



STATE OF VERMONT
OFFICE OF LEGISLATIVE COUNSEL

MEMORANDUM

To: Legislative Advisory Committee on the State House
From: Michael O'Grady
Date: June 29, 2021
Subject: Workplace Safety; Indoor Air Quality

The Office of Legislative Counsel received a question from Rep. Alice Emmons, Chair of the Legislative Advisory Committee on the State House asking whether the State House is required to comply with air quality standards, such as the ASHRAE standard 62.1 for commercial buildings. Rep. Emmons also asked what the ramifications are if every room in the State House does not comply with applicable air quality standards.

This memo discusses the existing indoor air quality requirements, if any, in the State House. It then reviews application of ASHRAE standards to the State House and when or if they are required. The memo then examines application of federal and State occupational safety and health requirements to the State House. Last, the memo discusses potential liability of the General Assembly to an employee or a member of the public exposed to COVID-19 at the State House.

A. Current Air Quality Requirements for the State House

1. State Indoor Air Quality Standards; Lack Thereof

Neither the Agency of Natural Resources (ANR) nor the Vermont Department of Health (DOH) maintain ongoing air quality requirements for State or public buildings. However, each agency has authority or issues guidance for how to respond to a hazardous air emission. But neither the ANR authority nor the DOH guidance is intended to be used as a standard for measuring the ongoing quality of air within a building.

ANR has authority to respond to a release of a hazardous material in an air emission.¹ A "release" is any intentional or unintentional action or omission resulting in the spilling, leaking, pumping, pouring, emitting, emptying, dumping, or disposing of hazardous materials into the surface or groundwaters, or onto the lands in, or into waters when damage may result to the public health, lands, waters, or natural resources within the State.² "Hazardous material" generally means all petroleum and toxic, corrosive, or other chemicals that fall under several delineated lists.³ ANR's authority relates to

¹ See 10 V.S.A. § 6615.

² 10 V.S.A. § 6602(17); see also Agency of Natural Resources, Investigation and Remediation of Contaminated Properties Rule § 35-210(37), available at <https://dec.vermont.gov/sites/dec/files/documents/IRULE%20Clean%20Version.pdf>.

³ 10 V.S.A. § 16; see also Agency of Natural Resources, Investigation and Remediation of Contaminated Properties Rule § 35-210(37), available at <https://dec.vermont.gov/sites/dec/files/documents/IRULE%20Clean%20Version.pdf>.

response and remediation of a released hazardous material—clean up the release⁴—and not to attainment of the appropriate amount of a material in indoor air prior to release.

DOH has authority to respond to public health hazards and public health risks.⁵ DOH exercises this authority with regard to chemical exposures by issuing screening values that can be used to evaluate potential exposure to a chemical.⁶ DOH develops and maintains two sets of chemical-specific values that may be used to evaluate potential exposure to chemicals in indoor air—residential air values (RAVs) and nonresidential air values (NAVs).⁷ RAVs and NAVs are appropriate for consideration of a potential exposure to a chemical in indoor air and how exposed persons should best respond to the exposure. RAVs and NAVs are not ongoing standards for maintaining indoor air quality.

Thus, the authority of ANR or DOH to regulate indoor air relates to discrete releases or exposures and does not establish ambient standards to be met in public or commercial buildings. Thus, current operation of the State House and its ventilation systems is not subject to generally applicable ANR or DOH indoor air quality standards unless a specific release, emission, or exposure occurs triggering those authorities.

2. ASHRAE Standard 62.1

The American National Standards Institute (ANSI) and the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) are private organizations that develop and publish voluntary standards for multiple aspects of industry, business, or construction. ANSI or ASHRAE standards are not regulatory requirements under a State or other jurisdiction unless the State or other jurisdiction adopts the standards under statute or rule.

ASHRAE standard 62.1 on Ventilation of Acceptable Air Quality is a standard published for nonresidential buildings, the purpose of which is to specify minimum ventilation rates and other measures for heating, conditioning, and other ventilation equipment so that air quality in a nonresidential building is acceptable to human occupants and adverse health effects are minimized.⁸ Thus, ASHRAE Standard 62.1 is a performance standard for a heating, conditioning, or other ventilation system and not a generally applicable standard for quality of air in a building.

⁴ Agency of Natural Resources, Investigation and Remediation of Contaminated Properties Rule, available at <https://dec.vermont.gov/sites/dec/files/documents/IRULE%20Clean%20Version.pdf>.

⁵ See 18 V.S.A. § 2(9) and (10).

