

Last Updated: September 17, 2009

Procedures for Obtaining Agency Interpretations.

All outside requests for interpretations of the regulation shall be referred to the VOSH Director at:

VOSH Director
Virginia Department of Labor and Industry
13 South 13th Street
Richmond, VA 23219

Interpretations.

[NOTE: During the regulatory promulgation process, the Department issued explanatory and interpretive information to commenters as the regulation progressed from the proposed to the final stage. Interpretive guidance for regulatory language that did not change from the proposed to the final regulation remains the official position of the VOSH Program. Interpretations based on proposed language that was later changed in the final regulation is provided for background purposes only.]

16 VAC 25-97-10, Applicability

This chapter shall apply to all general industry and construction industry vehicles, machinery or equipment capable of operating in reverse and with an obstructed view to the rear (hereafter referred to as "covered vehicles"), whether intended for operation in off-road work zones or over the road transportation or hauling.

Comment: “We are also concerned about vehicle owner-operators making deliveries to jobsites. First off, we are not certain if these individuals are even subject to VOSH regulations since they are sole proprietors with no employees. Regardless, you could have an instance where an independent operator who has not been trained makes a delivery to the jobsite and is cited for non-compliance. The controlling contractor would likely be cited, too under the multi-employer policy. Considering how the industry operates for the delivery of crushed stone from a quarry, for instance, this could be a problem. Or, for that matter, a UPS truck making a delivery at the jobsite could be subject to this requirement. The end result could conceivably be to require the addition of employees at all possible entrances to the jobsite to turn away any drivers who have not been trained. Again, extra expense for the contractor....very little improvement in jobsite safety.”

Response: With regard to ...[the Commenter’s] concern that vehicle owner-operators or UPS drivers making deliveries to jobsites, ...[the Commenter] is correct that there some jurisdictional issues. If the owner/operator is a sole owner of the company (not incorporated, not a partnership),

and has no employees, then VOSH laws, standards and regulations do not apply. While VOSH does have a multi-employer worksite citation policy, it does not use it to enforce training provisions in regulations. So, if the sole-ownership vehicle operator/owner was not trained in the ~~proposed~~ [final] regulation, VOSH would not cite the general contractor for that lack of training” (Source: TH-03, Final Regulation Agency Background Document, December 8, 2008).

Comment: “We are also concerned about personal liability for operators when they make a determination that no employees are or will be in the path of the machine. While they may not be subject as an individual to a VOSH citation, we believe they may be assuming some potential liability.”

Response: “...as noted previously, the newly added language in 16 VAC 25-97-30.A.2.b. (“Before operating the covered vehicle in reverse, the driver visually determines that no employee is in the path of the covered vehicle.”), is based on a current provision from the federal OSHA Logging Standard, 1910.266. The Department is not aware of any liability issues with regard to the Logging Standard provision that did not already exist in statutory or common law. If an accident occurs “off road” then VOSH regulations will apply as will existing Workers’ Compensation laws and regulations. If an accident occurs on the highway or a street, the same laws and regulations will apply, along with existing traffic regulations that are enforced by police and sheriff’s department around the state.” (Source: TH-03, Final Regulation Agency Background Document, December 8, 2008).

16 VAC 25-97-20, Definitions

The phrase "obstructed view to the rear" means anything that interferes with the overall view of the operator of the vehicle to the rear of the vehicle at ground level, and includes, but is not limited to, such obstacles as any part of the vehicle (e.g., structural members); its load (e.g., gravel, dirt, machinery parts); its height relative to ground level viewing; damage to windows or side mirrors, etc., used for rearview movement of the vehicle; restricted visibility due to weather conditions (e.g., heavy fog, heavy snow); or work being done after dark without proper lighting.

Comment: Commenters expressed concerns about what types of vehicles, machinery, equipment would be considered to have an “obstructed view to the rear.”

Response: “A number of Commenters may be under the impression that because a vehicle has a reverse signal alarm, it automatically would be considered to have an obstructed view to the rear and be covered by the ~~proposed~~ [final] regulation. That is not the case. The following additional guidance has already been provided by Department personnel in interpreting the language of the ~~proposed~~ [final] regulation:”

"...will a ... truck delivering a refrigerator to a model home under construction be covered?"

