

# APPLICATION FOR A VARIANCE

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## **437-001-0400 Application for a Variance.**

**(1)** Any employer may apply for a variance from any rule which specifically affects working conditions. This application may be submitted:

- (a)** On a form provided by the Division; or
- (b)** In any written form that includes all information required by OAR 437-001-0400(2) and (3).

**(2)** An application for a variance must contain:

- (a)** The name and address of the employer;
- (b)** The address and location of the place of employment;
- (c)** The rule, identified by number, from which the variance is sought;
- (d)** The type of variance desired (see OAR 437-001-0015);
- (e)** The means by which employees will be protected from the hazard until final action is taken on the variance request;
- (f)** A description of the means proposed to be used to provide employment which is as safe and healthful as that obtained by compliance with the rule;
- (g)** Certification that all affected employees have been informed of the application and of their right to comment on it by:
  - (A)** Giving a copy of the variance application to the authorized employee representative;
  - (B)** 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 (or in lieu of such summary, the posting of the application itself); and
  - (C)** By other appropriate means:
- (h)** A description of how employees have been informed of the application and of their right to comment on it to the Administrator, OR-OSHA Division, 350 Winter St. NE, Salem, Oregon, before it becomes a final order;
- (i)** A statement of whether the employer has previously filed application for a similar variance with any state or federal agency.

**(3)** If the employer is applying for a research variance, the application shall contain the following additional information:

- (a)** The purpose and contribution of the intended research;

# APPLICATION FOR A VARIANCE / INTERIM ORDER RELATING TO A VARIANCE

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- (b) A discussion of the research methods;
  - (c) The research schedule, including the projected completion date;
  - (d) A description of the hazards to which employees may be exposed and the steps to be taken to protect the employees safety and health;
  - (e) Biographical information to indicate the competence of the research staff;
  - (f) Assurances that the project shall be funded adequately; and
  - (g) Assurances that the Division shall be given a copy of the research report prepared under the variance. However, no trade secret, patented or patentable material or data need be submitted by the employer.
- (4) If the employer is applying for a temporary variance, the application shall contain the following additional information:
- (a) A statement of facts why the applicant is unable to comply with the rule by the effective date which is supported by representations from qualified persons having firsthand knowledge of the facts represented, and include data on:
    - (A) Unavailability of professional or technical personnel; or
    - (B) Unavailability of materials and equipment needed; or
    - (C) Inability to complete the construction or alteration of facilities by the effective date.
  - (b) An effective program including a timetable for complying with the rule; and
  - (c) The specific steps taken to protect employees against the hazard.

**Stat. Auth.:** ORS 654.025(2) and 656.726(3).

**Hist:** WCB Admin. Order 19-1974, f. 6-5-74, ef. 7-1-74.  
WCB Admin. Order, Safety 8-1975, f. 8-5-75, ef. 9-1-75.  
WCD Admin. Order, Safety 5-1978, f. 6-22-78, ef. 8-15-78;  
WCD Admin. Order, Safety 4-1981, f. 5-22-81, ef. 7-1-81.  
WCD Admin. Order, Safety 6-1982, f. 6-28-82, ef. 8-1-82.  
APD Admin. Order 7-1988, f. 6-17-88, ef. 7-1-74.

## **437-001-0405 Interim Order Relating to a Variance.**

- (1) An employer applying for a variance may request an interim order to be effective until final action is taken on the variance application. The request for an interim order:
- (a) May be included in the variance application;
  - (b) Shall include all information required by OAR 437-001-0400(2); and
  - (c) Must state the reasons why the interim order should be granted.

## **INTERIM ORDER RELATING TO A VARIANCE / ADMINISTRATIVE ACTION ON VARIANCE APPLICATION**

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- (2) The Administrator shall decide whether to issue an interim order on the basis of information provided in the application.
- (3) If an interim order is granted, it shall be sent to the employer. The employer shall inform affected employees by posting a copy of the interim order for as long as the order is in effect.
- (4) If an interim order is granted, the action shall be published in the manner required by OAR 437-001-0410(1).
- (5) If the interim order is denied, the employer shall be given prompt written notice of, and the reasons for, the denial.
- (6) An interim order or a written denial shall include notice of the employer's and employees' appeal rights as contained in ORS 654.056 and OAR 438-085-0006 through 438-085-0870.

