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## Final Regulation Agency Background Document

<b>Agency name</b>	Department of Labor and Industry/Safety and Health Codes Board
<b>Virginia Administrative Code (VAC) citation(s)</b>	16VAC25-60
<b>Regulation title(s)</b>	Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program; State and Local Government Penalties
<b>Action title</b>	Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program; State and Local Government Penalties
<b>Date this document prepared</b>	December 7, 2017

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

### Brief summary

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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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

The final 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.

### Acronyms and Definitions

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

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“ARM” means Administrative Regulations Manual;  
“OSH Act” means Occupational Safety and Health Act of 1970 (P.L. 91-596); and  
“VOSH” means Virginia Occupational Safety and Health

### Statement of final agency action

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

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On November 30, 2017, the Safety and Health Codes Board adopted the Final Amendments to 16VAC25-60, *et seq.*, the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program; State and Local Government Penalties.

### 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.*

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

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

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

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

## Purpose

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

The purpose for amending the Administrative Regulation 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, the substantive changes to existing sections, or both.*

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

The proposed 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.

## 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.*

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1) There is no primary advantage or disadvantage to the public.

2) The primary advantage to the agency or the Commonwealth: If the proposed imposition of penalties has the anticipated deterrent effect, pro-active steps to develop and implement injury and illness prevention programs can have a significant positive impact in reducing injury and illness rates and the significant associated costs for state and local government employers. 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 it 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.

Another primary advantage to the agency is that 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 at the end of the regulatory text in this form.]* Perhaps, a primary disadvantage to the Commonwealth would be that state and local government employers now will be issued a penalty for violations of occupational safety and health laws in which a worker can be seriously injured or killed.

An average of three (3) willful violations have been issued by VOSH per year in the public sector. Since 2007, there have been 24 willful violations, all of which have been issued to local government employers. An average of 1.4 repeated violations are issued per year to local government and 3.3 to state agencies.

Approximately five per cent (5%) of the serious violations issued are classified as high gravity. VOSH estimates that 15 such violations in state and local government would be subject to penalty per year. The average penalty issued for high gravity serious items is \$6,300.

VOSH estimates there are up to three (3) willful violations per year and up to five (5) repeat violations per year. The average penalty for a "high gravity" willful violation is \$63,000 and for a repeat is \$12,600.

VOSH estimates that the total penalties on a per year basis could range from zero to \$346,500.<sup>1</sup> In 2015, the National Safety Council (NSC) reported that the average cost of a medically consulted occupational injury in 2013 was \$42,000.

The Washington State Plan, which is tied directly into the states' workers' compensation system, conducted a study on "The impact of DOSH Enforcement and Consultation Visits on Workers' Compensation Claims Rates and costs, 1999-2008",<sup>2</sup> May, 2011. The study reviewed ten annual studies on the topic and found that:

"...enforcement inspections conducted at fixed worksites 'were associated with a 7.4% larger decrease in non-MSD [musculoskeletal disorder] compensable claims rates relative to employers with no DOSH activity. DOSH **consultation visits were associated with a 24.8% larger decrease** in non-MSD compensable claims rates relative to employers with no DOSH activity" (Emphasis added).

and

"...**enforcement** inspections were associated with a **3.1% larger decrease** in compensable claims rates relative to employers with no DOSH activity. DOSH consultation visits were associated with an **8.5% larger decrease** in compensable claims rates relative to employers with no DOSH activity."

Virginia employees will benefit from the identification and correction of workplace hazards as a result of cited violations and issued penalties, the development and implementation of injury and illness prevention programs, and the anticipated reduction in injuries and illnesses. No adverse impacts to employees are anticipated from the adoption of the proposed amendments.

According to OSHA publication, "Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job", the costs of workplace injury and illness are borne primarily by injured workers, their families, and tax-payer supported safety net programs...workers' compensation payments cover only a small fraction (about 21%) of lost wages and medical costs of work injuries and illnesses, workers, their families and private health insurance pay for nearly 63 percent of these costs, with taxpayers shouldering the remaining 16%.<sup>3</sup>

Adding penalties to citations issued does not significantly increase the workload for an individual VOSH Compliance Safety and Health Officer (CSHO). It is only anticipated that approximately 22 violations per year will carry a penalty for state and local government employers.

