

**338.153 Applications for variances -- Procedure for granting -- Temporary order.**

- (1) Any affected employer may apply to the commissioner for a rule or order for a variance from a standard promulgated under this chapter. Affected employees shall be given notice of each such application and an opportunity to participate in a hearing. The commissioner shall issue such rule or order if he or she determines on the record, after opportunity for an inspection where appropriate and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his or her employees which are as safe and healthful as those which would prevail if he or she complied with the standard. The rule or order so issued shall prescribe the conditions the employer must maintain, and the practices, means, methods, operations, and processes which he or she must adopt and utilize to the extent they differ from the standard in question. Such a rule or order may be modified or revoked upon application by an employer, employees, or by the commissioner of his or her own motion, in the manner prescribed for its issuance under this subsection at any time after six (6) months from its issuance.
- (2) (a) Any employer may apply to the commissioner for a temporary order granting a variance from a standard or any provision thereof promulgated under this section. Such temporary order shall be granted only if the employer files an application which meets the requirements of paragraph (b) of this subsection and establishes that:
  1. He or she is unable to comply with the standard by its effective date because of 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;
  2. He or she is taking all available steps to safeguard his or her employees against the hazards covered by the standard; and
  3. He or she has an effective program for coming into compliance with the standard as quickly as practicable.

Any temporary order issued under this subsection shall prescribe the practices, means, methods, operations, and processes which the employer must adopt and use while the order is in effect and state in detail his or her program for coming into compliance with the standard. Such a temporary order may be granted only after notice to employees and an opportunity for a hearing; provided, that the commissioner may issue one (1) interim order to be effective until a decision is made on the basis of the hearing. No temporary order may be in effect for longer than the period needed by the employer to achieve compliance with the standard or one (1) year, whichever is shorter, except that such an order may be renewed not more than twice:

1. So long as the requirements of this subsection are met; and
2. If an application for renewal is filed at least ninety (90) days prior to the

expiration date of the order. No interim renewal of an order may remain in effect for longer than one hundred eighty (180) days.

- (b) An application for a temporary order under this subsection shall contain:
1. A specification of the standard or portion thereof from which the employer seeks a variance;
  2. A representation by the employer, supported by representations from qualified persons having firsthand knowledge of the facts represented, that he or she is unable to comply with the standard or portion thereof and a detailed statement of the reasons therefor;
  3. A statement of the steps he or she has taken and will take (with specific dates) to protect employees against the hazard covered by the standard;
  4. A statement of when he or she expects to be able to comply with the standard and what steps he or she has taken and what steps he or she will take (with dates specified) to come into compliance with the standard; and
  5. A certification that he or she has informed his or her employees of the application by giving a copy thereof to their authorized representative, posting a statement giving a summary of the application and specifying where a copy may be examined at the place or places where notices to employees are normally posted, and by other appropriate means. 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 commissioner for a hearing.
- (c) The commissioner is authorized to grant a variance from any standard or portion thereof whenever he or she determines that such variance is necessary to permit an employer to participate in an experiment approved by him or her designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers.

**Effective:** July 15, 2010

**History:** Amended 2010 Ky. Acts ch. 24, sec. 1762, effective July 15, 2010. -- Amended 1984 Ky. Acts ch. 414, sec. 20, effective July 13, 1984. -- Created 1974 Ky. Acts ch. 311, sec. 2.