

VOSH PROGRAM DIRECTIVE: 12-003H

ISSUED: January 15, 2019

SUBJECT

Administrative Regulations Manual (ARM) for the Virginia Occupational Safety and Health Program

Purpose

- **CHANGE VIII** establishes procedures for the application of penalties for state and local government employers in accordance with §40.1-2.1 of the *Code of Virginia*.
- **CHANGE VII** codifies in regulation a number of changes impacting public employers, disclosure of information, whistleblower discrimination, action by the Commissioner in circuit court, enforcement of VDOT MUTCD, use of administrative subpoenas, and burdens of proof.
- **CHANGE VI** provides VOSH personnel with procedures for exercising the Commissioner's statutory authority to take and preserve testimony, examine witnesses and administer oaths, in instances where such witnesses/employees/supervisors refuse requests for interviews or refuse to answer specific questions posed by a VOSH inspector. Also, it makes longstanding non-substantive housekeeping changes to match the Virginia Registrar of Regulations official copy.
- **CHANGE V** codifies in regulation the agency's longstanding multi-employer worksite policy for citation issuance and the multi-employer worksite defense and requires the use of manufacturer's guidelines for machinery, equipment, vehicles, materials and tools where no overriding specific regulations exist.
- **CHANGE IV** removes outdated references to the Administrative Process Act (APA) which appear in the Administrative Regulations Manual and replaces those outdated references with renumbered references reflecting the statutory revisions to the APA.
- **CHANGE III** reflects the requirements from the Abatement Verification regulation that employers provide specific documentation of abatement, including detailed evidence of the corrective actions that have been taken to abate hazards for which citations were issued.
- **CHANGE II** amends the ARM to correct a typographical error and to reflect revised statutory language concerning the time limit for employers to report work-related incidents resulting in a fatality or in the in-patient hospitalization of at least 3 individuals.
- **CHANGE I** transmits to field personnel the above-referenced Administrative Regulations Manual.

Scope This directive applies to all VOSH personnel.

References

- CHANGE VIII:** Not Applicable;
- CHANGE VII:** Not Applicable;
- CHANGE VI:** Not Applicable;
- CHANGE V:** Not Applicable;
- CHANGE IV:** Not Applicable;
- CHANGE III:** 62 FR 15324, 31 Mar. 1997 & OSHA Inst. STP 2.23, 04 June 1997;
- CHANGE II:** Not Applicable; and
- CHANGE I:** Not Applicable

Cancellations

- CHANGE VIII:** VOSH Program Directive 09-003G, February 1, 2018;
- CHANGE VII:** VOSH Program Directive 09-003F, October 15, 2013;
- CHANGE VI:** VOSH Program Directive 09-003E, October 1, 2006;
- CHANGE V:** VOSH Program Directive 09-003D, April 1, 2003;
- CHANGE IV:** VOSH Program Directive 09-003C, March 15, 1998;
- CHANGE III:** VOSH Program Directive 09-003B, July 1, 1995;
- CHANGE II:** VOSH Program Directive 09-003A, September 1, 1994; and
- CHANGE I:** VOSH Program Directive 09-003, September 1, 1993

Action The Assistant Commissioner, Directors and Managers shall assure that VOSH personnel are aware of and comply with the rules, requirements and procedures of the ARM for the VOSH Program, as amended.

Effective Dates

- CHANGE VIII:** November 1, 2018
- CHANGE VII:** December 15, 2017
- CHANGE VI:** December 5, 2012
- CHANGE V:** September 21, 2006
- CHANGE IV:** March 1, 2003
- CHANGE III:** December 15, 1997
- CHANGE II:** August 1, 1995
- CHANGE I:** June 30, 1994

Attachments

- CHANGE VIII:** 16VAC 25-60-10, 20, 30, 260, 270 and 280
- CHANGES I-VII:** None. Attachments have already been incorporated into the VOSH ARM

C. Ray Davenport
Commissioner



11/11/2019

Distribution: Commissioner of Labor and Industry
Assistant Commissioner
VOSH Directors and Managers
Legal Support and OIS Staffs

Consultation Services Director
VOSH Compliance and Cooperative Programs Staffs
OSHA Region III and OSHA Norfolk Area Offices

I. **Background.**

CHANGE VIII: 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.”