(9) “Public health hazard” means the potential harm to the public health by virtue of any condition or any biological, chemical, or physical agent. In determining whether a health hazard is public or private, the Commissioner shall consider at least the following factors:

- (A) the number of persons at risk;
- (B) the characteristics of the person or persons at risk;
- (C) the characteristics of the condition or agent which is the source of potential harm;
- (D) the availability of private remedies;
- (E) the geographical area and characteristics thereof where the condition or agent which is the source of the potential harm or the receptors exist; and

(F) Department policy as established by rule or agency procedure.

(10) “Public health risk” means the probability of experiencing a public health hazard.

⁶ Vermont Department of Health, Environmental Chemicals and Pollutants, available at <https://www.healthvermont.gov/environment/chemicals>

⁷ Vermont Department of Health, Indoor Air, available at

https://www.healthvermont.gov/sites/default/files/documents/pdf/ENV_ECP_GeneralScreeningValues_Air.pdf

⁸ ANSI/ASHRAE Standard 62.1-2019, Ventilation for Acceptable Indoor Air Quality, available at https://ashrae.iwrapper.com/ASHRAE_PREVIEW_ONLY_STANDARDS/STD_62.1_2019.

As such, ASHRAE standard 62.1 does not apply to all buildings. It is triggered if a heating, conditioning, or ventilation system in a building is added or altered, and compliance is only required if enacted as rule or statute. ASHRAE standard 62.1 has not been enacted as an indoor air quality standard in Vermont but as a commercial building energy standard for new commercial buildings or alteration of existing commercial buildings. The Department of Buildings and General Services (BGS) also adopted ASHRAE 62.1 as a design guideline, but not an indoor air quality standard.

B. Application of ASHRAE Standard 62.1

1. State Commercial Building Energy Standards

Under the Commercial Building Energy Standards (CBES) required under Vermont statutes, the installation of a new heating, conditioning or ventilation system in the State House likely will require compliance with ASHRAE standard 62.1. The new construction of commercial buildings or the alteration of existing commercial buildings after the year 2007 are required to comply with Vermont's CBES.⁹ The CBES also apply to new portions of buildings and their systems, new systems and equipment in existing buildings, and new equipment or building specifically identified in the Standards that are part of an industrial or manufacturing process.¹⁰

The CBES require that in commercial buildings where mechanical ventilation is provided, the heating, conditioning, or ventilation system shall provide the capability to reduce the outdoor air supply to the minimum required by ASHRAE Standard 62.1.¹¹ Ventilation rates must be based on the expected occupancy level of the space, but life safety maximum allowable occupancy density shall not be used as a ventilation basis of design.¹² In addition, “[a]lterations, repairs, additions and changes of occupancy to, or relocation of, existing buildings and structures shall comply with the provisions for alterations, repairs, additions and changes of occupancy or relocation, respectively, in this code and in the . . . ASHRAE Standard 62.1”¹³

Compliance with the CBES is largely through self-certification by design professionals, contractors, or owners that the standards have been met.¹⁴ Submission of the certification is required prior to issuance of a certificate of occupancy for the building by the Division of Fire Safety¹⁵ or by a municipality with code enforcement authority.¹⁶ Failure to comply with the certification requirement or the requirements of the code is

⁹ See 30 V.S.A. § 53; see also Department of Public Service Commercial Building Energy Standards, § C.101.2. A “commercial building” is defined as all buildings that are not residential buildings as defined in 30 V.S.A. § 51(a)(2) or farm structures as defined in 24 V.S.A. § 4413. A “residential building” is defined under 30 V.S.A. § 51(a)(2) as:

(2) “Residential buildings” means one-family dwellings, two-family dwellings, and multi-family housing three stories or less in height.

(A) With respect to a structure that is three stories or less in height and is a mixed-use building that shares residential and commercial users, the term “residential building” shall include the living spaces in the structure and the nonliving spaces in the structure that serve only the residential users such as common hallways, laundry facilities, residential management offices, community rooms, storage rooms, and foyers.

(B) “Residential buildings” shall not include hunting camps.

¹⁰ 2020 Commercial Building Energy Standards § C.101.2.

¹¹ See Vermont Commercial Building Energy Standards § 403.2.2.

¹² Id.

¹³ See Vermont Commercial Building Energy Standards § C.501.4.

¹⁴ See 30 V.S.A. § 53(d); see also Vermont Commercial Building Energy Standards § C.101.5.1.

¹⁵ 20 V.S.A. § 2731(l).

