WEST VIRGINIA CODE: §21-3A-7

§21-3A-7. Adoption of federal and state standards; variances.

(a) The commissioner, on or before July 1, 1987, shall provide at the minimum, for the adoption of all occupational safety and health standards, amendments or changes adopted or recognized by the United States secretary of labor under the authority of the Occupational Safety and Health Act of 1970, which are in effect on the effective date of this section. Where no federal standards are applicable, or where standards more stringent than the federal standards are deemed advisable, the commissioner shall provide for the development of such state standards as will comport with the purposes of this act. Standards shall be adopted through state administrative procedures.

(b) In the event of emergency or unusual situations, the commissioner shall provide for an emergency temporary standard to take effect immediately if he determines:

(1) Employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards; and

(2) The emergency standard is necessary to protect employees from such danger.

The emergency standard may be in effect not longer than one hundred eighty days or, if renewed in compliance with the laws of this state governing the adoption or extension of rules, not longer than sixty additional days. On or before the expiration date of the emergency standard or renewal thereof, the commissioner shall develop a permanent standard to replace the emergency standard.

(c) Any standard promulgated shall prescribe the use of labels or other appropriate forms of warning necessary to ensure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment and, where appropriate, proper conditions and precautions of safe use or exposure. The standard shall also prescribe suitable protective equipment and control procedures for use in connection with such hazards and shall provide for measuring employee exposure in the manner necessary for the protection of employees. In addition, where appropriate, the standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available to employees exposed to such hazards in order to determine any adverse effect from that exposure.

(d) 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. A temporary order shall be granted if the employer files an application which meets the requirements of subsection (e) of this section and establishes that:

(1) He is unable to comply with a standard by its effective date because of unavailability of

WV Legislature

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 is taking all available steps to safeguard employees against the hazards covered by the standard; and

(3) He 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 program for coming into compliance with the standard. A temporary order may be granted only after notice by the commissioner to employees and an opportunity for a hearing before the commissioner: Provided, That the commissioner may issue one 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 year, whichever is shorter: Provided, however, That an order may be renewed if the requirements of this subsection are met and if an application for renewal is filed at least ninety days prior to the expiration date of the order. No interim renewal of an order may remain in effect longer than one hundred eighty days.

(e) An application for a temporary variance order 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 who have firsthand knowledge of the facts represented, that he 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 has taken and will take, with specific dates, to protect employees against the hazard covered by the standards;

(4) A statement of when he expects to comply with the standard and what steps he has taken and what steps he will take, with dates specified, to come into compliance with the standard; and

(5) A certification that he has informed his 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 inform them of their right to petition the commissioner for a hearing. The commissioner is authorized to grant a variance from any standard or portion thereof

WV Legislature

whenever he determines that a variance is necessary to permit an employer to participate in an experiment, approved by the commissioner, designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers.

(f) Any affected employer may apply to the commissioner for an order granting a variance from a standard promulgated under this section. Affected employees shall be given notice of each such application and an opportunity to participate in a hearing before the commissioner. The commissioner shall issue such order if he 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 which are as safe and healthful as those which would prevail if he complied with the standard. The order issued shall prescribe the conditions the employer must maintain and the practices, means, methods, operations and processes which he must adopt and utilize to the extent they differ from the standard in question. The order may be modified or revoked upon application by an employer or employees, or by the commissioner on his own motion, in the manner prescribed for its issuance under this subsection at any time after six months from its issuance.

(g) Any employee who may be adversely affected by a standard or variance or regulation issued under this section may challenge the validity or applicability of a standard or variance or regulation by bringing an action for a declaratory judgment.

(h) It is the expressed intent of the Legislature that an unlimited number of variances may be granted, if the conditions of this section are met.

WV Legislature