



**DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
Michigan Occupational Safety and Health Administration (MIOSHA)**

MIOSHA SAFETY AND HEALTH STANDARDS

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DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
BOARD OF HEALTH AND SAFETY COMPLIANCE AND APPEALS
OCCUPATIONAL SAFETY AND HEALTH STANDARDS

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(By authority conferred on the board of health and safety compliance and appeals by section 46 of Act No. 154 of the Public Acts of 1974, as amended, and section 33 of Act No. 306 of the Public Acts of 1969, as amended, being §§408.1046 and 24.233 of the Michigan compiled Laws)

R 408.21413, R 408.21415, R 408.21417, R 408.21422, and R 408.21442 of the Michigan Administrative Code, appearing on pages 8828 to 8830, and 8833 of the 1976 Annual Supplement to the Code, are amended to read as follows:

MIOSHA SAFETY AND HEALTH STANDARD
PART 4. PROCEDURES

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GENERAL PROVISIONS

R 408.21401. Scope.

Rule 401. (1) These rules shall govern proceedings in contested cases before the board or a hearings officer.

(2) Proceedings in a hearing before the board or a hearings officer shall also be governed by chapter 4 of Act No. 306 of the Public Acts of 1969, as amended, being §24.271 et seq. of the Michigan Compiled Laws, and the act.

R 408.21403. Definitions; A to D.

Rule 403. (1) "Act" means the Michigan occupational safety and health act, Act No. 154 of the Public Acts of 1974, as amended, being §408.1001 et seq. of the Michigan Compiled Laws.

(2) "Board" means the board of health and safety compliance and appeals.

(3) "Bureau" means the bureau of safety and regulation or the bureau of environmental and occupational health.

(4) "Citation" means a written communication issued by the department to an employer pursuant to section 33 of the act.

(5) "Day" means a calendar day.

(6) "Department" means the department of labor or the department of public health.

(7) "Director" means the director of the department of labor or his authorized representative, or the director of the department of public health or his authorized representative.

R 408.21405. Definitions; E to P.

Rule 405. (1) "Executive secretary" means secretary to the board.

(2) "Party" means the employer cited, the employee or employees affected by the citation, or their legal representative, and the department.

(3) "Person" means 1 or more individuals, partnerships, associations, corporations, business trusts, representatives, an organized group of individuals, or the state or a political subdivision of the state, or an agency, instrumentality, or authority thereof.

R 408.21411. Computation of time.

Rule 411. In the computation of the period of time within which an act shall be performed or appeal filed, the calendar day from which the act shall be performed or appeal filed shall be excluded in the computation of time. The calendar day on which a compliance therewith is required shall be included. If the last day within which the act shall be performed or appeal filed is a Saturday, Sunday, or a legal holiday, that day shall be excluded and the period shall run until the end of the next day which is neither a Saturday, Sunday, or legal holiday.

R 408.21412. Extension of time.

Rule 412. Requests for an extension of time for the filing of any document or application shall be received in advance of the date on which the document or application is due to be filed.

R 408.21413. Filing.

Rule 413. (1) All documents, with the exception of the notice of appeal, shall be filed with the Board of Health and Safety Compliance and Appeals, State Secondary Complex, 7150 Harris Drive, Box 30015, Lansing, Michigan 48909. The notice of appeal shall be filed with the division of the department that issued the citation.

(2) Delivery for filing may be accomplished by registered, certified, or first class mail or by personal delivery at the Board of Health and Safety Compliance and Appeals, State Secondary Complex, 7150 Harris Drive, Box 30015, Lansing, Michigan 48909.

(3) Filing is deemed effective at the time of mailing or at the time of personal service at the board. The mailing date shall be presumed to be the postmark date appearing on the envelope if postage was prepaid and the envelope was properly addressed.

R 408.21414. Protection of trade secrets.

Rule 414. Upon application of a party, the board or a hearings officer shall issue such orders as may be appropriate to protect the confidentiality of trade secrets obtained in connection with an inspection, investigation, or proceedings conducted pursuant to the act.

R 408.21415. Responsibility of employers to notify employees of proceedings.

Rule 415. (1) The employer shall, upon filing an appeal at the place where citations are required to be posted, post a copy of the notice of appeal and serve, by prepaid postage, first class mail, or by personal delivery, a copy of the notice of appeal on an authorized employee representative. The notice shall inform the affected employees of their right to party status and of the availability of all pleadings for their inspection and copying at reasonable times. The notice shall remain posted until the notice of hearing is received and posted. The employee rights statement made in the following form shall be deemed to comply with this rule: "(name of employer) Your employer has been cited by the (Michigan Department of Labor or Michigan Department of Public Health) for violation of an occupational safety or health standard. The citation (or penalty) has been contested and will be the subject of a hearing before the Board of Health and Safety Compliance and Appeals. Affected employees are entitled to participate as parties under the terms and conditions established by the Board of Health and Safety Compliance and Appeals in its rules of procedure. Notice of intent to participate should be sent to the Board of Health and Safety Compliance and Appeals, Secondary Complex, 7150 Harris Drive, Box 30015, Lansing, Michigan 48909. All documents filed relative to this matter and a copy of the board rules, may be inspected at (place reasonably convenient to employees, preferably at or near work place)."