**Stat. Auth.:** ORS 654.025(2) and 656.726(3).  
**Hist:** WCB Admin. Order 19-1974, f. 6-5-74, ef. 7-1-74.  
WCD Admin. Order, Safety 5-1978, f. 6-22-78, ef. 8-15-78.  
WCD Admin. Order, Safety 4-1981, f. 5-22-81, ef. 7-1-81.  
WCD Admin. Order, Safety 6-1982, f. 6-28-82, ef. 8-1-82.  
APD Admin. Order 7-1988, f. 6-17-88, ef. 7-1-74.

### **437-001-0410 Administrative Action on Variance Application.**

- (1) After a variance request is determined to be complete and procedurally adequate, as provided in OAR 437-001-0400, the Division shall publish the request for one day in at least one daily newspaper with general circulation throughout Oregon. The notice shall include:
- (a) The name of the applicant;
  - (b) The rule, also identified by number, from which the variance is sought;
  - (c) A brief description of the variance request;
  - (d) Notice of opportunity for public comment and hearing;
  - (e) Information on how interested persons may learn of the Division's decision on the variance application; and
  - (f) The address of the Division office from which further information may be obtained.
- (2) The Division may conduct an on-site review of the equipment or processes involved in the requested variance.

# ADMINISTRATIVE ACTION ON VARIANCE APPLICATION / HEARINGS FOR VARIANCE APPLICATIONS

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(3) A variance, if granted, shall have no retroactive effect. It shall not be the basis for amending or withdrawing a citation.

**Stat. Auth.:** ORS 654.025(2) and 656.726(3).

**Hist:** WCB Admin. Order 19-1974, f. 6-5-74, ef. 7-1-74.  
WCB Admin. Order 33-1974, f. 9-5-74, ef. 9-26-74.  
WCB Admin. Order, Safety 8-1975, f. 8-5-75, ef. 9-1-75.  
WCD Admin. Order, Safety 5-1978, f. 6-22-78, ef. 8-15-78.  
WCD Admin. Order, Safety 4-1981, f. 5-22-81, ef. 7-1-81.  
APD Admin. Order 7-1988, f. 6-17-88, ef. 7-1-74.

**437-001-0411 Hearings for Variance Applications.** Affected employers or employees shall be given the opportunity to request a hearing on an application.

(1) Request for hearings must be made in the following manner:

(a) The request must be made within 20 days of publication of the application;

(b) A request must be made to the Administrator and must contain:

(A) A concise statement of facts showing how the employer or employee would be affected by the relief applied for;

(B) A statement opposing any or all portions of the application, and a concise summary of the evidence supporting each item opposed; and

(C) Any views or arguments on any issue of fact or law presented.

(2) Notice of hearing shall be given by the Administrator to affected persons and shall contain:

(a) Time, place and nature of hearing;

(b) Legal authority under which the hearing will be held; and

(c) The issues to be discussed.

(3) The hearing shall be conducted by the Administrator in a manner which will allow all affected persons to submit information on the application.

(4) The Administrator shall evaluate all information submitted at the hearing and make a determination in the merits of the application.

**Stat. Auth.:** ORS 654.025(2) and 656.726(3).

**Hist:** WCD Admin. Order, Safety 6-1982, f. 6-28-82, ef. 8-1-82.  
APD Admin. Order 7-1988, f. 6-17-88, ef. 7-1-74.

## CRITERIA FOR VARIANCE APPROVAL / DECISION ON VARIANCE REQUEST

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### 437-001-0415 Criteria for Variance Approval.

(1) An application for a permanent variance shall be granted only if the applicant demonstrates, and the Division determines which includes the consideration of employee or the public comments, that the conditions, practices, operations or processes proposed to be used by the applicant shall provide employment which is as safe and healthful as that obtained by compliance with the rule.

