

# **FTA 2018 Joint SSO & RTA Workshop**

**October 24, 2018**

**Suzanne Smith, Director  
Office of State Programs  
OSHA**



# What is a State Plan?

- A State Plan is an OSHA-approved state-run program for occupational safety and health.
  - Under authority of state law
  - State preempted without State Plan
- Two Types of State Plans:
  - Comprehensive
  - State and Local Government only
- State Plans must be “at least as effective” as federal OSHA’s standards and enforcement program.
- Info on State Plans:  
<https://www.osha.gov/dcsp/osp/index.html>





# Why State Plans?

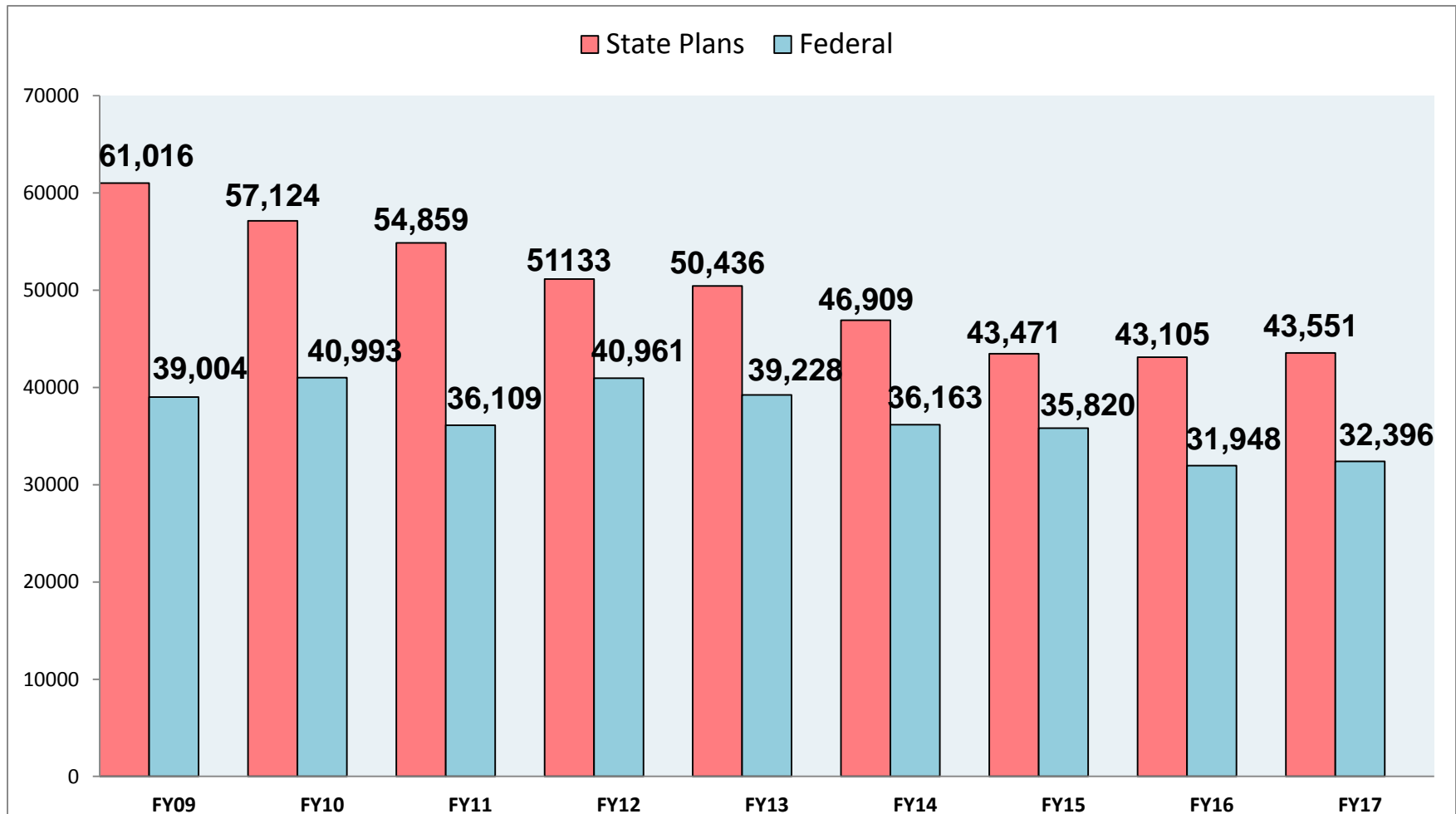
- Congress wanted the states to be actively involved in assuring safe and healthful working conditions for workers [First paragraph of OSHA Act of 1970]

