

**VOSH PROGRAM DIRECTIVE: 02-026****ISSUED: 01 July 2017****Subject**                    **Misclassification of Employees in VOSH Cases****Purpose**                    This directive transmits to field personnel VOSH's policy addressing Misclassification of Employees in VOSH Cases.

*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 Virginia Occupational Safety and Health 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.*

**Scope**                    This Directive applies VOSH-wide.**Reference**                    Memorandum from Commissioner C. Ray Davenport to VOSH Staff (02 June 2015)**Cancellation**                    Not Applicable**Effective Date**                    15 May 2017**Expiration Date**                    Not Applicable**Action**                    Directors and Managers shall ensure that field personnel understand and comply with the policies and procedures established in this Directive and that they are uniformly administered.

C. Ray Davenport  
Commissioner

Distribution:                    Commissioner of Labor and Industry                    Director of Cooperative Programs  
    Assistant Commissioner                    VOSH Compliance & Cooperative Programs Staffs  
    VOSH Directors and Managers                    OSHA Region III & OSHA Norfolk Area Offices  
    VOSH Legal Support & IMIS Staffs

## I. Background

The 2012 Joint Legislative Audit and Review Commission (JLARC) Report recommended a task force, comprised of the relevant state agencies, look further into the issue of misclassification. The Commissioner of Labor and Industry is a participating member on the task force and the Secretary of Commerce and Trade is leading the task force in its preparation of a report and recommendations on the issue. Other agencies participating include:

- Virginia Employment Commission (VEC)
- Workers' Compensation Commission (VWCC)
- Department of Labor and Industry
- Department of Professional and Occupational Regulation (DPOR)
- Department of Taxation
- State Corporation Commission Bureau of Insurance

One of the early findings of the task force was that many affected agencies do not have a good handle on how widespread the practice of misclassification is and do not track the issue in information systems. The JLARC Report identified and defined the problem of worker misclassification:

“Correct classification is important for employers, workers, and the State. Misclassification occurs when an employer improperly classifies a worker as an independent contractor instead of an employee. This can happen when the employer or worker does not understand the legal distinctions between employees and independent contractors, or when an employer wishes to avoid paying certain taxes and benefits on the worker’s behalf. Employees have taxes withheld from their paychecks and have legal protections such as the minimum wage law, unemployment benefits, and workers’ compensation insurance. Independent contractors are generally responsible for paying all of their taxes and benefits, and are often not eligible for legal protections.”

JLARC determined that worker misclassification undermines businesses that follow the law. It costs Virginia millions in tax revenue and denies workers legal protections and benefits.

JLARC’s report concluded that:

“A comprehensive approach to the problem of worker misclassification would include strategies to prevent misclassification before it happens, find it when it occurs, and penalize employers who misclassify.”

On August 14, 2014, Governor Terry McAuliffe issued Executive Order 24 entitled, “Establishing an Inter-Agency Task Force on Worker Misclassification and Payroll Fraud”.

## II. Statutes and Regulations

“Employee” and “employer” are defined in Va. Code §40.1-49.3 and apply specifically to the VOSH program and track definitions from the federal OSH Act. There is no definition in Title 40.1 for “independent contractor” or “misclassification”. The definitions from §40.1-49.3 are identical to the regulatory definitions set out in our Administrative Regulations Manual, §16VAC25-60-10.

### **§40.1-49.3. Definitions**

For the purposes of §§40.1-49.4, 40.1-49.5, 40.1-49.6, 40.1-49.7, and 40.1-51.1 through 40.1-51.3 the following terms, defined at §40.1-49.3, have the following meanings:

“Employee” means an employee of an employer who is employed in a business of his employer.

“Employer” means any person or entity engaged in business who has employees, but does not include the United States.

Employees and employers are both given rights and responsibilities under VOSH law.