(2) Where appropriate, the second sentence of the above notice shall be deleted and the following sentence shall be substituted: "The reasonableness of the period prescribed by the (Department of Labor or Department of Public Health) for the abatement of the violation has been contested and will be the subject of a hearing before the Board of Health and Safety Compliance and Appeals."

R 408.21416. Responsibility of employee to notify employer and other employees of proceedings.

Rule 416. Where an employee petition relating to the reasonableness of the abatement period is filed by an employee or an authorized employee representative, a copy of the employee petition shall be provided to the employer by the department for posting at or near the place where the citation is required to be posted.

R 408.21417. Parties and representatives.

Rule 417. (1) Employees may elect to participate as parties at any time before the commencement of a hearing, unless, for good cause shown, the board allows an election at a later time.

(2) Where an employee appeal is filed with respect to the reasonableness of a period of abatement of a violation, the employer charged with the responsibility of abating the violation may elect party status at any time before the commencement of the hearing, unless, for good cause shown, the board allows an election at a later time.

(3) An authorized employee representative who files an appeal shall be responsible for serving a copy of the appeal with an authorized employee representative whose members are affected.

(4) The department shall be a party to all proceedings before the board.

R 408.21418. Representative of parties.

Rule 418. (1) A party may appear in person or by a representative.

(2) Nothing contained herein shall be construed to require a representative to be an attorney-at-law.

DOCUMENTS

R 408.21421. Form of documents.

Rule 421. (1) There are no specific requirements relative to the form of documents.

(2) A document shall contain:

(a) A caption sufficient to identify the parties.

(b) The board's docket number, if assigned.

(c) A clear, plain statement of the relief sought, together with the grounds therefor.

(d) A signature by the party involved or by his representative.

R 408.21422. Notice of hearing.

Rule 422. (1) The Board shall, immediately upon receiving a notice of hearing from the department, send the notice of hearing to all parties. The employer shall post a copy of the notice of hearing at the place where the notice of appeal was required to be posted, and serve by prepaid postage, first class mail, or by personal delivery, a copy of the notice on an authorized employee representative. Notice of hearing shall remain posted until the conclusion of the hearing.

(2) The notice of hearing, which has been prepared by the department, shall have endorsed thereon prior to the mailing to the parties, a date of hearing.

(3) The notice of hearing shall comply with the requirements of section 71 of Act No. 306 of the Public Acts of 1969, as amended, being §4.271 of the Michigan Compiled Laws, as follows:

(a) The parties shall be given an opportunity for a hearing without undue delay.

(b) The parties shall be given a reasonable notice of the hearing. The notice shall include:

(i) A statement of the date, hour, place, and nature of the hearing. Unless otherwise specified in the notice, the hearing shall be held at the principal office of the agency.

(ii) A statement of the legal authority and jurisdiction under which the hearing is to be held.

(iii) A reference to the particular sections of the statutes and rules involved.

(iv) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is given, the initial notice may state the issues involved. Thereafter, on application, the agency or other party shall furnish a more definite and detailed statement of the issues.

R 408.21423. Intervention.

Rule 423. (1) A petition for leave to intervene may be filed at any state of a proceeding before commencement of the hearing.

(2) The petition shall set forth the interest of the petitioner in the proceeding and show that the participation of the petitioner shall assist in the determination of the issues in question, and that the intervention shall not unnecessarily delay the proceeding.

(3) The board or the hearings officer may grant a petition for intervention to such an extent and upon such terms as the board or the hearings officer determines.

R 408.21424. Statement of position and oral participation.

Rule 424. At any time prior to the commencement of a hearing, a person entitled to appear as a party or an intervenor may file a statement of position with respect to any issue to be heard.

R 408.21425. Withdrawal of notice of appeal.

Rule 425. At any stage of the proceeding, a party may withdraw his appeal or petition.

R 408.21426. Pre-hearing conference.

Rule 426. (1) At any time before a hearing, the board or hearings officer, on its own motion or on motion of a party, may direct the parties to exchange information or to participate in a pre-hearing conference for the purpose of considering matters which will tend to simplify the issues or expedite the proceedings.

(2) The hearings officer shall issue a pre-hearing statement which shall include the agreements reached by the parties. This statement shall be served on the parties and shall be a part of the record.

R 408.21427. Issuance of subpoenas; petition to revoke or modify subpoenas; right to inspect or copy data.

Rule 427. (1) The board shall, on the written application of a party, issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including relevant books, records, correspondence, or documents, in his possession or under his control. An application for a subpoena may be made ex parte. The subpoena shall show on its face the name and address of the party at whose request the subpoena was issued.

(2) Witness fees shall be paid to subpoenaed witnesses by the party who sought the subpoena. Witnesses ordered to appear in a proceeding pending before the board shall be entitled to the same fees as paid for like services in the circuit court.

R 408.21428. Failure to appear.

Rule 428. (1) If a party fails to appear in a contested case after proper notice, the hearing may proceed in the absence of the party.