¹⁶ 20 V.S.A. § 2736.

subject to fines of up to \$10,000.00 or administrative penalties of up to \$1,000.00 per violation.¹⁷

In addition, the CBES include a potential exclusion for historic buildings. Specifically, the Standards:

relating to the construction, repair, alteration, restoration and movement of structures, and change of occupancy shall not be mandatory for historic buildings provided that a “Historic Building Exemption Report” obtained from the State Historic Preservation Office, has been submitted to the State Historic Preservation Office and signed by the owner, an owners agent, a registered design professional, a representative of the State Historic Preservation Office or the historic preservation authority having jurisdiction, demonstrating that compliance with that provision would threaten, degrade or destroy the historic form, fabric or function of the building.¹⁸

The State Historic Preservation Office, upon receipt of the report, is required to review and validate a request for a historic building exemption.¹⁹

2. Department of Buildings and General Services Design Guidelines

BGS publishes design guidelines for all BGS projects. The guidelines are meant to serve as a supplement to, not a replacement of, any code, design, or industry standard.²⁰ These guidelines apply to new BGS construction and major renovation.²¹ “The goal of building design should be to achieve a high-performance building.”²²

The BGS Design Guidelines cite ASHRAE 62.1 as a reference standard.²³ The Design Guidelines also provide that whenever possible new construction and major alterations shall meet ASHRAE 62.1.²⁴ However, the BGS Design Guidelines are not necessarily mandates that all new BGS construction or major alterations must meet. The preface to the Design Guidelines provides that what is written in the Design Guidelines “is not so much cast in stone, as it is etched in wood, deviations may be allowed at the discretion of the BGS Project Manager.”²⁵ Thus, there is possibility that a BGS project, including construction in the State House could be approved not to comply with ASHRAE 62.1 under the BGS Design Guidelines.

C. Federal and State Occupational Safety and Health Standards

1. Federal Occupational Safety and Health Act

The federal Occupational Safety and Health Administration (OSHA) does not have general indoor air quality standards.²⁶ OSHA provides guidelines addressing the

¹⁷ 20 V.S.A. § 2734.

¹⁸ See Vermont Commercial Building Energy Standards § C.501.6.

¹⁹ Id.

²⁰ State of Vermont Department of Buildings and General Services Design Guidelines (Nov. 15, 2109), available at <https://bgs.vermont.gov/sites/bgs/files/Design%20Guidelines%202018.pdf>.

²¹ Id.

²² Id. at (see reference standards, unmarked page 8).

²³ Id. (see reference standards unmarked page 9).

²⁴ Id.

²⁵ Id. (important note for use of guidelines unmarked page 1).

²⁶ Occupational Safety and Health Administration, Indoor Air Quality in Commercial and Institutional Buildings 9 (2011), available at <https://www.osha.gov/sites/default/files/publications/3430indoor-air-quality-sm.pdf>

most common workplace complaints about indoor air quality, and these guidelines may apply to specific contaminants.²⁷ OSHA also publishes national consensus standards for indoor air quality. However, the OSHA provisions are guidelines and not regulatory standards and, therefore, are not mandatory.²⁸

The federal Occupational Safety and Health Act (OSH Act) does include a general obligation clause that requires all employers to provide employees with a safe workplace that does not have any known hazards that cause or are likely to cause death or serious injury.²⁹ However, the OSH Act defines the term “employer” to exclude any State or political subdivision.³⁰ Thus, the federal, general obligation requirement for employers to provide a safe workplace does not apply to the Vermont General Assembly.

2. Vermont Occupational Safety and Health Administration (VOSHA)

However, VOSHA, the State occupational safety program, is authorized to investigate employer work places to determine if health hazards are present that could present risk of injury to employees.³¹ Under State statute, “employee” means any person engaged in service to an employer for wages, salary, or other compensation, excluding an independent contractor.³² An “employer” is any person who employs one or more persons.³³ Thus, the State occupational and safety program does apply to State employers, including the General Assembly.³⁴

Under the statutory requirements for the State occupational and safety program, each employer, including State employers:

shall furnish to each of his or her employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or significant physical harm to his or her employees; and the employer shall comply with safety and health standards promulgated under the VOSHA Code.³⁵

The Department of Labor’s guidance to State employees reinforces the conclusion that workers in the State House are required to be provided with a safe working space. The guidance provides that “workers are entitled to working conditions that do not pose a risk of serious harm.”³⁶

The Commissioner of Labor or his or her agent may cite an employer who violates the VOSHA Code.³⁷ The penalties for a violation are dependent on the nature of

²⁷ Id.