(2) An application for a temporary variance shall be granted only if the applicant demonstrates, and the Division determines which includes the consideration of employee or the public comments, that the applicant is unable to comply with a new rule by its effective date, that the applicant has an effective program for complying with the rule by the agreed upon timetable and that all available steps are being taken in the interim to safeguard employees against the hazard covered by the rule.

(3) An application for a research variance shall be granted only if the applicant demonstrates, and the Division determines which includes the consideration of employee or public comments, that the conditions, practices, operations or processes used shall adequately safeguard employees against the hazards covered by the rule, while demonstrating or validating new or improved safety or health techniques or products.

**Stat. Auth.:** ORS 654.025(2) and 656.726(3).

**Hist:** WCD Admin. Order, Safety 5-1978, f. 6-22-78, ef. 8-15-78.

WCD Admin. Order, Safety 4-1981, f. 5-22-81, ef. 7-1-81.

WCD Admin. Order, Safety 6-1982, f. 6-28-82, ef. 8-1-82.

APD Admin. Order 7-1988, f. 6-17-88, ef. 7-1-74.

### 437-001-0420 Decision on Variance Request.

(1) If a variance is granted, an order of variance shall be issued. The order shall:

(a) State the name of the employer to whom the variance is granted;

(b) Identify the place of employment at which the variance is applicable;

(c) State the type of variance granted;

(d) State the specific rule to which the variance applies;

(e) Describe the alternative methods or safeguards to be used by the employer while the variance is in effect;

(f) Advise that the employer may be cited for any violation of the conditions established by the variance;

# DECISION ON VARIANCE REQUEST / EMPLOYER'S DUTY TO MEET VARIANCE TERMS

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- (g) Inform affected employees of their right to appeal the variance decision; and
  - (h) Inform affected persons that if no appeal is filed within 20 days of receipt of the order, the variance approval becomes a final order of the Director and subject to review only as specified in OAR 437-001-0430.
- (2) If a variance is denied, a notice of denial shall be issued. The notice shall:
- (a) Give the reasons for the denial;
  - (b) Notify the employer and employees of their appeal rights;
  - (c) Inform affected persons that if no appeal is filed within 20 days of receipt of the notice, the variance denial becomes a final decision without affecting the employer's right to submit another application; and
  - (d) Advise the employer that a compliance inspection may be made within 30 days.
- (3) A copy of any variance order or denial must be posted for 20 days.
- (4) A variance that has been denied, or that has expired, may be followed by a compliance inspection within 30 days.

**Stat. Auth.:** ORS 654.025(2) and 656.726(4).

**Stats. Implemented:** ORS 654.001 through 654.326, 654.412 through .423, 654.991.

**Hist:** WCB Admin. Order 19-1974, f. 6-5-74, ef. 7-1-74.

WCB Admin. Order, Safety 8-1975, f. 8-5-75, ef. 9-1-75.

WCD Admin. Order, Safety 5-1978, f. 6-22-78, ef. 8-15-78.

WCD Admin. Order, Safety 4-1981, f. 5-22-81, ef. 7-1-81.

APD Admin. Order 7-1988, f. 6-17-88, ef. 7-1-74.

OR-OSHA Admin. Order 10-2009, f. 10/5/09, ef. 10/5/09.

## 437-001-0425 Employer's Duty to Meet Variance Terms.

- (1) A variance is not effective until the employer has complied with its terms and requirements.
- (2) An employer may be cited for violating the terms of a variance. (See ORS 654.022)

**Stat. Auth.:** ORS 654.025(2) and 656.726(3).

**Hist:** WCB Admin. Order 19-1974, f. 6-5-74, ef. 7-1-74.

WCB Admin. Order, Safety 8-1975, f. 8-5-75, ef. 9-1-75.

WCD Admin. Order, Safety 5-1978, f. 6-22-78, ef. 8-15-78.

WCD Admin. Order, Safety 4-1981, f. 5-22-81, ef. 7-1-81.

APD Admin. Order 7-1988, f. 6-17-88, ef. 7-1-74.

## MODIFICATION OR REVOCATION OF A VARIANCE

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### 437-001-0430 Modification or Revocation of a Variance.

