

University of Richmond Law Review

Volume 12 | Issue 3

Article 4

1978

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Recommended Citation

Anthony F. Troy & Robert D. Perrow, *Enforcement of Occupational Safety and Health Laws in Virginia: A New Beginning*, 12 U. Rich. L. Rev. 535 (1978).

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ENFORCEMENT OF OCCUPATIONAL SAFETY AND HEALTH LAWS IN VIRGINIA: A NEW BEGINNING

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Preempted in 1972 from enforcing its laws and regulations pertaining to employee safety and health by the Occupational Safety and Health Act of 1970 (OSHA),¹ Virginia resumed enforcement activities on January 1, 1977, implementing, pursuant to the provisions of the Federal Act, a unique developmental State Plan. Virginia's resumption of enforcement activity in the area of job safety and health culminated a difficult four-year effort by the legislative and executive branches of Virginia government to gain recognition from the United States Department of Labor that her regulations and the method for enforcing the regulations were "at least as effective" as the provisions of the Federal Act.

This article seeks to explain the manner in which Virginia will develop and enforce its occupational safety and health laws and regulations. The purpose is to apprise the Virginia practitioner of the statutory and regulatory framework in which he will be operating; therefore, no attempt is made to criticize the provisions of either the Federal or Virginia law. To provide insight into the impetus for Virginia's enforcement scheme, a discussion of the Federal Act and prior Virginia job safety laws is incorporated.

I. THE IMPACT OF FEDERAL LEGISLATION ON VIRGINIA OCCUPATIONAL SAFETY AND HEALTH LAWS

A. *Pre-OSHA Virginia Job Safety Laws*

OSHA did not mark the origination of occupational safety and health laws in Virginia. In the late nineteenth century, the General

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1. 29 U.S.C. §§ 651-678 (1970).

Assembly began to place statutory obligations on an increasing range of employers in the area of employee job safety and health. Generally, violations of such laws were misdemeanors which, of course, were prosecuted by the local Commonwealth's Attorney.

Early Virginia efforts at job safety and health were entirely legislative.² More than likely in recognition of the wide scope of possible legislation in an increasingly industrialized society, the General Assembly in 1932 created the Safety Codes Commission to study and investigate all phases of safety in industry.³ The role of the Safety Codes Commission, predecessor of the current Safety and Health Codes Commission, was solely advisory until 1962. From 1932 to 1962 job safety and health legislation expanded slowly beyond the perimeters existing in 1932.⁴ Significant legislative changes, however, were made in 1962. The membership of the Safety Codes Commission was expanded and the Commission was given the authority to adopt rules and regulations "to further protect, and promote the safety and health of employees."⁵ Since 1962, therefore, Virginia, to accompany its demonstrated interest in the area of job safety, has had an established legislative and administrative framework for protecting the safety and health of employees. The enactment of OSHA altered the framework, but not the desire, of Virginia governmental officials to protect employees.

2. One of Virginia's earliest health laws dealt with cotton dust, a subject of current controversy under OSHA. 1908 Va. Acts 339. Other early statutes, since repealed, dealt with sanitary facilities, 1910 Va. Acts 19; machine guarding, 1914 Va. Acts 25; the construction and repair of railroad cars and other heavy equipment, 1920 Va. Acts 400; and the control of dust and refuse where grinding, polishing or buffing wheels are used in the course of manufacture, 1918 Va. Acts 440.

The working woman was a popular subject of the earliest laws dealing with the protection of employees. For example, employers were required to provide suitable seats for females to use when not performing work which required standing. 1897-98 Va. Acts 45. It was once unlawful for an employer to require a woman to work more than ten hours a day. 1889-90 Va. Acts 150.

3. 1932 Va. Acts 24, 25.

4. An exception to the relative inactivity of the General Assembly in the job safety area during this period was the enactment of legislation delegating to the State Health Commissioner the authority to enter and inspect any industrial or commercial establishment where persons are employed for the purpose of checking for occupational diseases with a view toward recommending "reasonable rules and regulations to control occupational disease." 1950 Va. Acts 636.

5. 1962 Va. Acts 102 & 865.

B. *Federal Preemption: The Occupational Safety and Health Act of 1970*

Prompted by congressional studies showing that American workers were being subjected to a high risk of fatal or disabling accidents and that the American economy was losing millions of man-days of productivity, Congress enacted the comprehensive OSHA job safety bill in 1970.⁶ Removal of job safety responsibility from the states is the result of a determination by Congress that many states were not adequately prepared for the task of ensuring occupational safety and health. As a consequence, OSHA preempts the field of occupational safety and health regulation in areas covered by federal standards, except where other federal agencies exercise authority to prescribe or enforce regulations affecting occupational safety or health.⁷

Although there was sentiment to the contrary,⁸ Congress never intended for OSHA to become the death knell for state involvement in the field of occupational safety and health. The overriding purpose of the Federal Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."⁹ Congress further recognized that notwithstanding the prior inadequacy of the laws of some states, reliance should be placed on all states willing and able to administer and enforce the Act and that its intent was to accomplish the purposes of the Act by involving the states in the following manner:

by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this

6. Congressman William A. Steiger, R. Wisconsin, patron of the Act in the House of Representatives, concisely states that "OSHA was proposed because of the failure by state governments, and labor and industry, to provide a safe and healthy working environment." Steiger, *OSHA: Four Years Later*, 25 LAB. L. J. 723 (1974).

7. 29 U.S.C. § 667(a) (1970).

8. Labor unions, skeptical of the ability of the individual states to administer an effective occupational safety and health plan, have challenged the validity of the U.S. Department of Labor's grant of enforcement authority to state agencies. See, e.g., *South Carolina Labor Council v. McGowan*, No. 73-145 (S.C. Feb. 22, 1973), [1971-1973] OSHD ¶ 15,500.

9. 29 U.S.C. § 651(b) (1970).

chapter, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith; . . .¹⁰

Section 18 of the Federal Act¹¹ permits any state to assume responsibility for developing and enforcing occupational safety and health standards in those areas in which a federal standard has been promulgated if the Secretary of Labor has approved a state plan for the development and enforcement of such standards. The essential condition for approval is that the plan provide for the development of standards (and the enforcement thereof) which are or will be "at least as effective" as the federal standards.¹² The states were left the freedom to imitate the federal system or to develop a different system which is "at least as effective" as the federal program. As Virginia eventually discovered, the greater the imitation of the federal model, the fewer the objections to plan approval.

OSHA creates a comprehensive job safety and health system centered on the development and enforcement of specific federal job safety and health standards and on the enforcement of a statutory "general" duty to provide a safe and healthful work place free from recognized hazards.¹³ Employers are required to comply with the general duty clause and all applicable specific standards,¹⁴ maintain certain records, and open their premises to periodic inspection by OSHA compliance officers.¹⁵ Civil and, in some cases, criminal sanctions may be imposed upon employers who violate these provisions.¹⁶ Such violations are subject to administrative and judicial review.¹⁷

The multitude of governmental functions mandated by OSHA is divided among three agencies of the federal government. The Secretary of Labor is vested with the authority, *inter alia*, to promulgate

10. *Id.* § 651(b)(11).