Response: "... any delivery truck operated on behalf of an employer will be covered under the ... [regulation] if there is no access to look out a rear window of the vehicle, as the dangers present are the same. If the vehicle is essentially a pick-up truck or flatbed with a refrigerator sitting in the back, and the cargo is completely blocking the rear window of the truck thereby creating a blind spot, then that would constitute an obstructed view to the rear and the truck would be covered by the ...regulation."

"What about pick-up trucks with shells?"

Response: "With the exceptions noted in the definition for "obstructed view to the rear" such as "damaged windows", as long as the shell has a front and rear window that are not obstructed and they allow the driver to look directly out the rear window of the truck, then the truck would not have an obstructed view to the rear and would not be covered by the ~~proposed~~ [final] regulation."

September 2, 2009, Interpretation Concerning Emergency/Public Safety Vehicles

Question: Do emergency/public safety vehicles fall under this regulation?

Response: The new regulation applies to emergency and public safety vehicles with an obstructed view to the rear. However, see our procedures for rescue operations below, which come from the VOSH Field Operations Manual:

“c. **Rescue Operations.** VOSH has no authority to direct rescue operations; this is the responsibility of the employer and/or of local political subdivisions or State agencies. VOSH does have the authority to monitor and inspect the working conditions of covered employees engaged in rescue operations to make certain that all necessary procedures are being taken to protect the lives of the rescuers. The employer shall be encouraged to use the personnel and facilities of local fire and police departments for their specialized knowledge and training in rescue operations.

(1) **Consultation.** VOSH shall be available for consultation on the safest or most effective way to conduct rescue operations. This information, based on technical knowledge of competent VOSH personnel at the scene, shall be given freely, if requested.

(2) **Operations.** If the CSHO is aware that the employer intends to use some rescue procedure that may be in violation of a standard or the general duty clause [Va. Code §40.1-51.1(a)] and the CSHO believes other, less hazardous procedures are more desirable, the employer shall be advised of this belief....

(3) **Application of Standards.** If rescue work is performed by the employer, VOSH standards are applicable. The employer is required to take such steps as are necessary to

eliminate, if at all possible, or to minimize recognized hazards likely to cause death or serious physical harm, considering the urgency in a particular rescue operation.

(4) **Emergency Situations.** Emergencies created by fatalities or catastrophes generally necessitate immediate rescue work, firefighting, etc., and any loss of time may increase injuries and/or fatalities. Therefore, as an example, when nonstandard equipment; e.g., tractors, bulldozers, etc., without rollover protection, is available for use in an emergency situation, VOSH shall permit its use without citing the employer rather than cause a delay waiting for equipment which meets VOSH standards. The use of such equipment by private employers shall be limited to the actual emergency situation of fighting fire, rescue work, etc. Use in cleanup or reconstruction work shall warrant the issuance of citations when appropriate.”

By analogy, if full compliance by emergency/public safety vehicles with the new regulation during an "Emergency Situation" (see above) could result in any loss of time which could increase injuries or fatalities, VOSH will allow some non-compliance with the regulation in order to save lives. Each situation would have to be dealt with on a case by case basis. If you have specific concerns about a specific provision or situation, please request further guidance from the Department.

Comment: "And your position that forklifts would ‘generally not be considered to have an obstructed view to the rear’ seems to only address small forklifts carrying no loads or small loads. Larger forklifts carrying capacity loads, it seems to me, brings into question the ‘obstructed view’ position."

Response: "...most if not all forklifts carry the load on forks mounted on the front of the vehicle. If the driver is traveling in reverse with a full load on the front of the vehicle the load does not impact the determination of whether there is an obstructed view to the rear of the forklift."

Comment: "It seems to me that as written this proposal would require Rollers (including asphalt rollers) and Rubber tire loaders (including skid steer loaders) that would be classified as "covered vehicles" to meet all of the requirements of this proposal."

Response: "Rollers would typically not be considered to have an obstructed view to the rear because the operator can normally turn his head and look behind his vehicle through an opening in his cab – in fact many rollers don't even have a cab, so there could be no obstruction that could interfere with the driver's ability to look behind the vehicle as he was traveling in reverse. Rubber tire loaders as well normally have a glass enclosed cab that allows the driver to turn his head and look out the rear view window, so such vehicles would not normally be considered to have an obstructed view to the rear. Skid steer loaders, depending on the design, may or may not be considered to have an obstructed view to the rear, depending on the location of the driver's seat and any rear view window that the driver can look out of." (Source: TH-03, Final Regulation Agency Background Document, December 8, 2008).

