WILLCOX SAVAGE

Virginia Employer's Guide to OSHA/VOSH

The first 24 hours after a workplace incident is critical. Call us before you call OSHA/VOSH.

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Admitted to Practice:

Supreme Court of Virginia and all lower state courts

United States District Court for the Eastern District of Virginia

United States District Court for the Western District of Virginia

United States District Court for the District of Columbia

U.S. Court of Appeals for the Fourth Circuit

Joe has over 20 years of experience defending businesses in complex litigation and potentially high exposure claims.

Joe helps clients with the full range of workplace health and safety matters, including counseling clients on OSHA and VOSH investigations and inspections, responding to safety and health complaints, contesting citations at informal conferences, litigating enforcement actions, and handling retaliation/whistleblower claims.

Joe's clients run the gamut, from large, publicly traded companies to small, family-run businesses. His diverse clientele includes employers in the construction trades, manufacturing, warehousing, logging, road construction, healthcare providers, cities and counties, non-profits, property owners, amongst others.

Joe is often called on to assist clients with compliance on the frontend to minimize the business disruption caused by a future government investigation and inspection at a worksite. Further, Joe helps clients understand and navigate an employer's responsibilities after a workplace incident occurs, including determining if the incident requires reporting and other key issues that may impact whether a government inspection even takes place. In this role, he provides clients with **24/7 rapid response** to serious workplace incidents and fatalities across Virginia and surrounding areas, ensuring immediate and effective legal support.

Joe is an active member of the Themis Advocates Group, a national network of leading civil defense attorneys and law firms located throughout the country. He has earned the Martindale-Hubbell's AV Preeminent© rating—the highest possible—in both legal ability and ethical standards. He has also been peer-recognized for inclusion in the lists by Best Lawyers in America, Litigation-Insurance, Virginia Business magazine's Legal Elite, and Virginia Super Lawyers.

Additionally, Joe is dedicated to giving back to the community through pro bono legal work with the Legal Aid Society of Eastern Virginia. He is also an active member of the Norfolk Portsmouth Bar Association's Pro Bono Committee.

(Updated April 2025)

WILLCOX SAVAGE

VIRGINIA EMPLOYER'S GUIDE TO OSHA/VOSH

Table of Contents

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WILLCOX SAVAGE

VIRGINIA EMPLOYER'S GUIDE TO OSHA AND VOSH

Federal OSHA Law

The federal Occupational Safety and Health Act ("OSH Act") was enacted in 1970 to protect workers by requiring certain safety standards to which employers and workplaces must adhere. The OSH Act created the Occupational Safety and Health Administration ("OSHA") and all the OSHA safety regulations. The OSH Act applies to private-sector employees in the 50 states and certain territories and jurisdictions under federal authority (District of Columbia, Puerto Rico, U.S. Virgin Islands, and others). There are 34 different sections of the OSH Act that you can find here. Section 5 of the Osh Act provides that each employer has the following duties – (1) shall furnish to each of its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees; and (2) shall comply with occupational safety and health standards promulgated under the Osh Act.

The Code of Federal Regulations ("C.F.R.") contains the general and permanent rules and regulations published in the Federal Register by executive departments, including Title 29 of the C.F.R. for the U.S. Department of Labor. The OSHA standards are included in Title 29, Labor, Chapter XVII. A standard is a regulatory requirement established and published by the agency to serve as criteria for measuring whether employers are complying with the OSH Act laws. There are "horizontal" standards (meaning they apply to all employers in any industry) and "vertical" standards (meaning they apply to just a specific industry). Examples of horizontal standards are found in OSHA 1910 General Industry Standards, such as PPE (1910 Subpart I), Fire Protection (1910 Subpart L), and Hazard Communication (1910 1200). Examples of vertical standards include:

- OSHA's 1926 Construction Standards,
- OSHA's 1915 Shipyard Standards;
- OSHA 1917 Marine Terminals Standards;
- OSHA 1918 Longshoring Standards;
- OSHA 1928 Agriculture Standards; and
- OSHA 1910 Subpart R Special Industries Regulations (including pulp, paper, and paperboards; for textiles; for sawmills; logging operations, telecommunications, electric power generation, transmission, and distribution, and grain handling facilities).

OSHA provides Letters of Interpretation ("LI"), which are standard interpretations written in response to public inquiries or field office inquiries regarding how OSHA will interpret or enforce aspect of or terminology in an OSHA standard or regulation. These letters clarify the application of an established OSHA standard, policy, or procedure, but they may not, in themselves, establish or revise OSHA policy or procedure or interpret the OSH Act. They must specifically cite the source policy or procedure document they interpret. OSHA has a website that lists all the LIs available to search.

One LI is related to directives (OSHA Directive ADM 8.-03), which is a written statement of policy and procedure on a single subject that may include implementation guidelines. There are four types of directives: (1) National directives; (2) Regional directives; (3) Internal procedure systems; (4) External authorities. You can review all OSHA Directives here.

National directives are further broken down to include Instructions, Notices, and OSHA Directives (DIRs). These are described by OSHA as follows:

- **Instruction** – "[L]ong-term policy and procedure pronouncements that have continuing reference value. They are intended to be in effect for more than one year. An instruction may be issued as a manual when the material is of a length equal to or more than 20 printed pages, or to meet special requirements."
- **Notice** – "Short-term policy and procedure pronouncements that are not to remain in effect over one year. Notices may be used to cancel an existing OSHA Instruction or Notice; such cancellations are permanent and do not expire at the end of that year."
- **OSHA Direction (DIRs)** – "Time-sensitive policy and procedure pronouncements that must be issued quickly to take effect when a policy or procedural change must be communicated quickly. They undergo a notification and rapid review screening rather than a full clearance process. DIRs remain in effect until the superseding instruction is effective but not more than 12 months from the effective date or until canceled by a superseding directive, whichever occurs first."