11. *Id.* § 667.

12. *Id.* § 667(c)(6); 29 C.F.R. §§ 1902.1(b) and 1975.5 (1977).

13. See generally Marinelli, *Occupational Safety and Health Act: The Right of a Worker to a Safe Work Place Environment*, 78 W. VA. L. REV. 57 (1975-1976).

14. 29 U.S.C. § 654 (1970).

15. *Id.* § 657; 29 C.F.R. §§ 1903-04 (1977).

16. 29 U.S.C. §§ 658-59 (1970).

17. *Id.* §§ 659-60.

occupational safety and health standards,¹⁸ to inspect business establishments,¹⁹ to issue citations and prosecute violations,²⁰ and to approve or reject state plans.²¹ The National Institute for Occupational Safety and Health (NIOSH) was created within the U.S. Department of Health, Education and Welfare to develop and establish recommended job safety standards, conduct research, carry on experimental programs, and develop and conduct educational and informational programs.²² Adjudication of challenges to citations issued by the Secretary of Labor is the responsibility of the three-member Occupational Safety and Health Review Commission (OSHRC), an independent agency in the executive branch. The sole authority of OSHRC is to review decisions of its administrative law judges in adversary proceedings between employers and the Occupational Safety and Health Administration represented by the Secretary of Labor.²³

II. VIRGINIA'S DEVELOPMENT OF A STATE PLAN

A. *State Plan Approval in Other Jurisdictions*

Fifty-six jurisdictions are eligible to assume responsibility for the development and enforcement of their own occupational safety and health standards in all areas where a federal safety standard exists.²⁴ To gain approval, each jurisdiction must submit a plan for assuming such responsibility.²⁵ These plans may be either developmental or complete.²⁶ Over twenty states have submitted plans which have been approved; all of these state plans were developmental.²⁷

18. *Id.* § 655.

19. *Id.* § 657(a).

20. *Id.* § 658(a).

21. *Id.* § 667.

22. *Id.* §§ 669-71.

23. The creation of OSHRC as an administrative agency with only quasi-judicial powers has apparently created difficulty for some Commission members who sought to exercise the traditional powers of an administrative agency assigned adjudicatory powers. Moran, *A Court in the Executive Branch of Government: The Strange Case of the Occupational Safety and Health Review Commission*, 20 WAYNE L. REV. 999 (1974).

24. 29 U.S.C. § 652(7) (1970).

25. *Id.* § 667(b).

26. 29 C.F.R. § 1902.2(b)(1977).

27. Several states have voluntarily withdrawn their developmental plans either before or after receiving approval of their developmental plan. See chart set forth in [1977] 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 5,003.

To be accepted, a plan must meet certain statutory and regulatory criteria.²⁸ These criteria are flexible enough to allow a state to develop procedures which somewhat reflect local conditions. Generally, most states have decided to adopt identical federal standards and to enforce these standards through an administrative procedure subject to later judicial review.

B. *Virginia's Decision to Develop a State Plan*

Facing federal preemption of its occupational safety and health laws, the Commonwealth of Virginia chose to avail itself of the provisions of section 18 of the Federal Act.²⁹ In the spring of 1971, Governor Linwood Holton designated the Virginia Department of Labor and Industry as the state agency in the Commonwealth to administer and enforce the provisions of the Federal Act and the Virginia Department of Health as the agency to investigate those conditions which are, or appear to be, health problems. On December 20, 1972, Virginia first submitted a State Plan for approval by the U.S. Department of Labor. Enabling legislation was submitted to the 1973 session of the General Assembly which adopted the legislation supported by the Virginia Department of Labor and Industry.³⁰ To enforce occupational safety and health standards in the Commonwealth, the Department of Labor and Industry sought to continue the enforcement of violations of such laws by criminal penalty in the local courts.

State and federal officials spent the year of 1973 negotiating and refining the Virginia State Plan. Despite efforts to expedite approval of the proposed State Plan, no decision was made in 1973. Finally on February 14, 1974, John Stender, then Assistant Secretary of Labor, wrote to the Virginia Commissioner of Labor and Industry of his intention to initiate proceedings to reject the Virginia Plan. The central objection to the Virginia State Plan was its entire enforcement system, which relied upon prosecution of employers who violated the Act in the Commonwealth's criminal court system.

28. 29 C.F.R. § 1902.3 (1977).

29. 29 U.S.C. § 667 (1970).

30. 1973 Va. Acts 615 (codified at VA. CODE ANN. §§ 40.1-22 to -51.4:2 (Repl. Vol. 1976)). The authority for Virginia to enter into agreements with the federal government is embodied in §§ 40.1-22.1 and 40.1-26 of the Code of Virginia.

The Assistant Secretary primarily objected to the enforcement system because employees or employee representatives would not be able to participate in such proceedings as third parties. In addition, the Assistant Secretary contended that the courts of the Commonwealth could not be required to impose the mandatory first-instance money penalties for "serious" violations set forth in the federal law and incorporated into Virginia law.

Until this time, no rejection proceedings had ever been initiated against a state plan. In fact, no procedural rules had ever been developed for rejection proceedings.

Virginia stood fast to its insistence on the designation of its court system to enforce occupational safety and health standards; therefore the Virginia Department of Labor and Industry, by the Attorney General, requested a formal hearing on the proposed rejection of her State Plan.³¹ While the rejection proceeding was pending, the 1973 General Assembly amended section 40.1-49.1 of the Code of Virginia to eliminate the criminal penalty feature of the Virginia State Plan, changing the penalty to a civil monetary penalty.³² Due to this change, the U.S. Department of Labor was of the opinion that the Commonwealth had, in effect, revised its State Plan. On July 28, 1975, an order issued from a U.S. Department of Labor Administrative Law Judge incorporating the new legislation into the rejection proceeding but, unfortunately, also continuing the rejection proceeding pending the Secretary of Labor's review of the "amended" State Plan. The procedural maneuverings of the U.S. Department of Labor were considered by state officials to be awkward, if not illegal. Negotiations between state and federal officials continued through 1975.