Employees have the duty to comply with VOSH laws and regulations and the right to make complaints to the Commissioner or their employer about safety and health conditions in the workplace; to accompany the inspector during an inspection; and to be informed of the results of a complaint. *[See §40.1-51.2, Rights and duties of employees]*

Employees also have the right to be free from discrimination for exercising any rights granted under VOSH law. Misclassification of an employee as an independent contractor could deny them the protection from discrimination for making a complaint or at least stifle their freedom to complain about safety and health conditions for fear of being let go from the job. *[See §40.1-51.2:1, Discrimination against employee for exercising rights prohibited; and §40.1-51.2:2, Remedy for discrimination]*

The employer’s duties are to furnish employees safe and healthy employment free of recognized hazards; to comply with occupational safety and health rules and regulation; to provide employees information about toxic materials or harmful physical agents in the workplace; to post copies of citations issued; to report fatalities or catastrophes to the Department within eight hours of the incident; and to post a notice of the employee’s rights and responsibilities under the VOSH law. An employer representative also shall be given the opportunity to accompany the inspector during the inspection. *[See §40.1-51.1. Duties of employers]*

### **VOSH Enforcement Practices**

In order to uphold violations and be able to issue a citation and penalties to an employer, VOSH must demonstrate that an employee was exposed to a hazard. VOSH encounters the issue of misclassification during its inspections of worksites, particularly construction industry inspections. The CSHO will first identify who, if anyone, is exposed to a hazard. If an exposed person is identified as an independent contractor, or working for another contractor, the investigator will examine the facts behind that

“classification” made determining whether the person is indeed an independent contractor or actually an employee.

VOSH considers the following factors in making this determination:

- Who has responsibility to control the workers?
- Does the alleged employer have the power to control the workers?
- Who pays the worker’s wages?
- Whom do the workers consider their employer?
- Does the alleged employer have power to hire, fire, or modify the employment conditions of the workers?
- Does the ability of the workers to increase their income depend on efficiency rather than on initiative, judgment or foresight?
- How are the worker’s wages established?

*(Source: VOSH Field Operations Manual (based on federal case law).*

The most important of the above factors is the power and responsibility to control the worker. The result is that VOSH analyzes the situation to determine if the person exposed is an employee versus an independent contractor. VOSH will not rely solely upon the classification by the employer being inspected as to the status of the person, i.e., employee or independent contractor. If VOSH finds that an exposed person is actually an employee, it will issue citations to that employer.

### **Multi-Employer Worksite Policy**

Even in cases where VOSH determines that the exposed person is an independent contractor, a citation can often still be issued under the multi-employer worksite citation policy. [See VOSH ARM §16VAC25-60-260.F.] That policy provides that an employer who controls or creates a worksite safety or health hazard may be held liable under VOSH laws and regulations even if the employees threatened by the hazard are solely employees of another employer.

Therefore, an employer who creates or controls the hazard to which the independent contractor is exposed can be cited for that violation when the independent contractor has its own employees exposed; or in situations where the independent contractor is the individual exposed and has incorporated his or her business – in such a case, the owner/independent contractor is considered an “employee” of the corporation for purposes of VOSH citation policy.

### **General Duty Citations**

General Duty citations under Va. Code §40.1-51.1(a) can only be issued in situations where the employee exposed works for the employer being cited. An independent contractor who is a sole owner, i.e., not incorporated and has no employees, cannot be cited for a general duty violation if the owner is the only person exposed to the violation.

### III. VOSH Policy

Effective July 1, 2015, VOSH instituted an outreach program to employers and employees to explain worker misclassification and provide notification of the VOSH procedures that would address misclassification in VOSH cases.

Where VOSH has reasonable cause to believe that worker misclassification has occurred in a VOSH case, the following actions will normally be taken:

- In the event that citations and penalties are proposed for the employer, penalty reductions for size and good faith will NOT be afforded to the employer.
- In construction multi-employer worksite situations, each contractor, i.e., general contractors, prime subcontractors, and lower tier subcontractors, will be asked to provide proof of their Department of Professional and Occupational Regulation (DPOR) contractors' license AND for proof of the DPOR license for any of its subcontractors.
- When it is determined that a construction employer has contracted with an unlicensed subcontract, VOSH will make a written referral to DPOR regarding the contractor and its unlicensed subcontractor. DPOR may impose sanctions for contracting with unlicensed subcontractors that may include fines, probationary terms, suspension or license revocation.
- In cases where the contract value for the specific subcontractor's job is less than \$1,000.00, VOSH will make a written referral to the Virginia Employment Commission (VEC) and/or the Virginia Workers' Compensation Commission (VWCC) for potential audits of the employer's employment practices. There may be instances where referrals will be made for contract values over \$1,000.00 as well.

