Chapter 20

VARIANCES, MEMORANDA OF UNDERSTANDING, LONG-TERM ABATEMENTS AND JOINT AND VOLUNTARY AGREEMENTS

Policy: It is the policy of the Division of Occupational Safety and Health (DOSH), also known as Cal/OSHA or the Division, to grant temporary variances, including experimental variances, from Title 8 Safety Orders, to enter into Memoranda of Understanding with employers concerning occupational safety and health, to approve long-term extensions of the time fixed for abatement when appropriate, and to enter into joint and voluntary agreements with employers and employees concerning occupational safety and health issues.

Authority: DOSH will administer this policy in compliance with all applicable laws, rules, and guidance:

- California Penal Code, Sections 143, 143.1, 143.2 and 6450 through 6457.

Procedures:

A. Variances

1. Temporary Variance

   a. Employer Option

      Any California employer may apply to the Division for a temporary order granting a variance from any Title 8 Safety Order.

   b. Application

1. Filing a Temporary Variance Application

   Employers may file an application for a temporary variance by writing a letter to the District Office in which their place of business is located or by writing a letter to the Chief of the Division.

   NOTE: The District Manager shall send a copy of all applications from employers for a temporary variance through the Regional Manager and the Deputy Chief for Field Operations to the Chief.

2. Application Content

   An application for a temporary variance shall contain the following information:

   a. A specification of the Title 8 Safety Order, or portion of thereof, from which the employer seeks a variance;

   b. A statement by the employer, and/or a statement by qualified persons to the extent the employer has relied on them, that the employer is unable to comply with the Title 8 Safety Order, or portion thereof, and a detailed state- ment of the reasons therefor;

   c. A statement of the steps the employer has taken and will take, with specific dates, to protect employees against the hazard covered by the Title 8 Safety Order;

   d. The employer's schedule for compliance, including what steps the employer has taken and will take (with specified dates) to come into compliance with the Title 8 Safety Order; and

   e. A certification that the employer has informed the employer's employees of the application. A description of how employees have been informed shall be contained in the certification. The information to employees shall also inform them of their right to petition the Division for a hearing concerning the variance.

c. Notice and Opportunity to be Heard

   1. Notice to Employees

      The applicant-employer shall provide notice to employees affected by the temporary variance of the conditions of the variance and their right to a hearing concerning the Division’s granting a variance.

   2. Variance Hearing

If the applicant-employer's employees request a hearing, the Division shall conduct an informal hearing to allow the employer's employees and the employer to present their views about the variance.

NOTE: The District Manager may issue one interim order for a temporary variance upon submission of an application by the employer showing that the employment or place of employment will be safe for employees pending a hearing on the employer's application for a temporary variance.

d. Application Evaluation

1. Criteria for Granting Variance

i. The applicant-employer has provided the information required in subsection b. above;

ii. The applicant-employer has established that the employer is unable to comply with the standard by its effective date because of the unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date;

iii. The applicant-employer is taking all available steps to safeguard the employer's employees against the hazards covered by the Title 8 Safety Order from which the employer is seeking a variance; and

iv. The applicant-employer has an effective program for coming into compliance with the Title 8 Safety Order as quickly as practicable.

2. Approval of Temporary Variance

- An application for a temporary variance shall be denied if the employer does not meet the criteria for granting a temporary variance.

i. If the employer's application for a temporary variance is denied, the District Manager shall notify the employer by letter stating that the application for a temporary variance has not been granted and the reasons why.

ii. The District Manager shall send a copy of the letter denying the temporary variance to the Chief through the Regional Manager and

the Deputy Chief for Field Operations and place another copy in the employer's case file.

3. Denial of a Temporary Variance

e. Appeal from Approval or Denial of Temporary Variance

1. Any employer or other person adversely affected by the Division's granting or denial of a temporary variance may appeal to the Occupational Safety and Health Standards Board within fifteen (15) working days from receipt of a notice granting or denying the temporary variance.

   NOTE: The Standards Board may extend the 15-day period for good cause.

2. The Standards Board shall conduct a hearing relating to the Division's granting or denial of a temporary variance.

3. The Director of the Department of Industrial Relations may seek judicial review of a Standards Board decision irrespective of whether the Director appeared or participated in the appeal to the Standards Board.

f. Temporary Variance Order

1. Content

   When granting any temporary order, the District Manager shall specify in a letter to the employer the practices, means, methods, operations, and processes which the employer must adopt and use while the temporary variance is in effect and state in detail the employer's program for coming into compliance with the Title 8 Safety Order from which the variance is granted.