Much of the difficulty in gaining approval of the Virginia State Plan was in the inability of the U. S. Department of Labor to elucidate its objections. Once these objections were received, steps were taken, consistent with state policy, to remove any roadblocks to approval. As a result, in 1976 the General Assembly was again asked to amend the occupational safety and health laws of the Commonwealth. The 1976 legislative amendments added a new enforcement

31. See 39 Fed. Reg. 27,844 - 51 (1974).

32. 1975 Va. Acts 496 (codified at VA. CODE ANN. § 40.1-49.1 (Repl. Vol. 1976)).

section to the Code,³³ but retained the use of the Virginia court system as a forum for review of alleged occupational safety and health violations by employers. Plan approval and dismissal of the rejection proceeding followed.³⁴

III. VIRGINIA'S OCCUPATIONAL SAFETY AND HEALTH PLAN

A. Administration

The administration of the Virginia Occupational Safety and Health program (VOSH) is divided among several state agencies, each possessing specialized skills and expertise. The Virginia Department of Labor and Industry has the overall responsibility for coordinating the development and administration of the State Plan.³⁵ The Virginia Department of Health has been designated to investigate those conditions which are or appear to be health problems. If through investigation, complaints, or by other means, the Department of Labor and Industry learns of health problems, the matter must be referred to the Department of Health for investigation.³⁶ Upon certification by the Department of Health that occupational health standards have been violated in a place of employment, steps to enforce occupational health standards are taken by the Department of Labor and Industry.³⁷ The authority to make rules and regulations concerning enforcement and procedures necessary for compliance with the Federal Act has been delegated to the Commissioner of Labor and Industry and the Safety and Health Codes Commission.³⁸ The enforcement responsibility of the Department of Labor and Industry is shared only with the State Fire Marshal, pursuant to an agreement to be developed between the agencies and only to the extent of investigations of fire safety rules and

33. VA. CODE ANN. § 40.1-49.2 (Repl. Vol. 1976).

34. Dismissal of the rejection proceeding was formally granted on October 26, 1976, and announced on December 28, 1976. 41 Fed. Reg. 56,412 (1976).

35. VA. CODE ANN. § 40.1-1 (Repl. Vol. 1976).

36. *Id.* § 40.1-40.

37. *Id.*

38. The Commissioner of the Department of Labor and Industry has the authority to make necessary enforcement rules and regulations. VA. CODE ANN. § 40.1-6(3) (Repl. Vol. 1976). The Safety and Health Codes Commission has the authority, "with the advice of the Commissioner," to promulgate rules and regulations to protect the occupational safety and health of employees. VA. CODE ANN. § 40.1-22(5) (Repl. Vol. 1976). Currently, all such rules and regulations have been promulgated by the Commission with the advice of the Commissioner.

regulations.³⁹ In enforcing such regulations, the Chief Fire Marshal will adhere to the enforcement procedures governing all occupational safety and health standards.⁴⁰

The legal representation of the state agencies involved in enforcing occupational safety and health standards is divided between the Attorney General and the local Commonwealth's Attorneys. The Commonwealth's Attorney for the county or city in which a violation or violations occurred is responsible for representing the Department of Labor and Industry in securing abatement and civil penalties for VOSH violations⁴¹ and any other violation of the labor laws of the Commonwealth.⁴² In all other legal matters, the Attorney General represents the state agencies involved.⁴³

B. *Scope of Coverage of the Virginia Developmental Plan*

Generally, the Virginia Developmental State Plan covers all private and public employers. Although the job safety of state and local government employees is an area exempt from direct federal regulation, such coverage is required for State Plan approval.⁴⁴

Some employers are not covered by either OSHA or VOSH. The term "employer" is defined in the Occupational Safety and Health Act as "a person engaged in an industry affecting commerce who has . . . employees"⁴⁵ but excludes the United States and the states and their political subdivisions.⁴⁶ By regulation, either as a result of administrative interpretation or as a matter of policy, the Secretary of Labor includes in the definition of employer nonprofit and charitable organizations, secular or proprietary activities of religious organizations, and Indians; individuals who privately employ household domestics are excluded from the definition of employer.⁴⁷ The performance of, or participation in, religious services is not consid-

39. VA. CODE ANN. § 27-83.1 (Cum. Supp. 1977). The delegation of enforcement responsibility to the Fire Marshal will be limited to certain General Industry Standards.

40. *Id.* See also VA. CODE ANN. § 40.1-49.2 (Repl. Vol. 1976).

41. VA. CODE ANN. § 40.1-49.2G (Repl. Vol. 1976).

42. *Id.* § 40.1-7.

43. See VA. CODE ANN. § 2.1-121 (Cum. Supp. 1977).

44. See note 12 *supra*.

45. 29 U.S.C. § 630 (1970).

46. *Id.* § 652(5).

47. See 29 C.F.R. §§ 1975.4 & 1975.6 (1977).

ered employment and members of the immediate family of an agricultural employer are not regarded as employees for the purposes of the definition of employer.⁴⁸

The Virginia Developmental State Plan expressly excludes from its coverage those employers excluded by the Federal Act.⁴⁹ This list of excluded employers consists of federal agencies, business covered under the provisions of the United States Atomic Energy Act, railroads, rolling stock and trucks covered by United States Department of Transportation regulations, and mining industries under the Federal Coal Mine Safety and Health Act. As a matter of choice, Virginia has elected to exclude coverage of longshoring and shipbuilding, ship breaking, and ship repairing from coverage under the State Plan and, as a result, specific federal standards covering these items will not be adopted. Those public and private employers which are covered by the Virginia State Plan must conform to certain statutory and regulatory duties in the performance of their businesses or jobs.

C. *Employer and Employee Duties*

The duty imposed upon private and public employees is to comply with all applicable occupational safety and health standards.⁵⁰ There are, however, no sanctions under the statute or public employee regulations for the failure of either private or public employees to adhere to this duty; rather, employers are left with the option of disciplining recalcitrant employees. This option may be viewed as an obligation, for the mere refusal of employees to comply with

48. *Id.* § 1975.5. See note 10 *supra*.

49. In correspondence between Commissioner Edmond Boggs and David H. Rhone, Regional Administrator for Occupational Safety and Health, dated August 23, 1976, the Department of Labor was assured that Virginia will not apply its State Plan to working conditions of employees with respect to which other federal agencies exercise job safety authority.

50. VA. CODE ANN. § 40.1-51.2(a) (Repl. Vol. 1976) covers private employees as follows: "It shall be the duty of each employee to comply with all occupational safety and health rules and regulations issued pursuant to this chapter and any orders issued thereunder which are applicable to his own action and conduct."

The Rules and Regulations Applying Virginia Occupational Safety and Health Law and Standards to State, Local and Municipal Governments § 1800.6 (1977) [hereinafter cited as Pub. Regs.] imposes a similar duty upon public employees as follows: "Public employees shall comply with all occupational safety and health standards which are applicable to their own action or conduct."

applicable job safety standards is not an adequate defense to a violation of the occupational safety and health standards.⁵¹

Employers have a duty to obey all specific occupational safety and health standards and an overriding "general duty" to furnish a safe and healthful work place free from recognized hazards. Thus, employers, like employees, must comply with all applicable occupational safety and health standards.⁵² Unlike the duty imposed upon employees, the obligations of employers are the target of all enforcement efforts.