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

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

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<sup>1</sup> Va. Code §40.1-49.4A.4(a) provides that the calculation of penalties shall take into account the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

**Requirements more restrictive than federal**

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

The proposed regulation is less restrictive than federal penalties applicable to private sector employers, but more restrictive than federal penalties applied to federal government agencies.

**Localities particularly affected**

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

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

**Family impact**

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

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

**Changes made since the proposed stage**

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

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

No changes have been made since the proposed regulation was published in the *Virginia Register of Regulations*.

**Public comment**

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

Commenter	Comment	Agency response
<p>Scott Kalis</p>	<p>He asked that language be included so that the Board can adopt and implement a penalty reduction system similar to the current program in place for application with private businesses, and allow public entities the same consideration when determining final penalty assessments and recording of citations.</p> <p>He stated that per Va. Code §40.1-49.4A.4(a), VOSH can adjust proposed penalties once a GBP is determined for a particular hazard. He requested that this same methodology used for private industry employers be utilized for penalties assigned to public sector employers – where appropriate. Most public sector employers are not small business (type) organizations and will not readily qualify for a size of business reduction, thus leaving three other criteria to be weighed in consideration before penalties are assigned.</p>	<p>The Department generally agrees with the Commenter’s request and intends to apply the same penalty calculation procedures to state and local government employers as it does to private sector employers, with the exception noted that penalties will not be issued for other-than-serious violations and “non-high gravity” serious violations as was represented to the General Assembly during the legislative process to amend Va. Code §40.1-2.1.</p> <p>The intended purpose of the legislation and regulation is to introduce a more serious deterrent effect to significantly reduce occupationally related accidents, injuries and illnesses in the public sector.... While Virginia employers regularly experience injury and illness rates well below national averages, the rate of injuries for Virginia state and local government employees is considerably higher than the Virginia private sector (reference was made to a table included on p. 3 of the briefing package, but not included in this summary).</p> <p>Should the Department’s current approach to penalties for state and local government not achieve the desired deterrent effect, it will approach the Safety and Health Codes board about the possibility of revising the regulation in the future to allow for penalties to be issued for “non-high gravity” serious and other than serious violations.</p>
<p>Fred Brown</p>	<p>He opposes this proposal on the following grounds noted in the DPB Economic Impact Analysis.</p> <p>He first stated that he applauds any effort to ensure the safety of the human workforce. As a veteran of high-risk work environments, he appreciates the scale of responsibility public managers must assume for the welfare of their employees and of those that author and enforce safety regulations. He</p>	<p>The Department will address each issue in the order it was raised.</p> <p>First, with respect to the concern that only small agencies or municipalities who can ill afford the cost will feel the effect of penalties in lieu of penalties in the form of a percentage relative to a portion of the budget; the Department’s current penalty calculation procedures for private employers take into account the size of the employer, the history of violations and the good faith of the employer. State and local government employers will, in</p>