2. Effect

   No temporary variance shall be in effect for longer than the period of time necessary for the employer to achieve compliance with the Title 8 Safety Order or for twelve (12) months, whichever is shorter.

3. Renewal

   A temporary variance may be renewed no more than twice by the Division provided that:

   - The employer files a renewal application;

a. The employer meets the application requirements; and

b. The employer files an application for renewal prior to the expiration date of the order.

NOTE: No single renewal of a temporary variance shall remain in effect for longer than 180 days.

2. Experimental (Temporary) Variance

a. The Division may grant a temporary variance from a Title 8 Safety Order to permit an employer to participate in an experiment, approved by the Director, designed to demonstrate or validate new techniques to safeguard the health and safety of workers.

b. The employer shall comply with all application requirements set forth in subsection 1. above in seeking an experimental variance.

c. The Division shall obtain the approval of the Director of the Department of Industrial Relations before

3. Permanent Variance

a. Application

Any employer may apply to the Occupational Safety and Health Standards Board for a permanent variance from an occupational safety and health standard, order, special order, or portion thereof, upon showing of an alternate program, method, practice, means, device or process which will provide equal or superior safety for employees.

b. Evaluation
All applications for permanent variances are evaluated by the Research and Standards Unit, or other Division Units as part of the Standards Board's process of evaluating an employer's application for a permanent variance.

c. Approval or Denial

After due consideration, the Standards Board approves or denies the employer's petition for a permanent variance.

B. Access

1. Definition

A Memorandum of Understanding is a written memorandum or letter between an employer and the Division concerning the specifics of the employer's compliance with a particular Title 8 Safety Order.

2. Use

   A Memorandum of Understanding between the Division and an employer is useful when there is potential for a dispute between an employer and the Division over the manner in which the employer will achieve compliance with a particular Title 8 Safety Order and the employer and the Division come to an agreement on how compliance can be achieved.

3. Evaluation of Workplace Conditions

   a. On-Site Investigation

      The Division shall conduct an on-site evaluation of the employer's establishment as part of its evaluation of the adequacy of an employer's compliance measures.

   b. Direction and Personnel

      The on-site evaluation shall be directed by the Deputy Chief for Health and Technical Services and shall be performed by a safety engineer or industrial hygienist under the direction of the Deputy Chief.

      NOTE: Evaluation personnel shall consult with the District Manager, compliance personnel and others at the employer's establishment who have knowledge of the compliance issues involved.

   c. Evaluation Report

      An evaluation report shall be written and formatted like a permanent variance report and shall set forth why a Memorandum of Understanding is appropriate.

4. Preparation

   The Memorandum of Understanding shall be prepared by the Deputy Chief for Health and Technical Services, reviewed by the Deputy Chief for Field Operations and the Legal Unit and submitted to the Chief for approval and signature. The Memorandum of Understanding shall contain a statement explaining the particular compliance alternative and list conditions which must be met by the employer to maintain the Memorandum in effect.

5. Issuance

   The Memorandum of Understanding shall be issued by the Chief after approval and signature.

   NOTE: Copies of the Memorandum of Understanding shall be distributed to each Regional and District Office.

C. Long-Term Abatements

1. Routine Abatement Periods

   In general, compliance personnel shall fix an abatement date for each cited violation of no more than thirty (30) days.

2. Abatement Periods from 30 to 60 Days

   If an abatement period of greater than 30 days is to be fixed, compliance personnel shall obtain approval from the District Manager.

3. Long-Term Abatement Periods

   a. Long-term abatement periods, i.e., abatement periods greater than 90 days, shall not be approved by the Regional Manager unless reviewed and approved by the Deputy Chief for Field Operations.

   b. Long-term abatement periods are suitable only for health violations where the employer requires additional time to comply with the Title 8 Safety Order because of the necessity of making extensive structural changes to the workplace or where new equipment or parts cannot be delivered within 90 calendar days.

D. Joint and Voluntary Agreements

A Joint and Voluntary Agreement is an agreement between the Division and an employer regarding how the employer will address hazards or potential hazards in the workplace which are not adequately addressed by existing Title 8 Safety Orders. Compliance personnel may be required to conduct an inspection to determine the employer's compliance with a Joint and Voluntary Agreement.