Comment: Commenter expressed concern about coverage of “scrapers.”

Response: “Without any photos or video to view, the Department would consider many scrapers and many open cab construction vehicles to not have an obstructed view to the rear and not be covered by the standard because the driver can see directly behind the vehicle at ground level by looking through a rear view mirror, or by turning around and looking out the rear window/opening. In addition, according to federal OSHA interpretations, vehicles with rotating cabs are not considered to have an obstructed view to the rear since the operator can rotate the cab in the direction he is traveling.” (Source: TH-03, Final Regulation Agency Background Document, December 8, 2008).

Comment: Commenter expressed concern about coverage of “front end loaders.”

Response: “A front end loader (with only a bucket attachment on the front of the vehicle and no attachment on the back) that has a large glass enclosed cab that allows the operator to see directly behind the vehicle through the rear glass, would not be considered to have an obstructed view to the rear. As noted in the regulation, there are certain exceptions to this general rule (e.g. damage to windows/mirrors, restricted visibility due to weather conditions or work being done after dark without proper lighting).” (Source: TH-03, Final Regulation Agency Background Document, December 8, 2008).

Comment: “[Commenter] ... expressed a concern that the proposal would create uncertainty and vagueness leading to potential citations in the areas of definitions and scope (i.e., “Does it apply to trucks with shells, vans, forklifts, etc.”).

Response: “The ... regulation applies to all vehicles in general industry and the construction industry with an “obstructed view to the rear.” This phrase is identical to the wording used in current regulations and the definition below is derived directly from a federal OSHA interpretation on the subject (found at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=19522):

The phrase “obstructed view to the rear” means anything that interferes with the overall view of the operator of the vehicle to the rear of the vehicle at ground level, and includes, but is not limited to, such obstacles as any part of the vehicle (e.g., structural members); its load (e.g., gravel, dirt, machinery parts); its height relative to ground level viewing; damage to windows or side mirrors, etc., used for rearview movement of the vehicle; restricted visibility due to weather conditions (e.g., heavy fog, heavy snow); or work being done after dark without proper lighting.”

Generally, any truck where the driver can see directly behind the vehicle at ground level by looking through a rear view mirror, or by turning around and looking out the rear window would not be considered to have an obstructed view to the rear. Examples of this would generally include pick-up trucks, fork lifts, etc. As noted in the regulation, there are certain exceptions to this general rule (e.g. damage to windows/mirrors, restricted

visibility due to weather conditions or work being done after dark without proper lighting).”

“On the other hand, certain tractor trailers pulling a large enclosed trailer, and vans with no or blocked/obstructed back windows, would be covered because they would be considered to have an obstructed view to the rear.”

16 VAC 25-97-30, Covered Vehicle Requirements

16 VAC 25-97-30.A.

A. No employer shall operate any covered vehicle in reverse unless:

1. The covered vehicle has a reverse signal alarm audible above the surrounding noise level, and
 2. a. The covered vehicle is operated in reverse only when a designated observer or ground guide signals that it is safe to do so; or
 2. b. Before operating the covered vehicle in reverse, the driver visually determines that no employee is in the path of the covered vehicle.

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September 17, 2009, Interpretation Concerning Asphalt Paving and Milling Operations

A question arose from the Virginia Asphalt Association (VAA) regarding application of the Reverse Signal Operation regulation to dump trucks carrying hot asphalt and milled asphalt for recycling during roadway paving operations. A paving company also asked about application of the regulation to micro-surfacing/slurry operations.