Action by the General Assembly during the 2016 Session amended the language in the existing statute to allow for the adoption of a regulation to provide for the issuance of monetary penalties to state and local government employers for certain occupational safety and health violations. On March 29, 2016, a statutory change approved by the General Assembly was signed by Governor McAuliffe with an effective date of July 1, 2016. *[Refer to Attachment-1 to this CHANGE.]*

On November 30, 2017, the Safety and Health Codes Board adopted as a final regulation of the Board an amendment to 16VAC 25-60, *et seq.*, Administrative Regulation for the VOSH Program, which incorporated State and Local Government Penalties. This amendment became final on November 1, 2018.

For detail on this amendment:

<http://townhall.virginia.gov/L/ViewAction.cfm?actionid=4681>

CHANGE VII: The final regulation addresses certain issues in regard to the Administrative Regulation of the VOSH Program:

- A. Allows 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.

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 instances of the use of the terms “should” and “may”. VDOT routinely specifies language, in its contracts with employers, that requires specific employer compliance with the VDOT Work Area Protection Manual.

- B. Clarifies anti-retaliation safeguards for public sector employees, *16VAC25-60-30*. Allowing Commonwealth’s Attorneys to act on behalf of the Commissioner for public sector employers, *16VAC25-60-30.F*.
- C. Allows 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*.
- D. Clarifies Virginia Freedom of Information Act (FOIA) requirements in regard to the Voluntary Protection Program (VPP), *16VAC25-60-90*.
- E. Changes section title(s) to reflect recent terminology changes in occupational discrimination or anti-retaliation cases, *16VAC25-60-110*.
- F. Clarifies that the Commissioner can request penalties or fines for occupational discrimination or anti-retaliation cases at the litigation stage, *16VAC25-60-110*.
- G. Updates ARM section title to reflect naming change with regard to the Commissioner's authority to issue administrative subpoenas, *16VAC25-60-245*.
- H. Clarifies that the “burden of proof” in VOSH court cases is by a “preponderance of the evidence”, *16VAC25-60-260*.
- I. Clarifies that the burden for proving an affirmative defense to a citation lies with the employer, *16VAC25-60-260*.

CHANGE VI: Amendments provide procedures for exercising the Commissioner’s statutory authority to take and preserve testimony, examine witnesses and administer oaths, in instances where such witnesses/employees/supervisors refuse requests for interviews or refuse to answer specific questions posed by a VOSH inspector. Also, longstanding non-substantive housekeeping changes were made to match the Registrar of Regulations official copy.

CHANGE V: Amendments were necessary to comply with changes to statutory law or to address procedural or other administrative changes that had occurred since the Administrative Regulations were revised.

CHANGE IV: Chapter 844 of the 2001 session of the General Assembly amended the Code of Virginia by recodifying Titles 2.1 and 9. As a result of this action effective on October 1, 2001, the Code sections in the Administrative Process Act were renumbered and the ARM amended to reflect these changes.

CHANGE III: Establishes regulatory requirements for employer abatement of violations related to citations issued by the VOSH Program.

CHANGE II: Two amendments were adopted. The first, which appears in paragraph 4 of what was then § 2.3, is to delete a typographical error that inadvertently resulted during the 1994 revision. The second, affects what was then § 2.4. A. and B., was made pursuant to Chapter 373 of the 1995 Virginia Acts of Assembly which amends Chapter 40.1-51.1, dealing with duties of employers. This statutory change was initiated by the Department to comply with a similar regulatory change by federal OSHA published at 59 FR 15594 on April 1, 1994.

