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Exempt Action Final Regulation Agency Background Document

Agency name	Virginia Department of Labor and Industry/Safety and Health Codes Board
Virginia Administrative Code (VAC) citation(s)	16VAC25-85-1904.0, Purpose, §1904.0 [amended]; 16VAC25-85-1904.4, Recording Criteria, §1904.4 [amended]; 16VAC25-85-1904.29, Forms, §1904.29 [amended]; 16VAC25-85-1904.32, Annual Summary, §1904.32 [amended]; 16VAC25-85-1904.33, Retention and Updating, §1904.33 [amended]; 16VAC25-85-1904.34, Change in Business Ownership, §1904.34 [amended]; 16VAC25-85-1904.35, Employee Involvement, §1904.35 [amended]; and 16VAC25-85-1904.40, Providing Records to Government Representatives, §1904.40 [amended]
Regulation title(s)	Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness
Action title	Final Rule on the Clarification of Employers' Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness
Final agency action date	June 14, 2018
Date this document prepared	June 19, 2018

When a regulatory action is exempt from executive branch review pursuant to § 2.2-4002 or § 2.2-4006 of the Virginia Administrative Process Act (APA) or an agency's basic statute, the agency is not required, however, is encouraged to provide information to the public on the Regulatory Town Hall using this form. Note: While posting this form on the Town Hall is optional, the agency must comply with requirements of the Virginia Register Act, 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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.

Under the Congressional Review Act, Congress passed and the President signed Public Law 115-21, a resolution of disapproval of OSHA's final rule entitled, "Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness," which was informally referred to as the "Volks" rule. The "Volks" rule affirmed longstanding OSHA policy by putting into regulation recordkeeping requirements stating that employers had a continuing obligation to maintain accurate injury and illness records and effectively gave OSHA the ability to issue citations to employers for failing to record work-related injuries and illnesses during the five-year retention period, (normally OSHA has a six-month statute of limitations to issue violations).

To that end, the most recent amendments generally restore the affected recordkeeping regulations to the pre-clarification rule, i.e., prior to the December 19, 2016 final rule, effective nationally on January 18, 2017, and in Virginia on May 15, 2017; and removed any references to an employer's continuing obligation to make and maintain an accurate record of each recordable injury and illness.

As a result of the Congressional resolution of disapproval of OSHA's recordkeeping clarification, OSHA's revisions are as follows:

a) §1904.0. Purpose.

Federal OSHA removed language, appearing in the December 19, 2016 final rule, concerning an employer's ongoing obligation to make and maintain an accurate record of each and every recordable fatality, injury, and illness continuing throughout the entire record retention period.

b) §1904.4. Recording criteria.

Federal OSHA removed the December 19, 2016 final rule language, concerning an employer's ongoing obligation to make and maintain an accurate record of each and every recordable fatality, injury, and illness continuing throughout the entire record retention period.

c) §1904.29. Forms.

Federal OSHA removed the December 19, 2016 final rule language, concerning failure to record within seven days not extinguishing an employer's continuing obligation to make a record of the injury or illness and to maintain accurate records of all recordable injuries and illnesses throughout the entire record retention period.

d) 1904.32. Annual Summary.

The heading of this section has been revised from "Year-end review and annual summary" to the earlier pre-December 19, 2016 heading, "Annual summary". In subsection (a), OSHA

deleted language referencing all recordable injuries and illnesses during that year; and subsection (b)(1)- *“How extensively do I have to review the OSHA 300 Log at the end of the year?”*- the following language was removed – “all recordable injuries and illnesses that occurred during the year, and make any additions or corrections necessary to ensure its accuracy”.

e) 1904.33. Retention and updating.

The heading of this section has been changed from “Retention and maintenance of accurate records” back to the earlier pre-December 19, 2016 heading, “Retention and updating.”

The question in paragraph (b)(1), Implementation, has been revised from “Other than the obligation identified in §1904.32, do I have further recording duties with respect to the OSHA 300 Logs and 301 Incident Reports during the five-year retention period?” to (1) *“Do I have to update the OSHA 300 Log during the five-year storage period?”* Unlike the most recent revisions, the December 19, 2016, final rule amendments required certain additions and corrections be made to the OSHA Log and Incident Reports during the five-year retention period. For example:

(1) OSHA Logs had to contain entries for all recordable injuries and illnesses occurring during the calendar year to which it relates;

(2) Each and every recordable injury and illness had to be recorded on an Incident Report; otherwise, the employer was under a continuing obligation to record the case on the Log during the five-year retention period; necessary additions and corrections to the OSHA Log must be made to accurately reflect any changes that had occurred in previously recorded injuries and illnesses; and

(3) Incident Report required for each and every recordable injury and illness, although making additions or corrections to Incident Reports during the five-year retention period was not required.

