

Chapter Comm 3

PETITION FOR VARIANCE PROCEDURES

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Note: Chapter ILHR 3 as it existed on November 30, 1988 was repealed and a new chapter ILHR 3 was created effective December 1, 1988. Chapter ILHR 3 was renumbered ch. Comm 3 under s. 13.93 (2m) (b) 1., Stats., and corrections made under s. 13.93 (2m) (b) 6. and 7., Stats., Register, June, 1998, No. 510.

Comm 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 of safety and buildings in the department. If the provisions of this chapter differ from those specified in the code containing the rule from which the variance is being requested, the most restrictive requirement shall govern.

History: Cr. Register, November, 1988, No. 395, eff. 12-1-88.

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

History: Cr. Register, November, 1988, No. 395, eff. 12-1-88.

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

History: Cr. Register, November, 1988, No. 395, eff. 12-1-88.

Comm 3.02 Definitions. (1) "Administrator" means the administrator of the division of safety and buildings in the department of industry, labor and human relations commerce, or his or her designee.

(2) "Department" means the department of commerce.

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

(4) "Equivalency" means the same intent and degree of safety, health or public welfare as contained in the requirements specified in a rule.

(5) "Public employee" means any employee 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 commerce.

(8) "Significant ownership rights" means any person having ownership, control or custody of any structure, one- or 2-family dwelling, place of employment or public building, or of the construction, repair or maintenance of any structure, one- or 2-family dwelling, place of employment or public building.

(9) "Variance" means a specified alternative to or deviation from a rule.

History: Cr. Register, November, 1988, No. 395, eff. 12-1-88; am. (1), n. (3) and (6), renum. (4), (5) and (7) to (11) to be (3), (4) and (5) to (9), Register, September, 2000, No. 537, eff. 10-1-00.

Comm 3.03 General variances. (1) SCOPE. Any person having significant ownership rights may petition for a variance from any rule of the division. The petition for variance shall establish an equivalency which meets the intent of the rule being petitioned.

(2) **APPLICATION FOR PETITION FOR VARIANCE.** Application for a petition for variance from 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. Comm 2;

(c) A completed position statement on the petition for variance from the department of health and social services, where applicable;

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

(e) A completed municipal recommendation on the petition for variance from the enforcement official of the municipality exercising jurisdiction, where applicable.

Note: The submittal of position statements and municipal recommendations is dependent on the rule being petitioned and is specified in the code under which the variance is requested.

Note: The department forms required in this chapter are available from the Safety and Buildings Division at P.O. Box 7162, Madison, WI 53707-7162, or at telephone 608/266-3151 and 608/264-8777 (TTY). Some of the department forms are also available from the Division's web site at www.commerce.state.wi.us.

(3) **DIVISION ACTION.** (a) Upon receipt of the petition for variance form, the applicable fee and the position statement, and any other documents the petitioner may wish to submit, the division 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.

(b) Except as provided in sub. (5), requests for petitions for variance shall be evaluated on a first come, first serve basis with respect to the code involved.

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

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

(e) If it is determined that the petition for variance does not provide an equivalency, the division may:

1. 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. Grant a temporary variance to delay enforcement of a rule to a specified date, not to exceed one year. In requesting the variance, the petitioner shall demonstrate that all available steps are being taken to safeguard the public and 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. A temporary variance may be renewed no more than twice, not to exceed one year each, and only

if the petitioner files an application for renewal at least 90 calendar days before expiration of the temporary variance;

3. 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. Deny the petition for variance.

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

(5) **TIME LIMIT FOR PROCESSING.** (a) Except as provided in pars. (b) to (d), the office shall review and make a determination on an application for a petition for variance within 30 business days of the receipt of the application and all forms, fees and other documents necessary to complete the review.

(b) Upon request of the petitioner and submittal of the required fee, the office shall facilitate the review of a petition in less than the processing time specified in par. (a). The fee for this type of priority petition review shall be twice the fee required for the processing time specified in par. (a). The office shall review and make a determination on an application for a priority petition for variance within 10 business days of the receipt of the application and all forms, fees and other documents necessary to complete the review.

(c) Petitions for variance from a rule contained in chs. Comm 20 to 25 shall be processed by the office within 5 business days of receipt of the required information where a municipality administers and enforces the code, and within 15 business days of receipt of the required information where the division administers and enforces the code.

(d) Petitions for variance from a rule contained in ch. Comm 70 shall be processed by the office within 10 business days of receipt of the required information.

(e) When additional information is requested by the office to complete the review of the petition, the amount of time from the date of the request to the date of receipt by the office of the information will not be included in the processing times specified in pars. (a) to (d). The full period for review specified in pars. (a) to (d) shall apply from the date of receipt of the additional information.

(f) 1. If a petition for variance is submitted with a request for a plan review under s. Comm 82.20, the processing times of this subsection for the petition and the processing times of s. Comm 82.20 (1) for the plan review shall run concurrently.