CHANGE I: The purpose of the Administrative Regulations Manual (ARM) is to provide an operational framework of rules and procedures for the administration of the Virginia Occupational Safety and Health (VOSH) program. The major objective of the revision was to provide employers, employees, the public, VOSH employees, and other parties interested in the administrative rules governing the VOSH program with a simplified document in a more concise format to aid in the understanding of the general administrative provisions and specific related procedures of the program.

II. **Summary.**

CHANGE VIII: This amendment establishes procedures for the application of penalties for state and local government employers in accordance with §40.1-2.1 of the *Code of Virginia*. In 2016, the Virginia General Assembly passed and Governor Terry R. McAuliffe signed into law legislation that allows the Board to authorize the Commissioner to issue penalties to state and local government employers. During the legislative process, the Department represented to General Assembly members that it would pursue authorization from the Board to:

“Allow VOSH to issue proposed penalties to state and local government employers for willful, repeat and failure-to-abate violations, as well as serious violations that cause a fatal accident or are classified as “high gravity”, i.e., a violation that is classified as “high severity” and “high probability”. An example of a “high gravity” serious violation would be one where a violation directly results in non-fatal but serious injuries such as broken bones or amputations. Violations that are classified as non-high gravity serious, and other-than-serious violations would not receive a penalty.”

IMPLEMENTATION: The implementation date for application of penalties for state and local government employers is December 1, 2018, to allow time for outreach.

CHANGE VII: The purpose of amending the Administrative Regulation is to make certain substantive and procedural changes and to clarify additional changes that reflect current VOSH policy:

- A. The 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). This amendment applies to 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 is also included.

- B. The 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.
- C. The 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:

- §40.1-49.4.F - Commissioner's authority to seek injunctive relief in certain situations.
- Commissioner's authority to obtain administrative search warrants under §§40.1-49.9 through -49.12 of the *Code of Virginia*.

- D. The 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 that:

“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.”

- E. The amendment to 16VAC25-60-90 clarifies Virginia Freedom of Information Act (FOIA) requirements in regard to the Voluntary Protection Program (VPP), §40.1-49.13 of the *Code of Virginia*.

¹ § 40.1-11. *Using or revealing information gathered. Neither the Commissioner nor any employee of the Department shall make use of or reveal any information or statistics gathered from any person, company or corporation for any purposes other than those of this title.*

- F. The amendment to 16VAC25-60-110 specifies that occupational safety and health anti-discrimination cases will also be referred to as "whistleblower" cases.
- G. The 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.
- H. The 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 oath constitutes an administrative subpoena power.
- I. The 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".
- J. The amendment to 16VAC25-60-260 clarifies that the burden for proving an affirmative defense to a citation lies with the defendant.

CHANGE VI: This amendment establishes procedures for the Commissioner or his appointed representatives under Va. Code §40.1-6(5) to take and preserve testimony, examine witnesses and administer oaths under Va. Code §§40.1-6(4) and 40.1-10. The amendment makes the following changes:

- A. Specifies the wording of the oath to be administered and the manner in which it would be administered.
- B. Explains the manner in which the Commissioner would appoint in writing Department personnel as his representatives having the authority to administer such oaths and having the authority to examine witnesses in accordance with the procedures outlined in the regulation.
- C. Specifies that testimony preserved under the regulation would be recorded by a court reporter.
- D. Specifies the level of confidentiality that would attach to any testimony preserved under the statute.
- E. Establishes a procedure for the Commissioner or his authorized representatives to follow in the event that any employer refuses to make an employee or supervisor available to provide testimony in accordance with Va. Code 40.1-6(4). The final regulation provides that an application for an inspection warrant under Va. Code §§40.1-49.8 through 40.1-49.12 for VOSH investigations/inspections will be submitted to the local General District or Circuit Court with jurisdiction over the employer.
- F. Establishes a procedure for the Commissioner or his authorized representatives to follow in the event that any person who has sworn to give testimony willfully refuses or fails to answer any legal and proper question in accordance with Va. Code §§40.1-10 and 40.1-6(4), up to and including referring such refusal to the appropriate Commonwealth's Attorney for prosecution of the individual involved.