Asphalt Paving and Milling Operations

The VAA describes a “paving train and milling” operation as follows:

- Asphalt paving and milling operations often take place in tightly restricted coned-off lanes where traffic is passing by the work zone in close proximity to the paving train or milling operation on one or both sides of the lane being placed or resurfaced.
- Good paving practices as outlined in VDOT specifications and guidelines necessitate that the asphalt paver continuously move forward while being replenished by dump trucks bringing asphalt mix from the plant. A similar procedure takes place during milling operations prior to placement of the asphalt (e.g. a line of trucks backing up to a milling machine to receive recyclable asphalt).
- This results in a line of trucks in front of the paver or milling machine waiting their turn to back up and offload mix into the paver’s hopper or pick up recycled asphalt pavement (RAP) to take back to the plant. As new mix is brought to the paver, the emptied truck pulls out to return to the

asphalt plant. In a milling operation, once the truck is filled with RAP it also pulls out to return to the plant. In many cases the trucks will pull out of the paving lane and into the active driving lane, crossing between the next truck in line and the paving crew.

- A VDOT required liquid asphalt coating (tack coat) is also applied on the pavement in front of the paver for some distance that serves as a bonding agent for the new asphalt mat to the old pavement surface that is being repaired. This material is placed prior to the arrival of the trucks.
- A member of the paving crew directs each truck delivering asphalt or picking up RAP as it backs up to the paver or milling machine and he has a clear view of the area behind that vehicle, but he cannot see behind the other trucks next in line to get to the paver or milling machine.
- The VAA is concerned that the trucks that line up to pour their asphalt in a paving train or are there to pick-up RAP in a milling operation will each need a ground guide before backing. It is possible that to comply with the regulation, a ground guide would be required for each truck's backing movement or a single ground guide would have to continuously be moving back and forth in the work zone to direct each truck's movements while standing in the recently sprayed tack coat on the pavement surface. This may result in the ground guide being exposed to hazards from moving traffic adjacent to the work zone, and the crossing truck leaving to return to the plant. In doing his job, the ground guide would also have his back to the adjoining moving traffic - one or two steps back could be fatal.
- Having the truck drivers get in and out of their truck for each backward movement to determine that the area behind the truck is clear creates its own set of problems as the driver will be opening the cab door and stepping out right next to moving traffic and must by other rules be fully outfitted with safety gear vests, steel toed shoe, hard hats, etc.

Micro-surfacing/Slurry Operations

“Micro-surfacing” is a polymer modified cold-mix paving system which begins as a mixture of dense-graded aggregate, asphalt emulsion, water and mineral fillers. It is applied to existing pavements by a specialized machine, which carries all components, mixes them on site and spreads the mixture onto the road surface (see <http://www.missouripetroleum.com/microsurfacing.html>). “Slurry” seal is in the same family of micro-surfacing, and is an asphalt emulsion product that has a higher asphalt content design for sealing asphalt pavements, but is not used for thick applications (see <http://www.micro-surfacing.com/services.html>).

Both operations may or may not involve support vehicles or trucks with obstructed views to the rear that have to operate in reverse.

Interpretation

The final Reverse Signal Operation regulation allows for the use of either a ground guide or for drivers to determine if the backing path is clear before backing. If the driver can determine that the backing path is clear, no ground guide is necessary under the regulation.

Trucks backing down a paving lane to reach the paver or milling machine, or micro-surfacing/slurry operation do not need a ground guide until they approach the paving crew if:

- the paving lane has been designated as a “prohibited area” and “coned-off” in accordance with VDOT requirements;

- employees have been instructed not to enter the paving lane during backing operations;
 - drivers are required to remain in their vehicles once they are in the backing lane so that they are not exposed to traffic and/or other asphalt trucks;
 - if an employee enters the paving lane “prohibited area” for any reason during backing operations, backing operations must be immediately stopped until the employee is removed from the “prohibited area” or a ground guide is provided;
 - a ground guide for the paving crew is provided to assist in back-up operations of each truck as it delivers its load of asphalt or picks up RAP from milling machines, or delivers materials for the micro-surfacing/slurry operation.
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Comment: “I understand the proposal however, it potentially requires the hiring/utilization of hundreds, perhaps thousands, of new "designated observer/ground guides" that do not presently exist. That is the potential cost that has not been addressed, and it is substantial.”

Response: “We do not believe that hundreds or thousands of new "designated observer/ground guides" would have to be hired to comply with the regulation. We believe that most employers who currently do not use "designated observer/ground guides" will take advantage of the exemption that enables the driver to operate in reverse without a "designated observer/ground guide”:

~~“if the driver visually determines from outside the vehicle that no employees are in the backing zone and that it is reasonable to expect that no employees will enter the backing zone during reverse operation of the vehicle.”~~

“Before operating the covered vehicle in reverse, the driver visually determines that no employee is in the path of the covered vehicle.”

