



COMMONWEALTH of VIRGINIA
DEPARTMENT OF LABOR AND INDUSTRY

C. Ray Davenport
COMMISSIONER

Main Street Centre
600 East Main Street, Suite 207
Richmond, Virginia 23219
PHONE (804) 371-2327
FAX (804) 371-6524

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Richard Mendelson
Regional Administrator, Region III
U. S. Department of Labor – OSHA
The Curtis Center, Suite 740
170 South Independence Mall West
Philadelphia, PA 19106-3309

SUBJECT: Virginia FFY 2015 Federal Annual Monitoring and Evaluation Report

Dear Mr. Mendelson:

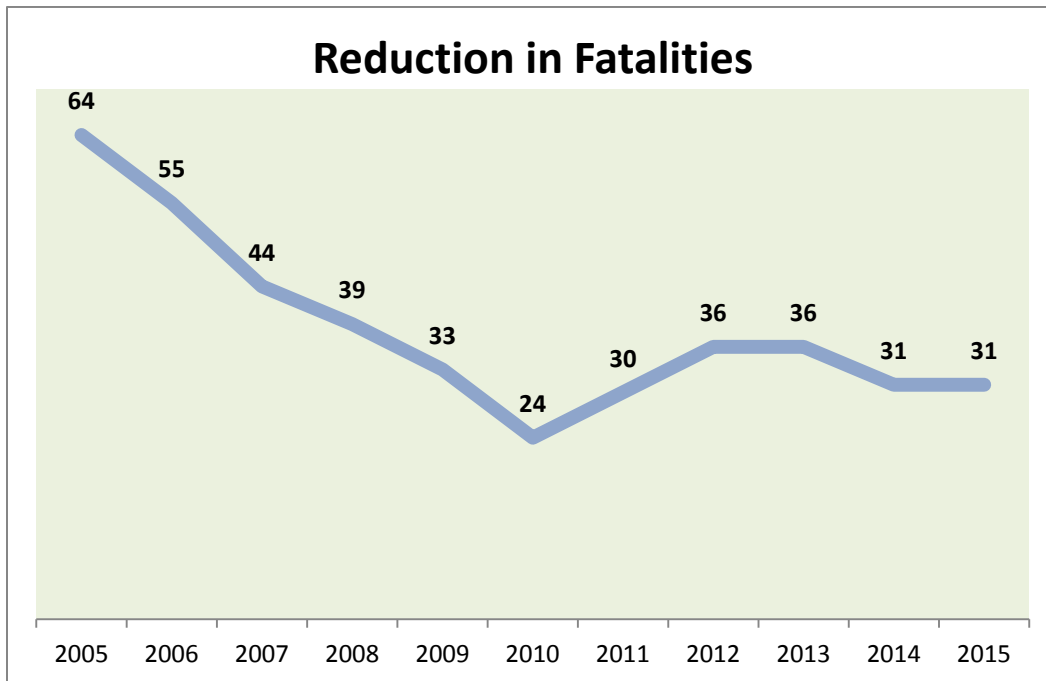
Thank you for your letter of July 15, 2016, forwarding Virginia's FFY 2015 Federal Annual Monitoring and Evaluation Report (FAME). I was pleased to see that Virginia did not have any findings that carried over from the 2014 FAME review.

ACCOMPLISHMENTS

The Virginia Occupational Safety and Health (VOSH) program prides itself on maintaining equally strong enforcement and cooperative program elements; and with the help of your dedicated staff, VOSH has accomplished many important achievements that benefit Virginia's employees and employers:

- Virginia's injury and illness rates are consistently well below the national average in both private and public sector employment. Bureau of Labor Statistics (BLS) data from the Survey of Occupational Injuries and Illnesses (SOII) for 2014 reflects an overall Total Recordable Case (TRC) Rate for Virginia of 3.0. When compared to the national rate of 3.4, the result is a difference of 10.0%. This rate is for all industries, including state and local government.
- The private industry TRC rate for Virginia is 2.7. When compared to the national rate of 3.2, the result is a difference of 15.6%.
- The manufacturing industry TRC rate for Virginia is 3.8. When compared to the national rate of 4.0, the result is a difference of 5.0%.
- The construction industry TRC rate for Virginia is 2.8. When compared to the national rate of 3.6, the result is a difference of 22.2%.
- The state and local government TRC rate for Virginia is 4.2. When compared to the national rate of 5.2, the result is a difference of 19.2%.