(2) The hearings officer, upon request filed within 10 days after the scheduled hearing date and upon a showing of good cause, may excuse the failure to appear. In that event, the hearing shall be rescheduled.

R 408.21429. Transcript of testimony.

Rule 429. A hearing shall be recorded verbatim. A transcript of the testimony shall be prepared upon request of a party or the board. A transcript shall be duly certified by the reporter. Parties requesting a transcript shall pay for the transcript.

HEARINGS

R 408.21431. Duties and powers of hearings officer.

Rule 431. (1) The hearings officer shall conduct a fair and impartial hearing, assure that the facts are fully elicited, adjudicate all issues, and avoid delay.

(2) The hearings officer shall have authority, with respect to cases assigned to him between the time he is designated and the time he issues his report and subject to the rules of the board and the provisions of chapter 4 of Act No. 306 of the Public Acts of 1969, being §24.271 et seq. of the Michigan Compiled Laws, to do the following:

- (a) Administer oaths and affirmations.
- (b) Sign and issue subpoenas in the name of the agency and require the attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence.
- (c) Provide for the taking of testimony by deposition.
- (d) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.
- (e) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties.

R 408.21432. Report of hearings officer.

Rule 432. (1) The report of the hearings officer shall include findings of fact, conclusions of law, and a determination.

(2) The hearings officer shall sign and date the report. Upon filing of the report with the executive secretary and the parties, jurisdiction shall rest solely in the board. All motions, petitions, and other pleadings filed subsequent to the filing of the report shall be addressed to the executive secretary.

(3) The report of the hearings officer shall become the final order of the board 30 days after filing with the board and parties, unless a board member directs that the report be reviewed and acted upon by the board.

(4) A party may file with the board exceptions, including written arguments, to the report of the hearings officer. Exceptions shall be received by the board within 20 days of the filing of the report.

R 408.21433. Authority of board.

Rule 433. (1) In reviewing a report of a hearings officer, the board, by a vote of not less than a majority of its members, may:

- (a) Dismiss or modify the citation.
- (b) Modify the abatement time of the citation.
- (c) Issue a final order sustaining the citation, the abatement time, or the assessed penalty.
- (d) Vacate or modify assessed penalties.
- (e) Remand the case for the taking of additional evidence or for correction of proceedings.
- (f) Direct other appropriate relief.

(2) Upon a showing by an employer that a good faith effort has been made to comply with the abatement requirements of a citation that has become a final order of the board as provided in the act, and that the abatement has not been completed because of circumstances beyond the reasonable control of the employer, the board, after a hearing if requested by the employer, affected employees, or the department, shall issue an order affirming or modifying the abatement requirements in the citation.

R 408.21434. Oral argument before the board; briefs; remand by board.

Rule 434. (1) Oral argument before the board shall not ordinarily be allowed.

(2) The board, upon request, may permit a party to submit a brief relative to an issue raised in the matter before it. The board may request briefs from the parties.

(3) In the event the board finds that the record is inadequate, the board may order the matter remanded to a hearings officer for a rehearing.

PETITIONS

R 408.21441. Petition for modification of abatement period.

Rule 441. (1) An employer may file a petition for modification of abatement date when the employer has made a good faith effort to comply with the abatement requirements of a citation, that has become a final order of the Board, but the abatement has not been completed because of the factors beyond the employer's reasonable control.

(2) A petition for modification of abatement date shall be in writing and shall include the following information:

(a) Steps taken by the employer, and the dates of those steps in an effort to achieve compliance during the prescribed abatement period.

(b) The specific additional abatement time needed in order to achieve compliance.

(c) The reasons the additional time is necessary, including the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date.

(d) Available interim steps being taken to safeguard the employees against the cited hazard during the abatement period.

(e) A certification that the petition for modification of abatement date has been filed and posted in accordance with subrule (4).

(3) A petition for modification of abatement date shall be filed with the board no later than the close of the next working day following the date on which abatement was originally required. A petition filed later shall be accompanied by the employer's statement of exceptional circumstances explaining the delay.

(4) On the same day that the petition is filed with the board, a copy of the petition shall be filed with the department that issued the citation and a copy shall be posted by the employer in a conspicuous place at or near the place where the citation was required to be posted and remain so posted for a period of 10 working days.

(5) The department, affected employees, or their representatives may file written objection to the petition with the board setting forth the reasons for opposing the petition. An objecting party shall also file a copy of the written objection with the other parties. Failure to file an objection within 10 working days of the date of filing the petition shall constitute a waiver of any further right to object to the petition.

(6) The board may approve without a hearing a petition for modification of an abatement date to which an objection has not been filed.

(7) Where a petition is objected to by the department or affected employees, the petition shall be processed as follows:

(a) The board shall process the petition in the same manner as any other contested case, except that a hearing on the petition shall be handled in an expeditious fashion.

(b) An employer petitioning for a modification of an abatement period shall have the burden of proving by a preponderance of the evidence that he has made a good faith effort to comply with the abatement requirements of the citation and that abatement has not been completed because of factors beyond his control.

MISCELLANEOUS PROVISIONS

R 408.21442. Settlement.