## Benefits of a State Plan:

- Have a long history of protecting worker safety and health.
- Some prefer state government control over federal government control.
- State is better positioned to address worker S&H needs for industries present in the state
- Want to provide safety and health protections for state and local government employees.
- 50/50 funding



# OSHA & State Plan Inspection Data



# State Plans and Rail Transit Systems

- Rail transit systems run by non-federal public sector agencies
  - Generally covered by a State Plan (both comprehensive or SLG)
  - Without a State Plan, not covered under OSH Act (no federal coverage)
- Rail transit systems run by private companies
  - Generally covered by comprehensive State Plans (not SLG)
  - Without a State Plan, would be covered by federal OSHA



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**Jay Withrow, Director  
Division of Legal Support,  
VPP, ORA, OPP and OWP  
Virginia Department of Labor and Industry**



DEPARTMENT OF LABOR AND INDUSTRY

<http://www.doli.virginia.gov>

# VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

<https://www.doli.virginia.gov/>



**Registered  
Apprenticeship**



**Labor and  
Employment Law**



**Boiler and Pressure  
Vessel Safety**



**Virginia Occupational  
Safety and Health  
(VOSH)**





# Virginia State Plan for Occupational Safety and Health

Final Approval:

November 30, 1988

VOSHA has Exclusive Jurisdiction  
Over Private and State and Local  
Government Covered Employers  
and Employees in Virginia



# VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

## Virginia Occupational Safety and Health (VOSH) Program



Enforcement

Asbestos/Lead

Consultation

SHARP

Training

Voluntary Protection Programs - VPP



<http://www.doli.virginia.gov>

# VOSH Laws and Regulations

- Title 40.1 of the Code of Virginia
- The overwhelming majority of VOSH regulations are federal identical; however VOSH has adopted a number of state unique regulations
- <https://www.doli.virginia.gov/vosh-programs/virginia-unique/>



# VOSH Unique Laws and Regulations

- Overhead High Voltage Line Safety Act
- <https://law.lis.virginia.gov/vacodepopularnames/overhead-high-voltage-line-safety-act/>



# VOSH Unique Laws and Regulations

- Reverse Signal Operation Safety Requirements for Vehicles, Machinery and Equipment for General Industry and the Construction Industry, 16 VAC 25-97
- <https://www.doli.virginia.gov/vosh-programs/reverse-signal-operation/>



# VOSH Unique Laws and Regulations



- VOSH ARM, Manufacturer's Specifications and Limitations for Machinery, Vehicles, Tools, Materials and Equipment, 16VAC25-60-120 [General Industry], -130 [Construction]
- The employer shall comply with the manufacturer's specifications and limitations applicable to the **operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment**; unless superseded by a more stringent corresponding requirement in Part 1910.