Additional duties are placed upon employers in the area of disseminating information to employees and maintaining certain records. An employer must maintain records relating his experience with safety and health accidents.⁵³ This record-keeping requirement is identical to the federal requirement. The Commissioner of Labor and Industry may require employers to retain certain records at the employer's place of business.⁵⁴ Excepted from the record-keeping requirement are employers with ten or fewer employees.⁵⁵

If an employer is cited for a violation of an occupational safety or health standard or the general duty clause, he must post at the site

51. The extent of the responsibility of employers is great, notwithstanding employee resistance to compliance. *See, e.g., Atlantic & Gulf Stevedores, Inc. v. OSHRC*, No. 75-1584 (3d Cir. March 26, 1976), [1975-1976] OSHD ¶ 20,577 (refusal to wear hard hats).

52. VA. CODE ANN. § 40.1-51.1(a) (Repl. Vol. 1976) covers private employers as follows:

It shall be the duty of every employer to furnish to each of his employees safe employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees, and to comply with all applicable occupational safety and health rules and regulations promulgated under this chapter.

Pub. Regs. § 1800.5 (1977) provides as follows: "Each public employer shall furnish a safe and healthy work place free from recognized hazards that are likely to cause death or injury and shall comply with all occupational safety and health standards promulgated."

53. Administrative regulations governing occupational safety and health matters affecting private employers have been promulgated by the Virginia Safety and Health Codes Commission in the form of Administrative Procedure Rules and Regulations for Enforcement of Occupational Safety and Health Standards (1977) [hereinafter cited as Ad. Proc.] and submitted to the Occupational Safety and Health Administration of the U. S. Department of Labor. The Occupational Safety and Health Administration has not yet replied as to whether these regulations conform to federal guidelines. Record-keeping requirements are set forth in Ad. Proc. §§ 1900.34 to .36 (1977) and Pub. Regs. § 1800.13 (1977). *See also* 29 C.F.R. § 1904 (1977).

54. VA. CODE ANN. § 40.1-6(7) (Repl. Vol. 1976).

55. Ad. Proc. § 1900.34(1) (1977).

of the violation a copy of the citation, which shall remain posted until the violation is abated but no less than three working days.⁵⁶ Posting of the citation in such a manner informs the affected employees of the existence of a possible violation in order that they or their representative may contest the violation and/or the abatement date.⁵⁷ If the violation is contested by either the employer or any affected employees or the employee representative, the employer must post a notice that the violation is being contested.⁵⁸

Employers have a statutory obligation to inform their employees of their rights and responsibilities under Title 40.1 of the Code of Virginia.⁵⁹ In this regard, employers are required to post an informational poster furnished by the Department of Labor and Industry.⁶⁰ This informational poster apparently suffices for the statutory obligation to inform employees. It should be noted, however, that employers have to inform their employees of any specific safety and health standards applicable to the employer's particular business and that there is a continuing obligation to keep the employees informed of any changes in such standards or in the right and responsibilities of the employees.⁶¹

An important informational requirement imposed upon employers is the duty to inform employees of their exposure to toxic materials or harmful physical agents. An employee or former employee is entitled to such information and has the right to observe monitoring or measuring of exposures and to be advised of any corrective action being taken.⁶² Public employees enjoy similar protection.⁶³

Where a fatality has occurred as a result of an accident or five or more persons have been hospitalized, the employer must inform the Virginia Department of Labor and Industry within forty-eight hours following the accident.⁶⁴

56. VA. CODE ANN. § 40.1-51.1(e) (Repl. Vol. 1976); Ad. Proc. § 1900.36 (1977). See text accompanying note 98 *infra*.

57. VA. CODE ANN. § 40.1-49.2A (Repl. Vol. 1976).

58. Ad. Proc. § 1900.24(3) (1977).

59. VA. CODE ANN. § 40.1-51.1(g) (Repl. Vol. 1976).

60. Ad. Proc. § 1900.36 (1977).

61. VA. CODE ANN. § 40.1-51.1(g) (Repl. Vol. 1976).

62. *Id.* § 40.1-51.1(c); Ad. Proc. § 1900.6 (1977).

63. Pub. Regs. § 1800.9(5) (1977).

64. VA. CODE ANN. § 40.1-51.1(f) (Repl. Vol. 1976).

D. *Standards and Variances*

The specific duty clause provides that an employer will comply with all occupational safety and health rules and regulations applicable to the type of activities engaged in by his employees.⁶⁵ These rules and regulations are promulgated by the Safety and Health Codes Commission which must promulgate standards "at least as stringent" as federal OSHA standards.⁶⁶ The Safety and Health Codes Commission, therefore, may adopt rules and regulations which are more stringent than federal standards.⁶⁷ Furthermore, the Virginia developmental plan states that the Safety and Health Codes Commission will adopt identical federal standards except for regulations concerning ionizing radiation which have been independently developed by the Commission.⁶⁸

Virginia statutes allow a challenge by declaratory judgment in the Circuit Court of the City of Richmond of any standard adopted by the Safety and Health Codes Commission.⁶⁹ Only those persons adversely affected by the standard may petition the court for relief. Relief will be denied if the determination of the Safety and Health Codes Commission is supported "by substantial evidence in the record considered as a whole."⁷⁰ Situations in which a state standard identical to the federal standard are overturned by the Circuit Court of the City of Richmond are avoided by the statutory provision that "[a]doption of a federal occupational safety and health standard shall be deemed to be sufficient evidence to support promulgation of such standard."⁷¹ The implementation of a standard adopted by

65. See note 52 *supra*.

66. VA. CODE ANN. § 40.1-22(5) (Repl. Vol. 1976).

67. Opinion of the Attorney General of Virginia to the Honorable Edmond M. Boggs, Commissioner, Department of Labor and Industry, dated September 22, 1976. The Opinion states that neither OSHA nor the Virginia Occupational Safety and Health Plan prohibits adoption by the Safety and Health Codes Commission of standards "more effective" than corresponding federal standards and that, accordingly, the public procedures of Virginia's Administrative Process Act, VA. CODE ANN. §§ 9-6.14:1 to .14:20 (Cum. Supp. 1977), must be followed in adopting identical federal standards.

68. 41 Fed. Reg. 42,655, 42,656 (1976).

