



Final Regulation Agency Background Document

Agency name	Virginia Department of Labor and Industry/Safety and Health Codes Board
Virginia Administrative Code (VAC) citation	16 VAC 25-60
Regulation title	Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program
Action title	Amendment to the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program
Date this document prepared	August 17, 2009

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.

The VOSH Program seeks the amendment of the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program to establish 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.

Following are the requirements of Va. Code §§40.1-6(4) and 40.1-10:

Va. Code §40.1-6(4), Powers and duties of the Commissioner.

“The Commissioner shall:
....

(4) In the discharge of his duties, have power to take and preserve testimony, examine witnesses and administer oaths and to file a written or printed list of relevant interrogatories and require full and complete answers to the same to be returned under oath within thirty days of the receipt of such list of questions. “ (Emphasis added).

Va. Code §40.1-10, Offenses in regard to examinations, inspections, etc.

“If any person who may be sworn to give testimony shall willfully fail or refuse to answer any legal and proper question propounded to him concerning the subject of such examination as indicated in §§ 40.1-6, or if any person to whom a written or printed list of such interrogatories has been furnished by the Commissioner shall neglect or refuse to answer fully and return the same under oath, or if any person in charge of any business establishment shall refuse admission to, or obstruct in any manner the inspection or investigation of such establishment or the proper performance of the authorized duties of the Commissioner or any of his representatives, he shall be guilty of a misdemeanor. **Such person, upon conviction thereof, shall be fined not exceeding \$100 nor less than \$25 or imprisoned in jail not exceeding 90 days, or both.”** (Emphasis added).

The final regulation:

- * Specifies the wording of the oath to be administered and the manner in which it would be administered;
- * 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;
- * Specifies that testimony preserved under the regulation would be recorded by a court reporter;
- * Specifies the level of confidentiality that would attach to any testimony preserved under the statute;
- * 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.

- * 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.
- Recommended changes to the proposed regulation are as follows:

16 VAC25-60-90, 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 in confidence pursuant to § [40.1-49.8](#) of the Code of Virginia shall not be disclosed **[for any purpose, except to the individual giving the statement].**

The Department recommends the above language change as a result of several enforcement cases over the last two years where attorneys for employers have independently identified employees that were interviewed during the VOSH inspection and begun having the employees request copies of their confidential interview statements so the employer could then review the statements. The recommended change is related to the purpose of the original proposed regulation because the practice could place at risk an employee’s willingness in future accident investigations to provide a statement to VOSH, or to be completely forthcoming with regards to safe working conditions on the job site, if they know their employer is going to be able to review the interview statement.

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 August 13, 2009, the Safety and Health Codes Board adopted as a final regulation of the Board amendments to 16 VAC 25-60--Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program, 16 VAC25-90 –Release of information and disclosure

pursuant to requests under the Virginia Freedom of Information Act and subpoenas, 16 VAC 25-60-240--Walkthrough, and 16 VAC 25-60-245--Take and Preserve Testimony, Examine Witnesses and Administer Oaths.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter numbers, if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

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.”

In fatal and non-fatal accident investigations particularly and more routine inspections as well, VOSH inspectors are required to interview one or more employees and supervisors. VOSH personnel sometimes encounter witnesses/employees/supervisors who refuse to talk with our inspectors or avoid answering specific questions for a variety of reasons. Some employees and supervisors have refused to talk with our inspectors after talking with either the company attorney or a private attorney hired by the individual. Although such refusals are rare, they can have a significant impact on the promptness, thoroughness and quality of the investigation.

It is a generally accepted investigative principle that the closer in time to an event that information about the event is obtained from witnesses, the better the chance is that the information will be accurate. Refusals can result in delays in obtaining witness statements immediately after the accident occurs, potentially resulting in altered memories and less accurate information concerning the cause of the accident.

In addition, the investigative process is often a very fluid one, where statements made by one witness can lead to additional questions being asked of other witnesses, or previously

undisclosed documents being obtained from the employer. Such refusals can not only result in the loss of the individuals' testimony, but can also result in the loss of other potential leads in the investigation. Early access to such information will result in higher quality investigations, and better and more accurate outcomes.

