



The Quirks of Mid-Atlantic State OSHA Programs- Virginia

Insights

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Virginia prides itself on being a business friendly state, and its state OSHA plan is no exception. The Virginia Occupational Safety and Health compliance program ("VOSH") should be commended for maintaining a robust safety record while keeping employer costs low. As great as VOSH is, it has its administrative quirks, which may catch the unwary employer or litigant off guard. A few of those quirks are discussed below.

You can end up in Court in Virginia.

Unlike every other state in the country, Virginia uses its state court system to prosecute contested OSHA citations. There are no administrative law judges who hear alleged safety violations; there is no review board or commission. Rather, VOSH simply files a complaint against the employer in the circuit court where the alleged violation occurred. Circuit courts are Virginia's court of general jurisdiction, hearing most felony criminal matters and civil matters where over \$25,000 is in dispute. The circuit court's jurisdiction over VOSH claims is statutory; the \$25,000 threshold does not apply. While juries are generally available in Circuit Court, they are not available to litigants in VOSH matters.

Virginia is also one of the few states that distinguishes between cities and counties, with a few exceptions, when determining proper venue. For example, although the City of Charlottesville lies within the boundaries of Albemarle County, there exists separate court systems for these municipalities. If the VOSH inspection took place in City of Charlottesville, it will be prosecuted in the City of Charlottesville Circuit Court; if it occurred in Albemarle County, then the complaint will be filed in the Albemarle County Circuit Court.

Justice may be fair but not swift.

In Federal OSHA states, the government has only 21 days to file its complaint to prosecute the alleged safety violation. In Virginia there is no such 21 day deadline. Indeed, there is no deadline, at all. The law simply states that after the employer's notice of contest has been filed, the Commissioner of Labor shall immediately send the file to the Commonwealth Attorney's office, and then a complaint shall be filed in circuit court. Specifically, the law reads:

E. Upon receipt of a notice of contest of a citation, proposed penalty, order of abatement or abatement time pursuant to subdivision A 4 (b), subsection B or C of this section, the **Commissioner shall 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 Section 40.1-49.4(D) (emphasis added).

Virginia courts do not interpret this law to mean what it appears on its face to require. The only “immediate” action required by the Commissioner of Labor is the “immediate” referral of the VOSH matter to the Commonwealth Attorney’s office- not the filing of a complaint. As a result, VOSH has been known to file complaints in circuit court to prosecute an alleged citation over two years from the time the notice of contest was filed, and routinely 18 months after the employer lodges its contest.

So, why does this matter?

If your company receives an OSHA citation in Virginia, take a critical look at whether there is merit to contesting the alleged violation. Call your attorney and address the issues raised in the citation. If there a plausible defense, contest it. Given the length of time between the notice of contest and when the complaint likely will be filed, one should seriously consider contesting a citation in lieu of paying a penalty. This allows your company to keep the proposed penalty amount and invest this money in improving employee safety. Additionally, you are granted more time to work with VOSH to reach a favorable settlement geared towards creating a safer workplace for your employees.

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