Rule 442. (1) Settlement is encouraged at any state of the proceedings where the settlement is consistent with the provisions and objectives of the act.

(2) A settlement agreement submitted by the parties shall be accompanied by an appropriate, proposed order.

(3) Where parties to a settlement agree upon a proposal, it shall be served upon the represented and unrepresented affected employees not less than 10 days prior to submission to the board for approval in the same manner as required for serving notices of hearing in R 408.21422(1) of these rules. The proposed settlement, when submitted to the board or hearings officer, shall contain a certification indicating the date and the manner in which service of the settlement was made on the represented and unrepresented affected employees.

R 408.21443. Ex parte communication.

Rule 443. There shall not be ex parte communication, with respect to the merits of a case not concluded, between the board, including a member, officer, employee or agent of the board who is employed in the decisional process, and a party.

R 408.21444. Restriction as to participation by investigative or prosecuting officers.

Rule 444. In a proceeding notice pursuant to the rules, the director shall not participate or advise, except as a party to the proceeding, with respect to the report of the hearings officer or the board decision.

R 408.21445. Inspection and reproduction of documents.

Rule 445. (1) Subject to the provision of law restricting public disclosures of information, a person may, at the offices of the board, inspect and copy a document filed in a proceeding.

(2) Actual costs of reproduction shall be borne by the person seeking the document.

R 408.21446. Restriction with respect to former employee.

Rule 446. (1) A former employee of the board or of the director, including a member of the board or the director, shall not appear before the board as an attorney or other representative for a party in a contested case in which that person participated personally and substantially during the period of that person's employment.

(2) A former employee of the board or of the director, including a member of the board or the director, shall not appear before the board as an attorney or other representative for a party in a proceeding or other matter, formal or informal, for which that person was personally responsible during the period of that person's employment, unless 1 year has elapsed since the termination of the employment.

(3) The prohibition against participation as an attorney or other representative as specified in subrules (1) and (2) applies to the attorney general and the assistants of the attorney general who serve the department.

R 408.21447. Amendment to rules.

Rule 447. The board may at any time upon its motion or initiative, or upon written suggestion of an interested person setting forth reasonable grounds therefor, amend or revoke any of the rules contained herein, pursuant to the Administrative Procedures Act, Act 306 of the Public Acts of 1969, as amended, being §24.201 et seq. of the Michigan Compiled Laws.



DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

DIRECTOR'S OFFICE

MIOSHA SAFETY AND HEALTH STANDARDS

Filed with the Secretary of State on February 25, 1976 (as amended May 7, 1979) (as amended June 6, 2000)

These rules take affect 15 days after filing with the Secretary of State

(By authority conferred on the department of consumer and industry services
by section 69 of Act No. 154 of the Public Acts of 1974, as amended,
being §408.1069 of the Michigan Compiled Laws)

R 408.22203, R 408.22213, R 408.22221, R 408.22224, R 408.22227, R 408.22234, and R 408.22240
of the Michigan Administrative Code are amended as follows:

**MIOSHA SAFETY AND HEALTH STANDARD
PART 12. VARIANCES**

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GENERAL PROVISIONS

R 408.22201. Purpose and scope.

Rule 1201. (1) This part pertains to the practice and procedure for administrative proceedings to grant variances under sections 27(1), (2), and (4) of the Michigan occupational safety and health act.

(2) These rules shall be construed and applied to secure a prompt and just conclusion of the proceedings subject hereto.

(3) These rules shall not apply to experimental variances which may be granted pursuant to section 27(3) of the act. Whenever experimental variances are sought or requested, the procedures for granting the variances shall be in accordance with the intent of the procedures of these rules, but shall be adapted to the circumstances of the request.

R 408.22203. Definitions; A to E.

Rule 1203. (1) "Act" means Act No. 154 of the Public Acts of 1974, as amended, being §408.1001 et seq. of the Michigan Compiled Laws.

(2) "Administrative procedures act" means Act No. 306 of the Public Acts of 1969, as amended, being §24.201 et seq. of the Michigan Compiled Laws.

(3) "Affected employee" means an employee who would be affected by the issuance or denial of a variance or Application for variance; interim order; publication of summary; opportunity for public response; informal hearing; notice; any of the employee's authorized representatives, such as the employee's collective bargaining agent.

(4) "Department" means the department of consumer and industry services.

(5) "Director" means the director of the department of consumer and industry services.

(6) "Experimental variance" means a written order issued by a department authorizing an employer to deviate from the requirements of an occupational safety or health standard while conducting or participating in an experiment to demonstrate or validate techniques to safeguard the health or safety of workers.

R 408.22204. Definitions; I to T.

Rule 1204. (1) "Interim order" means a written order issued by the department authorizing an employer to continue to operate equipment, or to carry on processes, procedures, or practices which do not meet the requirements of a standard pending a determination on the merits of a variance application.

(2) "Party" means a person admitted to participate in a hearing conducted pursuant to these rules. An applicant for relief and any affected employee shall be entitled to be named parties. A department shall be deemed to be a party without the necessity of being named.

(3) "Permanent variance" means a written order issued by a department authorizing an employer to deviate from the requirements of an occupational safety or health standard when protection is provided to employees equal to that which would be provided by compliance with the requirements of the standard.

