

**North Carolina Department of Labor
Occupational Safety and Health Division**

Raleigh, North Carolina

Field Information System

Operational Procedure Notice 118B

Subject: Administration of Variance Requests and Related Records.

A. **Purpose.**

This notice establishes the OSH Division protocol for the internal administration of variances to the adopted OSHA standards and state-specific rules contained in 13 NCAC 07A and 13 NCAC 07F, including the resulting records. It is not intended to repeat or conflict with N.C. General Statutes or N.C. Administrative Code rules and requirements.

B. **Scope.**

This notice applies statewide.

C. **Discussion.**

Variance requests, and the associated records, are as important as investigative and inspection records. Therefore, the primary objectives of this protocol are:

1. to ensure that the current status of each variance request is readily available, and
2. to ensure that an accurate variance record is maintained in a readily retrievable and predictable order.

D. **Action.**

OSH Division personnel will comply with the requirements of the attached protocol. OSH Division management will ensure that the guidance contained in this OPN is followed.

E. **Effective Date.**

OPN 118A is canceled. This OPN is effective on the date of signature. It remains in effect until revised or canceled by the director.

Signed on Original
Susan V. Haritos
Health Standards Officer

Signed on Original
Allen McNeely
Director

7/09/2010
Date of Signature

Administration of Variance Requests and Related Records

A. Introduction.

This document is an OSH Division protocol for the internal administration of identified variances, including the resulting records. It is not intended to repeat or conflict with N.C. General Statutes or N.C. Administrative Code rules and requirements.

13 NCAC 07A.0700 contains the rules of practice for administering proceedings to grant variances and other relief under G.S. 95-132. Questions related to these rules should be directed to the NCDOL Legal Affairs Division.

7 NCAC 04M.0500 contains the rules of practice for submitting or accessing records that are stored at the State Records Center. Questions related to these rules should be directed to the Department of Labor's Chief Records Officer or to the Division of Archives and History.

B. Identification.

1. Applications to the OSH Division.

Any employer, or class of employers, may apply for a temporary or permanent variance, or other relief, from the OSH Division related standard or rule.

Since no particular addressee is prescribed for such applications, applications are addressed to a variety of NCDOL officials e.g., the commissioner, the OSH director or assistant director, or bureau chiefs.

Responsibilities

Within 3 workdays of receipt of an application for variance or other relief, the addressee will forward the application and any related comments or instructions to the ETTA standards supervisor or designee.

Within 2 workdays of receipt, the ETTA standards supervisor or designee will promptly:

- a. identify a lead assessor,
- b. initiate the Variance Request Tracking Log entry,
- c. place the Tracking Log number on the application, and
- d. forward the application to the lead assessor for action.

2. Multi-State Variances

Federal OSHA issues multi-state variances. These variances may be applicable in North Carolina if the requestor performs work in North Carolina covered by the variance application. North Carolina will be provided the opportunity to provide input about the variance request during the federal review process.

The only exception to this is the specific exception contained in 29 CFR 1952.4 which prohibits State-Plan states from "...granting a variance to recordkeeping and reporting requirements under their own requirements." Variances to reporting and recordkeeping requirements must be obtained from the U. S. Department of Labor, Bureau of Labor Statistics, and such variances must be recognized by the NCDOL.

When the OSH Division takes actions associated with a multi-state variance, the related correspondence and actions will be documented.

OSH Division personnel receiving requests or specific information associated with a federal variance will, within 3 workdays of notice, notify the ETTA standards supervisor or designee.

The ETTA standards supervisor or designee will follow the steps under "responsibilities" above for review/documentation of a multi-state variance.

Instructions:

- a. The lead assessor and others as applicable will participate in technical reviews, analyses, inspections and other such activities as deemed necessary to evaluate if the proponent of the variance has demonstrated that the conditions, practices, means, methods, operations or processes proposed will provide places of employment as safe as those that would prevail if the existing standard were complied with.
- b. The lead assessor will forward all comments about the proposed variance to the standards supervisor prior to the end of the comment period specified in the *Federal Register* notice about the variance.
- c. The standards supervisor will forward any comments about the proposed variance to OSHA per the instructions/requirements in the *Federal Register*.

C. Tracking and Status Maintenance.

Responsibilities:

The ETTA standards supervisor or designee will:

1. Maintain a Variance Requests Tracking Log.

- Keep appropriate OSHNC personnel informed of variance request status changes.

The lead assessor for each variance will keep the ETTA standards supervisor or designee informed of status changes.