Regional directives do not alter, contradict, or overrule a national directive, but provide a local emphasis or supplement a national directive in the specific region. Internal procedure systems are restricted to operating procedures of the local office and do not establish OSHA policy and/or procedure. Lastly, OSHA describes external authorities as:

> The Congress, the courts, the Executive Office of the President, Cabinet Departments (including the Department of Labor), and other Federal agencies issue a variety of laws, legal decisions, regulations, directives, and the like, which OSHA must consider in drafting and promulgating policy and procedures in the Directive System. Originators must be aware of these materials when drafting policy materials.

The OSH Act encourages states to develop and operate their own job safety and health programs and precludes state enforcement of OSHA standards unless the state has an OSHA-approved Stated Plan. OSHA approves and monitors all State Plans and provides as much as 50 percent of the funding for each program. Currently, there are 22 states or territories with OSHA-approved State Plans that cover both private and state and local government workers, including Virginia. Workers at state and local government agencies are not covered by OSHA but have OSH Act protections if they work in states that have an OSHA-approved State Plan. OSHA rules also permit states and territories to develop plans that cover state and local government workers only. In these cases, private sector workers and employers remain under federal OSHA jurisdiction. Six additional states and one U.S. territory (U.S. Virgin Islands) have OSHA-approved State Plans that cover state and local government workers only.

Virginia State Plan

Virginia has enacted an OSHA-approved State Plan. Virginia state law incorporates the federal law by reference and provides additional protection for employees. Virginia's State Plan, like all OSHA-approved State Plans, must be at least as effective as federal OSHA in protecting workers and in preventing related injuries, illnesses, and death. The Virginia Department of Labor and Industry ("DOLI") enforces OSHA regulations through the Virginia Occupational Safety and Health ("VOSH") Program. The Virginia State Plan's unique standards and regulations are described by DOLI **here**.

The Virginia State Plan applies to private sector workplaces located in Virginia with the exception of:

- Maritime employment, including shipyard employment, marine terminals, and longshoring;
- Contract workers and contractor-operated facilities engaged in United States Postal Service (USPS) mail operations;
- Employment at worksites located within federal military facilities as well as on other federal enclaves where civil jurisdiction has been ceded by the state to the federal government;
- Employment at the U.S. Department of Energy's Southeastern Power Administration Kerr–Philpott System; and
- All working conditions of aircraft cabin crewmembers onboard aircraft in operation.

The Virginia State Plan also applies to state and local government workers, including maritime state and local government workers. It does not apply to federal government workers, including USPS. Federal OSHA covers the issues not covered by the Virginia State Plan. In addition, any hazard, industry, geographical area, operation or facility over which the State Plan is unable to effectively exercise jurisdiction for reasons not related to the required performance or structure of the plan shall be deemed to be an issue not covered and subject to federal enforcement.

In Virginia, VOSH is responsible for the enforcement of occupational safety and health standards. Compliance officers inspect workplaces for hazardous conditions and issue citations where violations of VOSH regulations are found. VOSH inspections may be the result of regular scheduling, imminent danger reports, fatalities, and worker complaints or referrals. Virginia law provides penalties, which are adjusted annually, ranging from $0 to $16,550 per violation for serious, other-than-serious, and posting requirement violations, and up to $165,514 for willful or repeated violations, with a per-day penalty of $16,550 for failure to abate. Other-than-serious violations issued to state and local government employers will not receive penalties. Criminal penalties are also provided for in the law. Any willful violation resulting in the death of an employee is punishable, upon conviction, by a fine of not more than $70,000 or by imprisonment for not more than six months, or by both. Subsequent conviction of an employer after a first conviction doubles these maximum penalties.

Workplace Accident or Fatality Investigation

In 2020, the U.S. Bureau of Labor Statistics reported there were 4,764 fatal work injuries recorded in the United States. The most common cause of work deaths nationally is traffic accidents and falls, slips, and trips. Virginia saw a total of 118 work-related fatalities in 2020, which is a 34% decline from 2019's total of 180. The four largest causes of fatal work injuries in Virginia were traffic accidents (44), attacks by other people or animals (24), contact with objects and equipment (18); and exposure to harmful substances or environments (16). In Virginia, non-fatal injuries and illnesses totaled approximately 52,600 in 2020, or 2.1 cases for every 100 full-time equivalent workers. The figure does not include COVID-19 cases. The most common injuries for these workers were sprains, strains, and tears as well as bruises and contusions. Injuries were most often due to falls, intentional injury by another, and lifting or lowering heavy people or items.

When a workplace injury or fatality occurs, the first thing the employer should do is call emergency medical services and take other reasonable steps to provide first aid to employees. OSHA provides a Best Practices Guide: Fundamentals of a Workplace First-Aid Program, which is a helpful starting point for information on creating a first-aid program. In addition, the employer has a duty to ensure that work-related accidents are timely reported and recorded. The employer must first determine whether the incident must be reported to VOSH. Only "work-related" incidents must be reported. Whether an injury or illness is "work-related," at times, may be difficult to determine and require careful consideration of OSHA reporting requirements. *See* 29 C.F.R. § 1904.5 (Determination of work-relatedness). Further, not all work-related incidents are reported to VOSH. However, the employer must report the following work-related incidents by the set time:

> Every employer shall report to the Virginia Department of Labor and Industry within eight hours any work-related incident resulting in a fatality or within 24 hours any work-related incident resulting in (i) the inpatient hospitalization of one or more persons, (ii) an amputation, or (iii) the loss of an eye, as prescribed in the rules and regulations of the Safety and Health Codes Board.