69. VA. CODE ANN. § 40.1-22(7) (Repl. Vol. 1976).

70. *Id.*

71. *Id.* It should be noted that no provision has been made for the situation in which a federal standard has been declared invalid after the state has adopted an identical standard. Presumably, the state standard remains in effect until challenged in the state court system or changed by the Safety and Health Codes Commission.

the Safety and Health Codes Commission cannot be stayed except by issuance of a preliminary injunction by the Circuit Court of the City of Richmond.⁷²

Employers aggrieved by any standard promulgated by the Commission may seek a variance from the rule's application. The Commissioner of the Department of Labor and Industry is empowered to make rules and regulations governing the granting of temporary variances to any "interested or affected" party and to make determinations under such regulations which may be appealed to the Commission.⁷³ Variances may be temporary⁷⁴ or permanent.⁷⁵ Temporary variances are issued by the Commissioner of the Department of Labor and Industry for good cause shown if an employer is unable to comply with a standard by its effective date.⁷⁶ A temporary variance can be granted for no longer than the time needed to come into compliance or for one year, whichever is the shorter period of time.⁷⁷ Permanent variances from standards are granted by the Commissioner of Labor and Industry upon a showing by an employer that the conditions, practices, means, methods, operations or processes used or proposed would provide a place of employment as safe and healthful as would be provided by the standard from which the variance is sought.⁷⁸ Affected employees are entitled to notice and an opportunity to participate in any proceeding requesting either a temporary or permanent variance. To avoid harsh inconsistencies, employers who have been granted variances for their business establishments by the U. S. Department of Labor will, in the absence of "compelling local conditions" dictating otherwise, retain the variance in Virginia.⁷⁹

72. *Id.*

73. *Id.* § 40.1-6(9). The Safety and Health Codes Commission has also been delegated the authority to grant variances from standards, rules and regulations. *Id.* § 40.1-51.4. This apparent contradiction has been resolved in favor of implementing the procedures set forth in § 40.1-6(9). Accordingly, the U.S. Department of Labor has been assured that all variances will be granted in accordance with § 40.1-6(9). *See* 41 Fed. Reg. 42,655, 42,658 (1976). The Commission had adopted appropriate regulations. Ad. Proc. §§ 1900.13 to .15 (1977).

74. Ad. Proc. § 1900.14 (1977).

75. *Id.* § 1900.15.

76. *Id.* § 1900.14(1).

77. *Id.* § 1900.14(15).

78. *Id.* § 1900.15.

79. Ad. Proc. § 1900.15(6) (1977) provides:

E. *General Duty Clause*

Any "recognized hazards" for which there is no specific standard are covered by the general duty clause contained in section 40.1-51.1(a) of the Code of Virginia. Under the provisions of this statute every employer must furnish his employees "safe employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm."⁸⁰

The general duty clauses in the Virginia and federal statutes are virtually identical.⁸¹ Certain interpretations and legal principles of the general duty clause have developed on the federal level from regulations of the Secretary of Labor, the administrative rulings of OSHRC and decisions of the various United States Circuit Courts of Appeal.⁸² The Secretary of Labor defines a "recognized hazard" as a condition of either common knowledge or general recognition in the particular industry which is detectable by the senses or if not detectable by the senses has such general recognition in the industry as a hazard that there are generally known and accepted tests for its existence.⁸³ Federal compliance officers are instructed to cite general duty violations only when specific standards do not apply and to always cite general duty violations as either serious, willful or repeated.⁸⁴

Business establishments which have been granted variances by the U.S. Secretary of Labor under the provisions of O.S.H.A. prior to the approval of this Plan will be required to so advise the Commissioner and unless compelling local conditions dictate otherwise, the variance will be honored. In such instances the requirement of publishing the notice of the request for and granting of the variance will be waived. When the Commissioner feels such a granted variance cannot be honored, he will advise the Area and Regional O.S.H.A. officials of the reasons and work with O.S.H.A. authorities to resolve the question. Variances granted by the U. S. Secretary of Labor to national companies with establishments in the State of Virginia after the approval of this Plan will be handled in the same manner as stated above.

80. See notes 50 and 52 *supra*.

81. Some doubt has been expressed as to the need for states to adopt a general duty clause. For a discussion of this issue and an analysis of the benefit of such a clause, see Note, *The Occupational Safety and Health Act of 1970: State Plans and the General Duty Clause*, 34 OHIO ST. L. J. 599 (1973).

82. See generally Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 HARV. L. REV. 988 (1973).

83. Occupational Safety and Health Administration's Field Operations Manual, ch. VIII (1975). The manual is reproduced in [1976] Empl. Safety and Health Guide (CCH) ¶ 4,251.

84. *Id.*

Judicial interpretations of the general duty clause are often inextricably intertwined with the facts of the particular case. Nevertheless, some general principles have emerged. It has been held that actual knowledge of a hazard by an employer is sufficient to show a hazard is recognized even though the hazardous condition is not recognized in the industry.⁸⁵ OSHRC and several United States Circuit Courts of Appeal have required proof that the employer knew or should have known of the hazard.⁸⁶

Administratively, Virginia has offered the following guideline to the interpretation of a general duty clause violation:

For the most part recognized hazards shall mean those included in the standards, codes, rules or regulations which have been promulgated by a nationally recognized authoritative agency.⁸⁷

F. *Enforcement in the Private Sector*

The inspection of work places will be conducted by either a safety or health inspector or both. The right to enter any business establishment, construction site or other work place has been vested in the Commissioner of Labor and Industry or his authorized representative.⁸⁸ The State Health Commissioner or his authorized representative has the right to enter any industrial or commercial establishment for the purpose of checking on occupational disease.⁸⁹ Neither statute authorizing such inspections requires an inspector to obtain a search warrant prior to entry into the place of employment. The federal law on which these statutes were patterned has been challenged repeatedly as to the constitutionality of a statutory procedure allowing warrantless administrative searches.⁹⁰ The issue is

85. *Brennan v. OSHRC*, No. 73-1235 (8th Cir. April 5, 1974), [1973-1974] OSHD ¶ 17,573.

86. *See Getty Oil Co. v. OSHRC*, No. 75-1828 (5th Cir. April 23, 1976), [1975-1976] OSHD ¶ 20,649.

87. Ad. Proc. § 1900.12(1) (1977).

88. VA. CODE ANN. § 40.1-6(8) (Repl. Vol. 1976).

89. *Id.* § 40.1-50.

90. The federal courts have adopted one of three viewpoints: (1) warrantless OSHA inspections are constitutional, *see, e.g., Brennan v. Buckeye Industries, Inc.*, 374 F. Supp. 1350 (S.D. Ga. 1974); (2) OSHA inspections are proper only when made pursuant to a warrant issued upon a showing of probable cause, *see, e.g., Brennan v. Gibson's Products, Inc.*, 407 F. Supp. 154 (E.D. Tex. 1976) (three-judge court); and (3) warrantless OSHA inspections are unconstitutional and non-consensual OSHA inspections cannot be allowed under any circum-

pending before the United States Supreme Court.⁹¹

In the enforcement scheme, unannounced inspections are considered essential to securing compliance with the occupational safety and health standards. For instance, any unauthorized person giving advance notice shall be guilty of a misdemeanor.⁹² Advance notice can be given only by the Commissioner of Labor and Industry or his authorized representative in certain carefully prescribed situations.⁹³ Any person in charge of any business establishment refusing entry or obstructing an inspection shall be guilty of a misdemeanor.⁹⁴

In conducting an inspection, the safety or health inspector may be accompanied by a representative of the employer and a representative of the employees. This "walk-around privilege" is mandated by statute and procedures have been promulgated concerning this right.⁹⁵

The walk-around privilege afforded employees has prompted the question whether the employee or the employee representative is entitled to wages for the time spent accompanying a safety or health inspector. On the federal level, regulations promulgated by the Sec-

stance, see *Barlow's Inc. v. Usery*, 424 F. Supp. 437 (D. Idaho) (three-judge court), *prob. juris. noted, sub nom. Marshall v. Barlow's Inc.*, 45 U.S.L.W. 369 (1977).