G. Recommends longstanding non-substantive housekeeping changes to the final regulation that are primarily in response to a request from the Registrar of Regulations to correct sections which do not comply with Virginia Administrative Code (VAC) formatting requirements:

- Section 10, Definitions, definitions are put in alphabetical order.
- Section 20, Jurisdiction, sections are renumbered, and cross-references to other sections in the regulation are put in proper VAC format.
- Section 90, Release of information and disclosure pursuant to requests under the Virginia Freedom of Information Act and subpoenas, the following language was amended:

“B. Interview statements of employers, owners, operators, agents, or employees given to the commissioner pursuant to § 40.1-49.8 of the Code of Virginia are confidential. Pursuant to the requirements set forth in §40.1-11 of the Code of Virginia, individuals shall have the right to request a copy of their own interview statements.”

- Section 100, Complaints, cross-references to other sections in the regulation were put in proper VAC format.
- Section 130, Construction industry standards, sections renumbered.
- Cross-references to other sections within the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program were put in proper Virginia Administrative Code format.
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CHANGE V: This amendment to the Administrative Regulations for the Virginia Occupational Safety and Health (VOSH) Program further clarifies and specifies the intent of definitions or other procedural actions listed in the regulation. It adds omitted statutory references applicable to the regulation and corrects omissions in listing of documents covered under notification and posting requirements. It clarifies the disclosability of file documents prior to the issuance of a final order. It further specifies the eligibility of a person to file a complaint, to modify the classification of complaints to correspond with the parallel procedures of federal OSHA and the response to such complaints. This amendment requires employers to comply with manufacturer’s specifications, requirements and limitations on all machinery, equipment, vehicles, materials and tools where not superseded by more stringent VOSH regulations. This amendment clarifies the meaning of the term “agricultural operations.” It also further clarifies the existing timetable for issuing citations and proposed penalties. Additionally, the amendment codifies in regulation the multi-employer worksite policy for citation issuance; and it removes the direct involvement of the Commissioner of Labor and Industry in the determination of the extension of abatement times.

CHANGE IV: These amendments to the Administrative Regulation for the Virginia Occupational Safety and Health Program will replace outdated references to Title 9 of the Administrative Process Act with the current references in the Code of Virginia.

CHANGE III: If abatement occurs during or immediately after the inspection that identified the violation(s), the employer would not be required to submit an abatement certification letter to VOSH. If the violation(s) is an other-than-serious violation, or serious violation that does not

require additional documentation, the employer is required to certify abatement using a simple one page form letter or equivalent. This form describing the completed abatement actions will meet the requirements for most violations. The employer certification that abatement is complete must include, among other things, a statement that affected employees and their representatives have been informed of the abatement (1903.19(c)(3)).

In cases involving the most serious violations, additional documentation will be required. Willful and repeat violations will require certification and documentation of abatement. Serious violations will require abatement documentation only if designated by VOSH. Abatement plans may be required by VOSH if the period allowed for abatement exceeds 90 days. For movable equipment, such as construction equipment, that has been cited as a serious hazard, the regulation would allow employers to either post a copy of the citation on the cited equipment or attach a warning tag supplied by VOSH, or devised by the employer to the equipment to alert affected employees to the presence of the hazard. VOSH must indicate cited items on the citation for which documentation and/or an abatement plan is required and the cited items of which certification are not required.