Va. Code § 40.1-21.1(D); *See also* 29 C.F.R. § 1904.39(a). An employer should stay apprised of the status of an employee because incidents that are not initially reportable may become reportable. If a fatality occurs within 30 days of the work-related incident, then it must be reported within eight hours. If an in-patient hospitalization, amputation, or loss of an eye occurs within 24 hours of the work-related incident, then it must be reported. If required, the work-related incident should be reported by calling the nearest VOSH Regional Office or the OSHA 24-hour hotline (1-800-321-6742). The employer's phone call to VOSH Regional Office or OSHA may be recorded. It is important to say as little as possible during the initial report and not speculate on what happened before you have time to investigate the incident. An employer may also report the work-related incident to OSHA online.

The next step is to determine whether the incident needs to be recorded in a written form. Recordkeeping is exempt for (1) small employers (with no more than 10 employees at a time during the calendar year preceding the year), and (2) employers in low hazard industries (such as retail, service,

financial, insurance, or real estate). *See* 29 C.F.R. § 1904.1 and 1904.2. A full list of employer types that are not required to record injury and illness records is available at Appendix A to Subpart B of Part 1904. The partial industry classification exemption applies to individual business establishments. If a company has several business establishments engaged in different classes of business activities, some of the company's establishments may be required to keep records, while others may be partially exempt. Importantly, all employers must report any workplace incident that results in an employee's fatality, in-patient hospitalization, amputation, or loss of an eye, regardless of the recordkeeping exemption.

If an employer is not exempt, incident recording is required for all reportable incidents, as well as work-related injuries or illnesses that meet the criteria in 29 C.F.R. § 1904.7 through 29 C.F.R. § 1904.11, including:

- Work-related incident results in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness;
- Work-related incident involving a significant injury or illness diagnosed by a physician or other licensed health care professional, even if it does not result in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness;
- Work-related needlestick and sharp injuries;
- Work-related medically removed employee;
- Work-related hearing loss in certain circumstances; and
- Work-related tuberculosis cases.

Employers should seek legal advice if they are uncertain whether an incident is recordable. New incidents should be recorded within seven days. Previously recorded incidents should be updated, as needed.

In practice, recording a work-related injury or illness means to complete OSHA Forms 300, 300A and 301. The OSHA forms and instructions are available here. Each form serves a different recordkeeping purpose, described below.

- **Form 300 (Log of Work-Related Injuries and Illnesses)** – Form 300 is a log that classifies work-related injuries and illnesses and notes the extent and severity of each. If the injury or illness involves a privacy concern, the employer should not record the name of the employee and instead list "private case" in the space used for employee's name. An employer must create a new Form 300 log each year. Employers do not need to send Form 300 to VOSH, but employees and their representative have the right to request, access, and view the employer's Form 300.
- **Form 300A (Summary of Work-Related Injuries and Illnesses**) – Form 300A is a summary of the work-related injuries and illness that occurred at the workplace in the previous year and that should have been recorded on Form 300. An employer must post

Form 300A (not Form 300) at the workplace by February 1 of the year following the year it covers. An employer must keep a separate Form 300A for each physical location that is expected to be in operation for one year or longer. The employer must keep these records at the worksite for at least five years. Starting on January 1, 2024, certain employers must electronically submit Form 300A under 29 CFR Part 1904.41(a)(2). This includes (1) employers with 250 or more employees; (2) employers with 20-249 employees and identified in Appendix A to Subpart E of Part 1904; and (3) employers with 100 or more employees and identified in Appendix B to Subpart E of Part 1904.

- **Form 301 (Injury and Illness Incident Report)** – Form 301 to record the work-related injury or illness. Employers must complete the Form 301 within seven calendar days after it receives information that a recordable work-related injury or illness has occurred at the workplace. The employer must keep these records at the worksite for at least five years.

OSHA/VOSH - Inspections

In 2024, VOSH conducted approximately 711 workplace inspections, which was a 58.5% decrease from the number of inspections the prior year. The construction (43%) and manufacturing (21%) industries made up 74% of the total inspections. VOSH issued 1,224 violations after completing the inspections. Most of the violations were for Safety violations (78%) compared to Health violations (22%). The inspections included 14 fatalities from the following hazards: struck by (6); caught-in/by (4); falls (2); workplace violence (1); and OHV/electrocution (1). This is a significant decrease in fatality investigations than in prior years. The number of fatality inspections in the prior 15 years ranged from 24 to 57 per year.

VOSH inspects workplaces in the Commonwealth of Virginia, typically without notice, under the following circumstances:

- **Unprogrammed inspections** –Inspections in response to alleged hazardous working conditions that have been identified at a specific worksite. This is in response to imminent dangers, fatalities/catastrophes, complaints, and referrals. Employees may request an inspection if they believe a safety or health hazard exists in a workplace, without giving notice to the employer first. The employer will be given a copy of the written complaint with the complainant's name redacted, as well as any other identifying information. VOSH will provide the complainant a copy of any resulting citation issued to the employer.
- **Unprogrammed related inspections** – Inspections of employers at multi-employer worksites whose operations are not directly affected by the subject of the condition identified in the complaint, accident, or referral.
- **Programmed inspections** – Inspections schedule based upon objective or neutral selection criteria.