When such refusals do occur, the inability to gather crucial information from eyewitnesses and sometimes the testimony of the injured employee greatly hampers the VOSH program's ability to complete a full and fair investigation of the accident in a timely manner - Va. Code §40.1-49.4.A.3 requires VOSH to issue citations within six months following the occurrence of any alleged violation. The Commissioner's statutory authority to take and preserve testimony, examine witnesses and administer oaths, if implemented through regulation, could be used to obtain necessary testimony very early in the investigative process, avoiding delays and potentially altered memories.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it 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 the final regulation is to provide VOSH personnel with procedures on how to exercise the Commissioner's statutory authority to take and preserve testimony, examine witnesses and administer oaths, in instances where witnesses/employees/supervisors refuse requests for interviews or refuse to answer specific questions posed by a VOSH inspector.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.

The amendment of the Administrative Regulations of the VOSH Program 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 proposed regulation specifies the wording of the oath to be administered and the manner in which it would be administered. It explains the manner in which the Commissioner would appoint in writing Department personnel as his representatives having the authority to administer such oaths and have the authority to examine witnesses in accordance with the procedures outlined in the regulation. It specifies that testimony preserved under the regulation would be recorded by a court reporter. It specifies the level of confidentiality that would attach to any testimony preserved under the statute. The amendment 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 proposed 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.

Lastly, it 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.

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.*

In fatal and non-fatal accident investigations particularly and more routine inspections as well, VOSH inspectors are required to interview one or more employees and supervisors. VOSH personnel sometimes encounter witnesses/employees/supervisors that refuse to talk with our inspectors or avoid answering specific questions for a variety of reasons. Although such refusals are rare, they can have a significant impact on the promptness, thoroughness and quality of the investigation.

It is a generally accepted investigative principle that the closer in time to an event that information about the event is obtained from witnesses, the better the chance is that the information will be accurate. Refusals can result in delays in obtaining witness statements immediately after the accident occurs, potentially resulting in altered memories and less accurate information concerning the cause of the accident.

In addition, the investigative process is often a very fluid one, where statements made by one witness can lead to additional questions being asked of other witnesses, or previously undisclosed documents being obtained from the employer. Such refusals can not only result in the loss of the individuals' testimony, but can also result in the loss of other potential leads in the investigation. Early access to such information will result in higher quality investigations, and better and more accurate outcomes.

When such refusals do occur, the inability to gather crucial information from eyewitnesses and sometimes the testimony of the injured employee greatly hampers the VOSH program's ability to complete a full and fair investigation of the accident in a timely manner - Va. Code §40.1-49.4.A.3 requires VOSH to issue citations within six months following the occurrence of any alleged violation. The Commissioner's statutory authority to take and preserve testimony,

examine witnesses and administer oaths, if implemented through regulation, could be used to obtain necessary testimony very early in the investigative process, avoiding delays and potentially altered memories.

Employers would have to make employees available for private interview as identified by the Commissioner or his representative, in accordance with procedures in the proposed regulation, implementing the statutory requirements in Va. Code §§40.1-6(4) and 40.1-10.

The Commissioner currently has the statutory authority to “question privately any such employer, owner, operator, agent or employee” during a VOSH inspection in accordance with Va. Code §40.1-49.8(2). As noted previously, VOSH investigation procedures provide for employee interviews on all inspections, and employers, as a regular course of business, make their employees available for such interviews without limitation. VOSH does not believe the proposed regulation will have a significant cost impact on employers for the following reasons:

- VOSH estimates that it will seek to use the new procedures in the proposed regulation to require an employer to make an employee available for an interview on an average of five or fewer cases per year.
- The average length of a VOSH interview is normally 15 minutes or less; however, in accident cases an interview may last up to 60-90 minutes. Significant down time for employers or employees is not anticipated.
- Interview locations would normally be at the employer’s worksite, an agreed to alternate site, or at the local VOSH Office. Significant travel costs are not anticipated.
- VOSH will assume the cost of transcription services.