^{28,28} Id.

²⁹ 29 U.S.C. § 654.

³⁰ 29 U.S.C. § 652.

³¹ See 18 V.S.A. § 1417. In addition, VOSHA does maintain permissible exposure limits for certain air contaminants in the work place. These are specific standards for the presence of specific contaminants and do not necessarily relate to circulation of air or the proper operation of a ventilation system.

³² 21 V.S.A. § 203(6); see also 18 V.S.A. § 1416(3).

³³ 21 V.S.A. § 203(7); see also 18 V.S.A. § 1416(4).

³⁴ See U.S. Department of Labor, Occupational Safety and Health Administration, State Plans, Vermont, available at [available at https://www.osha.gov/stateplans/vt](https://www.osha.gov/stateplans/vt) (stating that the Vermont State Plan covers state and local government workers.).

³⁵ 21 V.S.A. § 223(a).

³⁶ See Vermont Department of Labor, Employee Rights, available at [osha/employee-rights](https://www.vermont.gov/department-of-labor/employee-rights) (linking to an OSHA website providing Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace. The OSHA guidance provides recommendations on the actions that employers and workers can take to mitigate the spread of COVID-19 and improve the safety of the workplace.).

³⁷ 21 V.S.A. § 225.

the violation, the mens rea of the violating employer, and other considerations.³⁸ In addition, “[w]henver the Commissioner finds that any workplace is in violation of any portion of the VOSHA Code . . . and that the violation creates a dangerous condition that can be reasonably expected to cause imminent death or serious physical harm, the Commissioner may order the workplace or any portion of the workplace to be immediately closed or order that steps be taken to avoid, correct, or remove the imminently dangerous conditions.”³⁹

D. Workers Compensation for Employees; Damages for Others

A General Assembly employee who contracted COVID-19 or another virus or pathogen at the State House could receive workers’ compensation for his or her injuries.⁴⁰ The State of Vermont carries workers compensation insurance for its employees.⁴¹ Legislators are considered “employees” under worker’s compensation “for the periods that the General Assembly is in session or while engaged in duties for which compensation is provided by law.”⁴² In order for a worker to successfully claim workers’ compensation on and after July 15, 2021, the employee would need to be able to show that they actually contracted COVID or another virus or pathogen because of a work-

³⁸ See 18 V.S.A. § 210(a)(1)-(9):

(1) Any employer that willfully or repeatedly violates the requirements of this Code or any standard or rule adopted, or order issued pursuant to this Code may be assessed a civil penalty of not more than \$126,749.00 for each violation, but not less than \$5,000.00 for each willful violation.

(2) Any employer that has received a citation for a serious violation of the requirements of this Code, or any standard or rule adopted, or order issued pursuant to this Code, shall be assessed a civil penalty of up to \$12,675.00 for each violation.

(3) Any employer that has received a citation for a violation of the requirements of this Code, or any standard or rule adopted, or order issued pursuant to this Code, if the violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to \$12,675.00 for each such violation.

(4) Any employer that fails to correct a violation for which a citation has been issued within the period permitted for its correction, which period shall not begin to run until the date of the final order of the Review Board, in the case of any review proceeding under section 226 of this title initiated by the employer in good faith and not solely for delay or avoidance of penalties, may be assessed a civil penalty of not more than \$12,675.00 for each day during which the failure or violation continues.

(5) Any employer that willfully violates any standard or rule adopted, or order issued pursuant to this Code, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than \$126,749.00 or by imprisonment for not more than one year, or by both.

(6) Any person who gives advance notice of any inspection to be conducted under this Code, without authority from the Commissioner or Director or designees, shall, upon conviction, be punished by a fine of not more than \$ 1,000.00 or by imprisonment for not more than six months, or by both.

(7) Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this Code shall, upon conviction, be punished by a fine of not more than \$10,000.00 or by imprisonment for not more than six months, or by both.

(8) Any employer that violates any of the posting requirements, as prescribed under the provisions of this Code, shall be assessed a civil penalty of up to \$12,675.00 for each violation.

(9)(A) As provided under the federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 and the Act, the penalties provided in subdivisions (1), (2), (3), (4), (5), and (8) of this subsection (a) shall annually, on January 1, be adjusted to reflect the increase in the Consumer Price Index, CPI-U, U.S. City Average, not seasonally adjusted, as calculated by the U.S. Department of Labor or successor agency for the 12 months preceding the previous December 1.

³⁹ 18 V.S.A. § 208.