- **Programmed related inspections** – Inspections of employers at multi-employer worksites whose activities were not included in the programmed assignment.

The priority of VOSH inspections is in the following order: (1) imminent danger; (2) fatality; (3) accident/first report of accident inspection: (4) complaints/referrals; (5) follow-up/monitoring; and (6) programed inspections, i.e., general schedule, construction schedule, national.

These inspections include: (1) presentation of VOSH credentials; (2) an opening conference; (3) a "walkaround" inspection of all or part of the workplace; and (4) a closing conference. An employer representative must be given the opportunity to accompany the VOSH inspector during the workplace inspection. The employer representative should take replicas of all photographs and video taken by the VOSH inspector. Further, an employer may identify trade secrets for the VOSH inspector to keep in a separate case file protected from disclosure. *See* Va. Code § 40.1-51.4:1. The VOSH inspector's walkaround is limited to the specific area that is the focus of the accident or complaint. In a fatality inspection, VOSH has broader authority to look around the workplace. The employer can negotiate the terms of entry under certain circumstances. Significantly, the VOSH inspector may record violations that are in clear view, including visible from outside the jobsite, even if unrelated to the incident. The employer should tell all employees to stop all work – if it is in plain sight, it is fair game for citations and penalties. If a violation is pointed out, document it and advise you will investigate it, but do not fix it yet. VOSH has a broad definition of "employer" to include creating, controlling, exposing, and correcting employers (*i.e.*, so do not fix anything right away without considering the correcting role). Thus, just because the injured worker is not your employee does not mean you cannot be issued a citation and penalties.

In addition, the VOSH inspector may check required posting and recordkeeping practices. The VOSH inspector may also request safety policies, training records, and incident reports. The employer representative should send an email to the VOSH inspector after the inspection confirming all verbal requests for documents. An attorney may be present for high-level interviews. However, the VOSH inspector may interview low-level employees without anyone present. There is a caveat applicable to Virginia. In the U.S. Court of Appeal for the Fourth Circuit (which includes Virginia), employees can use the same lawyer as the employer in interviews with no conflict of interest. *See Reich v. Muth*, 34 F.3d 240 (4th Cir. 1994). All other U.S. Circuit Courts of Appeal say you cannot use the same attorney. The attorney may also help prepare the employees for interviews. The only requirement is for employees to answer questions truthfully. There is no requirement for employees to sign anything. Further, the interview statements can only be video- or audio-recorded, with the consent of the person being interviewed. The employer may ask the employee post-interview what the VOSH inspector asked and confirm they did not sign anything. *But see* "OSHA/VOSH – Whistleblower Claims," below discussing anti-retaliation laws.

VOSH has up to six months after the occurrence of any violations to issue a final report and any citations with or without penalties. VOSH may choose to issue citations and financial penalties to the employer for violating specific standards and regulations or for violating the "General Duty Clause" of the Osh Act.

The "Top 10 Most Frequently Cited Standards," for fiscal year 2023 by federal OSHA for all industries, are related to the following standards:

In 2023, VOSH most cited **safety standards** in the **general industry and manufacturing industry** were:

1	1910.212(a)(1) - One or more methods of machine guarding shall be provided
2	1910.305(g)(2)(ii) – Flexible cords may be used only in continuous lengths without splice or tap.
3	16VAC25-60-120 - comply with the manufacturer's specifications and limitations
4	1910.147(c)(4)(i) – LOTO procedures shall be developed, documented, and utilized.
5	1910.212(a)(3)(ii) – The point of operation of machines whose operation exposes employees to injury shall be guarded.
6	1910.303(b)(2) - Listed or labeled equipment used in accordance with any instructions
7	1910.151(b) – In the absence of an infirmary, hospital, or clinic, a person or persons shall be trained to render first aid.
8	1910.303(g)(1)(iv)(A) – Where the location permits a continuous and unobstructed way of exit, one means of exit is permitted.
9	1910.303(g)(1) - Sufficient access and working space about all electric equipment
10	1910.28(b)(1)(i) – Ensure that each employee on a walking-working surface with an unprotected side or edge that is 4 feet or more above a lower level is protected from falling

The VOSH most cited **safety standards** for the **construction industry** were:

1	1926.50(c) – Not having someone who is certified in first aid training at the worksite.**
2	1926.503(a)(1) – Not providing fall protection training.**
3	1926.100(a) – Not ensuring employees wear protective helmets where head injuries are possible.**
4	1926.102(a)(1) – Not ensuring employees use appropriate eye or face protection when exposed to eye or face hazards.**
5	1926.501(b)(13) – *Residential Construction*: Not utilizing fall protection when working 6 feet or more above lower levels.**
6	1926.1053(b)(1) – Portable ladder side rails not extending at least 3 feet above the upper landing to which the ladder is used to gain access.**
7	1926.501(b)(1) – Not using guardrail systems, safety net systems, or personal fall arrest systems to protect employees from unprotected sides and edges which are 6 feet or more above a lower level.**
8	1926.501(b)(11) – *Steep Roof:* Not using guardrail systems with toeboards, safety net systems, or personal fall arrest systems when working on a steep roof with unprotected sides or edges 6 feet or more above a lower level.**
9	1926.503(b)(1) – Not ensuring fall protection training was completed by preparing a written certification record.**
10	1926.1060(a) – Not providing a training program for employees using ladders and stairways.