[NOTE: THE ABOVE TEXT WENT THROUGH SEVERAL REVISIONS BETWEEN THE PROPOSED AND FINAL VERSIONS. THE COMMENTER WAS ADDRESSING AN INTERMEDIATE VERSION WHICH IS SHOWN WITH THE LANGUAGE STRUCK THROUGH. THE FINAL LANGUAGE IS UNDERLINED. The above language change in 2.b. is based on 1910.266(f)(2)(v) of the Logging Standard which provides:

“Before starting or moving any machine, the operator shall determine that no employee is in the path of the machine.”

“The change in text was added to address potential cost issues associated with the exemption in the original proposed regulation from use of a designated observer/ground guide that would have allowed drivers to get out of the vehicle to determine that no employees are in the backing zone and that it is reasonable to expect that no employees will enter the backing zone. The change would also provide a level of consistency by providing drivers of covered vehicles in construction and general industry the same reverse operation option as provided drivers in the logging industry.

This change would also help to address situations like a driver pulling into a large shipping terminal and having to back-up to a loading dock – the change would allow the driver as he pulls in to determine that no employees are in the back-up area and then continue with back-up without having to get out of the vehicle. Finally, the Department also considered concerns expressed at the April 16th meeting by construction contractors that significant costs could be incurred by the delays on large road building projects where a constant flow of dump trucks could result in each driver having to stop his vehicle, exit the cab to check for employees in the back-up zone, re-enter the cab and proceed with reverse operations for hundreds of yards.” (Source: TH-03, Final Regulation Agency Background Document, December 8, 2008.)]

Response to Comment Continued:

“In looking at the structure of the regulation, it may be more helpful to the regulated community to put the "Exemptions" section up at the beginning of the regulation instead of at the end, so that employers and employees realize that there is flexibility built into the regulation to limit compliance costs. We would also certainly address this issue in our training materials.

The Department believes that most employers who currently use a "designated observer/ground guide" will continue to do so and will train and outfit them according to the regulation and understand that some additional cost may be associated with that. As previously noted, we will try to reduce training costs by providing free training materials on-line for employers and employees to access. In our experience "designated observer/ground guides" are used primarily on construction sites and with mobile work crews where more than one employee is already present because of the nature of the work, so we do not believe those employers will be forced by the ~~proposed~~ [final] regulation to hire new employees to act as "designated observer/ground guides", they will merely train existing employees.

For those employers that send delivery/trade trucks out with only one person, as noted above, those employers/drivers can take advantage of the exemption. If the single employee drives onto a worksite with other employers working in the area and chooses to request, as many do currently, assistance from an employee of another contractor on site to act as the "designated observer/ground guide," there is nothing in the ~~proposed~~ [final] regulation to prohibit that practice. The employer of the driver would not be required to hire or train a "designated observer/ground guide" just to accompany their single driver, nor would it be that employer's responsibility to train the other contractor's "designated observer/ground guide."

What we want to accomplish with the ~~proposed~~ [final] regulation is to change current behaviors that cause these deaths and debilitating accidents. As I mentioned in my previous letter to you, without exception, every reverse signal operation fatality involves the driver either not knowing anyone is in the back-up zone or losing sight of someone he knows is in the back-up zone and proceeding anyway. Under the current regulations, as long as a covered vehicle has a functioning back-up alarm, the burden of avoiding an accident is placed squarely on the shoulders of the pedestrians in the traffic area. No real safety responsibility is placed on the driver while operating the vehicle other than to make sure the back-up alarm is working. A driver can back-up without even checking his side mirrors under the current regulations.”

“The ... regulation will place a positive responsibility on the driver to either keep the designated observer/ground guide in sight at all times during reverse operations, or in the absence of a designated observer/ground guide, to visually determine that no one is in the back-up zone prior to beginning reverse operations of the vehicle.”

Additional Response: “If a driver with a covered vehicle (properly trained under the ~~proposed~~ [final] regulation) approaches an area where he needs to operate in reverse, ...and determines that the backing zone is clear, and then backs-up safely, we have changed the driver's behavior. If the driver sees that there is pedestrian traffic in the area he needs to back up in, uses a "designated observer/ground guide", and keeps that individual in site at all times during reverse operation, we have changed the driver's behavior.”

