

Variances under the Occupational Safety and Health Act of 1970

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ABSTRACT. "File a request for a variance" is often the advice of an OSHA administrator to aggrieved employers when they ask what recourse there is when they feel unable to comply with regulations. It is important that all associated with filing a variance application understand the law, procedures, history, and implications of exceptions. The author explains why and how those in the field of safety should become better informed.

When a manufacturer asks what recourse he has when unable to comply with pollution regulations, the government environmental administrator usually responds with the following advice: "File a request for a variance." This simple statement has usually lead the company into a maze of regulations and red tape and sometimes a denial of the variance request by the same administrator who suggested that it be filed. Furthermore, sometimes a fine was imposed for the same violation admitted in the request. However, this can be avoided.

Attorneys must have special understanding

It is important that the practicing attorney, if requested to file a variance application, understand the law, procedures, history, and implications of exceptions. This is the intention of this presentation in regard to the Occupational Safety and Health Act (OSHA) and the variances outlined therein.

A variance can be considered as a requested exception to a regulation, rule, or law.

The variance is not a new device to the practicing attorney. Lawyers have used it as a tool for years in zoning laws, health laws, and recently environmental regulations.

This remedial device prevents an unjust and irreparable injury to the affected party. It is an equitable remedy. The applicant requests an exception from a regulation since he cannot comply with the rule due to circumstances beyond his control. In order to obtain an exception, it is alleged that no harm will come to anyone if the law is not complied with;

and it is further alleged the applicant will be substantially damaged if he is forced to comply.

This is summarized by the following formula: Variance = (is granted if) injury to the applicant (A) is greater than potential injury to the public and/or a specified group (P) or $V = A > P$.

A variance offers an answer to a client with a problem. This is especially true under OSHA and its regulations as shown by the fact that by August 31, 1972, some 240 variance applications had been submitted for approval to the Department of Labor's Occupational Safety and Health Administration. Since this procedure involves legal interpretation and precise draftsmanship, an attorney should be the major participant in its preparation and, of course, its advocacy.

Categories of variances under OSHA

OSHA sets forth several types of variances. They are the permanent, temporary, experimental and national defense exception, as well as rules relating to modifying, promulgating and revoking safety and health standards.

Section (6) (d) of OSHA authorizes the Secretary of Labor to grant a permanent variance, without time limits, after a hearing is held. Basically, this order will be granted if the employer can show that its employees' safety and health will not be impaired if the specific standard is violated.

Section (6) (b) (6) (a) of OSHA sets forth a temporary variance procedure. This is an interim device which an employer may need if additional time is required to comply with certain standards. (This section was added at the Congressional conference stage when adopting the Senate Safety Standard section. The House insisted on an amendment granting temporary variances.)

A special and unique variance can be granted as provided in section (6) (b) (6) (c) of OSHA if the Secretary of Labor or the Department of Health, Education & Welfare determine that a variance is needed to permit an employer to participate in an approved experiment designed to demonstrate or validate new and approved health-safety techniques. In addition a procedure is set forth in section 16 of OSHA which allows for an exception which may be granted if an employer is involved in the production of defense products and compliance with a standard could impair national defense due to a curtailment of production of the products. Such exceptions shall not be in effect for more than six months without

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