The VOSH most cited **health standards** for **general industry and manufacturing industry** were:

1	1910.1200(e)(1) – *Hazard Communication:* Written program
2	1910.1200(h)(1) – *Hazard Communication: Training*
3	1910.151(c) – Suitable facilities for quick drenching or flushing of the eyes and body when working with injurious corrosive materials.
4	1910.1200(g)(8) – *Hazard Communication:* Not maintaining SDS onsite or having it readily available.
5	1910.157(c)(1) – *Portable Fire Extinguishers:* Not mounting, locating, and identifying them.
6	1910.1200(e)(1)(i) – *Hazard Communication:* Not maintaining a list of hazardous chemicals known to be present
7	1910.1200(f)(6)(ii) – *Hazard Communication:* Workplace labeling did not include product identifier and words, pictures, symbols or combination of, which provides at leas the general information and hazards of the chemicals.
8	1910.134(f)(2) – *Respiratory Protection:* Fit testing prior to initial use, whenever a different respirator facepiece is used, and at least annually thereafter.
9	1910.303(g)(1) – Not maintaining sufficient space about electrical equipment
10	1910.134(e)(1) - *Respiratory Protection:* Medical evaluation prior to being fit tested or required use of respirator in the workplace.

The VOSH's most cited **health standards** for **construction industry** were:

1	1910.1200(e)(1) – *Hazard Communication:* Written program
2	1926.1153(g)(1) – *Crystalline Silica:* Not having a written exposure control plan
3	1926.1153(i)(1) – *Crystalline Silica:* Not including silica into the employers HAZCOM program
4	1926.501(b)(11) - *Steep Roof:* Not using guardrail systems with toeboards, safety net systems, or personal fall arrest systems when working on a steep roof with unprotected sides or edges 6 feet or more above a lower level.
5	1926.1053(b)(1) - Portable ladder side rails not extending at least 3 feet above the upper landing to which the ladder is used to gain access
6	1926.1101(g)(8)(ii)(E) – *Asbestos:* Asbestos-containing material (ACM) removed from a roof shall not be dropped or thrown to the ground.
7	1926.1101(k)(9)(iv)(A) – *Asbestos:* Training for Class II asbestos work, to include "hands-on" training and at least 8 hours.
8	1926.1153(c)(1) – *Crystalline Silica:* Following Table 1 for *fully* implementing engineering controls, work practices, and respiratory protection.
9	1910.1200(g)(8) – *Hazard Communication:* Not maintaining SDS onsite or having it readily available.
10	1926.50(c) - Not having someone who is certified in first aid training at the worksite

OSHA/VOSH – Challenging Citations, Penalties, and Abatement Dates

Upon receipt of the written Citation and Notification of Penalty, the employer has specific posting requirements. The employer is required to post the citation at or near the violation(s), or a conspicuous place, where notices to employees are routinely posted. The Citation must be posted until the violations have been abated, or for 3 working days (excluding weekends, State and Federal Holidays), whichever is longer. The penalty amount may be redacted or marked out. If the Citation is contested, then a written notice of contest must be posted until the proceedings are complete.

The employer has 15 working days to send a Notice of Contest of the citations, penalties, and/or abatement dates. The employer should determine the basis for the citation, whether it was timely, and the calculation and assessment of penalties. Penalty items not contested become a final order of the Commissioner and must be paid within 15 working days after the employer's receipt of the citation and notice of penalties.

In addition, the employer may request an informal conference through the VOSH Regional Office. The information conference does not extend the deadline for submitting the notice of contest. The employer must notify employees and the employee representative, if any, about the informal conference as soon as the time and place of the conference has been established. A request for an informal conference will not extend the 15 working day period for the employer to either pay the penalties or elect to contest. If at the informal conference the employer and VOSH reach a settlement, it is important to draft non-admission language in the settlement agreement for future litigation, whether civil or criminal. The employer will also be required to submit a Report of Corrective Action/Abatement Verification form showing that the appropriate corrective action by the abatement deadlines.

If at the informal conference the employer and VOSH cannot reach a settlement, a Complaint will be prepared by VOSH and filed in the jurisdiction where the inspection occurred to set the case for trial before a Circuit Court judge. There is no specific statute of limitation deadline for the lawsuit to be filed. Instead, the statute requires VOSH, after the employer contests the citation, to "immediately notify the attorney for the Commonwealth for the jurisdiction wherein the violation is alleged to have occurred and shall file a civil action with the circuit court." Va. Code § 40.1-49.4(E). There is Virginia case law finding that a 15-month delay is not unreasonable, but a 39-month delay was unreasonable. It is a case-by-case analysis on the inherent and actual prejudice to the employer given the delay – mainly lost witnesses and evidence, but also fading memories.

In the enforcement action, the Circuit Court judge must issue findings of fact and conclusions of law, affirming, modifying, or vacating VOSH's citation or proposed penalty, or directing other appropriate relief deemed necessary by the court. Like other civil cases, the litigants have full access to pretrial discovery. Similarly, the court typically requires the employer to be represented by an attorney.