91. *Barlow's Inc. v. Usery*, 424 F. Supp. 437 (D. Idaho), *prob. juris. noted, sub nom., Marshall v. Barlow's Inc.*, 45 U.S.L.W. 3690 (1977). Virginia has joined in a brief *Amicus Curiae* on behalf of eleven states urging reversal of the *Barlow's Inc.* decision and, therefore, supporting warrantless inspections of places of employment.

92. VA. CODE ANN. § 40.1-51.3:1 (Repl. Vol. 1976).

93. *Id.* § 40.1-6(8)(b); Ad. Proc. § 1900.18 (1977) provides:

(1) The Commissioner, his authorized representative, nor anyone else shall give or authorize the giving of advance notice of a safety or health inspection except for the following:

- (a) in cases of imminent danger
- (b) in cases where it is necessary to conduct inspections at times other than regular working hours
- (c) in cases where it is necessary to assure the presence of personnel needed to conduct the inspection
- (d) in cases where the Commissioner of Labor and Industry or the Commissioner of the Department of Health determines that advance notice will insure a more effective and thorough inspection. In addition, no advance notice may be given more than twenty-four (24) hours before inspection except in instances of apparent imminent danger or other unusual circumstances.

94. VA. CODE ANN. § 40.1-10 (Repl. Vol. 1976).

95. *Id.* § 40.1-51.1(h) and -51.2(d); Ad. Proc. § 1900.19 (1977).

retary of Labor setting forth those circumstances in which employers must pay have been amended to state that an employer's failure to pay employees for time during which they are engaged in walk-around inspections is discriminatory under the Federal Act.⁹⁶ It should be noted that while the walk-around privilege under Virginia law is essentially identical to the federal privilege, a nondiscrimination clause has been placed in the Virginia statute which is not found in either the federal statute or regulations.⁹⁷ It remains to be seen whether Virginia's nondiscrimination clause constitutes a *per se* requirement that employees be compensated for time spent during a walk-around or under what circumstances the nondiscrimination clause will mandate such payments.

If during an inspection a safety or health inspector discovers a violation of either an occupational safety and health standard or the general duty clause, a citation will be issued to the employer. A citation is a notice that a condition has been found which does not meet a standard or rule or regulation of the Virginia Safety and Health Codes Commission or any provision of Title 40.1 of the Code of Virginia.⁹⁸ The citation, which must be issued with "reasonable promptness," must also "describe with particularity" the nature of the violation or violations, including a reference to the statute or rule violated, and set a "reasonable time" for abatement of the violation or violations.⁹⁹ It is the duty of the Commissioner of Labor and Industry or his authorized representative to deliver the citation to the cited employer in person or by registered or certified mail.¹⁰⁰

96. 42 Fed. Reg. 47,343 (1977). The walk-around was previously held to be exempt from the U. S. Fair Labor Standards Act requirement of compensation for time spent in normal work activity. *Leone v. Mobil Oil Corp.*, 377 F. Supp. 1302 (D.D.C. 1974). The walk-around is embodied in federal statute and regulation. 29 U.S.C. § 657(e) (1970); 29 C.F.R. § 1903.8 (1977).

97. VA. CODE ANN. § 40.1-51.2 (Repl. Vol. 1976) provides, in pertinent part, as follows: "No person shall discharge or in any manner discriminate against an employee representative for his participation in any safety and health inspection."

98. Ad. Proc. § 1900.21 (1977).

99. VA. CODE ANN. § 40.1-49.2A (Repl. Vol. 1976). The "reasonable promptness" with which a citation must issue is not subject to precise definition since the complexity of each situation will determine the amount of time necessary for an investigation and issuance of a citation under the appropriate standards; however, federal officials will carefully monitor the time period between an inspection and the subsequent issuance of a citation to insure that the state favorably complies with federal statistics.

100. *Id.* § 40.1-49.2A.

Once a citation has been issued, the employer or any employee adversely affected by the issuance of the citation may contest the violation or the abatement date. If a "notice of contest" is not filed within fifteen calendar days with the Commissioner of Labor and Industry, the citation becomes a final order of the Commissioner.¹⁰¹

In addition to contesting a citation, an employer, an adversely affected employee or an employee representative may seek an informal conference with the appropriate commissioner to discuss the violation or abatement date; the request for an informal conference, however, does not stay the time allowed for filing a notice of contest.¹⁰²

The primary emphasis of VOSH is the abatement of violations of health and safety standards. Nevertheless, enforcement of the regulations requires a deterrent; therefore, employers who violate the safety and health regulations of the Commission or fail to abate such violations are subject to civil and criminal penalties. The primary enforcement mechanism is the civil monetary penalty, the amount of which is determined by the seriousness of the violation.

The types of violations of occupational safety and health standards established by the Federal Act have been carried forth in a slightly modified form by Virginia. The statutory definitions found in section 40.1-49.2 of the Code have been categorized administratively by the Department of Labor and Industry as follows together with the penalty:

1. Nonserious:

- a. The violation or violations have a direct and immediate relationship to safety or health.
- b. Civil monetary penalty of not more than one thousand dollars for each violation and/or injunctive relief.¹⁰³

101. *Id.* The federal notice of contest period is fifteen *working* days. 29 U.S.C. § 659(a) (1970).

102. Ad. Proc. § 1900.29 (1977).

103. VA. CODE ANN. § 40.1-49.2 (Repl. Vol. 1976). Subsection C provides several factors which may be considered for the purpose of reducing the demanded monetary penalty for a serious violation. The state has assured the U. S. Department of Labor that these same penalty reduction factors will also be applied to nonserious and other violations by administrative action. 41 Fed. Reg. 42,655, 42,658 (1976); see Ad. Proc. §§ 1900.30 to 31 (1977). Record-keeping and posting violations will be treated as nonserious violations. *Id.* Further-

2. Serious:

- a. A substantial probability that death or serious physical harm will occur as a result of the violation or violations.
- b. A civil penalty of one thousand dollars for each such violation and/or injunctive relief.¹⁰⁴

3. Repeated:

- a. An employer has repeatedly violated provisions of Title 40.1 or the rules and regulations adopted thereunder, *i.e.*, a previous citation has been issued for the same or substantially similar offense.
- b. The employer may be subject to a civil penalty of up to ten thousand dollars or a criminal fine of up to ten thousand dollars and/or injunctive relief.¹⁰⁵

4. Willful:

- a. The employer willfully violates any occupational safety or health standard or provision of Title 40.1.
- b. Penalties are the same as for a repeated violation. In addition, if the willful violation causes death to any employee, the employer is subject to a fine of ten thousand dollars or six months imprisonment or both for a first offense and if the offense follows such a conviction, the punishment shall be a fine of twenty thousand dollars or one year imprisonment or both.¹⁰⁶

5. Imminent danger:

- a. Any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious bodily harm immediately before the imminence of such danger can be eliminated by other enforcement procedures.

more, the state will follow the restraints placed upon the U. S. Department of Labor by the Fiscal 1977 Appropriation Act and not assess monetary penalties for ten or fewer nonserious violations. Pub. L. No. 94-439, 90 Stat. 1418 (1976).

