 to a subset of the broader category of the term "public employer". The proposed amendment will eliminate this apparent conflict.</p> <p>E. Sections 40.1-7, 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.</p> <p><u>Rationale:</u> Amendment to 16VAC25-60-30.E applies §40.1-7 of the Code of Virginia to public employers other than the Commonwealth and its agencies, which will allow Commonwealth's Attorneys to act on behalf of the Commissioner in certain situations involving those public sector employers.</p> <p>Section 16VAC25-60-30.E provides that the following sections of the Code of Virginia apply to public employers other than the Commonwealth and its agencies, and are actions that would need the</p>
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		<p>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 same manner as provided in this chapter.</p>	<p>assistance of local Commonwealth's Attorneys:</p> <p>a. §40.1-49.4.F - Commissioner's authority to seek injunctive relief in certain situations.</p> <p>b. Commissioner's authority to obtain administrative search warrants under §§40.1-49.9 through -49.12 of the Code of Virginia.</p> <p>....</p> <p>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 same manner as provided in this chapter <u>16VAC25-60-300.B</u>.</p> <p><u>Rationale:</u> Amendment to 16VAC25-60-30.G. clarifies that when seeking to resolve whistleblower anti-retaliation cases involving the Commonwealth and its agencies, the Commissioner will petition the appropriate state official in a manner similar to that specified in 16VAC25-60-300.B, which outlines the process for resolving failure to abate issues involving the Commonwealth and its agencies.</p> <p>Section 16VAC25-60-300.B provides: "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 normally 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</p>
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			<p>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.”</p>
<p>16VAC25-90</p>		<p>16VAC25-90. Release of information and disclosure pursuant to requests under the Virginia Freedom of Information Act and subpoenas.</p> <p>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.</p> <p>J. The commissioner shall disclose information and statistics gathered pursuant to the enforcement of Virginia's occupational safety and health laws, standards,</p>	<p>16VAC25-90. Release of information and disclosure pursuant to requests under the Virginia Freedom of Information Act and subpoenas.</p> <p><u>I. All information gathered through participation in voluntary protection programs of the department pursuant to §40.1-49.13 of the Code of Virginia shall be withheld from disclosure except for statistical data which does not identify individual employers and the following:</u></p> <ol style="list-style-type: none"> <u>1. Participant applications and amendments, onsite evaluation reports, and annual self-evaluations;</u> <u>2. Agency staff correspondence containing recommendations to the Commissioner, approval letters, notifications to compliance staff removing the participants from the general inspection list, and related formal correspondence.</u> <p>J. 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.</p> <p>J.<u>K.</u> 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</p>

		<p>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.</p>	<p>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.</p> <p><u>Rationale:</u> Amendment to 16VAC25-60-90 clarifies Virginia Freedom of Information Act (FOIA) requirements in regard to the Voluntary Protection Program, §40.1-49.13 of the Code of Virginia. The proposed amendment tracks federal OSHA’s FOIA provisions for the federal VPP and provides that the following documents are releasable pursuant to an FOIA request:</p> <ul style="list-style-type: none"> • Participant applications and amendments; • Onsite evaluation reports; • Annual self-evaluations; • Agency staff correspondence containing recommendations to the Commissioner; • Approval letters; and • Notifications to compliance staff removing the participants from the general inspection list, Related formal correspondence. <p>Housekeeping changes proposed to renumber paragraphs after new paragraph was inserted.</p>
<p>16VAC25-110</p>		<p>16VAC25-60-110. Whistleblower discrimination; discharge or retaliation; remedy for retaliation. A. Employee activities₁ protected by § 40.1-51.2:1 of the Code of Virginia include, but are not limited to:</p>	<p>16VAC25-60-110. Whistleblower discrimination; discharge or retaliation; remedy for retaliation. Employee <u>whistleblower</u> activities₁ protected by § 40.1-51.2:1 of the Code of Virginia include, but are not limited to: <u>C. Section 40.1-51.2:2.A provides that the Commissioner shall bring an action in Circuit Court when it is determined that a violation of 40.1-51.2:1 has occurred and attempts at conciliating a voluntary agreement could not be obtained. Section</u></p>