Unlike typical agency review process under the Virginia Administration Process Act, Virginia courts review VOSH's citations *de novo* (anew, meaning they consider the case as if it were being heard for the first time, without deference to VOSH's decision or interpretation of the regulation). Virginia

courts employ the traditional tools of statutory interpretation when interpreting VOSH regulations, including the plain meaning rule (*i.e.*, words are given their ordinary meaning, unless it is defined by the legislature). Virginia courts will also look to decisions from federal Article III court (U.S. Supreme Court, U.S. Court of Appeals, and U.S. District Courts) and the Occupational Safety and Health Review Commission (OSHRC) as persuasive, non-binding, decisions.

Until June 2024, OSHA in federal courts and before the OSHRC received considerable deference, under the *Chevron* doctrine, if it applied a reasonable interpretation of an ambiguity in a regulation. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (setting the two-part test: first, whether Congress has spoken directly to the precise issue at question, and second, whether the agency's answer is based on a permissible construction of the statute"). The *Chevron* case was one of the most important decisions in U.S. administrative law and was cited in thousands of cases. Forty years later, in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 360 (2024), the Supreme Court overturned the *Chevron* doctrine, holding that courts, not agencies, are best suited to interpret ambiguous statutory provisions, even in areas of agency expertise. The prior administrative actions and court decisions decided using the *Chevron* doctrine were not overturned by *Loper Bright*. *Id.* In lieu of *Chevron*, agency interpretations can still be persuasive under the weaker *Skidmore* doctrine, which established a case-by-case test when considering the persuasiveness of an agency's rulings, interpretations, and opinions. *Id.* (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

The litigation process includes the typical civil discovery, such as interrogatories, request for the production of documents, document subpoenas, depositions, expert witnesses, and pretrial motions. There are two privileges that arise in VOSH litigation – the "deliberative process" privilege and "confidential government informant" privilege. The deliberative process privilege shields from discovery anything that sheds light on how VOSH employees do their jobs. The confidential government informant privilege shields from discovery anything that sheds light on the identify of employees and subject them to discipline for talking to VOSH. However, at trial, if there is a statement taken by VOSH that has been redacted, and that witness testifies, the employer's attorney is allowed a recess, and VOSH must produce an unredacted version to allow for cross-examination of the witness.

In the end, if a settlement is not reached during litigation, the case is tried to a judge, who may affirm, modify, or eliminate any contested item of the citation or penalty. At trial, VOSH must prove by a preponderance of evidence – *i.e.*, more likely than not – that (1) citated standard applies; (2) employer failed to comply with the terms of the cited standard; (3) employees were exposed to the hazard; (4) employer knew or could have known with the exercise or reasonable diligence of the violative condition; and (5) reasonableness of abatement date. Significantly, under the fourth element, an employer's lack of actual or constructive knowledge precludes citations for violations which are generally unforeseeable. The knowledge requirement test is whether the condition was reasonably foreseeable to create an increased risk of harm. Under *respondeat superior* principles, the knowledge of a "job foreman" or a "supervisor" that employees under his watch are violating VOSH standard can be imputed to the employer. The result is different, however, when the foreman or supervisor is himself the "actual malfeasant guilty of unforeseeable rogue conduct.

Additionally, the employer should consider raising viable affirmative defenses. Examples of affirmative defenses include the following:

- Wrong employer cited;
- Res Judicata;
- Improper promulgation of standard;
- Vagueness of Standard;
- Concerted refusal to comply;
- Unpreventable employee misconduct;
- Lack of employer knowledge;
- Infeasibility/impossibility of compliance;
- No hazard exists;
- Greater hazard;
- Technological infeasibility; and
- Economic infeasibility.

The employer bears the burden of proving any affirmative defenses. If unhappy with the Circuit Court judge's decision, either party may appeal the judge's ruling to the Virginia Court of Appeals, and then petition the Supreme Court of Virginia thereafter.

OSHA/VOSH – Workplace Violence

Workplace violence has become a serious issue for employers throughout the United States. In 2020, twenty percent (20%) of the fatal work injuries in Virginia were resulted from workplace violence. This number was down by 24 from the total of 48 in 2019, when a mass shooting at a Virginia Beach municipal office building resulted in the deaths of 12 people. Recently, in November 2022, there was another mass shooting in Virginia, when six employees were shot and killed by a fellow employee at a Walmart located in Chesapeake, Virginia.

In addition to the potential civil liability and workers' compensation liability, VOSH may issue citations and penalties to the employer for workplace violence under the "General Duty Clause" of the OSH Act. The General Duty Clause requires employers to provide their employees with a place of employment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm." Employers who do not take reasonable steps to prevent or abate a recognized violence hazard in the workplace can be cited and fined.

VOSH does not provide guidance regarding workplace violence, however, courts have interpreted the General Duty Clause to mean that an employer has a legal obligation to provide a

workplace free of conditions or activities that either the employer or industry recognizes as hazardous and that cause, or are likely to cause, death or serious physical harm to employees when there is a feasible method to abate the hazard. OSHA describes workplace violence as follows:

> Workplace violence is any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site. It ranges from threats and verbal abuse to physical assaults and even homicide. It can affect and involve employees, clients, customers and visitors.

OSHA has issued guidance to identify certain risk for workplace violence, such as exchanging money with the public and working with volatile, unstable people. Working alone or in isolated areas may also contribute to the potential for violence. Providing services and care, and working where alcohol is served may also impact the likelihood of violence. Additionally, time of day and location of work, such as working late at night or in areas with high crime rates, are also risk factors that should be considered when addressing issues of workplace violence. Among those with higher-risk are workers who exchange money with the public, delivery drivers, healthcare professionals, public service workers, customer service agents, law enforcement personnel, and those who work alone or in small groups.