However, the new rule did retain the requirement for employers to continuously update the OSHA 300 Log throughout the five year storage period:

Do I have to update the OSHA 300 Log during the five-year storage period? Yes, during the storage period, you must update your stored OSHA 300 Logs to include newly discovered recordable injuries or illnesses and to show any changes that have occurred in the classification of previously recorded injuries and illnesses. If the description or outcome of a case changes, you must remove or line out the original entry and enter the new information.

Prior to the Volks II decision (see below discussion), Virginia’s policy was identical to that of OSHA that an employer had a continuing obligation to maintain an accurate record of its injuries and illnesses. In addition, the Board previously adopted effective September 21, 2006 §16VAC25-60-260.A.2, in the VOSH Administrative Regulations, which provides:

2. 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.

The changes to the federal regulation as result of the Congressional action have no impact on Virginia's regulation at §16VAC25-60-260.A.2, which was in existence prior to the December 19, 2016, recordkeeping rule changes.

f) §1904.34. Change in business ownership

This amendment would delete the following language that was added in the December 19, 2016 changes to the standard: "The new owner is not responsible for recording and reporting work-related injuries and illnesses that occurred before the new owner took ownership of the establishment."

g) §1904.35. Employee involvement

In response to the question "(2) Do I have to give my employees and their representatives access to the OSHA injury and illness records?" The proposed change to paragraph (b)(2) would remove the word "accurate" before "OSHA injury and illness records". The sentence currently reads: "Yes. Your employees, former employees, their personal representatives, and their authorized employee representatives have the right to access the OSHA injury and illness records."

Additionally, in paragraph (b)(2)(iii), in response to the question: "If an employee or representative asks for access to the OSHA 300 Log, when do I have to provide it?" the word "accurate" preceding "OSHA 300 Log(s)" was deleted.

h) Subpart E – Reporting Fatality, Injury and Illness Information to the Government

The heading to Subpart E was changed from: "Reporting Accurate Fatality, Injury, and Illness Information to the Government" to "Subpart E – Reporting Fatality, Injury and Illness Information to the Government."

i) §1904.40. Providing records to government representatives

In subsection (a), Basic requirement. The term "accurate" was deleted preceding the word, "records". The phrase, which formerly read: "...You must provide accurate records, or copies thereof,..." , now reads: " ... you must provide copies of the records...."

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 June 14, 2018, the Safety and Health Codes Board adopted federal OSHA's Final Rule on the Clarification of Employers' Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness, as authorized by Virginia Code §§40.1-22(5) and 2.2-4006.A.4(c), with an effective date of September 15, 2018.

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.

This regulatory action does not appear to have any impact on the institution of the family and family stability.

To access the Final Rule for the Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness, please click on the link below:

<https://www.osha.gov/sites/default/files/laws-regs/federalregister/2017-05-03.pdf>

**Clarification of Employer's Continuing Obligation to Make and Maintain
an Accurate Record of Each Recordable Injury and Illness; Final Rule**

As Adopted by the

Safety and Health Codes Board

Date: June 14, 2018



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: September 15, 2018

- 16VAC25-85-1904.0, Purpose, §1904.0
- 16VAC25-85-1904.4 Recording Criteria, §1904.4
- 16VAC25-85-1904.29, Forms, §1904.29
- 16VAC25-85-1904.32, Annual Summary, §1904.32
- 16VAC25-85-1904.33, Retention and Updating, §1904.33
- 16VAC25-85-1904.34, Change in Business Ownership, §1904.34
- 16VAC25-85-1904.35, Employee Involvement, §1904.35
- 16VAC25-85-1904.40, Providing Records to Government Representatives, §1904.40

When the regulations, as set forth in the Final Rule for the Clarification of Employer’s Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness, are applied to the Commissioner of the Department of Labor and Industry and/or to Virginia employers, the following federal terms shall be considered to read as below:

Federal Terms

VOSH Equivalent

29 CFR

VOSH Standard

Assistant Secretary

Commissioner of Labor and Industry

Agency

Department

May 3, 2017

September 15, 2018



20548

Federal Register / Vol. 82, No. 84 / Wednesday, May 3, 2017 / Rules and Regulations

or that the employee is eligible for workers' compensation or other benefits.