**(1)** A variance may be modified or revoked after it has been in effect 6 months or longer upon:

**(a)** Request from the employer, an affected employee or an employee representative which may be in writing, the request shall contain:

**(A)** The name and address of the applicant;

**(B)** A description of the relief which is sought;

**(C)** A statement setting forth with particularity the grounds for relief;

**(D)** If the applicant is an employer, a certification that the applicant has informed affected employees of the application by:

**(i)** Giving a copy thereof to their authorized representative;

**(ii)** Posting at the place or places where notices to employees are normally posted, a statement giving a summary of the application and specifying where a copy of the full application may be examined (or, in lieu of the summary, posting the application itself); and

**(iii)** Other appropriate means.

**(E)** If the applicant is an affected employee, a certification that a copy of the application has been furnished to the employer; and

**(F)** Any request for a hearing, as provided for in these rules.

**(b)** Notification and confirmation that the alternative methods or safeguards required by the variance are not fully complied with; or

**(c)** A Division review.

**(2)** The Division shall publish the proposed modification or revocation for one day in at least one daily newspaper with general circulation throughout Oregon. Exception: A revocation based on a company being out of business or no longer needed does not need to be published. The notice shall include:

**(a)** The name of applicant;

**(b)** The rule, also identified by number, from which the variance had been granted;

**(c)** A brief description of the variance and why relief is sought;

# MODIFICATION OR REVOCATION OF A VARIANCE

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- (d) Notice of opportunity for public comment and hearing and that a request for hearing shall be made within 20 days of publication;
  - (e) Information on how interested persons may learn of the Division's decision on the variance; and
  - (f) The address of the Division office from which further information may be obtained.
- (3) The Division may conduct an on-site review of the equipment or processes involved in the proposed, revoked or modified variance.
- (4) The employer and affected employees shall be advised in writing of modification or revocation of the variance. The modification or revocation order shall state:
- (a) The name and address of the employer;
  - (b) The address and location of the place of employment involved;
  - (c) The rule, identified by number, from which the variance was granted;
  - (d) The type of variance issued;
  - (e) The reasons for modification or revocation of the variance; and
  - (f) The employer's and affected employees appeal rights.
- (5) Any request for a hearing shall be made within 20 days of publication and shall include a short and plain statement of:
- (a) How the proposed modification or revocation would affect the requesting party; and
  - (b) What the requesting party would seek to show on the subjects or issues involved.

**Stat. Auth.:** ORS 654.025(2) and 656.726(4).

**Stats. Implemented:** ORS 654.001 through 654.295.

**Hist:** WCB Admin. Order 19-1974, f. 6-5-74, ef. 7-1-74.

WCB Admin. Order, Safety 8-1975, f. 8-5-75, ef. 9-1-75.

WCD Admin. Order, Safety 5-1978, f. 6-22-78, ef. 8-15-78.

WCD Admin. Order, Safety 4-1981, f. 5-22-81, ef. 7-1-81.

WCD Admin. Order, Safety 6-1982, f. 6-28-82, ef. 8-1-82.

APD Admin. Order 7-1988, f. 6-17-88, ef. 7-1-74.

OR-OSHA Admin. Order 6-2003, f. 11/26/03, ef. 11/26/03.

## EFFECT OF A VARIANCE GRANTED BY THE U.S. SECRETARY OF LABOR

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### **437-001-0435 Effect of a Variance Granted by the U.S. Secretary of Labor.**

**(1)** If an employer requesting a variance from an Oregon rule submits proof that a variance from an equivalent federal rule has been granted by the U.S. Secretary of Labor, the federal variance shall be accepted in lieu of the information required by OAR 437-001-0400, Application for a Variance.

**(2)** If an employer is cited for violating an Oregon rule equivalent to a federal rule for which a variance has been granted by the U.S. Secretary of Labor, and all conditions of that variance are being met, the Administrator shall consider the federal variance as a possible defense against the citation.

**Stat. Auth.:** ORS 654.025(2) and 656.726(3).

**Hist:** WCB Admin. Order 19-1974, f. 6-5-74, ef. 7-1-74.

WCD Admin. Order, Safety 5-1978, f. 6-22-78, ef. 8-15-78.

APD Admin. Order 7-1988, f. 6-17-88, ef. 7-1-74.