Instructions:

- The Variance Request Tracking Log will contain the components shown on the following sample tracking log and will be maintained on the NCDOL intranet.

SAMPLE TRACKING LOG

| OSH Division Variance Requests: Tracking Log ^{Instruction 1} | | | | | | | |
|---|------------------------|-------------|----------------|---------------------------|-------------------------------------|----------------------------|-------------------------------|
| Log Number ² | Req. Date ³ | Date Logged | Type [Tmp/Prm] | Requested by ⁴ | Standard(s) and Topics ⁵ | Lead Assessor ⁶ | Status & Remarks ⁷ |
| 1997-V-01 | | | | | | | |

- The format for OSH Division log numbers is the year followed by a "V" and a two digit sequence number. Example: 1997-V-10. If the documentation is associated with a federal variance, the log number is the year followed by "FV" and a two digit sequence number.
- The variance request letter date or, if from federal OSHA, the date of the letter requesting OSH Division input. It may also be the date that an internal action item was initiated by OSH Division.
- Insert Employer, requesting employer class representative.
- List the specific standard(s) and/or NCAC rule(s) for which a variance is applicable followed by a brief topical description. Example: 29 CFR 1910.219(a)(3) -- guarding of knitting machines.
- Typically, the lead assessor will be an ETTA standards officer; however, where the issue is a legal interpretation or is administrative/rules specific the lead assessor may be the OSH Division assistant director or the NCDOL Legal Affairs Division.
- Statuses will be entered as follows:

Under Evaluation: [Disposition actions are underway.] List completed and open actions including dates.

Active: [A temporary or permanent variance has been granted and is in force.] Include the Order Number and the date of issuance, or if federally issued, the Federal Register citation. Note future closure dates, if any.

Closed: [The variance was determined to not be necessary, was denied, or the allocated time frame for granted relief has expired.] Include closure date(s). If a single request includes both a temporary and a permanent variance, the statuses should be clearly separated.

Transferred to the State Records Center: Enter the date of transfer and the archival record number.

D. Technical Evaluations.

Instructions:

1. Within 10 workdays of assignment, the lead assessor will conduct a review of a state-specific variance application to determine if the application contains the information required by 13 NCAC 07A.0707, .0708, or .0709 as applicable.
 - a. If the application is defective, the lead assessor will:
 - i. Prepare correspondence to the applicant, including brief statement of the grounds for the denial. Refer to 13 NCAC 07A.0710 for content rules. Typically, such correspondence should be prepared for signature by the OSH Division director. However, if the original application was addressed to the commissioner, or there is another compelling reason, the director or assistant director should be consulted to determine the appropriate responder.
 - ii. If a resubmittal of the application is not anticipated, compile and submit a closed file to the ETTA standards supervisor or designee.
 - iii. If a resubmittal is anticipated, provide an updated status to the ETTA standards supervisor or designee.
 - b. If the application is not defective, the lead assessor will:
 - i. Proceed with the technical evaluation, including documentation of same. In addition to a thorough review of the application, the technical evaluation may include site visits and inspections, research relative to other alternatives, requests for submittal of additional information, or other such actions deemed necessary to document a firm basis for the final decision.
 - ii. Brief the Legal Affairs Division on the details of the issue and initiate the actions described in Section V.
2. If the action concerns a multi-state variance request, the lead assessor will immediately assess the necessary response or action dates and follow the instructions contained in Section II. B.

E. Regulatory Submittals and Actions.

Responsibilities:

The lead assessor will seek the assistance of the NCDOL Legal Affairs Division, relative to the publication of Notices, conduct of hearings, issuance of Orders and other actions required by 13 NCAC 07A.0700.

The Legal Affairs Division will assist the lead assessor in assuring that the actions required by 13 NCAC 07A.0700 meet the requirements and due dates specified by the rules. This assistance includes:

1. Preparation of input to correspondence that includes posting and documentation instructions for the applicant.
2. Preparation and submittal of Notices and Orders for publication in the *N.C. Register*.
3. Responding to comments and inquiries from the requester or regulated community.

4. Preparation for and conduct of hearings.
5. Forwarding of applicable documentation to the lead assessor for inclusion in the variance file.

F. Records Management.

1. Order of Files.

Responsibilities:

The lead assessor is responsible for compiling and maintaining an up-to-date variance file. The following file compilation instructions **may** be used to organize the variance file. Within 5 workdays of completing the evaluation stage, or when a significant period of inactivity is anticipated, the file will be submitted to the ETTA standards supervisor or designee for retention.