(4) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or organized group of individuals or an agency, authority, or instrumentality of the state or a political subdivision thereof.

(5) "Temporary variance" means a written order issued by a department authorizing an employer to deviate from the requirements of an occupational safety or health standard prior to the effective date of the standard for the specific period of time necessary for the employer to achieve compliance with the standard.

R 408.22212. Effect of variance.

Rule 1212. A variance granted pursuant to this part shall have only future effect. In his discretion, a director may decline to entertain an application for a variance on a subject or issue concerning which a citation has been issued to the employer involved, and a proceeding on the citation or a related issue concerning a proposed penalty or period of abatement is pending before a department or the board of health and safety compliance and appeals, until the completion of that proceeding.

R 408.22213. Notice of granted variance; publication.

Rule 1213. Notice that a variance has been granted under this part shall be published in the MIOSHA News, a quarterly publication of the department of consumer and industry services.

R 408.22214. Notice to applicant and affected employees.

Rule 1214. (1) A department, upon granting a variance, shall notify by mail the applicant and affected employees, if known, of the granting of the variance, including the terms and conditions thereof.

(2) An employer, upon receiving notice that a variance has been granted, shall notify affected employees of the granting of the variance by giving to them a copy of the variance and posting a statement containing a summary of the variance. A summary of the variance shall specify where a copy of the variance may be examined. The posting shall be at the area in which the affected employees work.

R 408.22215. Form of documents, subscriptions, copies.

Rule 1215. A particular form is not prescribed for applications and other papers which may be filed in proceedings under these rules. However, an application and other papers shall be clearly legible, comply with the provisions of section 27 of the act, and be signed by the person filing them.

APPLICATION FOR VARIANCE

R 408.22221. General application requirements.

Rule 1221. (1) An employer desiring a temporary or permanent variance from a standard, or a portion of a standard, shall file a written application containing the information prescribed in this rule and R 408.22222 or R 408.22223 with the appropriate division of the Department of Consumer and Industry Services, Bureau of Safety and Regulation, State Secondary Complex, 7150 Harris Drive, Box 30643, Lansing, Michigan 48909.

(2) An application for a variance shall include all of the following information:

(a) The name and address of the firm, and the name and title of the person filing the application.

(b) The address of the place of employment involved.

(c) A specification of the standard, or portion of the standard, from which the application seeks a variance.

(d) A request for a hearing, as provided in these rules.

(e) A statement that the applicant has informed affected employees of the application, at the time the application for a variance was filed, by giving a copy of the application to the affected employees' authorized representative, if any, and by posting a copy of the application or a statement containing a summary of the application. A summary of the application shall specify where a copy of the application may be examined. Posting shall be at the area in which the affected employees work.

(f) A description of how affected employees have been informed of the variance application, and of their right to petition the director for a hearing.

(3) The department may issue an interim order subject to the following conditions:

(a) An application for an interim order may be made to be effective until a decision is rendered on the application for the variance. An application for an interim order shall include a statement of facts and reasons as to why the applicant believes that the requested order should be granted. The department may rule ex parte upon the application for an interim order.

(b) The department may grant an interim order on its own motion.

(c) If an application for an interim order filed pursuant to subdivision (a) of this subrule is denied, then the applicant shall be given prompt written notice of the denial. This notice shall include a statement of the grounds for denial.

(d) If an interim order is granted, then the department shall serve a copy of the order upon the applicant and other parties. The terms of the interim order may specify necessary or appropriate conditions. The order shall provide that the applicant shall give notice of the granting of the order and its terms to affected employees by the same means used to inform them of an application for a variance.

(4) Where the application for a variance concerns a state standard or a portion of a state standard, identical in requirements and substance to a federal standard, the applicant shall do all of the following:

(a) Identify the identical federal standard.

(b) Certify whether the applicant has filed for a variance, on the same facts, with the assistant secretary for occupational safety and health, U.S. department of labor.

(c) Certify whether citations for violations of the identical federal standard, or portion of the federal standard, have been issued to the applicant by the federal government. If a citation has been issued, then identification shall be included.

(5) Variances granted by the U.S. department of labor to multistate employers pursuant to 29 CFR 1905.13(c)(1975) shall be deemed as an authoritative interpretation of the employers' compliance obligation with the state standard.

R 408.22222. Application for temporary variance.

Rule 1222. An employer submitting an application for a temporary variance shall include in the application, in addition to the information required in R 408.22221, the following:

(a) A statement that the applicant is unable to comply with the standard, or portion thereof, and a detailed explanation of the reason why.

(b) A statement of the steps the applicant has taken and shall take, with specific dates where appropriate, to protect employees against the hazard covered by the standard.

(c) A statement indicating when the applicant shall comply with the standard, and what steps the applicant has taken and shall take, with specific dates where appropriate, to comply with the standard.

(d) A statement of the facts establishing that the applicant is unable to comply with a standard by its effective date because of the unavailability of professional or technical personnel, because of the unavailability of materials needed to come into compliance with the standard, or because necessary construction or alteration of facilities cannot be completed by the effective date.