104. VA. CODE ANN. § 40.1-49.2 (Repl. Vol. 1976); Virginia Compliance Manual 72 (proposed) [hereinafter cited as Va. Com. Man.].

105. VA. CODE ANN. § 40.1-49.2F (Repl. Vol. 1976); Va. Com. Man. 75.

106. VA. CODE ANN. § 40.1-49.2F (Repl. Vol. 1976); Va. Com. Man. 75. See *Intercounty Construction Company v. OSHRC*, 522 F.2d 777, 779 (4th Cir. 1975), *cert. denied*, 423 U.S. 1072 (1976).

b. The Commissioner or his authorized representative may seek injunctive relief to enjoin such conditions or practices.¹⁰⁷ In addition, the Commonwealth has assured the Secretary of Labor that it will issue a citation for a serious violation in all cases of imminent danger.¹⁰⁸

6. Failure to abate:

a. The failure to abate a violation on the date set pursuant to a final order of the Commissioner or a final order of any court constitutes a separate violation for each day of such failure to abate.

b. Civil penalties will be demanded dependent upon the seriousness of the violation. Injunctive relief may be sought.¹⁰⁹

The primary point of divergence between the Federal Act, enforcement programs of other states, and the Virginia State Plan, is the earlier involvement of the judiciary in the enforcement process. If an employer has been cited for a serious, a repeated or a willful violation, or if an employer contests a nonserious violation, a summons will be issued requiring the employer to appear in the general district court of the county or city in which the violation or violations occurred within fifteen days from the date of issuance of the citation to show cause, if any, why he should not be held in violation of the cited regulation or statute.¹¹⁰ The Commissioner is represented by the local Commonwealth's Attorney. As a result, the employer and the affected employees have rapid access to an impartial forum in their local area for a determination of the validity of any citation.¹¹¹ This procedure avoids the often time-consuming and

107. VA. CODE ANN. § 40.1-49.2E (Repl. Vol. 1976).

108. 41 Fed. Reg. 42,655, 42,657 & 42,658 (1976).

109. VA. CODE ANN. § 40.1-49.2 (Repl. Vol. 1976).

110. *Id.*

111. Virginia has assured the U. S. Department of Labor that employers will be permitted to confess judgment. As stated in a letter to Assistant Secretary Morton Corn from Commissioner Edmond Boggs, dated January 15, 1976, the following procedure is available to employers:

An employer who has received a citation and summons for a nonserious violation or violations may pay the amount demanded by the Commissioner to the clerk of the general district court, or the circuit court upon appeal, thus satisfying the judgment demanded. All such funds collected by the clerk will be paid into the general fund of the Commonwealth by the clerk. In situations where a serious violation has occurred, the Commissioner and the Commonwealth's attorney, who is the Commissioner's legal

expensive process of administrative review embodied in the enforcement procedures applicable under the Federal Act and the plans of other states.¹¹²

The order of the general district court will set forth an abatement date for all violations and, where appropriate, a civil penalty. This order is appealable to the circuit court of the city or county in which the violation or violations occurred; the decision of the general district court is not stayed unless so ordered by the local circuit court. All appeals are heard *de novo* by the circuit court.¹¹³

In order to record decisions of local general district and circuit courts, a court reporting system is being developed. An annual report will be compiled of all decisions in both the courts of record and the courts not of record.¹¹⁴

G. *Enforcement in the Public Sector*

The Occupational Safety and Health Act of 1970 did not purport to extend its coverage to employees of state and local governments. Nevertheless, the federal statute did make state plan approval contingent upon the receipt of "satisfactory assurances" that the state, "to the extent permitted by its law," establish and maintain an occupational safety and health program applicable to all employees of the state and its political subdivisions.¹¹⁵ To gain plan approval, the Safety and Health Codes Commission revised its previous regulations covering public employees.

The coverage of public employees in Virginia is solely by regulation. The regulations, however, generally parallel the scheme for

representative for the purposes of the State Plan, may settle the claim by following the guidelines set forth in § 40.1-49.2(c) prior to court appearance. This settlement procedure is the same followed in most, if not all, civil cases for money judgments in the Commonwealth and are inherent within the civil courts system.

112. The federal system provides for review of alleged violations by OSHRC which initially refers the case to an administrative law judge for a hearing and decision. The decision may then be reviewed by OSHRC. It takes from two to three years to get a decision from OSHRC. If OSHRC's decision is appealed to the United States Court of Appeal, an additional one to two years has elapsed. In contrast, the Virginia system provides for an initial decision by the general district court within fifteen days from issuance of a summons.

113. VA. CODE ANN. § 40.1-49.2D (Repl. Vol. 1976).

114. The court reporting system is a developmental step for final plan approval. 41 Fed. Reg. 42,655, 42,659 (1976).

115. See note 12 *supra*.

private employers and employees, adopting, in fact, several sections of Title 40.1.¹¹⁶ The primary departures lie in the area of enforcement procedures since all occupational safety and health standards apply to public employers and employees "unless for good cause it is shown they need not apply."¹¹⁷

The enforcement procedures for the public sector recognize the different status of the public employer, especially the impropriety of monetary penalties. A citation will be issued for a violation of an occupational safety and health standard setting forth the nature of the violation and including a time for abatement. Any contest of the violation or abatement date is initially set for an informal hearing before the Commissioner of Labor and Industry if the violation involves a safety matter or before the Commissioner of the Department of Health if the violation involves a health matter.¹¹⁸ A grant of an informal hearing will stay the abatement date for nonserious violations but not for serious violations.¹¹⁹

The decision of the appropriate Commissioner following the informal hearing is appealable to the Safety and Health Codes Commission only by the party who sought the informal hearing. The abatement period will not be stayed pending the appeal.¹²⁰

There are provisions for judicial enforcement of occupational safety and health standards in the public sector. For the failure of a public employer to abate a serious or nonserious violation, a violation of the general duty clause resulting in serious injury or death, or a repeated or willful violation resulting in death or serious bodily harm, the Commissioner of Labor and Industry may invoke the provisions of section 40.1-49.2 of the Code to issue a summons and seek to enjoin the violation.¹²¹ In imminent danger situations, the Governor, if a state employer is involved, or the appropriate head of the affected local government will be notified prior to the institu-

116. VA. CODE ANN. § 40.1-2.1 (Repl. Vol. 1976). See Pub. Regs. §§ 1800.1 to .4 (1977).

117. Pub. Regs. § 1800.7(1) (1977). It should be noted, however, that requests for variances may be made by a public employer after the issuance of a citation and before a summons issues. *Id.* § 1800.8.

