

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

Raleigh, North Carolina

Field Information System

Operational Procedure Notice 118A

Subject: Administration of Variance Requests and Related Records.

A. Purpose.

This notice establishes the OSHNC 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. Expiration.

This OPN amends and cancels OPN 118A. It is effective on the date of signature and will remain in effect until amended or canceled by the Director.

E. Action.

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

Susan V. Haritos
Health Standards Officer

Robert K. Andrews, Jr.
Director

Date of Signature

Administration of Variance Requests and Related Records

A. Introduction.

This document is an OSHNC 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 OSHNC Assistant Director or Regulatory Coordinator.

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 (currently Marge Howell: 733-2355) or to the Division of Archives and History (currently Sharon A. McGlothen: 733-3540).

B. Identification.

1. Applications to OSHNC.

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

Since no particular addressee is prescribed for such applications, applications are addressed to a variety of DOL officials e.g., the Commissioner, the Director or Assistant Director of OSHNC, any of the OSHNC 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 OSHNC ETTA Standards Supervisor or designee.

Within 2 workdays of receipt, the OSHNC ETTA Standards Supervisor or designee will promptly:

- a. identify a Lead Assessor,
- b. initiate an OSHNC 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 record keeping and reporting requirements under their own requirements." Variances to reporting and record keeping requirements must be obtained from the U. S. Department of Labor, Bureau of Labor Statistics, and such variances must be reorganized by OSHNC.

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

OSHNC 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 for review of a multi-state variance.

Instructions:

- a. Upon receipt of notification from federal OSHA that a multi-state variance request is under consideration, the Lead Assessor and others as appropriate will participate in reviewing the application pursuant to the process defined in 29 CFR 1905.10(b), 29 CFR 1905.11(b) and 29 CFR 1905.14.

If the application is found to be deficient, a copy of the federal response letter and other documentation as appropriate will be retained as an OSHNC variance record.

- b. If the application is acceptable, 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.

Concurrently, the **Lead Assessor with the assistance of the Department's legal staff** will ensure that Notices are published in the *N.C. Register* with the rules contained in 13 NCAC 07A.0700.

Documentation of these activities will be compiled by the **Lead Assessor** for retention as an OSHNC variance record.

c. The **Lead Assessor with the assistance of the Department's legal staff** will coordinate with federal OSHA to ensure that processing schedules (e.g., publications, posting requirements, hearings, and effective dates) also meet the requirements of N.C.G.S 95-132 and 13 NCAC 07A.0700.

C. Tracking and Status Maintenance.

Responsibilities:

The ETTA Standards Supervisor or designee will:

1. maintain a Variance Requests Tracking Log.
2. 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:

1. The OSHNC Variance Request Tracking Log will contain the components shown on the following sample tracking log and will be maintained on an OSHNC accessible read-only directory of the OSHNC LAN and in the variance file retention area.

SAMPLE TRACKING LOG

OSHNC 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							

2. The format for OSHNC 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.
3. The variance request letter date or, if from federal OSHA, the date of the letter requesting OSHNC input. It may also be the date that an internal action item was initiated by OSHNC.
4. Insert Employer, requesting employer class representative, or "federal OSHA".
5. 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.

6. 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 OSHNC Assistant Director or the DOL Legal Staff.

7. 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 OSHNC 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 an interview 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 OSHNC 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 DOL Legal Staff 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 DOL Legal Staff, relative to the publication of Notices, conduct of Hearings, issuance of Orders and other actions required by 13 NCAC 07A.0700.

The DOL Legal Staff 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 in accordance with the requirements specified in the following File Compilation Instructions. 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 construction 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 OSHNC responses and/or documentation of actions should be on the right.

Miscellaneous notes, comments, or correspondence 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 OSHNC.
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, Notice of Hearing.
6. Examples include: Similar variances, correspondence between OSHNC 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 provided checkout sheets and facilitate the successful maintenance of the variance files. Only the Lead Assessor may check out a file for longer than 5 work days.

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 record keeping 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 OSHNC management perogative---Reference N.C.G.S. 121 and 132 and 7 NCAC 04M.0500 rules.
- c. Assisting OSHNC 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 OSHNC personnel.

Internal Audit Documentation:

Documentation of the most recent internal audit, including resolution of findings, will be maintained in the OSHNC 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 OSHNC variance file retention area.