R 408.22223. Application for permanent variance.

Rule 1223. An employer submitting an application for a permanent variance shall include in the application, in addition to the information required in R 408.22221, the following:

(a) A description of the conditions, practices, means, methods, operations, and processes used or proposed to be used by the applicant.

(b) How the conditions, practices, means, methods, operations, and processes used or proposed to be used would provide employment to employees which is as safe and healthful as those required by the standard for which a variance is sought.

R 408.22224. Application for modification, revocation, and renewal of variance; contents; informing affected employees; furnishing copy of application to employer; notice of intent to revoke or modify a variance; publication of notice.

Rule 1224. (1) An employer or an affected employee may apply in writing to the department for a modification, revocation, or renewal of a variance issued under section 27 of the act. The application shall contain all of the following information:

(a) The name and address of the firm, and the name and title of the applicant.

(b) A description of the relief, whether modification, revocation, or renewal, which is sought.

(c) A statement setting forth with particularity the grounds for the modification, revocation, or renewal.

(d) Any request for a hearing as provided in these rules.

(2) If the applicant is the employer, a certification shall be made that the applicant has informed his affected employees of the application by doing both of the following:

(a) Giving a copy of the application to the affected employees' authorized representative.

(b) Posting a copy of the application or a statement containing a summary of the application. If a summary of the application is posted, it shall specify where a copy of the full application may be examined. Posting shall be at the area in which the affected employees work.

(3) If the applicant is an affected employee, then the department shall make a certification that a copy of the application has been furnished to the employer.

(4) A department may, on its own motion, proceed to modify or revoke a variance. In that event, the department shall give actual notice of its intention to revoke or modify to the employer and affected employees. The notice shall inform the employer and affected employees of their right to request a hearing. A request for a hearing shall include a short and plain statement of the following:

(a) How the proposed modification or revocation will affect the requesting party.

(b) What the requesting party seeks to show on the subjects or issues involved.

(5) A notice of the department's own intention to modify or revoke a variance shall be published in the MIOSHA News in the same manner as required by R 408.22227.

R 408.22225. Action on defective variance application.

Rule 1225. (1) If an application filed pursuant to these rules is defective by not conforming to the applicable requirements, a department shall promptly return the application to the applicant with a brief statement indicating the reason for its return.

(2) The return of an application because it is defective shall be without prejudice to the filing of another application.

R 408.22226. Requests for hearing on application.

Rule 1226. (1) Within 10 days after the time the employer gives notice to employees of the filing of an application for a variance in accordance with employee notice requirements of these rules, the applicant or affected employee may file with the department a request for a hearing on the application.

(2) A request for a hearing filed pursuant to subrule (1) shall include the following:

(a) A concise statement of facts showing how the applicant or employee would be affected by the relief applied for.

(b) A specification of any statement or representation in the employer's application which is in dispute, and a concise summary of the facts that would be presented.

(c) Views or arguments on any issue of fact or law presented.

(3) The department, on its own motion or that of a party, may consolidate or contemporaneously consider 2 or more proceedings which involve the same or closely related issues.

R 408.22227. Application for variance; interim order; publication of summary; opportunity for public response; informal hearing; notice; issuance of denial or variance.

Rule 1227. (1) Upon receipt of a valid application for a variance, and if the application has not been denied pursuant to this part, the department may issue an interim order and shall publish in the MIOSHA News a summary of the application. The published notice shall include a statement outlining the opportunity for public response and an informal hearing. This informal hearing is separate from the formal hearing that is provided for in R 408.22226 and R 408.22231 to R 408.22251 of this part.

(2) Upon request for an informal hearing resulting from the published application for a variance, the department shall notify the person requesting the hearing, the employer applying for the variance, the employer's employees, or the authorized employee representative, of all of the following:

(a) The time, date, place, and the subject matter of the hearing.

(b) The authority under which the hearing is to be held.

(3) The department shall consider the views expressed by the participants at the informal hearing, if held, and shall issue a denial of the application or shall issue the variance.

HEARINGS

R 408.22231. Notice of hearing; contents, referral to hearing officer.

Rule 1231. (1) Upon request for a hearing as provided in R 408.22226 or upon its own initiative, a department shall serve or cause to be served on the parties a reasonable notice of hearing.

(2) A notice of hearing served under subrule (1) shall include the following:

(a) The time, date place, and nature of the hearing.

(b) The legal authority and jurisdiction under which the hearing is to be held.

(c) A reference to the section of the act and rules involved.

(d) A brief statement of the issues involved.

(3) The matter shall be referred to a hearing officer, or another department official designated by the department who shall serve as the hearing officer at the hearing on a variance.

R 408.22232. Manner of service.

Rule 1232. Service of a document upon any party shall be made by personal delivery or mailing by certified mail to the last known address of the party. The person serving the document by personal delivery shall certify to the manner and the date of the service.

R 408.22233. Hearing officers or other officials, powers and duties.

Rule 1233. (1) A hearing officer designated to preside over a hearing shall have all powers necessary or appropriate to conduct a fair, full, and impartial hearing, including the power to:

(a) Administer oaths and affirmations.