⁴⁰ 21 V.S.A. § 618 (If a worker receives a personal injury by accident arising out of and in the course of employment by an employer subject to this chapter [workers compensation], the employer or the insurance carrier shall pay compensation in the amounts and to the person hereinafter specified.)

⁴¹ Vermont Department of Labor, Employer Verification, available at <https://www.ewccv.com/cvs/search?ref=http%3A%2F%2Flabor.vermont.gov%2Fworkers-compensation%2Finjured-workers%2Fdoes-my-employer-have-workers-comp-coverage%2F>

⁴² 21 V.S.A. § 601(12). If a legislator is injured on the campaign trail or while performing constituent services during the interim, he or she is not covered by the State’s workers’ compensation insurance. In addition, at the June 29, 2021 meeting of the Legislative Advisory Committee on the State House, there were questions about whether legislators are generally State employees. I conferred with Damien Leonard, and he stated that legislators should generally not be considered State employees since they are not hired by the State but are instead elected to carry out an official duty. However, there are some employment law definitions of “employee” that are broad enough to be construed to include legislators. Consequently, the default is that legislators are not employees, but each statute must be read to determine its specific application legislators.

related exposure.⁴³ Implementing distancing requirements, improved ventilation, or other safety measures will potentially reduce the incidents of exposure to any virus or contagion.

Workers compensation protection and relief does not extend to non-employees of the General Assembly. As the State House is required to be open to the public under the Vermont Constitution, there will almost certainly be lobbyists, advocates, and other general members of the public who visit the State House. It is possible that members of the public are exposed to COVID or another virus or pathogen at the State House.

If a member of the public is exposed to a virus or other contagion at the State House, it is possible that he or she could have a claim in tort, most likely for negligence. A person claiming negligence must show that the alleged violator had: 1) a duty of care; 2) the duty was breached; 3) the person alleging negligence suffered damages; and 4) the breach of the duty of care caused the damages. I believe the two key elements for the purpose of liability for the General Assembly are the “duty of care” that the General Assembly may have to the public and the ability of a member of the public to show that exposure at the State House was the “proximate cause” of the contraction of the disease.

As discussed in subdivision C.2 of this memo, Vermont employers have a legal duty to provide employees with a safe work space. However, I do not know of a duty of care that the General Assembly maintains to the public other than general standard not to injure someone and the standard to operate a safe public building.⁴⁴ If the General Assembly employs its usual and ordinary safety procedures for operation of the building and implements additional virus or pathogen mitigation measures similar to those recommended by federal OSHA, it likely could be argued that the General Assembly exercised the appropriate level of care to prevent or mitigate harm and no duty of care was breached.

In addition, I think it will be difficult for a person to clearly prove that any exposure to a virus or contagion occurred at the State House. Courts may require that a plaintiff prove that it is more likely than not that exposure occurred at the State House.⁴⁵ Because viruses are highly contagious and invisible to the naked eye, it is difficult if not impossible to determine where a virus was contracted.⁴⁶ As the Congressional Research Service concluded, the “inherent characteristics [of viruses] may naturally mitigate the liability risk that some defendants face.”⁴⁷ Consequently, a successful negligence claim for exposure to a virus or other pathogen will be difficult if not unlikely.

⁴³ 21 V.S.A. chapter 9. Prior to July 15 (30 days after end of COVID state of emergency) an exposure to COVID-19 is presumed to be work-related if the employee had a documented work-related exposure within 14 days before a positive COVID diagnosis unless the General Assembly could show that either the worker contracted COVID because of a non-employment-related exposure or that the General Assembly was in compliance with all relevant safety guidance issued by ACCD. See 2020 Acts & Resolves No. 150; extended by 2021 Acts & Resolves No. 2.

⁴⁴ Congressional Research Service, COVID-19 Liability: Tort, Workplace Safety, and Securities Law 5 (September 2020), available at <https://crsreports.congress.gov/product/pdf/R/R46540>.

⁴⁵ See, e.g., id. FN. 96; see also Susan Wiltsie, Esq., Madalyn Doucet, Esq., and Reilly Moore, Esq., Hunton Andrews Kurth, Workplace Safety in the Time of COVID-19 (March 1, 2021), available at [https://today.westlaw.com/Document/I2573d47c7afb11ebbea4f0dc9fb69570/View/FullText.html?contextData=\(sc.Default\)&transitionType=Default&firstPage=true](https://today.westlaw.com/Document/I2573d47c7afb11ebbea4f0dc9fb69570/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true).

⁴⁶ Id. at 11.

⁴⁷ Id.