CHANGE II: This first amendment involves removing the unnecessary language, "subsection B of," which appears in paragraph 4 of § 2.3., Notification and Posting Requirements. This typographical error was made when the Administrative Regulation for the Virginia Occupational Safety and Health Program was revised in 1994. The second amendment, which appears in § 2.4. A. and B., reduces from 48 hours to 8 hours the time limit for employers to report any work-related incident resulting in a fatality or the hospitalization of at least 3, rather than 5, individuals. In cases where an employer does not immediately learn of a reportable incident, the employer would report within 8 hours, rather than 48 hours, of learning of such incident. This amendment also requires an employer to report within 8 hours, rather than 48 hours, after learning of the death of a worker who dies within 30 days of an incident; and provides specifics for information requirements and reporting methods.

CHANGE I: This was the first complete revision of the Administrative Regulations Manual (ARM) which was initially adopted in 1986. This revision contained substantive changes primarily in the areas of additional definition of terms and clarification of the 48-hour accident reporting requirements of employers. To respond to the requests to the Department for information by subpoena, new language was added which allowed the Commissioner to restrict VOSH employees from being deposed, testifying or otherwise participating in third-party lawsuits in which the Department had no genuine interest. This revision also clarified the VOSH program's response to certain federal judicial action, such as vacation of §1910.1000 permissible exposure limits (PEL). The revised ARM codified the employee misconduct defense and provided that the defense does not apply to supervisory personnel. This revision also simplified the regulation by omitting requirements already stipulated in Title 40.1 of the Code of Virginia in those cases where no further regulatory language was necessary to carry out that mandate.

**16VAC25-60, *et seq.*, Administrative Regulation for the
Virginia Occupational Safety and Health (VOSH) Program;
State and Local Government Penalties**

As adopted by the
Safety and Health Codes Board

Date: November 30, 2017



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: 01 November 2018

16VAC25-60, *et seq.*, Administrative Regulation for the
Virginia Occupational Safety and Health (VOSH) Program

Part I
Definitions

16VAC25-60-10. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Abatement period" means the period of time defined or set out in the citation 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 shall include his authorized representatives.

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

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

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

"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 (i) a single physical location where a specific governmental function is performed; or (ii) 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.

"Gravity based penalty" means an unadjusted penalty that is calculated based on the severity of the hazard and the probability that an injury or illness would result from the hazard.

"High gravity violation" means a violation with a gravity based penalty calculated at the statutory maximums contained in §§40.1-49.4 H through J.

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

"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.

"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.

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. The United States is the employer or exercises exclusive jurisdiction;
2. 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. The employer is a public employer, as that term is defined in this chapter. 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, 16VAC25-60-260, 16VAC25-60-280, 16VAC25-60-290, and 16VAC25-60-300.

Part II

General Provisions

....

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 this chapter 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), 40.1-49.4 A(4), except that the reference to subsection G does not apply, 40.1-49.4 C, 40.1-49.4 D, 40.1-49.4 H through J, 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 A(4), except that the reference to subsection G does not apply, 40.1-49.4 C, 40.1-49.4 D, 40.1-49.4 F, 40.1-49.4 H through J, 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 this chapter.

....

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 commissioner shall have authority to propose penalties for cited violations in accordance with §40.1-49.4 of the Code of Virginia and this Chapter. 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 § 1-210 A of the Code of Virginia. The word "month" shall be construed to mean one calendar month in accordance with § 1-223 of the Code of Virginia.

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 subdivision 1 b of this subsection, 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 § 40.1-51.1 D of the Code of Virginia, the six-month time frame shall not be deemed to commence until the commissioner receives actual notice of the incident.

d. Notwithstanding subdivision 1 b of this subsection, 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 § 65.2-900 of the Code of Virginia, the six-month time frame shall not be deemed to commence until the commissioner actually receives the EAR form.

e. Notwithstanding subdivision 1 b of this subsection, 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 16VAC25-60-100 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.

The commissioner shall have authority to propose civil penalties to public employers for willful, repeat and failure-to-abate violations in accordance with §§40.1-49.4 I and J; and for serious violation(s) that cause death to an employee or are classified as high gravity in accordance with §40.1-49.4 H.

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); or

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

G. A citation issued under subsection F of this section 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.

....