			<p><u>40.1-51.2:2.A further provides that the court "...shall have jurisdiction, for cause shown, to restrain violations and order appropriate relief..." The court's authority to "restrain violations and order appropriate relief" includes the ability to issue penalties or fines to the employer which would be payable to the employee. In determining the appropriate level of penalties or fines, the court may look to §§40.1-49.4.G, H, I and J.</u></p> <p><u>Rationale:</u> Amendment to 16VAC25-60-110 specifies that occupational safety and health anti-discrimination cases will also be referred to as "whistleblower" cases. This terminology change reflects changes implemented by federal OSHA to refer to employees who allege discriminatory practices by an employer when the employees have engaged in activities protected by §11(c) of the OSH Act of 1970, as "whistleblowers". It also clarifies that the Commissioner can request penalties or fines for occupational discrimination or anti-retaliation cases at the litigation stage pursuant to §40.1-51.2:2.</p> <p>Section 40.1-51.2:1 prohibits employers from discriminating against employees who have exercised their safety and health rights under Title 40.1. Section 40.1-51.2:2.A provides that the Commissioner shall bring an action in Circuit Court when it is determined that a violation of 40.1-51.2:1 has occurred and attempts at conciliation have failed. Section §40.1-51.2:2.A further provides that the court "...shall have jurisdiction, for cause shown, to restrain violations and order appropriate relief..."</p> <p>The amendment clarifies that the court's authority to "restrain violations and order appropriate relief" includes the ability to issue penalties or fines to the employer which would be payable to the employee</p>
<p>16VAC25-60-120</p>		<p>Part III Occupational Safety and Health Standards</p> <p>16VAC25-60-120. General Industry Standards</p>	<p>Part III Occupational Safety and Health Standards</p> <p>16VAC25-60-120. General Industry Standards</p>

		<p>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.</p> <p>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 29 CFR Part 1910. The use of any machinery, vehicle, tool, material or equipment that 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.</p>	<p><u>A.</u> 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.</p> <p><u>B.</u> 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 29 CFR Part 1910. The use of any machinery, vehicle, tool, material or equipment that 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.</p> <p><u>Rationale:</u> A housekeeping change to renumber all paragraphs in §16VAC25-60-120 correctly is proposed here.</p>
<p>16VAC25-60-130</p>		<p>16VAC25-60-130. Construction Industry standards.</p> <p>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</p>	<p>16VAC25-60-130. Construction Industry standards.</p> <p><u>A.</u> 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</p>

		<p>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.</p> <p>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 29 CFR Part 1926. The use of any machinery, vehicle, tool, material or equipment that 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.</p> <p>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,</p>	<p>the Virginia State Plan for Occupational Safety and Health.</p> <p><u>B.</u> 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 29 CFR Part 1926. The use of any machinery, vehicle, tool, material or equipment that 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.</p> <p><u>4.C.</u> 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, tunneling, and electrical work. Construction does not include maintenance, alteration or</p>
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<p>16VAC25-60-140</p>		<p>16VAC25-60-140. Agriculture standards.</p> <p>The occupational safety or health standards adopted as rules or regulations by the board either directly, or by reference, from 29 CFR Part 1910 and 29 CFR Part 1928 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</p>	<p>16VAC25-60-140. Agriculture standards.</p> <p><u>A.</u> The occupational safety or health standards adopted as rules or regulations by the board either directly, or by reference, from 29 CFR Part 1910 and 29 CFR Part 1928 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.</p>