Outreach materials regarding worker misclassification issues have been provided to the Regional Offices of the Department of Labor and Industry (DOLI) for dissemination during inspections, consultation visits, informal conferences, etc.

The Department has also established a webpage dedicated to worker misclassification issues that can be used as a resource by employees and employers. A copy of this document has been posted on DOLI's webpage at [www.doli.virginia.gov](http://www.doli.virginia.gov), along with other outreach and informational materials and links to other websites.

### III. Procedures

#### A. **OSHA Information System (OIS) Procedures**

The VOSH program tracks misclassification issues in the OIS system through use of a State Strategic Initiative Program (SSIP) Code entitled, "Misclassification".

Regional Directors and CSHO's are directed to indicate on all inspections and unprogrammed activities whether the issue of misclassification has arisen during the inspection or investigation.

**NOTE:** Please review all cases opened since January 1, 2015, where you have *reasonable cause to believe* that misclassification may have occurred and update OIS by selecting the SSIP code “**Misclassification**”.

**Situation 1:**

If Employer A alleges that certain workers are independent contractors but the CSHO only opens an inspection with Employer A and treats the workers as employees, then the SSIP “Misclassification” Code shall be entered for Employer A.

**Situation 2:**

If Employer A alleges that certain workers are independent contractors and the CSHO has reasonable cause to believe they are employees, BUT opens an inspection with Employer A and with each worker designated by Employer A as independent contractors, Workers B, C and D as Employers B, C and D, then the SSIP “Misclassification” Code shall be entered for Employers A, B, C, and D.

**For an inspection**, the SSIP code can be selected under the "Inspection Type" tab:

The screenshot shows the OIS (Occupational Inspection System) interface. The top navigation bar includes tabs for Inspection, Investigation, Violation, Citation Assembly, ISA, PMA, Contested Appealed Case, and SBH Assessment. The 'Inspection Info' tab is active, showing fields for Inspection #, Establishment Name, Citation Status (Issued), and RID. Below this is a secondary navigation bar with tabs for Site Info, CSO Info, Related Activities, Inspection Dates, Inspection Type (selected), Contact Info, Narrative/Penalty Factors, Denial of Entry, and Case Summary.

The 'Inspection Type' section contains several dropdown menus and checkboxes:

- Inspection Types:** Initiating Type (Program Planned), Secondary Types (Select One Or More), Other Initiating Type.
- Inspection Emphasis Programs:** National Emphasis Program (Select), State Emphasis Program (FALL (14-201 - LEP - FALL HAZARDS)), Local Emphasis Program (Select), Primary Emphasis Program (FALL(14-201 - LEP - FALL HAZARDS)).
- Inspection Category\*:** Safety. **Partnership Program:** (empty).
- Sampling Performed\*:** Yes (radio), No (radio, selected). **Migrant Farm Worker:** Yes (radio), No (radio, selected).
- Scope of Inspection\*:** Partial. **Reason No Inspection:** Select One.
- SVEP:** Yes (radio), No (radio, selected). **Explanation:** (empty).
- Strategic Plan Activity:** Federal Strategic Initiative Program (Select), State Strategic Initiative Program (empty).
- Additional Codes:** MISCLASSIFICATION, RRE.

Red arrows point to the 'Inspection Types' dropdown menu and the 'Additional Codes' dropdown menu.

Type	ID	Value	Description
		MISCLASSIFICATION	
		RRE	

**For an unprogrammed activity**, the SSIP code can be selected under the "Program Info" tab:

Manage Unprogrammed Activity

Activity Number: [REDACTED] Establishment/DBA Name: [REDACTED] RID: [REDACTED]

Sensitive Report Non-Sensitive Report

Establishment Info Receipt/Activity Info Source Information FAT/CAT Info Comp/Ref Actions **Program Info** Assign/Transfer

**Program Information**

National Emphasis Program: AMPUTATE (REDUCING MACHINE HAZARDS LEADING TO AMPUTATIONS) X X ▾

State Emphasis Program: Select ▾

Local Emphasis Program: Select ▾

Federal Strategic Initiative Program: Select ▾

State Strategic Initiative Program: | ▾

Migrant Farm Worker Camp: MISCLASSIFICATION RRI ▾

Save Reset

**Additional Codes**

Type	ID	Value	Description
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Add Edit Remove Add from Reference Add from State Reference