# VOSH Unique Laws and Regulations

- VOSH ARM, Manufacturer's Specifications and Limitations for Machinery, Vehicles, Tools, Materials and Equipment, 16VAC25-60-120 [General Industry], -130 [Construction]
- The use of any machinery, vehicle, tool, material or equipment which is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be **identified by the employer as unsafe by tagging or locking the controls to render them inoperable, or be physically removed from its place of use or operation.**



# Virginia Mass Transit Fatal Accidents

## Washington Metropolitan Area Transit Authority, Inspection Number 309436574

- On October 1, 2005, an employee was struck by an WMATA train while picking up electrical cords between track 2 and the retaining wall. He later died of his injuries on October 15, 2005. The victim was part of a work crew that had been drilling weep holes into the retaining walls. Members of the work crew crossed track 2 approximately 6 times during the work shift.
- At the time of the accident, the crew had completed its work and was cleaning up, and tools and equipment were being transported across the tracks 2 and 1 to the loading gate area which was located on the track 1 side. The “third rail,” which is energized while trains are running, was not de-energized while the work crew was crossing the tracks, although it had been shut down the day before the accident so employees could carry tools and equipment across the track.
- Two willful “general duty” violations issued.



# Virginia Mass Transit Fatal Accidents

## Washington Metropolitan Area Transit Authority, Inspection Number 310585914

- On November 30, 2006, two employees were struck by an WMATA train while engaged in track walking duties. One employee was killed at the scene and a second died of his injuries on December 7, 2007. WMATA employees are regularly assigned to walk the tracks to inspect for loose components, rail breaks and any other condition that could interfere with the safe operation of WMATA trains.
- At the time of the accident, the two victims had been assigned to walk between Huntington Station and Crystal City Station. They were struck from the rear by train 307 that was being taken off line and driven to the Alexandria Rail Yard. Train 307 was “single tracking” at the time of the accident - “single tracking” is when one track is being utilized by trains traveling in both directions.
- One serious “general duty” violation issued.

# Virginia Mass Transit Fatal Accidents

## Washington Metropolitan Area Transit Authority, Inspection Number 313620999

- On August 9, 2009, at approximately 9:50 pm, a Washington Metropolitan Area Transit Authority (WMATA) track maintenance worker was struck and killed by a piece of track roadway maintenance equipment during night work operations on the Orange Line track near Dunn Loring and Vienna Stations. The victim was apparently not visible to the operator and a spotter/trainee of the Ballast Regulator (attached to and trailing the Ballast Regulator was a Tamper unit). Illumination for the work area was provided by vehicle mounted lamps and ambient lighting from vehicle traffic on Route 66 adjacent to the work area.
- The investigation revealed that visibility was poor due to dust created by the ballast operation which limited visibility to approximately 10-15 feet; the Ballast Regulator was travelling at approximately 20-25 mph.
- One serious “general duty” violation issued.

# The “General Duty” Clause

Va. Code §40.1-51.1(a)  
[§5(a)(1) of OSH Act]



It shall be the duty of every employer to furnish to each of **his employees** safe employment and a place of employment that 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 title.

# Multi-Employer Worksite Policy

- An employer who controls or creates a worksite safety or health hazard may be held liable under OSHA regulations even if the employees threatened by the hazard are solely employees of another employer
- Applies to all industries, not just construction



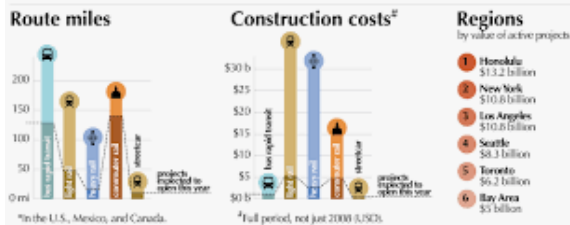
# VOSH Multi-Employer Worksite Regulation 16VAC25-60-260.F and G



F. On multi-employer worksites for all industries covered by VOSH

- Covers “General Contractor” or the “Host Company”
- Covers “Prime Subcontractor” at a Host Site [different than OSHA]
- Due Diligence in selecting and vetting Prime Subcontractors

## 2018 Transit Construction\* TP



Construction Starts Planned for 2018 ...