In addition, OSHA provides guidance on various prevention programs and provides training resources to prevent workplace violence. OSHA recommends that employer's take appropriate precautions, implement a well-written workplace violence program, and establish a zero-tolerance policy towards workplace violation. Specifically, an employer that has experienced acts of workplace violence, or becomes aware of threats, intimidation, or other indicators showing that the potential for violence in the workplace exists, could be on notice of the risk of workplace violence and should implement a workplace violence prevention program combined with engineering controls, administrative controls, and training.

OSHA/VOSH – Whistleblower Claims

In addition to setting standards in the workplace, both Federal and Virginia laws have anti-retaliation provisions that prohibit employers from terminating, discriminating against, or taking other adverse actions toward an employee for any of the following:

- Employee participation in safety and health activities
- Complaining to OSHA/VOSH or seeking an OSHA/VOSH inspection
- Participating in an OSHA/VOSH inspection
- Participating or testifying in any proceeding related to an OSHA/VOSH inspection
- Reporting a work-related injury, illness, or fatality
- Reviewing records of work-related injuries and illnesses

- Receiving information and training about hazards, methods to prevent harms, and the OSHA/VOSH standards that apply to the employee's workplace

OSHA's Whistleblower Protection Program enforces the provisions of more than 20 federal laws protecting employees from retaliation for, among other things, raising or reporting concerns about hazards or violations of various workplace safety and health, aviation safety, commercial motor carrier, consumer product, environmental, financial reform, food safety, health insurance reform, motor vehicle safety, nuclear pipeline, public transportation agency, railroad, maritime, securities, tax, antitrust, and anti-money laundering laws. Employees who believe that they have experienced retaliation in violation of one of these laws may file a complaint with OSHA. OSHA provides a Whistleblower Statutes Summary Chart that provides the time period to file a claim, respondents covered, allowable remedies, and further information on each federal whistleblower statute enforced by OSHA.

Private-sector employees who suffer retaliation because of OSHA activity are covered by section 11(c) of the OSH Act. There is no private cause of action under the OSH Act. If OSHA determines that retaliation in violation of the OSH Act has occurred, the Secretary of Labor may sue in federal district court to obtain relief. If OSHA determines that no retaliation has occurred, it will dismiss the complaint. Under the other whistleblower laws, if the evidence supports an employee's complaint of retaliation, OSHA will issue an order requiring the employer, as appropriate, to put the employee back to work, pay lost wages, and provide other possible relief. If the evidence does not support the employee's complaint, OSHA will dismiss the complaint. After OSHA issues a decision, the employer and/or the employee may request a full hearing before an administrative law judge of the Department of Labor. The administrative law judge's decision may be appealed to the Department's Administrative Review Board (ARB); in significant cases the Secretary of Labor may review the ARB decision. Aggrieved parties may seek review of final DOL decisions by the courts of appeals. Under some of the laws, an employee may file the retaliation complaint in federal district court if the Department has not issued a final decision within a specified number of days (180, 210 or 365 depending on the law).

In Virginia, the VOSH Office of Whistleblower Protection ("OWP") conducts investigations of employee complaints of discrimination pursuant to Virginia Code §§ 40.1-51.2 and 40.1-51.2:2. Whistleblower complaints must be filed within 60 days from the date when the alleged adverse action took place. If the alleged discrimination is continuing in nature, the time period begins when the last act of alleged discrimination occurred. If, upon such investigation, VOSH determines actionable discrimination has occurred, VOSH will attempt to reach a settlement with the employer to have the violation abated without economic loss to the employee. In the event a voluntary agreement cannot be obtained, VOSH shall bring an action in a circuit court having jurisdiction over the employer charged with the violation. The court shall have jurisdiction, for cause shown, to restrain violations and order appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay plus interest at a rate not to exceed eight percent per annum. If the OWP refuses to issue a charge against the employer, the employee may bring a private cause of action in a circuit court having jurisdiction over the person allegedly discriminating against the employee, for appropriate relief.

In July 2020, Virginia enacted the Virginia Whistleblower Protection Law, which provides that a private employer cannot "discharge, discipline, threaten, discriminate against, or penalize an employee, or take other retaliatory action regarding an employee's compensation, terms, conditions, location, or privileges of employment" because the employee engaged in certain types of protected conduct. The law identifies the following protected conduct:

1. Reporting a violation of federal or state law or regulation to a supervisor, governmental body, or law-enforcement official;
2. Participating in a governmental or law-enforcement investigation;
3. Refusing to engage in a criminal act;
4. Refusing an employer's order to violate any federal or state law or regulation and the employee informs the employer that the order is being refused for that reason; and
5. Providing information or testimony before a governmental body or law enforcement official conducting an investigation into an alleged violation by the employer

Virginia Code § 40.1-27.3(A). The law specifically does not:

1. Authorize an employee to make a disclosure of data otherwise protected by law or any legal privilege;
2. Permit an employee to make statements or disclosures knowing that they are false or that they are in reckless disregard of the truth; or
3. Permit disclosures that would violate federal or state law or diminish or impair the rights of any person to the continued protection of confidentiality of communications provided by common law.

Virginia Code § 40.1-27.3(B). Under the law, an employee may bring a private cause of action within one year of the employer's prohibited retaliatory action. The court may order as a remedy to the employee (i) an injunction to restrain continued violation of this section, (ii) the reinstatement of the employee to the same position held before the retaliatory action or to an equivalent position, and (iii) compensation for lost wages, benefits, and other remuneration, together with interest thereon, as well as reasonable attorney fees and costs. Virginia Code § 40.1-27.3(C).