Employees would have to provide testimony, in accordance with any procedures implementing the statutory requirements in Va. Code §§40.1-6(4) and 40.1-10. As noted previously, VOSH investigation procedures provide for employee interviews on all inspections, and employees and supervisory personnel regularly agree, without limitation, to be interviewed. VOSH does not believe the proposed regulation will have a significant cost impact on employees for the reasons listed in C. above.

The Department would have to designate and train personnel on the procedures implementing the statutory requirements in Va. Code §§40.1-6(4) and 40.1-10. The average cost of transcriptions services ranges for a one hour interview is approximately \$200. The VOSH Program estimates that annual costs for interviews under the proposed regulations would be \$1,000 or less.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar’s office, please put an asterisk next to any substantive changes.

Section number	Requirement at proposed stage	What has changed	Rationale for change
<p>16 VAC 25-60-90</p>	<p>16VAC25-60-90. Release of information and disclosure pursuant to requests under the Virginia Freedom of Information Act and subpoenas.</p> <p>B. Interview statements of employers, owners, operators, agents, or employees given to the commissioner in confidence pursuant to § 40.1-49.8 of the Code of Virginia shall not be disclosed for any purpose, except to the individual giving the statement.</p>	<p>16VAC25-60-90. Release of information and disclosure pursuant to requests under the Virginia Freedom of Information Act and subpoenas.</p> <p>B. Interview statements of employers, owners, operators, agents, or employees given to the commissioner in confidence pursuant to § 40.1-49.8 of the Code of Virginia shall not be disclosed [for any purpose, except to the individual giving the statement].</p>	<p>Language changed as a result of several enforcement cases over the last two years where attorneys for employers have independently identified employees that were interviewed during the VOSH inspection and begun having the employees request copies of their confidential interview statements so the employer could then review the statements. The recommended change is related to the purpose of the original proposed regulation because the practice could place at risk an employee’s willingness in future accident investigations to provide a statement to VOSH, or to be completely forthcoming with regards to safe working conditions on the job site, if they know their employer is going to be able to review the interview statement.</p>

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.

Commenter	Comment	Agency response

No comments were received.

All changes made in this regulatory action

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
16 VAC25-60-90		16VAC25-60-90. Release of information and disclosure pursuant to requests under the Virginia Freedom of Information Act and subpoenas. B. Interview statements of employers, owners, operators, agents, or employees given to the commissioner in confidence pursuant to § 40.1-49.8 of the Code of Virginia shall not be disclosed for any purpose, except to the individual giving the statement.	16VAC25-60-90. Release of information and disclosure pursuant to requests under the Virginia Freedom of Information Act and subpoenas. B. Interview statements of employers, owners, operators, agents, or employees given to the commissioner in confidence pursuant to § 40.1-49.8 of the Code of Virginia shall not be disclosed [for any purpose, except to the individual giving the statement] <u>Rationale:</u> Language changed as a result of several enforcement cases over the last two years where attorneys for employers have independently identified employees that were interviewed during the