16VAC25-60-270. Contest of citation or proposed penalty; general proceedings.

A. An employer to whom a citation, **abatement order** or proposed penalty has been issued may contest the citation by notifying the commissioner in writing of the contest. The notice of contest must be mailed or delivered by hand within 15 working days from the receipt of the citation or proposed penalty. No mistake, inadvertence, or neglect on the part of the employer shall serve to extend the 15 working day period in which the employer must contest.

B. The notice of contest shall indicate whether the employer is contesting the alleged violation, the proposed penalty or the abatement time.

C. Employees may contest abatement orders by notifying the commissioner in the same manner as described at subsection A.

D. The employer's contest of a citation or proposed penalty shall not affect the citation posting requirements of 16VAC25-60-40 unless and until the court ruling on the contest vacates the citation.

E. When the commissioner has received written notification of a contest of citation or proposed penalty, he will attempt to resolve the matter by settlement, using the procedures of 16VAC25-60-330 and 16VAC25-60-340.

F. If the matter is not settled or it is determined that settlement does not appear probable, the commissioner will initiate judicial proceedings by referring the contested issues to the appropriate Commonwealth's Attorney and arranging for the filing of a bill of complaint and issuance of a subpoena to the employer.

G. A contest of the proposed penalty only shall not stay the time for abatement.

....

16VAC25-60-280. General contest proceedings applicable to the public sector.

A. Public employers may contest citations, abatement orders or proposed penalties by notifying the commissioner in writing of the contest. The notice of contest must be mailed or delivered by hand within 15 working days from receipt of the citation or abatement order. No mistake, inadvertence, or neglect on the part of the employer shall serve to extend the 15 working day period during which the employer may contest.

B. The notice of contest shall indicate whether the public employer is contesting the alleged violations, the proposed penalty or the abatement order.

C. Public employees may contest abatement orders by notifying the commissioner in the same manner as described at subsection A.

D. The commissioner shall seek to resolve any controversies or issues rising from a citation issued to any public employer in an informal conference as described in 16VAC25-60-330.

E. The contest by a public employer shall not affect the requirements to post the citation as required at 16VAC25-60-40 unless and until the commissioner's or the court ruling on the contest vacates the citation. A contest of a citation may stay the time permitted for abatement pursuant to § 40.1-49.4 C of the Code of Virginia.

F. A contest of the proposed penalty only shall not stay the time for abatement.

VIRGINIA ACTS OF ASSEMBLY -- 2016 SESSION

CHAPTER 526

An Act to amend and reenact § 40.1-2.1 of the Code of Virginia, relating to the occupational safety and health program applicable to employees of agencies of the Commonwealth, political subdivisions, and other public bodies.

[S 607]

Approved March 29, 2016

Be it enacted by the General Assembly of Virginia:

1. That § 40.1-2.1 of the Code of Virginia is amended and reenacted as follows:

§ 40.1-2.1. Application of title to Commonwealth and its agencies, etc.; safety and health program for public employees.

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 or the Board shall establish procedures and adopt regulations for enforcing the program which shall include provisions for (i) the issuance of proposed penalties; (ii) the payment of such penalties or a negotiated sum in lieu of such penalties; (iii) the deposit of such payments into the general fund of the state treasury; (iv) fair hearings, including judicial review; and (v) other sanctions to be applied for violations.

**16VAC25-60, et seq., Administrative Regulation for the
Virginia Occupational Safety and Health (VOSH) Program, Miscellaneous Changes**

As Adopted by the
Safety and Health Codes Board

Date: 27 July 2017



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: 15 December 2017

16VAC25-60, et seq., Administrative Regulation for the
Virginia Occupational Safety and Health (VOSH) Program