118. *Id.* § 1800.10. Note that a public employer has fifteen *working* days in which to contest a citation.

119. *Id.* § 1800.10(5).

120. *Id.* § 1800.10(7) & (9).

121. *Id.* § 1800.14.

tion of injunctive proceedings.¹²² A procedure has been established, therefore, for administrative resolution of public employer violations of occupational safety and health standards. The judicial enforcement mechanism should be viewed as a last resort to obtain compliance.

H. *Employee Discrimination*

To protect employees who have been discharged or "in any manner discriminated against" by any person for exercising their rights under the Federal Act, the Secretary of Labor investigates such complaints and institutes appropriate action in the United States District Court against such persons who are determined to be in violation of the federal statute.¹²³ The Virginia Plan closely parallels the Federal Act providing for investigation and enforcement by the Commissioner of Labor and Industry.¹²⁴ By regulation, similar protection under a slightly altered procedure has been afforded public employees.¹²⁵

122. *Id.* § 1800.14(3).

123. 29 U.S.C. § 660(c) (1970). *See* 29 C.F.R. § Part 1977 (1977).

It has been held that the discrimination protection of § 11(c) of the Federal Act, 29 U.S.C. § 660(c) (1970), extends to all complaints made under the Act including complaints to employers as well as the U. S. Department of Labor. *Marshall v. Springville Poultry Farm Inc.*, No. 77-296 (M.D. Pa. August 16, 1977). On the other hand, 29 C.F.R. § 1977.12 (1977) which states that under some conditions it is discriminatory to discharge employees who refuse to work in the face of hazardous conditions, has been held to be invalid because it exceeds the rulemaking authority of the Secretary of Labor. *Marshall v. Daniel Constr. Co., Inc.*, No. 76-1465 (5th Cir. Nov. 21, 1977).

124. VA. CODE ANN. §§ 40.1-51.1:1 & -51.1(d) (Repl. Vol. 1976). The U. S. Department of Labor does not consider that the approval of a State Plan divests either the Secretary of Labor or the federal district courts of jurisdiction over employee complaints of discrimination. 29 C.F.R. § 1977.23 (1977).

125. Pub. Regs. § 1800.15 (1977) provides as follows:

Any public employee who believes he has been discharged or discriminated against in terms of conditions of employment because he has exercised his rights under these regulations may within thirty (30) working days of such violation file a written complaint with the Commissioner of the Virginia Department of Labor and Industry. Upon receipt of the complaint the Commissioner shall cause an investigation to be made. If upon investigation he determines that the provisions of SUBPART G(3) of these regulations have been violated, he shall so advise the public employer and request that the employee be reinstated with back pay if discharged, or request a correction of discriminatory practice if discrimination is charged. Failure of the employer to comply with the Commissioner's request shall result in legal action as provided in Section 40.1-51.1:1 of Title 40.1. The provisions of this Section shall be in addition to any other relief available to the employee by law or agency personnel policies.

An employee who believes he has been discharged or discriminated against for exercising his rights under the Virginia safety laws and regulations has thirty days to file a complaint with the Commissioner of Labor and Industry.¹²⁶ Upon receipt of the complaint, the Commissioner of Labor and Industry has three working days to request the complainant to amplify his complaint by responding to written questions.¹²⁷ An investigation will follow and within ninety days after receipt of the complaint or response to the written questions, the employee will be notified of the Commissioner's determination.¹²⁸ If the Commissioner of Labor and Industry determines the complaint is justified, he will seek appropriate relief in any court having jurisdiction over the employer which may include the employee's reinstatement to his former position with back pay or rehiring.¹²⁹

Although the language of the Federal Act and the Virginia Plan are virtually identical, there are subtle differences which distinguish the two statutes.¹³⁰ It should be remembered, however, that the provisions of the State Plan regarding employee discrimination complainants are not considered by the Secretary of Labor to divest the federal authorities of jurisdiction over such complaints.¹³¹ The employee, therefore, enjoys the full panoply of federal and state remedies for discrimination.

IV. THE FUTURE OF OCCUPATIONAL SAFETY AND HEALTH IN VIRGINIA

Since the late nineteenth century, Virginia has recognized the need for legislation to protect the safety and welfare of its working citizens. OSHA has brought profound changes to the development of such legislation, not the least of which has been a rapid acceleration of specific safety and health standards. Virginia, however, has

126. VA. CODE ANN. § 40.1-51.1:1 (Repl. Vol. 1976).

127. Ad. Proc. § 1900.33(2) (1977).

128. *Id.* § 1900.33(4).

129. VA. CODE ANN. § 50.1-51.1:1 (Repl. Vol. 1976); Ad. Proc. § 1900.33(5) (1977).

130. The Federal Act prohibits discrimination against an employee by any "person" which is defined in § 3(4) of the Act. 29 U.S.C. § 652(4) (1970). See 29 C.F.R. § 1977.4 (1977). On the other hand, VA. CODE ANN. § 40.1-51.1(d) (Repl. Vol. 1976) prohibits discrimination against an employee by an "employer" which is defined in § 40.1-2(3) of the Code. The remedies provided for employees in § 40.1-51.1:1 of the Code exist for discrimination by any "person" in violation of § 40.1-51.1(d). The term "person" is not defined in Virginia statutes or regulations.

recognized the continued need for state involvement in occupational safety and health matters. Instead of vacating the area to federal authorities, the Virginia Developmental State Plan seeks to insure impartiality and a more reasonable and effective enforcement effort. There is obviously no need to repeat tragedies such as Kepone poisoning because of a lack of prompt attention by government safety officials to an employee complaint.

The Virginia practitioner will undoubtedly be faced with an increasing number of occupational safety and health questions. Within three years, the current level of safety and health inspectors will have increased dramatically. As a result, the vast majority of occupational safety and health cases in Virginia will be in the state court system, opening a virgin area of the state law and a developing area of federal law to Virginia practitioners and jurists.

Accomplishment of the developmental steps of the State Plan will be necessary before the Plan becomes fully operational to the exclusion of concurrent federal inspections. For the next three years, discretionary federal enforcement authority of federal standards on issues covered in the State Plan will continue. This minimum period may be increased by one year since the Assistant Secretary of Labor must have at least one year following completion of all developmental steps specified in the Plan to evaluate the actual operation of the Plan.¹³² Once the Plan has been approved, federal involvement will be limited to monitoring efforts.

131. See note 124 *supra*.

132. See 29 C.F.R. § 1902.32 to .52 (1977).

UNIVERSITY OF RICHMOND LAW REVIEW

VOLUME 12

SPRING 1978

NUMBER 3

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