- A 52% reduction in fatal accidents covered by VOSH jurisdiction from calendar years 2005 to 2015:



- Census of Fatal Occupational Injuries (CFOI) data that indicate that occupational fatalities in Virginia have decreased 22.1% since 2012:
 - 2014: 116
 - 2013: 128
 - 2012: 149
- Virginia unique regulations in tree trimming; overhead high voltage line safety; fall protection in steel erection; reverse signal operation in construction and general industry; confined space hazards in the telecommunications industry; and compliance with manufacturer's instructions for vehicles, machinery, tools and equipment in general industry, construction, agriculture and public sector maritime.
- An abatement verification regulation that requires not only abatement certification (i.e., the employer's signed statement that abatement has occurred), but also requires employers to provide photographs, receipts, purchase orders, etc., as verification that a hazard was abated.
- A national top eight ranking in the rate of state occupational safety and health inspections per number of employers¹.
- Development of public service announcement (PSA) videos in the areas of tree trimming operations, overhead high voltage line safety, trenching safety, the dangers of heat stress and fall protection.
- The scheduling of regular Virginia Voluntary Protection Program (VPP) Best Practices training days provided free of charge to VPP members, prospective applicants and state and local government employers. VPP Best Practices days were hosted by Norfolk State University, R. R. Donnelly (machine guarding), and Sysco (Poultry Processing) during FFY 2016. VOSH videotapes the presentations/PowerPoints and is working on a technology solution that will make

¹ "Death on the Job: The Toll of Neglect", 25th edition, April 2016, AFL-CIO.

the training materials available to a much wider audience through enhancements to the www.doli.virginia.gov website.

- An exemplary and one of a kind Apprenticeship Program for VOSH Compliance Safety and Health Officers (CSHO), Industrial Hygienists and Safety and Health Consultants. The Apprenticeship Program has approval through the U. S. Department of Veteran's Affairs and the Virginia Department of Veteran's Services as an authorizing agency for benefits under the Montgomery and Webb GI Bills.
- A thriving Virginia Voluntary Protection Program (VPP) which recognized four new VPP STAR and one MERIT sites and 45 active members (a 2.3% increase over 2014):
 - NIBCO, Inc. – Salem, VA
 - Johns Manville – Richmond, VA
 - Cintas Location #385 – Culpeper, VA
 - Raytheon – Dulles, VA
 - Tecton (MERIT) – Salem, VA
- A statute that recognizes the Virginia Voluntary Protection Program and requires the Virginia Safety and Health Codes Board to enact regulations for the operation of VPP in Virginia, Va. Code §40.1-49.13. Governor Terry McAuliffe proposed the legislation that codified the Virginia Voluntary Protection Program (SB 881 and HB 1768). The legislation passed unanimously. Governor McAuliffe held a bill signing ceremony on June 4, 2015. The Virginia Safety and Health Codes Board is currently developing a regulation to implement the statute.
- An improving Safety and Health Achievement and Recognition Program (SHARP) with 19 active members and 17 sites that are pursuing SHARP status.
- An annual safety and health conference which is now entering its 21st successful year of outreach to employees, employers, unions, associations and government agencies.

FUNDING CONCERNS

I would also like to take this opportunity to express our serious concerns about the level of funding that the federal government is providing to State Plans. Funding for State Plans continues to lag well behind that provided by Congress for OSHA. Virginia faces significant budget difficulties due to a combination of long term underfunding of State Plans and the Congressional Sequestration Act:

- The Virginia 23g Enforcement grant for FFY 2016 reflects a continued 3.2% federal sequestration reduction (\$258,400 – 50%/50%).
- The grant reflects 12 unfunded benchmark positions (8 safety and 4 health). This represents approximately 674 safety and 190 health inspections that are not conducted each year in Virginia.
- The FFY 2017 grant reflects 2 VPP positions vacant due to lack of federal funding.
- Vacancy rates are likely to increase during the FFY 2017 Grant Application process due to scheduled State salary and fringe rate increases to possibly take effect during the grant period.
- The Virginia Consultation grant reflects three unfunded consultant positions.

At the national level, State Plans “overmatch” federal grant funds by as much as 90%. In FFY 2015, federal funding of 23g grants totaled \$100.8 million and state plans matched with 193.3 million – an overmatch of \$92.5 million. Reference: “OSHSPA Numbers at a Glance” which is taken from the 2015 OSHSPA Grassroots publication.

