



townhall.virginia.gov

Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Virginia Department of Labor and Industry/Safety and Health Codes Board
Virginia Administrative Code (VAC) citation(s)	16VAC25-60
Regulation title(s)	Administrative Regulations for the Virginia Occupational Safety and Health Program
Action title	Proposed regulations to establish procedures for the application of penalties for state and local government employers
Date this document prepared	September 26, 2016

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

Subject matter and intent

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

This NOIRA was requested to establish procedures for the application of penalties for state and local government employers in accordance with §40.1-2.1 of the *Code of Virginia*. This NOIRA will begin the process that will 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.

Legal basis

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

The Safety and Health Codes Board is authorized by Title 40.1-22(5) to:

“... adopt, alter, amend, or repeal rules and regulations to further, protect and promote the safety and health of employees in places of employment over which it has jurisdiction and to effect compliance with the federal OSH Act of 1970...as may be necessary to carry out its functions established under this title”.

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

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

Recent incidents which have resulted in the death of government employees, as well as other accident situations, have highlighted a need for an additional incentive for compliance with the safety and health laws and regulations. From January 1, 2007 to August 1, 2014, twenty-nine fatalities and catastrophes occurred in state and local government employment. The deterrent effect of a penalty can reduce this number by encouraging compliance. The Department introduced this legislation in 2007 based on what we viewed at the time as a high number of fatalities among government employees. Unfortunately, the rate of fatalities and catastrophes for state and local employees has increased from an average of 2.2 per year before the Department introduced the legislation to 3.9 per year since then.

Action by the General Assembly during the 2016 Session amended the language in the existing statute to allow the issuance of monetary penalties to state and local government employers for certain occupational safety and health program 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 document]*

Purpose

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

The purpose of this NOIRA is to establish procedures for the application of penalties for state and local government employers in accordance with §40.1-2.1 of the *Code of Virginia*.

Substance

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

This NOIRA was requested to establish procedures for the application of penalties for state and local government employers in accordance with §40.1-2.1 of the *Code of Virginia*. This NOIRA will begin the process that will 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.

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

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

Public participation

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

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

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

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

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

Periodic review and small business impact review report of findings

If this NOIRA is the result of a periodic review/small business impact review, use this NOIRA to report the agency's findings. Please (1) summarize all comments received during the public comment period following the publication of the Notice of Periodic Review and (2) indicate whether the regulation meets the criteria set out in Executive Order 17 (2014), e.g., is necessary for the protection of public health, safety, and welfare, and is clearly written and easily understandable. In addition, as required by 2.2-4007.1 E and F, please include a discussion of the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation from the public; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

Commenter	Comment	Agency response

This NOIRA is not the result of a periodic review/small business impact review.

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~~ that 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.*