

Chapter ILHR 3

PETITION FOR VARIANCE PROCEDURES

ILHR 3.001 Purpose	ILHR 3.04 Public employer variances
ILHR 3.002 Scope	ILHR 3.05 Exemptions under the right-to-know law
ILHR 3.01 Petition procedures	ILHR 3.06 Appeals on petitions for variances
ILHR 3.02 Definitions	
ILHR 3.03 Petition for variance	

ILHR 3.001 Purpose. The purpose of this chapter is to specify procedures for applying for a variance from a rule administered and enforced by the division.

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84.

ILHR 3.002 Scope. This chapter specifies who may apply for a petition for variance from a rule, the procedures that must be followed for applying and processing a petition for variance, and includes procedures for appealing a decision on a petition for variance.

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84.

ILHR 3.01 Petition procedures. Except as specified in ss. ILHR 3.04 and 3.05, all petitions for variance from rules of the division shall be processed as provided for in s. ILHR 3.03. Appeals shall be handled as set forth in s. ILHR 3.06.

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84; am. Register, May, 1985, No. 353, eff. 6-1-85.

ILHR 3.02 Definitions. (1) "Administrator" means the administrator of the division of safety and buildings in the department of industry, labor and human relations.

(2) "Department" means the department of industry, labor and human relations.

(3) "Division" means the division of safety and buildings.

(4) "Equivalency" means the same intent and degree of safety is being provided in lieu of the requirements being specified in the rule.

(5) "Public employe" means any employe of the state, of any state agency or of any political subdivision of the state.

(6) "Public employer" means the state, any state agency or any political subdivision of the state.

(7) "Secretary" means the secretary of the department of industry, labor and human relations.

(8) "Significant ownership rights" means any person having ownership, control or custody of any place of employment or public building, or of the construction, repair or maintenance of any place of employment or public building.

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Register, May, 1985, No. 353

ILHR 3

ILHR 3.03 Petition for a variance. Any person having significant ownership rights may petition for a variance on any rule of the division. The petition for variance shall establish an equivalency which meets the intent of the rule being petitioned.

(1) **APPLICATION FOR PETITION FOR VARIANCE.** Application for a petition for variance of a rule shall be made on forms furnished by the division. The following shall be submitted when requesting a variance from a rule:

(a) A completed and notarized petition for variance form including a clear and concise written statement of the specific provisions of the rule from which the variance is requested along with a specific statement of the procedures and materials to be used if the variance is granted;

(b) A petition for variance fee as specified in ch. Ind 69; and

(c) A completed position statement on the petition for variance from the chief of the fire department having jurisdiction, where applicable.

Note: See Appendix for examples of petition for variance forms and a position statement.

(2) **DIVISION ACTION.** Upon receipt of the petition for variance form, applicable fee and the position statement, and any other documents as the petitioner may wish to submit, the administrator shall evaluate the petition for variance and determine if the petition for variance provides for an equivalency which meets the intent of the rule being petitioned.

(a) If additional information is needed by the division to review the petition for variance and make a determination, the division shall notify the owner of the specific information required.

(b) If it is determined that the petition for variance provides an equivalency, the petition for variance shall be approved by the administrator.

(c) If it is determined that the petition for variance does not provide an equivalent protection as provided by the original rule, the administrator:

1. May approve the petition for variance subject to specific conditions determined by the division which shall establish an equivalency which meets the intent of the rule;

2. May grant a temporary variance to delay enforcement of a rule to a specified date, not to exceed one year. The petitioner shall demonstrate that all available steps are being taken to safeguard employees and frequenters against the hazard covered by the rule from which the variance is sought and shall possess and describe a program for coming into compliance with the rule as quickly as possible. A temporary variance may be renewed no more than twice, and only if the petitioner files an application for renewal at least 90 calendar days before expiration of the temporary variance;

3. May grant an experimental variance to allow the petitioner to participate in an experiment approved by the division to demonstrate or validate new or improved techniques to safeguard the health or safety of the public and employees; or

4. May deny the petition for variance.

(3) **NOTIFICATION OF PETITION FOR VARIANCE DETERMINATION.** The administrator shall notify the petitioner in writing of the petition for variance determination. Any denial shall include the reason for denial, and information on the appeals procedure.

(4) **TIME LIMIT FOR PROCESSING.** Except for priority petitions, the division shall approve or deny a petition for variance and shall mail notification of the determination to the petitioner after receipt of the completed and notarized petition for variance form and applicable fees, and any additional information as may be required by the department within 30 business days. The division shall process priority petitions within 10 business days.

(5) **REVOCATION.** The division may revoke any petition for variance where it is determined that the variance was obtained through fraud or deceit or where the petitioner has violated the specific conditions on which the variance was approved.

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84.