(b) Rule upon offers of proof and receive relevant evidence.

(c) Provide for the taking of testimony by deposition.

(d) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.

(e) Consider and rule upon procedural requests.

(f) Hold conferences for the settlement or simplification of the issues by consent of the parties.

(g) Make, or to cause to be made, an on-site visit to the place of employment involved.

(h) Prepare proposed decisions.

(2) Except to the extent required for the disposition of ex parte matters, a hearing officer shall not consult a person or a party on any fact at issue, unless upon notice and opportunity for all parties to participate.

(3) When a hearing officer deems himself disqualified to preside over a particular hearing, he shall withdraw therefrom by notice on the record directed to the director. A party who deems a hearing officer for any reason to be disqualified to preside, or to continue to preside, over a particular hearing, may file with the director, a motion to disqualify and remove the hearing officer. The motion shall be supported by affidavits setting forth the alleged grounds for disqualification. The director shall rule upon the motion.

R 408.22234. Pre-hearing conference.

Rule 1234. (1) Upon his or her own motion or the motion of a party, the hearing officer may request the parties or the parties' council to meet with the hearing officer for a conference to consider all of the following:

(a) Simplification of the issues.

(b) Necessity or desirability of amendments to documents for purposes of clarification, simplification, or limitation.

(c) Stipulations, admissions of fact, and of contents and authenticity of documents.

(d) Limitation of the number of parties and of expert witnesses.

(e) Other matters as may tend to expedite the disposition of the proceeding, and to assure a just conclusion to the proceeding.

(2) The hearing officer shall state on the record the stipulations, agreements, and other matters agreed to by the parties at the conference.

R 408.22235. Consent findings and orders.

Rule 1235. (1) At any time before the hearing or before the reception of evidence in a hearing, or during a hearing, a reasonable opportunity may be afforded to permit negotiation by the parties of an agreement containing consent findings and an order disposing of the whole or a part of the proceeding. The allowance of this opportunity and the duration thereof shall be in the discretion of the hearing officer, after considering the nature of the proceeding, the representations of the parties, and the probability of an agreement which would result in a just disposition of the issues involved.

(2) An agreement containing consent findings and an order disposing of a proceeding shall also provide the following:

(a) That the consent finding and order shall have the same force and effect as if made after a full hearing.

(b) That the record on which an order may be based shall consist solely of the application and agreement.

(c) A waiver of any further procedural steps before the hearing officer and the director.

(d) A waiver of any right to challenge or contest the validity of the consent findings and order made in accordance with the agreement.

(3) On or before the expiration of the time granted for negotiations, the parties or their counsel may:

(a) Submit the proposed agreement to the hearing officer for his consideration.

(b) Inform the hearing officer that agreement cannot be reached.

(4) In the event an agreement containing consent findings and an order is submitted within the time allowed therefor, the hearing officer shall accept the agreement by issuing his decision based upon the agreed findings.

R 408.22236. Depositions.

Rule 1236. (1) For reasons of unavailability or for other good cause shown, the testimony of any witness may be taken by deposition. Depositions shall be taken before a person designated by the hearing officer having the power to administer oaths.

(2) A party desiring to take the deposition of a witness shall make application in writing to the hearing officer, setting forth the following:

(a) The reasons why the deposition should be taken.

(b) The time and date when, the place where, and the name and post office address of the person before whom the deposition is to be taken.

(c) The name and address of the witness.

(3) A notice, as the hearing officer may order, shall be given by the party taking the deposition to every other party.

(4) Taking and receiving in evidence shall be as follows:

(a) Each witness testifying upon deposition shall be sworn, and the parties not calling him shall have the right to cross-examine him.

(b) The questions propounded and the answers thereto, together with objections made, shall be reduced to writing, read by the witness, subscribed by the witness, and certified by the person before whom the deposition is taken.

(c) The person designated by the hearing officer, before whom the deposition is taken, shall mail 2 copies of the deposition by certified mail to the hearing officer.

(d) Subject to such objections to the questions and answers as were noted at the time of taking the deposition, and those objections would be valid were the witness personally present and testifying, the deposition may be read and offered in evidence by the party taking it as against a party who was present, represented at the taking of the deposition, or who had due notice thereof.

(e) Except for purposes of impeachment, a deposition shall not be admitted in evidence if the witness is available.

R 408.22237. Hearings.

Rule 1237. (1) Except as may be ordered otherwise by the hearing officer, the party applicant for relief shall proceed first at a hearing.

(2) The party applicant shall have the burden of proof.

(3) A party shall be entitled to present his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full disclosure of the facts. Any oral and documentary evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs may be received, but a hearing officer may exclude evidence which is irrelevant, immaterial, or unduly repetitious.

(4) The testimony of a witness shall be upon oath or affirmation administered by the hearing officer.

(5) If a party objects to the admission or rejection of any evidence or to the limitation of the scope of an examination or cross-examination or to the failure to limit the scope, he shall state briefly the grounds for the objection. Rulings on objections shall appear in the record.

(6) A formal exception to an adverse ruling is not required.