	<p>stated that the language of the proposed rule appears to originate from good intentions (and he has no doubt it does). But he fears the only penalties that would be felt are with those small agencies and municipalities who can ill-afford pre-determined monetary penalties in lieu of penalties in the form of percentages relative to a portion of a select budget of the violator.</p> <p>He also sent caution of the culture that may be created from this policy. The adage “what gets inspected, gets done” may create a culture whereby specific violations are ignored in favor of those identified.</p> <p>His final concern was that agency departments with large, geographically separated departments (i.e. VDOT, public universities, etc.) would be penalized for remote violations occurring outside their department. And how might municipalities respond after large penalties are assessed? Are citizens expected to pay more taxes because of a public managers’ negligence? Are there laws that would prevent increased fees and taxes after such penalties?</p>	<p>certain situations, be able to take advantage of some of those reductions.</p> <p>In addition, the Code of Virginia contains statutory maximums for penalties that can be issued on a per violation basis (see Va. Code §40.1-49.4), which serves to cap the amount of penalties that can be issued in any one case. The Department also uses an informal settlement conference process with state and local government employers that can be used to take into account the cost associated with correcting violations toward the final penalty levels agreed to. Finally, the Code of Virginia does not currently allow for a penalty calculation process that would assess penalties relative to a portion of a select budget of the violator.</p> <p>Second, with respect to the concern that certain violations will be ignored in favor of those identified, there is nothing unique in the final regulation that would treat state and local government employers any differently with respect to this issue than private sector employers are treated. All employers have a statutory and regulatory duty to provide a safe and healthy workplace environment for employees, regardless of the way that hazards are identified. In those situations where VOSH conducts a comprehensive inspection of a worksite and issues violations, all violations will have to be corrected. In situations where a limited portion of a worksite is inspected (e.g., in response to an employee complaint), identified violations will have to be corrected and the employer will be placed on notice that hazards in other portions of the worksite should be identified and corrected as well. In such cases, the employer will have the opportunity to correct hazards without having to incur monetary penalties.</p> <p>Third, with regard to geographically separated departments, this is a situation again where there is no statutory distinction between private and public sector employers when it comes to the responsibility to provide a safe and healthy workplace, even for mobile employees or worksites that are geographically separated. It is the employer’s responsibility to assure that employees and supervisors receive proper safety and health training and the proper personal protective equipment to complete job tasks in a safe and healthy manner, regardless</p>
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		<p>of the physical location. The primary purpose of introducing penalties to state and local government employers is to encourage positive and proactive approaches to providing safe and healthy workplaces, particularly in instances where worksites are geographically separated.</p> <p>Fourth, with regard to the concern that citizens may pay more taxes because of a public manager's negligence, taxing authority is not within the legal purview of the Department. However, VOSH citations and penalties when issued are public documents accessible by the news media and private citizens. The appropriate forum to address how penalties issued to a local government are paid for is through the governing structure of the locality (mayor, city council, board of supervisors, etc.).</p> <p>Fifth, with regard to the question of whether there are any laws to prevent increased fees and taxes after such penalties, the Department is not aware of any such laws at this time.</p>
<p>David Malewitz</p>	<p>In response to the proposed regulation to amend the administrative regulation for the Virginia Occupational Safety and Health (VOSH) Program; State and Local Government Penalties, He stated that he was in favor of this amendment. His reasoning stems from the simplicity of the amendment to include penalties on only infractions that have been repeated or are considered "high gravity". State and local governments should be taking appropriate precautions to prevent the occurrence of these infractions. Unfortunately, one cannot depend on an agreement of correction without some stipulation attached to it. State and local governments are held to the same principles as private organizations. In some cases, they should be held to higher principles due to their relationship with the public that they serve. In any case, all organizations should be held accountable for not adhering to safety regulations and</p>	<p>With regard to the request that some of the penalty monies be set aside "so that the money can be appropriated to help disadvantaged workers who cannot afford the medical bills associated with a "high gravity" injury," such a fund would have to be set up through a statutory change. Currently, state and local government employees injured on the job are covered by workers' compensation which should serve to cover the medical bills associated with the injury, although the Department recognizes that the effect of a serious injury on the employee and his or her family can be extensive, and not always fully compensated.<sup>1</sup></p> <p><sup>1</sup> Adding Inequality to Injury: : The Costs of Failing to Protect Workers on the Job, OSHA; <a href="https://www.dol.gov/oshareport/20150304-inequality.pdf">https://www.dol.gov/oshareport/20150304-inequality.pdf</a>; Leigh JP, Marcin JP. Workers' compensation benefits and shifting costs for occupational injury and illness. Journal of Occupational and Environmental Medicine 2012;54:445-450.</p>

	<p>protocols. Repeated offenses must be rectified and serious infractions dealt with in an appropriate manner. If that means fines have to be imposed, then do what must be done to ensure compliance.</p> <p>His only recommendation would be to create a separate fund that these funds are placed into so that the money can be appropriated to help disadvantaged workers who cannot afford the medical bills associated with a "high gravity" injury. If they were injured as a result of the state or local government failing to adequately secure a safe working environment, then they should not have to bear the brunt of the expenses.</p>	
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**All changes made in this regulatory action**