16 VAC 25-97-30.B.

B. Covered vehicles that were not equipped with a reverse-signal alarm upon manufacture or were not later retrofitted with an alarm are exempt from subdivision A.1 of this section. If the manufacturer of the covered vehicle offered the employer a reverse signal alarm retrofit package at a reasonable and economically feasible cost and the employer did not have the retrofit package installed, this exemption does not apply.

[NOTE: THE ABOVE TEXT WENT THROUGH SEVERAL REVISIONS BETWEEN THE PROPOSED AND FINAL VERSIONS. The explanation for the final language follows:

“This changed section is being moved from the 16 VAC 25-97-60, Exemptions, section so that all coverage issues are addressed in one area [the “Exemptions” section was then deleted from the final regulation]. The new text regarding retrofit packages is added for consistency purposes – federal OSHA has a similar policy for older industrial trucks (forklifts) that were originally manufactured without seat belts. OSHA’s policy is that if a manufacturer offered to retrofit a seatbelt onto a forklift, and OSHA can prove that the retrofit package was offered to and refused by the employer, then OSHA will issue a citation to the employer for failure to provide a seatbelt. If no retrofit package is available or it was not offered to the specific employer, no citation can be issued for failure to have the retrofit completed.” (Source: TH-03, Final Regulation Agency Background Document, December 8, 2008.)]

Comment: “A couple of our members have finally reviewed the regs and expressed some concern about the retrofit language in paragraph B under "covered vehicle requirements." Their questions are what constitutes "at a reasonable and economically feasible cost ", what criteria will be used in making that determination and who will be making that determination? They are concerned that this is, in essence, a mandate to retrofit all trucks operating in Virginia with back-up alarms.”

Response: “The Department will not use this provision to mandate retrofitting of all trucks with back-up alarms. As the above explanation indicates, the Department would be required to prove that not only was there a retrofit package available from the specific manufacturer of the vehicle, but that it was specifically offered to the individual employer for the specific vehicle, and that the employer refused it. The above requirements pose a very difficult standard of proof to meet in a courtroom, and any use of the section would be a very rare occurrence. To the best knowledge of Department staff over the last 23 years there has not been a single instance of this issue of a retrofit package for either a seat belt on a forklift or for a back-up alarm on a vehicle.” (Source: TH-03, Final Regulation Agency Background Document, December 8, 2008).

16 VAC 25-97-30.C.

C. Where immediate correction is not feasible, covered vehicles equipped with a reverse signal alarm that is not operational or is not functioning properly shall be either:

1. operated in reverse only when a designated observer or ground guide signals that it is safe to do so; or
2. removed from service until the reverse signal alarm is repaired.

[NOTE: THE ABOVE TEXT WENT THROUGH SEVERAL REVISIONS BETWEEN THE PROPOSED AND FINAL VERSIONS. The explanation for the final language follows:

“The new text is added to assure that malfunctioning reverse signal alarms are promptly repaired. A concern was expressed at the April 16th meeting about what a general contractor is supposed to do if an independent dump truck driver attempts to enter a road construction site with a malfunctioning reverse signal alarm. One option mentioned by a participant was to not allow the dump truck onto the work site. Department personnel agreed with that approach.

Another concern was raised on the issue of what the Department would require if it was found that a back-up alarm stopped functioning after it was already on the work site (and the alarm had been properly functioning when it entered the work site). Department personnel indicated that in such a circumstance, and in light of it being impossible for the employer to comply with the reverse signal alarm portion of the regulation, it would be permissible to operate the vehicle with only a designated observer/ground guide, and that the revised proposed regulation would be changed to allow such operation. All agreed that the malfunctioning alarm is then to be fixed as soon as possible.” (Source: TH-03, Final Regulation Agency Background Document, December 8, 2008.)]

16 VAC 25-97-30.D.

D. Covered vehicles with operable video or similar technological capability used by the driver and capable of providing the driver with a full view behind the vehicle are exempt from subdivision A.2.a of this section.