2. If a petition for variance is submitted with a request for a plan review under either s. Comm 50.12 or 83.07 and 83.08, the processing times of this subsection for the petition and the processing times of ss. Comm 50.12 (5) and 83.07 (1) (d) for the plan review shall run consecutively, with the petition being processed first.

(6) **MODIFICATIONS AND REVISIONS.** (a) If a petition for variance is initially denied by the division, the petitioner may, in writing, modify the request for variance by submitting additional or other alternatives in order to provide an equivalency and resubmit the application for the petition for variance.

(b) The petitioner may, in writing, request that his or her original petition statements or the conditions of approval be modified and resubmit the application for the petition for variance.

(7) **REVOCAATION.** 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, 1988, No. 395, eff. 12-1-88; correction in (2) (b) made under s. 13.93 (2m) (b) 7., Stats., Register, January, 1995, No. 469; correc-

tion in (5) (c) made under s. 13.93 (2m) (b) 7., Stats; am. (3) (a), (c), (d), (e) (intro.), 1., 3., (4), (6) (a) and (7), Register, September, 2000, No. 537, eff. 10-1-00.

Comm 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 rules affecting public employees.

(a) **Temporary variance.** 1. The division may grant a temporary variance before a rule goes into effect if the public employer complies with subs. (2) and (3) 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.

2. 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.

3. If a hearing on the application for variance 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.

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

5. 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 subs. (2) and (3) 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 subs. (2) and (3) and it is determined that the employer has demonstrated by a preponderance of the evidence that the conditions 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 employee, a public employee representative or the department and after opportunity for a hearing on the application, 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 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; and

(b) A petition for variance fee as specified in ch. Comm 2.

Note: The department forms required in this chapter are available from the Safety and Buildings Division at P.O. Box 7162, Madison, WI 53707-7162, or at telephone 608/266-3151 and 608/264-8777 (TTY). Some of the department forms are also available from the Division's web site at www.commerce.state.wi.us.

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

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

(c) The notice shall summarize the application and inform public employees of the right to request a hearing. Employees shall have 15 business days to request a hearing.

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

(4) HEARING. (a) Upon receipt of a written request for a hearing from a public employer, an affected public employee or a public employee representative, the division shall schedule a hearing on the petition and inform the parties in writing about the date, time and place for the hearing. The division shall hold the hearing within 30 business days from receipt of the request, unless the person requesting the hearing asks for an extension.

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

(5) DIVISION ACTION. (a) Unless a hearing is requested upon receipt of the petition for variance form, the division 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.

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

(c) 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 division.

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

1. 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;
 2. Grant a temporary variance as specified in sub. (1) (a);
 3. Grant an experimental variance as specified in sub. (1) (b);
- or
4. Deny the petition for variance.

(6) NOTIFICATION OF PETITION FOR VARIANCE DETERMINATION. The division 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 appeals procedure.

(7) TIME LIMIT FOR PROCESSING. The office shall process petitions submitted under this section as specified in s. Comm 3.03 (5).

(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, 1988, No. 395, eff. 12-1-88; correction in (2) (b) made under s. 13.93 (2m) (b) 7., Stats., Register, January, 1995, No. 469; am. (1) (Intro.), (a) 1, 3, (b), (c), (3) (d), (4), (5) (a) to (c), (d) (Intro.), 1, (6) and (8), Register, September, 2000, No. 537, eff. 10-1-00.

Comm 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. (a) Pursuant to s. 101.598 (2), Stats., an employer may petition the division for an exemption from retain-

ing a data sheet or maintaining an identification list as specified in s. 101.583 (1), Stats., regarding any mixture containing a toxic substance.

(b) A petition for the exemption shall be in writing.

Note: Petitions for exemption should be sent to: Division of Safety and Buildings, P.O. Box 2658, Madison, Wisconsin 53707.

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

1. That the nature of the toxic substance or the quantity of the toxic substance present in the mixture is such that 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.

(d) An employer requesting an exemption shall provide a copy of the petition to the appropriate employee representative 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. Employees shall have 15 business days to request a hearing.

(3) DIVISION ACTION. (a) 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.

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

(c) Upon receipt of a written request for a hearing from the employer, an affected employee or employee representative, the division shall schedule a hearing on the petition and inform the interested parties in writing 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. The division shall hold the hearing within 30 business days from receipt of the request, unless the person requesting the hearing asks for an extension.

(d) The division shall review and make a determination on a petition for exemption 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 division or after a hearing is held in accordance with par. (c).

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

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

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

(h) 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.

(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, November, 1988, No. 395, eff. 12-1-88; am. (2) (a), (b), (3) (a) to (f) and (4), Register, September, 2000, No. 537, eff. 10-1-00.

Comm 3.06 Appeals on petitions. (1) APPLICATION. The provisions of this section shall apply to appeals on any determinations made under ss. Comm 3.03, 3.04 and 3.05.