# VOSH Multi-Employer Worksite Regulation 16VAC25-60-260.F and G

## F. Multi-employer worksite defense:

1. The employer **did not create** the hazard;
2. The employer **did not have the responsibility or the authority** to have the hazard corrected;
3. The employer **did not have the ability** to correct or remove the hazard;
4. The employer can demonstrate that the creating, the controlling or the correcting employers, as appropriate, have been **specifically notified of the hazards** to which his employees were exposed;
5. The employer has **instructed his employees** to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it;
6. Where feasible, an exposing employer must have taken appropriate **alternative means of protecting employees** from the hazard; and
7. When extreme circumstances justify it, the exposing employer shall have **removed his employees** from the job.



# Temporary Employment Agencies: “Temp Employees”

- "Host employers need to treat temporary workers as they treat existing employees. Temporary staffing agencies and host employers share control over the employee, and are therefore jointly responsible for temp employee's safety and health."

• David Michaels, PhD, MPH, Assistant Secretary of Labor for Occupational Safety and Health



# Temporary Employees



## JOINT RESPONSIBILITY

## CAN MEAN ***JOINT LIABILITY***

- OSHA can hold both the host and temporary employers responsible for safety and health violations – such as lack of adequate training regarding workplace hazards.



# Temporary Employees



- A key concept is that each employer should consider the hazards it is in a position to prevent and correct, and in a position to assure compliance with VOSH laws and regulations.
- For example: staffing agencies might provide general safety and health training, and host employers provide specific training tailored to the particular workplace equipment/hazards.



# Worker Misclassification

Worker Misclassification occurs when an employer improperly classifies an employee as an independent contractor



## Worker Misclassification:

- ❑ Undermines businesses that follow the law
- ❑ Costs Virginia millions in tax revenue
- ❑ Constitutes wage theft
- ❑ Denies workers legal protections and benefits

# Federal and State Employment Laws that Cover Employees

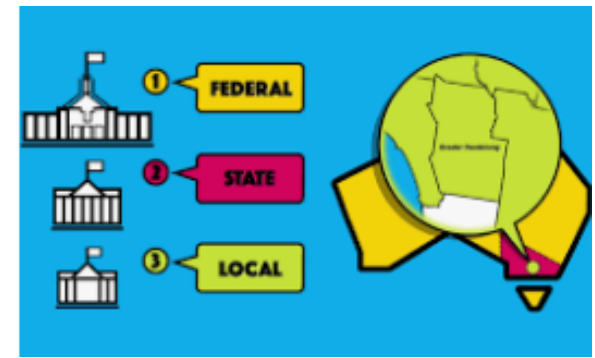
- Unemployment Compensation
- Minimum Wage
- Occupational Safety & Health
- Family Medical Leave
- Fair Labor Standards
- Workers' Compensation
- Age Discrimination in Employment
- Americans with Disabilities



*John Elway Chevrolet (Englewood, Colorado)*

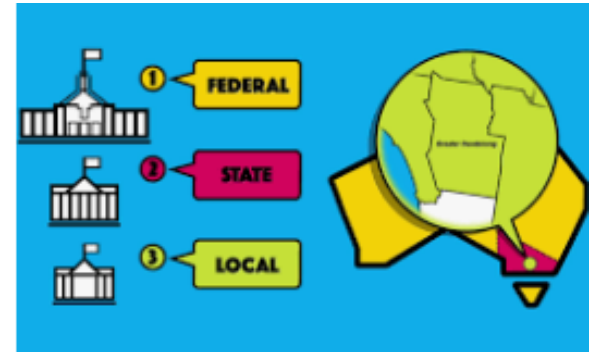
# Virginia State and Local Government Employers and Employees





# Public Employee Defined

- 16VAC25-60-10
- **"Public employee" means any employee of a public employer.** Volunteer members of volunteer fire departments, pursuant to § 27-42 of the Code of Virginia, members of volunteer rescue squads who serve without pay, and other volunteers pursuant to the Virginia State Government Volunteers Act are not public employees. Prisoners confined in jails controlled by any political subdivision of the Commonwealth and prisoners in institutions controlled by the Department of Corrections are not public employees unless employed by a public employer in a work-release program pursuant to § 53.1-60 or § 53.1-131 of the Code of Virginia.