Virginia is not generally permitted to overmatch – federal funds are needed to use additional available state funds. A report issued by OSHSPA in 2016 demonstrates the disparity with which OSHA and State Plans are treated from a funding standpoint by Congress:

http://www.oshspa.org/wp-content/uploads/2016/06/OSHSPA_Special_Report_2016.pdf

- From 2005 to 2015, funding for OSHA increased 19% while funding for State Plans increased 9.9%.
- The “real dollars” available to States have significantly decreased when considering inflation. In 2005, State Plans were funded at \$91 million. To fund States at the same level in 2015, a budget of \$118 million would be needed (the 2015 State Plan appropriation is \$100.85 million).
- When federal OSHA receives COLA adjustments, State Plans do not.
- As a percentage of the total OSHA budget, the State Plan appropriation decreased from 19.6% in 2005 to 19.2% in 2015, near an all-time low.

VIRGINIA COMMENTS ON 2015 FAME

2015 FAME: Citations and Penalties (p. 15)

VOSH’s average current penalty per serious violation in private sector (SAMM 8A: 1-250+ workers) was \$920.66 in FY 2015. The Further Review Level (FRL) is -25% of the National Average (\$2,002.86) which equals \$1,502.14. Penalty levels are at the core of effective enforcement, and State Plans are therefore required to adopt penalty policies and procedures that are “at least as effective as” (ALAE) those contained in the FOM which was revised on October 1, 2015 to include changes to the penalty structure in Chapter 6 – Penalty and Debt Collection.

Note that with the passage of the Bipartisan Budget Bill on November 2, 2015, OSHA is now required to raise its maximum penalties in 2016 and to increase penalties according to the Consumer Price Index (CPI) each year thereafter. State Plans are required to follow suit. As a result of this increase in maximum penalties, OSHA will be revising its penalty adjustment factors in Chapter 6 of the FOM. Following completion of the FOM revision and after State Plans have the opportunity to adopt the required changes in a timely manner; OSHA will be moving forward with conducting ALAE analysis of State Plan penalty structures, to include evaluation of average current penalty per serious violation data.

Virginia Response:

As with all other policies and procedures adopted by OSHA, Virginia will review and consider OSHA’s revisions to their penalty calculation procedures as we did after OSHA’s 2010 policy memorandum and make any changes that we feel will enhance the effectiveness of our state plan.

In response to OSHA's 2010 change which was intended to increase federal penalties 300-400%, VOSH changed our policies to increase penalties 30%. In response to OSHA's formally publishing their penalty calculation changes in the federal FOM in 2015, VOSH changed our policies to increase penalties another 30%. The changes in Virginia were made with no discernable disruptions in agency operations and with limited impact on small employers – small employers comprise the overwhelming majority of companies that receive VOSH citations.

In conducting our analysis of yet another major change by OSHA in their penalty calculation procedures, we will take into account not only the deterrent effect of increased penalties, but other factors such as the deterrent effect that an increased likelihood of inspection in Virginia poses; and the potential impact that penalty increases will have on contest rates, denial of entry rates, penalty retention, violation retention, prompt abatement of violations, small employers, etc. Virginia reserves the right to implement penalty calculation procedures that will prove effective in reducing employee exposure to safety and health hazards, injuries, illnesses and fatalities in Virginia without regard to OSHA's position that state plan penalty calculation procedures are required to be "at least as effective as" OSHA's procedures.

Finding FFY 2015-01: Case files were lacking the appropriate documentation in the form of worker interviews. Documentation did not meet VOSH interview requirements in at least 57 of 132 (43%) of the cases reviewed. VOSH retained 29% of the penalty in cases which did not meet the VOSH interview documentation requirements.

Excerpts from FAME: VOSH policy, per the Field Operations Manual (FOM), requires that at least one non-management and one supervisory interview be documented in each case file. At least one non-management and one supervisory interview were not located in 57 of 132 (43%) case files reviewed.

When the data was filtered to evaluate those cases with informal conferences, there was a 48% penalty retention for those cases which were evaluated and met the VOSH FOM requirement.

There was a 29% penalty retention for those cases reviewed which did not meet the VOSH FOM requirement. According to SAMM #12, the percent penalty retained was 21% below the national average of 67.96% at 53.80%. OSHA believes that there is a correlation between the lack of documented worker interviews and the low percent of penalties retained (53.80%) by VOSH.

Virginia Response:

Virginia agrees that case file reviews found that some case files did not meet the VOSH FOM requirement for at least one employee and one supervisory interview statement. Virginia takes very seriously its commitment to employee safety and health and to conducting effective and efficient inspections. One of the best ways to assure that an effective enforcement inspection has been conducted is to assure employee involvement during the inspection process.

One way that Virginia strives to assure employee involvement is through its requirement that employee (and supervisor) interview statements are documented on an employee interview statement form, in CSHO notes or on VOSH 1B forms (used to document the occupational hazard and employee exposure for each cited violation). The preference is for an employee interview statement form to be used, but is not always achievable.