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

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
16VAC25-60-10			<p><u>"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.</u></p> <p><u>"High gravity violation" means a violation with a gravity based penalty calculated at the statutory maximums contained in subsections H, I, and J of § 40.1-49.4 of the Code of Virginia.</u></p> <p><u>Rationale:</u> These definitions were added because they basically come from the Field Operations Manual that the Department has always used in the private sector. When the department calculates a penalty, by statute, it has to take into account the size of the company, the gravity of the violation (which</p>

			is where these definitions come from), good faith, and the history of previous violations. When the Department looks at the gravity of a violation, it looks at the seriousness of the hazard and at the probability that the injury or illness could occur from being exposed to the hazard. A high gravity violation is one coded as high severity and high probability.
16VAC25-60-20.3.		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, 16VAC25-60-280, 16VAC25-60-290, and 16VAC25-60-300.	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, <u>16VAC25-60-260</u> , 16VAC25-60-280, 16VAC25-60-290, and 16VAC25-60-300.  <u>Rationale:</u> The Administrative Regulations Manual requires the Department to apply, by regulation, statutes to the public sector when the Department needs them to apply. Section 16VAC25-60-260 was added so that the Department’s ability to issue citations and penalties for safety and health violations also will apply to “public employers” defined as the Commonwealth of Virginia, including its agencies, authorities, or instrumentalities or any political subdivision or public body.
16VAC25-60-30.C.		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), 40.1-49.8, 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.	C. The following portions of Title 40.1 of the Code of Virginia shall apply to public employers: <del>§§ § 40.1-10;</del> <u>subdivisions A 1 and A 4, except that the reference to subsection G in subdivision A 4 does not apply, and subsections C, D, H, I, and J of § 40.1-49.4 A(1);</u> <del>and §§ 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.</del>  <u>Rationale:</u> The code section added, which now also will apply to public sector employers, is referencing sections in the Virginia Code that provide for the maximum penalty levels for serious violations, willful violations, repeat violations, and failure to abate. Sections that deal with other-than-serious penalties have been excluded.
16VAC25-60-30.E.		E. Sections 40.1-49.4 F, 40.1-49.9, 40.1-49.10, 40.1-49.11, 40.1-49.12, and 40.1-51.2:2 of the Code of Virginia shall apply	<del>E. Sections 40.1-49.4</del> <u>Subdivision A 4, except that the reference to subsection G in subdivision A 4 does not apply, and subsections C, D, F, H, I, and J of § 40.1-49.4 of the Code of Virginia and §§ 40.1-</u>

		to public employers other than the Commonwealth and its agencies.	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.  <u>Rationale:</u> The code section added, which now also will apply to public sector employers, is referencing sections in the Virginia Code that provide for the maximum penalty levels for serious violations, willful violations, repeat violations, and failure to abate. Sections that deal with other-than-serious penalties have been excluded.
16VAC25-60-260.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 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.	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. <u>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.</u> 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.  <u>Rationale:</u> These amendments are cleanup, non-substantive changes made to match the regulatory text with statutory text. The Commissioner has statutory authority to propose penalties, but the Department had not place the above language in the regulation.
16VAC25-60-260.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	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

		<p>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.</p>	<p>employer's history of previous violations.</p> <p><u>The commissioner shall have authority to propose civil penalties to public employers for willful, repeat, and failure-to-abate violations in accordance with subsections I and J of § 40.1-49.4, and for serious violations that cause death to an employee or are classified as high gravity in accordance with subsection H of § 40.1-49.4.</u></p> <p><u>Rationale:</u> These amendments are cleanup, non-substantive changes made to match the regulatory text with statutory text. The Commissioner has statutory authority to propose penalties, but the Department had not place the above language in the regulation.</p>
16VAC25-60-270.A.		<p>An employer to whom a citation 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.</p>	<p>An employer to whom a citation, <u>abatement order</u>, 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.</p> <p><u>Rationale:</u> The addition of the words "abatement order" is a cleanup provision to make sure the regulation matches the statute. Employers have the right to contest citations, which contain the violations, abatement orders, and penalties. The words "abatement order" had been inadvertently omitted previously.</p>
16VAC25-60-270.C. through 16VAC25-60-270.F.	16VAC25-60-270.C. through 16VAC25-60-270.F.	<p>C. 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.</p> <p>D. The employer's contest of a citation or proposed penalty shall not affect the citation posting requirements of 16VAC25-</p>	<p><u>C. Employees may contest abatement orders by notifying the commissioner in the same manner as described in subsection A of this section.</u></p> <p><del>C. D.</del> 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</p>