Virginia has a separate law related to government agencies and independent contractors of government agencies. The Fraud and Abuse Whistle Blower Protection Act allows employees to make good faith reports of instances of wrongdoing or abuse committed by government agencies or independent contractors of government agencies. Wrongdoing is defined, by statute, as "a violation, which is not of a merely technical or minimal nature, of a federal or state law or regulation, local ordinance, or a formally adopted code of conduct or ethics of professional organization designed to protect the interest of the public or employee." Va. Code § 2.2-3010. The Act provides for a private cause of action brought by the employee within three years after the date of the unlawful discharge, discrimination, or retaliation occurs, and does not require the employee to exhaust existing internal procedures or other administrative remedies. Va. Code § 2.2-3011.

It is important for employers to be mindful of possible protected activity with so many laws containing whistleblower and anti-retaliation provisions. Employers should draft an anti-retaliation policy and train managers and supervisors thoroughly on their obligation to avoid retaliation against employees that make complaints. By undertaking these practices, employers reduce the risk of a whistleblower retaliation complaint, as well as increase the opportunity for a good defense should one materialize from an actual or perceived violation of laws. It is highly recommended that employers consult legal counsel prior to disciplining any employee who they believe has engaged in any protected whistleblowing activity.

Additional Resources

There are several helpful resources provided by OSHA and VOSH, including:

- VOSH Administrative Regulation Manual (ARM) – rules, regulations, and procedures for the Virginia State Plan.
- VOSH Closing Conference Guide – provides a reference to the topics that may be discussed with the VOSH inspector in the closing conference.
- Virginia's Employer Responsibilities and Courses of Action Following a VOSH Inspection – Provides information regarding an employer's responsibilities and opportunities to respond to citation(s) and notification of penalty.
- VOSH Field Operations Manual – this is VOSH playbook that tells you what VOSH inspector can and cannot do. This program directive is an internal guideline, not a statutory or regulatory rule, and is intended to provide instructions to VOSH Personnel regarding internal operation of the VOSH Program and is solely for the benefit of the program. This document is not subject to the Virginia Register Act or the Administrative Process Act; it does not have general application and is not being enforced as having the force of law.
- VOSH Whistleblower Investigation Manual – this is VOSH playbook that tells you what VOSH inspector can and cannot do with regards to whistleblower investigations.
- OSHA Field Operations Manual – To provide OSHA offices, State Plan programs and federal agencies with policy and procedures concerning the enforcement of occupational safety and health standards. Also, this instruction provides current information and ensures occupational safety and health standards are enforced with uniformity.
- OSHA Compliance Assistance Quick Start – Provides seven steps to follow to identify the major OSHA general industry requirements and guidance materials that may apply to your workplace. These steps will lead you to resources on OSHA's website that will help you comply with OSHA requirements and prevent workplace injuries and illnesses.
- The OSHA Poster – The OSHA Job Safety and Health poster is available for free from OSHA. It informs workers of their rights under the OSH Act. All covered employers are required to display the poster in their workplace. Employers do not need to replace

previous versions of the poster. Employers must display the poster in a conspicuous place where workers can see it. Employers can even get it in different languages if they have a multi-language workforce. In Virginia, employers are also required to post The Virginia Poster.

- OSHA Small Business Safety and Health Handbook – The handbook summarizes the benefits of an effective safety and health program, provides self-inspection checklists for employers to identify workplace hazards, and reviews key workplace safety and health resources for small businesses.
- OSHA Recommended Practices for Safety and Health Programs (General) – Provides responsible employers, workers, and worker representatives with a sound, flexible framework for addressing safety and health issues in diverse workplaces. They may be used in any workplace, but will be particularly helpful in small and medium-sized workplaces. They can be applied equally well in traditional, fixed manufacturing workplaces and in the service sector, healthcare, retail, and even mobile or office-based work environments. They also include information specifically aimed at temporary worker and multiemployer work situations.
- OSHA Recommended Practices for Safety & Health Programs in Construction – Providesresponsible employers, workers, and worker representatives with a sound, flexible framework for addressing safety and health issues on diverse construction job sites. They may be used by any construction company or job site, but they will be particularly helpful to small and medium-sized contractors. They also include guidance specifically aimed at general contractor employment, staffing agency employment, and multiemployer work situations.

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DO YOU HAVE QUESTIONS?

Willcox Savage, P.C.'s OSHA & VOSH Defense Group is available to assist clients on workplace safety and health matters in a wide range of industries – including manufacturing, construction, transportation, healthcare, retail, and more. Our attorneys provide legal representation and guidance to clients on workplace safety and health matters, including:

- Legal Advice on OSHA and VOSH Laws and Regulations
- Recordkeeping and Reporting Compliance
- Managing Inspections and Audits
- Investigation of Serious Workplace Incidents and Fatalities
- Presenting Employee Witnesses for Interviews
- Responding to Subpoenas and Document Requests
- Evaluating Citations – Specific Duty and General Duty Clause Violations
- Contesting Citations at Informal Administrative Conferences
- Litigating Enforcement Actions on Citations and Penalties
- Whistleblower and Retaliation Claims
- Overall Dealings with OSHA, VOSH, and Other Governmental Entities

The first 24 hours after a workplace incident is critical – call us before you call OSHA/VOSH.

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