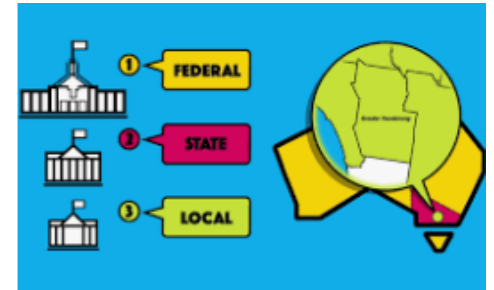


# Public Employer Defined

- 16VAC25-60-10
- "Public employer" means the Commonwealth of Virginia, including its agencies, **authorities, or instrumentalities** or any political subdivision or public body.



# Public Employee Defined



- 16VAC25-60-10
- The Department considers authorities and instrumentalities such as the Washington Metropolitan Area Transit Authority (**WMATA**), and the Greater Richmond Transit Company (**GRTC**) to be public employers covered by the state and local government penalty regulation.



# §4(b)(1) of OSH Act - Preemption

- Nothing in this Act shall apply to working conditions of employees with respect to which **other Federal agencies**, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), **exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.**





# §4(b)(1) of OSH Act - Preemption

- The “Other Federal Agency” must have statutes/regulations that address **“employee” safety**, either primarily or secondarily
- In the context of a DOT statute which is designed to protect the public, transportation equipment, or cargo, the §4(b)(1) issue is usually of the type that is known as the **"gap theory,"** or **"hazard-by-hazard"** approach.



# §4(b)(1) of OSH Act - Preemption

- The question is whether the other federal agency has **an enforceable regulation** which, if that agency chooses to enforce that regulation, **would reduce or eliminate the workplace hazard** in question.
- If the other agency has **no such regulation** applicable to the hazard, then there exists a **"gap" in worker protection** which is filled by the residual jurisdiction of the OSH Act and State Plans.

# §4(b)(1) of OSH Act - Preemption

- If OSHA is going to be preempted, then a State Plan will be preempted as well.
- States will normally consult closely with OSHA and the U.S. Department of Labor's Solicitor's Office.



# Whistleblower Protections

- Va. Code § 40.1-51.2:1. Discrimination against employee for exercising rights prohibited.
- No person shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or otherwise acted to exercise rights under the safety and health provisions of this title for themselves or others.



- Known as “Protected Activities”
- Virginia has a “private right of action” for employees if the Commissioner chooses not to proceed.
- OSHA case law allows for punitive damages, Virginia does not.

# Whistleblower Protections

“Protected Activities” include:

- Making any complaint to his employer or any other person under or related to the safety and health provisions of Title 40.1 of the Code of Virginia
- **Filing a complaint with VOSH – even before bringing the complaint to the attention of the employer**
- Testifying or intending to testify in any proceeding under or related to the safety and health provisions of Title 40.1 of the Code of Virginia
- Cooperating with/providing information to VOSH during an inspection
- Exercising on his own behalf or on behalf of any other employee any right afforded by the safety and health provisions of Title 40.1 of the Code of Virginia.

# Federal Whistleblower Statutes



- National Transit Systems Security Act (**NTSSA**)  
6 U.S.C. §1142
- Protects transit employees who report a hazardous safety or security condition, a violation of any federal law relating to public transportation agency safety, or the abuse of federal grants or other public funds appropriated for public transportation. The Act also protects public transit employees who refuse to work when confronted by a hazardous safety or security condition or refuse to violate a federal law related to public transportation safety. 29 CFR 1982.
- 180 days to file complaint after adverse action.

Tweets by @NTSSA



North Texas Soccer  
@NTSSA

# Questions

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