Subpart C—Recordkeeping Forms and Recording Criteria

■ 3. Revise the heading of subpart C to read as set forth above.

■ 4. In § 1904.4, remove the note to § 1904.4(a) and revise paragraph (a) introductory text to read as follows:

§ 1904.4 Recording criteria.

(a) *Basic requirement.* Each employer required by this part to keep records of fatalities, injuries, and illnesses must record each fatality, injury and illness that:

* * * * *

■ 5. Revise § 1904.29(b)(3) to read as follows:

§ 1904.29 Forms.

* * * * *

(b) * * *

(3) *How quickly must each injury or illness be recorded?* You must enter each recordable injury or illness on the OSHA 300 Log and 301 Incident Report within seven (7) calendar days of receiving information that a recordable injury or illness has occurred.

* * * * *

■ 6. Revise the heading and paragraphs (a) and (b)(1) of § 1904.32 to read as follows:

§ 1904.32 Annual summary.

(a) *Basic requirement.* At the end of each calendar year, you must:

(1) Review the OSHA 300 Log to verify that the entries are complete and accurate, and correct any deficiencies identified;

(2) Create an annual summary of injuries and illnesses recorded on the OSHA 300 Log;

(3) Certify the summary; and

(4) Post the annual summary

(b) * * *

(1) *How extensively do I have to review the OSHA 300 Log entries at the end of the year?* You must review the entries as extensively as necessary to make sure that they are complete and correct.

* * * * *

■ 7. Revise the heading and paragraph (b) of § 1904.33 to read as follows:

§ 1904.33 Retention and updating.

* * * * *

PART 1904—RECORDING AND REPORTING OCCUPATIONAL INJURIES AND ILLNESSES

■ 2. Revise § 1904.0 to read as follows:

§ 1904.0 Purpose.

The purpose of this rule (part 1904) is to require employers to record and report work-related fatalities, injuries, and illnesses.

Note to § 1904.0: Recording or reporting a work-related injury, illness, or fatality does not mean that the employer or employee was at fault, that an OSHA rule has been violated,

(b) *Implementation*—(1) *Do I have to update the OSHA 300 Log during the five-year storage period?* Yes, during the storage period, you must update your stored OSHA 300 Logs to include newly discovered recordable injuries or illnesses and to show any changes that have occurred in the classification of previously recorded injuries and illnesses. If the description or outcome of a case changes, you must remove or line out the original entry and enter the new information.

(2) *Do I have to update the annual summary?* No, you are not required to update the annual summary, but you may do so if you wish.

(3) *Do I have to update the OSHA 301 Incident Reports?* No, you are not required to update the OSHA 301 Incident Reports, but you may do so if you wish.

■ 8. Revise § 1904.34 to read as follows:

§ 1904.34 Change in business ownership.

If your business changes ownership, you are responsible for recording and reporting work-related injuries and illnesses only for that period of the year during which you owned the establishment. You must transfer the part 1904 records to the new owner. The new owner must save all records of the establishment kept by the prior owner, as required by § 1904.33 of this part, but need not update or correct the records of the prior owner.

■ 9. Revise paragraphs (b)(2) introductory text and (b)(2)(iii) of § 1904.35 to read as follows:

§ 1904.35 Employee involvement.

(b) * * *

(2) *Do I have to give my employees and their representatives access to the OSHA injury and illness records?* Yes, your employees, former employees, their personal representatives, and their authorized employee representatives have the right to access the OSHA injury and illness records, with some limitations, as discussed below.

(iii) *If an employee or representative asks for access to the OSHA 300 Log, when do I have to provide it?* When an employee, former employee, personal representative, or authorized employee representative asks for copies of your current or stored OSHA 300 Log(s) for an establishment the employee or former employee has worked in, you must give the requester a copy of the relevant OSHA 300 Log(s) by the end of the next business day.

Subpart E—Reporting Fatality, Injury and Illness Information to the Government

■ 10. Revise the heading of subpart E to read as set forth above.

■ 11. Revise the heading and paragraph (a) of § 1904.40 to read as follows:

§ 1904.40 Providing records to government representatives.

(a) *Basic requirement.* When an authorized government representative asks for the records you keep under part 1904, you must provide copies of the records within four (4) business hours.

* * * * *

Signed at Washington, DC, on April 25, 2017.

Dorothy Dougherty,
Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2017-06754 Filed 5-2-17; 8:45 am]

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