(2) REQUEST FOR REVIEW BY THE ADMINISTRATOR. (a) Any person whose petition for variance is denied, approved with condi-

tions, approved as a temporary variance, or approved as an experimental variance or any person whose rights are affected by the granting of a petition for variance may request a review by the administrator. The review by the administrator shall not be considered as a contested case hearing.

(b) A person otherwise entitled to review by the administrator under par. (a) may waive a review by submitting to the secretary a written request clearly indicating the intent to waive review and requesting to proceed to a contested case hearing under sub. (6).

(c) The request for review by the administrator shall be in writing and shall include a statement of the specific reasons why the person believes the division's decision on the petition for variance is incorrect.

Note: Requests for a review by the administrator may be forwarded to Administrator, Safety and Buildings Division, P.O. Box 2599, Madison, WI 53707-2599.

(d) A review by the administrator shall be denied if the request for review is received more than 30 days after the date of the decision on the petition for variance.

(e) A review shall be denied, and the petition remanded to staff in the division, if the request for review contains significant new information not considered by the division in making the decision on the petition for variance. The administrator may remand the petition to staff in the division at any point in the review process if significant new information is presented by the petitioner or other persons seeking review by the administrator, and that information was not available to the division at the time of its decision on the petition for variance. Following a remand, the division shall issue a decision on the petition for variance within 30 days after the date the petition for variance is remanded by the administrator. Petitioners and other persons affected by a petition for variance may request a review by the administrator or a hearing by the secretary under this section following a decision by the division on remand.

(3) DECISION. (a) If the administrator determines that insufficient reasons are provided in the request for review, the request may be denied. The denial shall be in writing and shall provide the petitioner with the reason for denial and with information about the right to appeal the decision on the petition to the secretary.

(b) If the administrator grants the request for review, the petitioner shall be notified of the date, time and place where the review will be conducted. The administrator shall schedule the review within 30 business days after the request for review, unless the person requesting the review asks for an extension.

(4) REVIEW CONFERENCE. (a) If a review is granted, the person requesting the review and any other interested persons shall be provided an opportunity to meet with the administrator to present statements and documents regarding the petition for variance. The administrator may require the attendance of division staff familiar with the basis for the decision on the petition for variance to explain the decision, to comment on the testimony and documents presented by the person requesting review, and to answer questions from the person requesting review.

(b) The administrator may conduct the review conference personally or may designate one or more persons to review the division's decision on the petition for variance. If a designation is made, the person requesting review shall be notified prior to the

review conference who will conduct the conference and who will make the decision following the review conference.

(c) At the request of the person requesting review, the administrator may issue subpoenas under s. 101.02 (5) (c), Stats., to compel the attendance and testimony of witnesses and the production of documents. The administrator may refuse to issue a subpoena if the information to be provided by the witness or the documents identified in the subpoena will not contribute materially to an effective review of the decision on the petition for variance.

(d) The administrator may electronically record a review conference. No transcript shall be prepared by the administrator. A person requesting review may, at his or her own expense, provide a court reporter to transcribe the proceedings or any portion thereof.

(e) The person requesting review, department staff responsible for the decision on the petition for variance, and witnesses called by the person requesting review or department staff shall provide informal statements. There shall be no sworn testimony. The person requesting review and staff designated by the administrator may ask questions of any person making a statement in a review conference. The administrator may limit questions and statements if the information being requested or provided does not contribute substantially to an understanding of the issues involved in the review.

(5) DECISION OF THE ADMINISTRATOR. The administrator shall issue a written decision within 30 business days following the review conference that shall affirm, vacate, or modify the division's decision on the petition for review. The written decision shall inform the person requesting review of the right to appeal to the secretary under this section.

(6) HEARING BY THE SECRETARY. (a) Any person adversely affected by a decision on a petition for variance may request a hearing by the secretary whether or not that person has first requested a review by the administrator.

(b) The appeal to the secretary shall be in writing and shall indicate the nature of the person's interest in the petition for variance, the identity of all other known parties who may have an interest in the decision on the petition for variance, and a statement of the reasons why the person believes the division's decision on the petition for variance is incorrect. An appeal may be returned to the petitioner for additional information, however the date the appeal was first received by the secretary shall be the date used to determine the timeliness of the appeal.

(c) No hearing by the secretary may be held if the request for hearing is received more than 30 days after the date of the division's decision on the petition for variance or the date of the administrator's decision following a review conference, whichever is later. A request for hearing may be denied under the provision of s. 101.02 (6) (g), Stats. A denial of a hearing shall be in writing and shall contain the reasons for the denial and a statement of the person's appeal rights, if any.

(d) The hearing by the secretary shall be a contested case hearing. The hearing and decision issued after the hearing shall be governed by the provisions of ch. 227, Stats.

Note: Requests for a contested case hearing may be forwarded to the department of commerce legal counsel, P.O. Box 7970, Madison, WI 53707-7970.

History: Cr. Register, November, 1988, No. 395, eff. 12-1-88; r. and recr. (2) to (6) and r. (7) to (10), Register, September, 2000, No. 537, eff. 10-1-00.