[NOTE: THE ABOVE TEXT WENT THROUGH SEVERAL REVISIONS BETWEEN THE PROPOSED AND FINAL VERSIONS. The explanation for the final language follows:

“This section is being moved from the 16 VAC 25-97-60, Exemptions, section so that all coverage issues are addressed in one area. Text changes were made to clarify that the equipment has to be operable and used in order for the exemption to apply. (Source: TH-03, Final Regulation Agency Background Document, December 8, 2008.)]

16 VAC 25-97-30.E.

E. To the extent that any federal Department of Transportation (DOT) regulation applies to covered vehicles conflicts with this chapter, the DOT regulation shall take precedence.

NO INTERPRETATIONS AS OF SEPTEMBER 17, 2009

16 VAC 25-97-40, Responsibilities while engaged in reverse signal operation activities

16 VAC 25-97-40.A.

A. While an employee is functioning as the designated observer/ground guide during reverse signaling activities (e.g., collecting tickets from drivers, giving verbal instructions to drivers, signaling to drivers once reverse operation of the covered vehicle has begun), the designated observer/ground guide shall:

1. Not engage in any activities other than those related to the covered vehicle being signaled;
2. Not use personal cellular phones, personal head phones or similar items that could pose a distraction for the designated observer/ground guide;
3. Be provided with and wear during daytime operations a safety vest or jacket in orange, yellow, strong yellow green or fluorescent versions of these colors;
4. Be provided with and wear during nighttime operations a safety vest or jacket with retroreflective material in orange, yellow, white, silver, strong yellow green or a fluorescent version of these colors and shall be visible at a minimum distance of 1,000 feet;
5. Not cross behind in close proximity to a covered vehicle while it is operating in reverse;
6. Always maintain visual contact with the driver of the covered vehicle while it is operating in reverse; and
7. Maintain a safe working distance from the covered vehicle.

[NOTE: THE ABOVE TEXT WENT THROUGH SEVERAL REVISIONS BETWEEN THE PROPOSED AND FINAL VERSIONS. The explanation for the final language follows:

“The new text is to make clear that the provisions in A. ...only apply to employees while they are functioning as designated observers/ground guides for covered vehicles when the vehicles are operating in reverse. When the employees are not engaged as designated observers/ground guides, they are free to do other assigned work.” (Source: TH-03, Final Regulation Agency Background Document, December 8, 2008.)

“The above changes are added to address unsafe behaviors of designated observers/ground guides identified by the Department that have led to fatal accidents in the past. Violation of these requirements by a trained employee would normally constitute employee misconduct. The wording for the ... [some] provisions comes from safety rules instituted by a Virginia employer following the death of their employee who was functioning as a designated observer/ground guide.” (Source: TH-03, Final Regulation Agency Background Document, December 8, 2008.)]

Comment: Commenters expressed concern about the costs associated with training under the regulation.

Response: “... the regulation requires employers to train drivers of covered vehicles and designated observers/ground guides in the requirements of the regulation. The requirements for designated observers/ground guides are spelled out specifically in the ... regulation and provide a simple, commonsense approach to protecting both the ground guide and other workers in the area. The requirements are actually modeled in part after current provisions in the construction standards for individuals working as “monitors” in the Fall Protection Standards, 1926.501 to 503. In addition, the personal protective equipment requirements for designated observers/ground guides are taken directly from current OSHA regulation 1926.201(a), which incorporates by reference Part VI of the Manual on Uniform Traffic Control Devices (1988 Edition, Revision 3 or the Millennium Edition):

- A. While engaged in signaling activities, the designated observer/ground guide shall:
1. have no other assigned duties;
 2. shall not engage in any other activities unrelated to back-up operations other than those related to the covered vehicle being signaled;
 3. shall not use personal cellular phones, personal head phones or similar items that could pose a distraction for the designated observer/ground guide; and
 4. shall be provided with and wear:
 - a. during daytime operations a safety vest or jacket in orange, yellow strong yellow green or fluorescent versions of these colors, reflective warning garments; and
 - b. during nighttime operations a safety vest or jacket with retroreflective material in orange, yellow, white, silver, strong yellow green or a fluorescent version of these colors and shall be visible at a minimum distance of 1,000 feet.”
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16 VAC 25-97-40.B.