		<p>60-40 unless and until the court ruling on the contest vacates the citation.</p> <p>D. 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.</p> <p>E. 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.</p> <p>F. A contest of the proposed penalty only shall not stay the time for abatement.</p>	<p>contest vacates the citation.</p> <p><del>D.</del> <u>E.</u> 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.</p> <p><del>E.</del> <u>F.</u> 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.</p> <p><del>F.</del> <u>G.</u> A contest of the proposed penalty only shall not stay the time for abatement.</p> <p><u>Rationale:</u> This is a cleanup, non-substantive change made to match the regulatory text with statutory text, and states that employees may contest abatement orders by notifying the commissioner in writing. That text was not in the regulation and it should have been.</p>
<p>16VAC25-60-280.A.</p>		<p>A. The commissioner will not propose penalties for citations issued to public employers.</p>	<p><del>A. The commissioner will not propose penalties for citations issued to public employers.</del></p> <p><u>Rationale:</u> The Department did have contest proceedings for the public sector, one of which mentioned the fact that the Department did not issue penalties. This regulation has been amended to allow the Department to issue penalties to public employers; therefore, language, referencing the commissioner not proposing penalties for citations issued to public employers, is no longer applicable and has been removed.</p>

<p>16VAC25-60-280.B.</p>	<p>16VAC25-60-280.A.</p>	<p>B. Public employers may contest citations or abatement orders 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.</p>	<p><del>B.</del> <u>A.</u> Public employers may contest citations <del>or</del>, abatement orders, <u>or proposed penalties</u> 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.</p> <p><u>Rationale:</u> The Department had contest proceedings for the public sector, one of which mentioned that the Department did not issue penalties. The Department had to add a reference that there could be proposed penalties, and that the employer has the right to contest those proposed penalties.</p>
<p>16VAC25-60-280.C.</p>	<p>16VAC25-60-280.B.</p>	<p>C. The notice of contest shall indicate whether the employer is contesting the alleged violations or the abatement order.</p>	<p><del>C.</del> <u>B.</u> The notice of contest shall indicate whether the <u>public</u> employer is contesting the alleged violations, <u>the proposed penalty</u>, or the abatement order.</p> <p><u>Rationale:</u> The Department had contest proceedings for the public sector, one of which mentioned that the Department did not issue penalties; therefore, the Department had to strike through that language, and then a reference had to be added that there could be proposed penalties, and that the employer has the right to contest those proposed penalties.</p>
<p>16VAC25-60-280.D. through 16VAC25-60-280.E.</p>	<p>16VAC25-60-280.C. through 16VAC25-60-280.D.</p>	<p>D. Public employees may contest abatement orders by notifying the commissioner in the same manner as described at subsection B.</p> <p>E. 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.</p>	<p><del>D.</del> <u>C.</u> Public employees may contest abatement orders by notifying the commissioner in the same manner as described at subsection <u>B.</u> <u>A.</u></p> <p><del>E.</del> <u>D.</u> 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.</p> <p><u>Rationale:</u> This is a cleanup, non-substantive change made to match the regulatory text with statutory text.</p>

<p>16VAC25-60-280.F.</p>	<p>16VAC25-60-280.E. and 16VAC25-60-280.F.</p>	<p>F. 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.</p>	<p><del>F.</del> <u>E.</u> 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.</p> <p><u>Rationale:</u> The Department had contest proceedings for the public sector, one of which mentioned that the Department did not issue penalties; therefore, the Department had to strike through that language, and then add that there could be proposed penalties, and that the employer has the right to contest those proposed penalties.</p> <p><u>F. A contest of the proposed penalty only shall not stay the time for abatement.</u></p> <p><u>Rationale:</u> Employers have the right to contest both violations and penalties. If only the penalties are contested, then the employer has to go ahead and abate the violation immediately. If the employer contests the violation and the abatement period, the employer does not have to correct the violation until the violation becomes a final order of the commissioner. This is based on statute as well.</p>
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