		<p>for Occupational Safety and Health.</p> <p>For the purposes of applicability of such Part 1910 and Part 1928 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 subdivision 1 of 16VAC25-60-130, 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.</p> <p>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 29 CFR Part 1910 or 29 CFR Part 1928. The use of any machinery, vehicle, tool,</p>	<p><u>B.</u> For the purposes of applicability of such Part 1910 and Part 1928 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 subdivision 1 of 16VAC25-60-130, 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.</p> <p><u>C.</u> 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 29 CFR Part 1910 or 29 CFR Part 1928. The use of any machinery, vehicle, tool, material or equipment that 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</p>
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<p>16VAC25-150</p>		<p>16VAC25-60-150. Maritime standards.</p> <p>The occupational safety or health standards adopted as rules or regulations by the board either directly, or by reference, from 29 CFR Part 1915, 29 CFR Part 1917, 29 CFR Part 1918 and 29 CFR 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.</p> <p>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 1915, 1917, 1918 or 1919. The use of any machinery, vehicle, tool, material or equipment that is not in compliance with any applicable requirement of the manufacturer is</p>	<p>16VAC25-60-150. Maritime standards.</p> <p><u>A.</u> The occupational safety or health standards adopted as rules or regulations by the board either directly, or by reference, from 29 CFR Part 1915, 29 CFR Part 1917, 29 CFR Part 1918 and 29 CFR 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.</p> <p><u>B.</u> 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 1915, 1917, 1918 or 1919. The use of any machinery, vehicle, tool, material or equipment that 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.</p> <p><u>Rationale:</u> A housekeeping change to renumber all paragraphs in §16VAC25-60-</p>

		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.	150 correctly is proposed here.
16VAC25-60-245		Part V Inspections 16VAC25-60-245. Take and preserve testimony, examine witnesses and administer oaths.	Part V Inspections 16VAC25-60-245. <u>Use of Administrative Subpoenas to take</u> Take and preserve testimony, examine witnesses and administer oaths. <u>Rationale:</u> This amendment clarifies that the Commissioner’s authority in Subdivision 4 of §40.1-6 of the Code of Virginia to take and preserve testimony, examine witnesses and administer oath constitutes an administrative subpoena power.
16VAC25-60-260		Part VI Citation and Penalty 16VAC25-60-260. Issuance of citation and proposed penalty.	Part VI Citation and Penalty 16VAC25-60-260. Issuance of citation and proposed penalty. <u>H. The Commissioner's burden of proving the basis for a VOSH citation, penalty or order of abatement is by a preponderance of the evidence.</u> <u>Rationale:</u> This amendment clarifies that the Commissioner's burden of proving the basis for a VOSH citation, penalty and order of abatement is by a "preponderance of the evidence". While the Virginia Court of Appeals has ruled that the burden of proof for the Commissioner in a VOSH case is by a preponderance of the evidence (Nat'l Coll. of Bus. & Tech., Inc. v. Davenport, 57 Va. App. 677, 685, 705 S.E. 2d 519, 523 (2011)), the issue has not been definitively ruled on by the Virginia Supreme Court. <u>I. The burden of proof in establishing an affirmative defense to a VOSH citation</u>

			<p><u>resides with the employer.</u></p> <p><u>Rationale:</u> This amendment clarifies that the burden for proving an affirmative defense to a citation lies with the employer. While it is generally accepted in case law that the burden for proving an affirmative defense to an OSHA/VOSH citation lies with the employer, it is not conclusively so. For instance the Fourth Circuit Court of Appeals has ruled that the burden of proving unforeseeable and unpreventable employee misconduct lies with the government (<i>Ocean Electric Corp. v. Sec of Labor</i>, 594 F. 2d 396 (4th Cir. 1979); and <i>L.R. Willson & Sons, Inc. v. Occupational Safety and Health Review Comm'n</i>, 134 F. 3d 1235 (4th Cir.), cert denied, 525 U. S. 962 (1998). While the Virginia Court of Appeals has ruled that the burden of proof on the issue of employee misconduct lies with the employer in Virginia (<i>Magco of Maryland, Inc., v. Barr</i>, 33 Va. App. 78, 531 S. E. 2d 614 (2000)), the issue has not been definitively ruled on by the Virginia Supreme Court.</p>
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