B. When using a designated observer/ground guide, no driver of a covered vehicle shall operate in reverse unless they maintain constant visual contact with the designated observer/ground guide. If visual contact is lost, the driver shall immediately stop the vehicle until visual contact is regained and a positive indication is received from the designated observer/ground guide to restart reverse operations.

NO INTERPRETATIONS AS OF SEPTEMBER 17, 2009

16 VAC25-97-40.C.

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C. Except as provided for in subdivisions A. and B. of this section, employees shall not enter or cross the path in close proximity to a covered vehicle while it is operating in reverse.

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[NOTE: THE ABOVE TEXT WENT THROUGH SEVERAL REVISIONS BETWEEN THE PROPOSED AND FINAL VERSIONS. The explanation for the final language follows:

“This new language is to address the issue where a covered vehicle is backing up for a long distance and an employee needs to cross the back-up path, but the truck may still be several hundred yards from the where the employee is going to cross; or the paving example ... where the employee cannot walk across the newly paved roadway. A 100 foot distance was originally chosen so that there would be no blind spot issues with large vehicles and keeping in mind that a vehicle traveling at 5 MPH covers about 7.3 feet/second - Comments were requested on this distance issue. One commenter suggested more “performance oriented” language such as “in the immediate vicinity” to give employers more flexibility to address site configuration issues. Department staff recommend use of the phrase “in close proximity to.” The Department intends to address the issue of vehicle backing speeds and blind spots in its training materials on the eventual standard. (Source: TH-03, Final Regulation Agency Background Document, December 8, 2008.)]

16 VAC 25-97-50, Training

16 VAC 25-97-50.A.

A. Prior to permitting an employee to engage in any covered activity under this chapter, the employer shall ensure that each driver of a covered vehicle and each designated observer/ground guide is trained in the requirements of this chapter.

Comment: “There is insufficient guidance on employee training.

Response: As noted above, the Department plans to prepare and make available to employers a free training program that could be used to meet the training requirements contained in the ~~proposed~~ [final] regulation. You asked how the Department would ensure that training was provided since there is no requirement in the proposal to document training. We did not include a documentation requirement so as not to impose a significant “paperwork” requirement on employers. Many federal OSHA regulations contain training requirements with no corresponding documentation requirement. Part of the training program the Department develops will be a non-mandatory method for documenting training through employee certification, similar to what OSHA does in several of its regulations. If an employer does not want to keep such records, and VOSH conducts an inspection, it will follow normal procedures for documenting compliance with training requirements through discussions/interviews with employer representatives and employees

Comment: Commenter question about training.

Response: “... the regulation requires employers to train drivers of covered vehicles and designated observers/ground guides in the requirements of the regulation. The requirements for designated observers/ground guides are spelled out specifically in the ... regulation and provide a simple, commonsense approach to protecting both the ground guide and other workers in the area. The requirements are actually modeled in part after current provisions in the construction standards for individuals working as “monitors” in the Fall Protection Standards, 1926.501 to 503. In addition, the personal protective equipment requirements for designated observers/ground guides are taken directly from current OSHA regulation 1926.201(a), which incorporates by reference Part VI of the Manual on Uniform Traffic Control Devices (1988 Edition, Revision 3 or the Millennium Edition):

- A. While engaged in signaling activities, the designated observer/ground guide shall:
1. have no other assigned duties;
 2. shall not engage in any other activities unrelated to back-up operations other than those related to the covered vehicle being signaled;
 3. shall not use personal cellular phones, personal head phones or similar items that could pose a distraction for the designated observer/ground guide; and
 4. shall be provided with and wear:
 - a. during daytime operations a safety vest or jacket in orange, yellow strong yellow green or fluorescent versions of these colors, reflective warning garments; and
 - b. during nighttime operations a safety vest or jacket with retroreflective material in orange, yellow, white, silver, strong yellow green or a fluorescent version of these colors and shall be visible at a minimum distance of 1,000 feet.”

B. Refresher training shall be provided by the employer for any driver of a covered vehicle or any designated observer/ground guide when the driver or designated observer/ground guide has:

1. Been observed to violate the requirements of this chapter;
2. Been involved in an accident or near miss accident; or
3. Received an evaluation that reveals that the driver or designated observer/ground guide is not operating under this chapter in a safe manner.

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NO INTERPRETATIONS AS OF SEPTEMBER 17, 2009