Virginia also follows the normal practice of talking with employees who are exposed to hazards for purposes of documenting the prima facie elements of a violation (employee exposed, job title and duties, type of hazard, duration of exposure, etc.), as well as talking with the employer's representatives during the opening, walk around and closing conferences.

VOSH's commitment to conducting thorough and effective inspections is further demonstrated by its requirement that at least one supervisory interview be documented in a similar fashion – a requirement that is more stringent than that of OSHA. Supervisory statements are important both because supervisors are "employees" too, and because they can provide important information on the employer's knowledge of the alleged hazard – information which is critical in supporting the prima facie case for a VOSH violation.

VOSH has already begun to address this critical documentation issue with its Regional Safety and Health Directors and CSHO staff and will develop a corrective action plan to assure compliance with VOSH FOM requirements.

With regard to OSHA's belief that there is a correlation between the lack of documented worker interviews and the low percent of penalties retained (53.80%), we do not believe that the case file review data supports this conclusion. VOSH conducted an independent legal review² of the case files used in the evaluation and looked for indications of employee and supervisor interviews in the form of interview statement forms, supervisory interview statement forms, CSHO interview notes, and CSHO notes on the VOSH IW-I and VOSH-1B.

We then made a determination as to whether each case file met the VOSH FOM requirements for at least one employee and one supervisory interview. While our review confirmed that documentation of employee and supervisory interviews was an issue, it also revealed a statistically significant difference in the data that impacts any conclusions that can be drawn about penalty retention in cases settled by informal conference.

The difference between Virginia's and the Region's results are primarily, but not exclusively, due to Virginia's multi-employer worksite policy, and its procedures for investigating workplace deaths (e.g., heart attacks and other deaths as a result of natural causes). For example, of the 132 case files reviewed, Virginia determined that 11 inspections that had been categorized by the Region as not meeting VOSH FOM requirements had no employees on site to be interviewed (e.g., under VOSH's multi-employer worksite policy an inspection is opened with all employers on a construction site that is receiving a planned comprehensive inspection – this results in inspections of general contractors who frequently only have one representative on site – a member of management).

In such cases, since no employee was available to interview, Virginia determined that its FOM requirements were met as long as at least one supervisory interview was conducted or there was some other documented extenuating circumstance (e.g., in one fatal accident case, the victim was the sole owner of the company and attempts to contact other employees who had left the site proved unsuccessful; however, an interview of an employee of another employer who was onsite was conducted).

Our results indicated the following in relation to the Region's findings:

Evaluation Results	Total Case Files	Did Not Meet FOM Reqts.	Percent of Total
Virginia	132	43	32.6%
Region III	132	57	43.2%

² Copies of spreadsheets with the results of Virginia's independent legal review will be provided upon request.

While Virginia's result of 32.6% of case files not meeting FOM requirements will be addressed in our corrective action plan, when the difference between the Virginia and Regional results are applied to the cases used in determining VOSH's performance on penalty retention as the result of informal conferences, the results indicate that there is no direct correlation between penalty retention and the number or type of interview statements:

Evaluation Results	Cases With Informal Conferences	Did Not Meet FOM Reqts.	Percent Penalty Retained	Did Meet FOM Reqts.	Percent Penalty Retained
Virginia	43	11	38.6%	32	35.6%
Region III	43	24	28.8%	19	48.3%

Using Virginia's revised figures, a higher level of penalty was actually retained (38.6%) in cases where the FOM requirement for interviews was not met than in those where it was met (35.6%).

Virginia believes that the level of penalty retention from cases that result in an informal conference are many and varied, which is supported by the above data. Such factors include but are not limited to, the size of the company, the type of inspection (e.g., fatality/accident, multi-employer, etc.), the severity and classification of the violations, the good faith of the employer, the employer's familiarity with VOSH/OSHA requirements, affirmative defenses raised, etc.

In closing, although we have many challenges in Virginia, it is our sincere belief that we do an effective and highly efficient job in trying to assure that all Virginia workers have the chance to return home at the end of their shift in the same condition that they started their work day.

Thank you again for this opportunity to provide our response to the Virginia's 2015 FFY FAME report. We look forward to an ongoing cooperative and mutually supportive relationship with Region III. Please accept our sincere thanks for the valuable services you have provided to the Commonwealth of Virginia's employees and employers.

Sincerely,



C. Ray Davenport
Commissioner

cc: Bill Burge, Assistant Commissioner
Jennifer Rose, VOSH Safety Program Director
Ron Graham, VOSH Health Program Director