ILHR 3.04 Public employer variances. (1) TYPES OF VARIANCES. Pursuant to s. 101.055 (4), Stats., a public employer may apply to the division for a temporary, experimental or permanent variance on occupational safety and health issues affecting public employees.

(a) *Temporary variance.* The division may grant a temporary variance before a rule goes into effect if the public employer complies with this section and establishes that it is unable to comply with a rule by the rule's effective date because of unavailability of professional or technical personnel or of necessary materials or equipment or because necessary construction or alteration of facilities cannot be completed by the effective date.

1. The employer shall also show that it is taking all available steps to safeguard employees against the hazard covered by the rule from which the variance is sought and shall possess and describe a program for coming into compliance with the rule as quickly as possible.

2. If a hearing is requested, the division may state in writing that non-compliance with the rule is permitted for 180 calendar days or until a decision is made after the hearing, whichever is earlier.

3. A temporary variance shall be in effect for the period of time needed by the employer to achieve compliance with the rule or for one year, whichever is shorter.

4. A temporary variance may be renewed no more than twice, and only if the public employer files an application for renewal at least 90 calendar days before expiration of the temporary variance.

(b) *Experimental variance.* The division may grant an experimental variance if the public employer complies with this section and it is determined that the variance is necessary to permit the employer to participate in an experiment approved by the division to demonstrate or validate new or improved techniques to safeguard the health or safety of employees.

(c) *Permanent variance.* The division may grant a permanent variance if the public employer complies with this section and finds the employer has demonstrated by a preponderance of the evidence that the conditions

Register, May, 1985, No. 353

and methods the employer uses or proposes to use provide employment or a place of employment which is as safe and healthful as that provided under the rule from which the employer seeks a permanent variance. A permanent variance may be modified or revoked upon application by the employer, an affected employe, a public employe representative or the department and after opportunity for a hearing, but not sooner than 6 months after issuance of the permanent variance.

(2) **APPLICATION FOR PETITION FOR VARIANCE.** Application for a petition for variance of a rule shall be made on forms furnished by the division. The following shall be submitted when requesting a variance from a rule:

(a) A completed and notarized petition for variance form including a clear and concise written statement of the specific provisions of the code from which the variance is requested and a specific statement of the procedures and materials to be used if the variance is granted; and

(b) A petition for variance fee as specified in ch. Ind 69.

(3) **NOTIFICATION TO EMPLOYEES.** The employer shall provide a copy of the application for petition for variance to the appropriate public employe representatives.

(a) A copy of the petition for variance shall be posted by the employer at places where notices to employes are normally posted.

(b) The notice shall:

1. Summarize the application; and
2. Inform public employes of the right to request a hearing.

(c) The public employer shall furnish evidence to the division that conditions specified in par. (b) have been satisfied and that public employes have no interest in requesting a hearing from the division.

(4) **HEARING.** Upon a written request for a hearing from a public employer, an affected public employe or a public employe representative, the division shall hold a hearing.

(a) Upon a written request for a hearing, the administrator shall schedule a hearing and inform the parties about the date, time and place for the hearing.

(b) Where a hearing is requested, no decision will be made by the division until a hearing has been held.

(5) **DIVISION ACTION.** Unless a hearing is requested upon receipt of the petition for variance form, the administrator shall evaluate the petition for variance and determine if the petition for variance provides for an equivalent degree of safety or health. The petition shall prescribe the methods and conditions which the employer must adopt and maintain while the variance is in effect.

(a) If additional information is needed by the division to review the petition for variance and make a determination, the division will notify the owner of the specific information requested.

(b) If it is determined that the petition for variance provides an equivalent degree of safety or health, the petition for variance shall be approved by the administrator.

(c) If it is determined that the petition for variance does not provide an equivalent degree of safety or health, the administrator:

1. May approve the petition for variance subject to specific conditions determined by the division which will establish an equivalent degree of safety or health as specified in the rule; or

2. May deny the petition for variance.

(6) **NOTIFICATION OF PETITION FOR VARIANCE DETERMINATION.** The administrator shall notify the petitioner and affected parties in writing of the petition for variance determination. Any denial shall include the reason for denial, and information on the appeals procedure.

(7) **TIME LIMIT FOR PROCESSING.** Except for priority petitions, the division shall approve or deny a petition for variance and shall mail notification of the determination to the petitioner within 30 business days after receipt of the completed and notarized petition for variance form and applicable fees, and any additional information as may be required by the department. The division shall process priority petitions within 10 business days.

(8) **REVOCATION.** The division may revoke any petition for variance where it is determined that the variance was obtained through fraud or deceit or where the petitioner has violated the specific conditions on which the variance was approved.

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84.

ILHR 3.05 Exemptions under the right-to-know law. (1) DEFINITIONS. In this section:

(a) "Employee" means any person as defined in s. 101.58 (2) (c), Stats.