<p>16VAC25-60-240</p>		<p>16 VAC 25-60-240.</p> <p>Walkthrough</p> <p>Walkthrough by the commissioner for the inspection of any workplace includes the following privileges.</p> <p>1. The commissioner shall be in charge of the inspection and, as part of an inspection, may question privately any employer, owner, operator, agent, or employee. The commissioner shall conduct the interviews of persons during the inspection or at other convenient times.</p>	<p>VOSH inspection and begun having the employees request copies of their confidential interview statements so the employer could then review the statements. The recommended changed is related to the purpose of the original proposed regulation because the practice could place at risk an employee’s willingness in future accident investigations to provide a statement to VOSH, or to be completely forthcoming with regards to safe working conditions on the job site, if they know their employer is going to be able to review the interview statement.</p> <p>16 VAC 25-60-240. Walkthrough</p> <p>Walkthrough by the commissioner for the inspection of any workplace includes the following privileges.</p> <p>1. The commissioner shall be in charge of the inspection and, as part of an inspection, may question privately any employer, owner, operator, agent, or employee. The commissioner shall conduct the interviews of persons during the inspection or at other convenient times. <u>[The commissioner may take and preserve testimony, examine witnesses and administer oaths as provided for in [§24516 VAC 25-60-245 of these regulations.]</u></p> <p><u>Rationale:</u> Language provides a reference for powers of the commissioner which appear in 16</p>
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<p>16VAC 25-60-245</p>			<p>VAC 25-60-245.</p> <p><u>[16 VAC 25-60-245</u> <u>Take and Preserve Testimony,</u> <u>Examine Witnesses and Administer</u> <u>Oaths</u></p> <p><u>1. Section 40.1-6(4) of the Code of Virginia authorizes the commissioner, in the discharge of his duties, to take and preserve testimony, examine witnesses and administer oaths. In accordance with §40.1-6(5) of the Code of Virginia, the Commissioner of Labor and Industry may appoint such representatives as are necessary to carry out the functions outlined in §40.1-6(4) of the Code of Virginia. Such appointments shall be made in writing, identify the individual being appointed, the length of appointment, the method of withdrawal of such appointment, and specify what duties are being prescribed.</u></p> <p><u>2. The oath shall be administered by the commissioner’s appointed representative to the witness as follows: “Do you swear or affirm to tell the truth”.</u></p> <p><u>3. Testimony given under oath shall be recorded by a court reporter.</u></p> <p><u>4. Questioning of employers, owners, operators, agents or employees under oath shall be in private in accordance with §40.1-49.8(2) of the Code of Virginia.</u></p> <p><u>5. An employer’s refusal to make an owner, operator, agent or employee available to the commissioner for examination under this section shall be considered a refusal to consent to the commissioner’s inspection authority under §40.1-49.8 of the</u></p>
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			<p><u><i>Code of Virginia. Upon such refusal the commissioner may seek an administrative search warrant in accordance with the provisions contained in §§40.1-49.9 to -49.12 of the Code of Virginia, and obtain an order from the appropriate judge commanding the employer to make the subject owner, operator, agent or employee available for examination at a specified location by a date and time certain.</i></u></p> <p><u><i>6. In accordance with §40.1-10 of the Code of Virginia, if any person who may be sworn to give testimony shall willfully fail or refuse to answer any legal and proper question propounded to him concerning the subject of the examination under §40.1-6 of the Code of Virginia, he shall be guilty of a misdemeanor. Such person, upon conviction thereof, shall be fined not exceeding \$100 nor less than \$25 or imprisoned in jail not exceeding 90 days or both. Any such refusal on the part of any person to comply with this section may be referred by the Commissioner of Labor and Industry to the appropriate Commonwealth’s Attorney for prosecution.]</i></u></p> <p>....</p> <p><u>Rationale:</u> This language:</p> <p>Specifies the wording of the oath to be administered and the manner in which it would be administered;</p> <p>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</p>
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			<p>accordance with the procedures outlined in the regulation;</p> <p>Specifies that testimony preserved under the regulation would be recorded by a court reporter;</p> <p>Specifies the level of confidentiality that would attach to any testimony preserved under the statute;</p> <p>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.</p> <p>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.</p>
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Regulatory flexibility analysis

Please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

The VOSH Program considered the adoption of written guidelines in lieu of a regulatory approach. Written guidelines do not have the force and effect of law, nor are they subject to notice and comment procedures required by the Virginia Administrative Process Act. It has been the experience of the VOSH Program that the regulated community prefers the opportunity to officially comment on procedures that could impact how VOSH inspections are conducted, and prefers a regulatory approach that cannot be changed at the whim of the agency, but would be subject to additional notice and comment procedures if the agency desired to change the procedures in the future.

Family impact

Please assess the impact of the proposed 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.

No impact on the family is anticipated as a result of this proposed regulatory action.