Within 5 workdays of receipt, ETTA standards supervisor or designee is responsible for reviewing submitted files for content and compliance with this protocol, and for entering up-to-date status information on the tracking log. In addition to the tracking log status, each folder or notebook cover should clearly indicate the status.

File Compilation Instructions:

Typically, a six section folder or notebook should be compiled and organized per the following instructions. Tabs may be omitted or added as necessary to assure clarity of the record.

If a variance is denied, or determined to not be necessary, during the early stages of evaluation, a two section folder or notebook may be used. The Tab 1 materials should be on the left and the Tab 2 materials should be on the right.

If the variance file is related to a variance under review by or issued by federal OSHA a two section folder should be used. The request for input, or *Federal Register* notice, should be on the left, and OSH Division responses and/or documentation of actions should be on the right.

Miscellaneous notes, comments, or correspondences that are **not** germane to the final resolution of the variance request should not be included in any file.

| Folder Tab or Notebook Spine | Cover |
|-------------------------------------|---|
| Log Number and; Status ¹ | Log Number Requester or Internal Identifier Standard(s) & Topic Status |
| Tab or Section ² | Title |
| 1 | Application & Correspondence ³ |
| 2 | Technical Evaluation & Background Information ⁴ |

| | |
|---|---|
| 3 | Notices ⁵ |
| 4 | Third Party Requests & Comments |
| 5 | Posting Documentation, Interim & Final Orders |
| 6 | Other ⁶ |

1. The four possible statuses are: *Under Evaluation, Active, Closed or Transferred to the State Records Center*. See the Tracking Log Instructions for the definitions of each status.
2. Within each section/tab, items should be in chronological order: newest on top.
3. Correspondence between the applicant and OSH Division.
4. Include a written evaluation of the necessity and basis for granting or denying the application, support documents, hearing attendees list(s), transcripts, and any photos (with negatives). Photos will be placed on photo sheets with date and description of photos.
5. Examples include: Notice of Intent, Notice of Filing, and Notice of Hearing.
6. Examples include: Similar variances, correspondence between OSH Division and other agencies or entities (other than the applicant).

2. Retention and Access.

Responsibilities:

The ETTA standards supervisor or designee is responsible for:

- a. Retaining submitted files in log number sequence.
- b. Providing access to the files and assuring that checkout sheets are readily available and are utilized.
- c. Pursuing the return of files that have been checked out for longer than 5 work days.

Each user of the variance files will utilize the checkout sheets provided and facilitate the successful maintenance of the variance files. Only the lead assessor may check out a file for longer than 5 workdays.

3. Audits and Archives.

Responsibilities:

The ETTA standards supervisor or designee is responsible for:

- a. At least once per 12-month cycle, conducting an internal audit to:
 - i. Verify that the tracking log is up to date and accurate.

Note: This includes assuring that variances issued by federal OSHA (e.g., multi-state variances or variances related to recordkeeping and reporting) have been identified and appropriately handled.

- ii. Verify consistency between the tracking log and the files.
 - iii. Assure that file checkout/return protocols are being followed.
- b. At least once per 5-year cycle, complying with the disposition instructions for Item 35310 of the Records Retention and Disposition Schedule for the Bureau of Education, Training, and Technical Assistance.
Note: Compliance with disposition requirements is not solely an OSH Division management prerogative---Reference N.C.G.S. 121 and 132 and 7 NCAC 04M.0500 rules.
- c. Assisting OSH Division personnel in the retrieval of records previously submitted to the State Records Center.
- d. Identifying and implementing corrective actions as necessary to ensure the efficient management of variance-related work and compliance with the requirements of this protocol and 13 NCAC 07A.0700.
- e. Preparing status reports of the activities described in items 1 through 5 and distributing the reports to interested OSH Division personnel.

Internal Audit Documentation:

Documentation of the most recent internal audit, including resolution of findings, will be maintained in the variance file retention area. No specific mat is required; however, the documentation should clearly describe the methods used to conduct the audit and the resolution of identified inconsistencies or problems.

Documentation associated with the previous audit should be destroyed when the successive audit is completed.

Note: Upon request, the State Records Center will provide the transfer forms, boxes, tape, and labels for records that are scheduled for transfer.

State Records Center Documentation:

Documentation associated with the transfer of closed variance files to the State Records Center will be permanently maintained in the variance file retention area.