(b) "Employee representative" means any individual or organization as defined in s. 101.58 (2) (d), Stats.

(c) "Employer" means any person as defined in s. 101.58 (2) (e), Stats.

(2) **PETITIONS.** Pursuant to s. 101.598 (2), Stats., an employer may petition the division for an exemption from retaining a data sheet or maintaining an identification list as specified in s. 101.583 (1), Stats., regarding any mixture containing a toxic substance.

(a) A petition for the exemption shall be in writing. Petitions for exemption shall be sent to: Division of Safety and Buildings, Bureau of Safety Inspection, P.O. Box 7969, Madison, Wisconsin 53707.

(b) The petition shall be accompanied by the appropriate information and documentation indicating:

1. That any toxic substance present in the mixture is highly unlikely to pose an unreasonable acute or chronic health hazard to an employee who works with or is likely to be exposed to the mixture; and

2. The specific conditions and procedures under which the mixture is to be used if the exemption is granted.

ILHR 3

(c) An employer requesting an exemption shall provide a copy of the petition to the appropriate certified collective bargaining agents and shall post a statement at the place where notices to employees are normally posted. The posted statement shall summarize the petition, specify a place where employees may examine it and inform employees of their right to request a hearing on it.

(3) **DIVISION ACTION.** Upon receipt of a petition for exemption, the applicable fee and any other documents the employer may wish to submit, the division shall evaluate the petition and determine if the exemption may be granted.

(a) If additional information is needed by the division to review the petition in order to make a determination, the division shall notify the employer of the specific information required.

(b) Upon receipt of a written request from the employer, an affected employee or employee representative, the division shall schedule a hearing on the petition and inform the interested parties about the date, time and place for the hearing. If a hearing has been requested, the division shall not act on the petition for exemption until the hearing has been held.

(c) The division shall grant or deny a petition for exemption and shall mail notification of the determination to the employer within 60 business days, but no sooner than 15 business days, after receipt of the petition and any additional information which may be required by the department of after a hearing is held in accordance with par. (b).

(d) The division shall notify the employer and any interest parties as to the determination of the petition.

(e) The division may grant the petition for exemption subject to specific conditions.

(f) A denial of the exemption shall include the reason for the denial and information on the appeals procedure.

(g) If the petition for exemption is granted, the employer shall post a statement at the place where notices to employees are normally posted. The posted notice shall summarize the exemption and the specific conditions under which the exemption is granted and inform employees of their right to appeal the exemption under s. ILHR 3.06.

(4) **REVOCATION.** The division may revoke an exemption when it is determined that the exemption was obtained through fraud or deceit, where the employer has violated the specific conditions of the exemption or new information repudiates the original information on which the exemption was granted.

History: Cr. Register May, 1985, No. 353, eff. 6-1-85.

ILHR 3.06 Appeals on petitions for variances. (1) PETITION FOR A HEARING. Any person who wishes to contest a determination on a petition for variance made by the administrator may file an appeal with the secretary for a hearing.

(a) The petition for a hearing shall contain a statement of the specific reasons why the person believes a hearing should be held.

Register, May, 1985, No. 353

(b) A petition for a hearing must be received within 30 calendar days from the date of the notification of determination.

(2) DETERMINATION FOR HEARING. (a) If it is determined by the secretary that insufficient reasons are provided for a hearing, the request for a hearing may be denied. The person who requested the hearing shall be notified of any denial for a request for hearing in writing along with the reasons for denial.

(b) If upon review, it is determined that a hearing shall be granted, the division shall inform the person making the request and, if different, the person who filed the original petition about the date, time and place of the hearing.

(3) HEARING. (a) The secretary may hear and decide the appeal; or

(b) The secretary may designate a hearing examiner to hear the appeal and make a recommended finding to the secretary, who will then make the final decision on the appeal.

(4) FINAL ORDER. Any decision resulting from this hearing shall be the final order of the department. The person who requested the hearing shall be notified of the final order in writing, and be provided with information on the appeal procedure.

(5) PETITION FOR REHEARING. Any person aggrieved by a final order may, within 20 calendar days after service of the final order, file a written petition with the secretary for rehearing. Unless this order was served personally, service occurred on the date of mailing as set forth in the letter of transmittal. The petition for rehearing shall specify the grounds for the relief sought and supporting authorities.

Note: See s. 227.12, Stats., for procedural details regarding petitions for rehearing.

(6) PETITION FOR JUDICIAL REVIEW. Any person aggrieved by a decision is entitled to judicial review. The petition for judicial review shall be served and filed with all parties within 30 calendar days after the service of this decision. The petition for judicial review shall identify the department of industry, labor and human relations as the respondent.

Note: See s. 227.16, Stats., for complete procedural details regarding petitions for judicial review.

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84; renun. from ILHR 3.05, Register, May, 1985, No. 353, eff. 6-1-85.