16 VAC 25-60, *et seq.*, Administrative Regulation for the Virginia Occupational Safety and Health Program

As Adopted by the
Safety and Health Codes Board

Date: August 18, 2010



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: December 5, 2012

16 VAC 25-60, *et seq.*, Administrative Regulation
for the Virginia Occupational Safety and Health Program

CHANGE V

16 VAC 25-60, *et seq.*, Administrative Regulation for the Virginia Occupational Safety and Health Program

As Adopted by the
Safety and Health Codes Board

Date: March 7, 2006



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: September 21, 2006

16 VAC 25-60, *et. seq.*, Administrative Regulation
for the Virginia Occupational Safety and Health Program

16 VAC 25-60, *et seq.*, Administrative Regulation for the Virginia Occupational Safety and Health Program

As Adopted by the
Safety and Health Codes Board

Date: December 2, 2002



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: March 1, 2003

16 VAC 25-60, *et seq.*, Administrative Regulation
for the Virginia Occupational Safety and Health Program

Amendment to the Administrative Regulation for the Virginia Occupational Safety and Health Program by inclusion of Abatement Verification, Final Rule, 29 CFR § 1903.19

As adopted by the

Safety and Health Codes Board

Date: September 29, 1997



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: December 15, 1997

16 VAC 25-60-307, Abatement Verification

When the regulations as set forth in the final rule for Abatement Verification, 29 CFR §1903.19, are applied to the Commissioner of the Department of Labor and Industry and/or to Virginia employers, the following federal terms or language, shall be considered to read as below:

Federal Terms/Language:

VOSH Equivalent:

OSHA

VOSH

Occupational Safety and Health Act of 1970

Virginia Occupational Safety and Health Act

29 CFR

VOSH Standard

§1903.16

§0ARM.0002.03

§1903.19

§0ARM.0007.00

Assistant Secretary

Commissioner of Labor and Industry

Agency

Department

May 30, 1997

December 15, 1997

Occupational Safety and Health Review Commission

Virginia Circuit Court

“(b)(2)(ii) For a contested citation item for which the Occupational Safety and Health Review Commission (OSHRC) has issued an order affirming the violation, the later of:
(A) The date identified in the final order for abatement; or
(B) The date computed by adding the period allowed in the citation for the abatement to the final order date;
(C) The date established by a formal settlement agreement.

“(b)(2)(ii) For a contested citation item the date established in a formal settlement agreement between VOSH and the employer; **or**
For a contested citation item for which a Virginia Circuit Court has issued an order affirming the violation, the later of:
(A) The date identified in the final order; or
(B) The date computed by adding the period allowed in the citation for the abatement to the final order date;
or
(C) The date established by an agreed

order.

“(b)(4)(ii)(A) The thirtieth day after the date on settlement which a decision or order of a commission law judge administrative law judge has been docketed with the commission, unless a member of the

“(b)(4)(ii)(A) Date that a formal agreement is signed by VOSH; or..”

commission has directed review; or..."

"(b)(4)(ii)(B) Where review has been directed, the

Thirtieth day after the date on which the

Commission issues its decision or order

Disposing of all or pertinent part of a case; or..."

"(b)(4)(ii)(B) The thirtieth day after the date

on which a decision or order of a circuit court

judge has been entered;, or..."

"(b)(4)(ii)(C) That date on which a federal appeals

court issues a decision affirming the violation in a

case in which a final order of OSHRC has been stayed."

"(b)(4)(ii)(C) The date on which the Virginia

Court of Appeals issues a decision affirming

the violation in a VOSH case."

CHANGE II

**Administrative Regulations Manual (ARM) for the Virginia
Occupational Safety and Health Program;
and Corrections**

As adopted by the
Safety and Health Codes Board

Date: April 17, 1995



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: August 1, 1995

Administrative Regulations Manual for the
Virginia Occupational Safety and Health Program

VR 425-02-95

**Administrative Regulations Manual (ARM) for the Virginia
Occupational Safety and Health Program**

As adopted by the
Safety and Health Codes Board

Date: April 25, 1994



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: June 30, 1994

Administrative Regulations Manual for the
Virginia Occupational Safety and Health Program

VR 425-02-95