(7) Official notice may be taken of any material fact not appearing in evidence in the record, which is among the traditional matters of judicial notice or concerning which the departments by reason of their functions are presumed to be expert, if the parties are given adequate notice, at the hearing or by reference in the hearing officer's proposed decision, of the matters so noticed, and, upon timely request, are given adequate opportunity to show the contrary before the final decision.

(8) Hearings shall be recorded, but need not be transcribed, unless requested by a party. The party requesting the transcript shall pay for the transcription. Copies of the transcript may be obtained by the parties upon written application filed with a department and upon the payment of fees at the rate provided on notice by the department.

R 408.22238. Proposed decision of the hearing officer; service; contents; exception, inoperative while on referral; filing proposed order.

Rule 1238. (1) Within 10 days of the conclusion of a hearing or within 5 days of the receipt of the transcript, if any, or such additional time as allowed by the hearing officer, each party may file with the hearing officer a proposed order, including proposed findings of fact and conclusions of law, with such supporting argument and reasoning as are necessary to support the proposed order.

(2) Within 20 days of the conclusion of a hearing or within 15 days of the receipt of the transcript, if any, the hearing officer shall serve upon parties by certified mail or personal service a proposed decision which shall include the following:

(a) A statement of the reasons for the proposed decision.

(b) Issues of fact and law necessary for the proposed decision.

(3) Unless a party, within 10 days of the receipt of the proposed decision, files exceptions thereto with supporting reasons, the proposed decision shall become a final decision of the director. Exceptions shall refer to the specific issues of fact and law, or terms of the proposed decision excepted to. If the testimony was transcribed, reference shall be made to specific pages of the transcript, and shall suggest modified issues of fact and law, and terms of the proposed decision.

(4) The decision of the hearing officer shall be based upon consideration of the whole record and shall be made on the basis of a preponderance of reliable and probative evidence.

(5) A hearing officer's proposed decision under this rule shall not be operative while that decision is being referred to the director.

R 408.22239. Transmission of record.

Rule 1239. (1) If exceptions and objections thereto are filed, the hearing officer shall transmit the record of the proceeding to the director.

(2) The record shall include the following:

(a) Notices, pleadings, motions, and intermediate rulings.

(b) Questions and offers of proof, objections, and rulings thereon.

(c) Evidence presented.

(d) Matters officially noticed, except matters so obvious that a statement of them would not serve a useful purpose.

(e) Proposed findings of fact and conclusions of law and exceptions and objection thereto.

(f) Any proposed decision, opinion, order, or report by the hearing officer.

R 408.22240. Decision of director.

Rule 1240. (1) Upon receipt of the record transmitted under these rules, the director shall, within a reasonable time, render his or her decision.

(2) The decision may affirm, modify, or set aside, in whole or in part, the findings, conclusions, and the rule or order contained in the proposed decision of the hearing officer, and shall include a statement of reasons which shall provide for each conclusion of law, supporting authority, or reasoned opinion.

(3) The director shall serve or cause to be served, a copy of his or her decision upon all parties and the hearing officer.

JUDICIAL REVIEW

R 408.22251 Request for rehearing or reconsideration.

Rule 1251. (1) An aggrieved party may file a petition for rehearing or reconsideration with the director within 60 days of the mailing of the notice of the director's decision. The request shall be in writing and include specific reasons in support of the request.

(2) Upon receipt of a petition for a rehearing, the director shall, within 10 days, grant or deny the request and provide notice of the decision to the parties.

(3) If the request for reconsideration or rehearing is denied, notice of the denial, along with the director's decision on the variance application, shall be deemed to be final department action for purposes of judicial review.



DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

DIRECTOR'S OFFICE

MIOSHA SAFETY AND HEALTH STANDARDS

Filed with the Secretary of State on **October 28, 1976**

These rules take affect 15 days after filing with the Secretary of State

(By authority conferred on the departments of labor and public health by section 69 of Act No. 154 of the Public Acts of 1974, as amended, being §§408.1069 of the Michigan Compiled Laws.)

**MIOSHA SAFETY AND HEALTH STANDARD
PART 13. INSPECTIONS AND INVESTIGATIONS, CITATIONS
AND PROPOSED PENALTIES**

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GENERAL PROVISIONS

R 408.22301. Purpose

Rule 1301. The purpose of this part is to prescribe rules and set forth general policies for enforcement of the inspection and investigation, citation, and proposed penalty provisions of the act. In situations where this part sets forth general enforcement policies, rather than substantive or procedural rules, such policies may be modified in specific circumstances where the

department director or his designee determines that an alternative course of action would better serve the objectives of the act.

R 408.22303. Scope.

Rule 1303. (1) The act requires that every employer covered under the act furnish to his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees. The act also requires that employers comply with occupational safety and health standards promulgated under the act, and that employees comply with standards, rules, regulations, and orders issued under the act which are applicable to their own actions and conduct.

(2) The act authorizes the departments of labor and public health to conduct inspections and investigations and to conduct tests and gather samples of materials and substances as are necessary to aid in the evaluation of the place of employment, and to issue citations and proposed penalties for alleged violations, and to question employers and employees in connection with research and other related activities.

(3) The act contains provisions for adjudication of violations, periods prescribed for the abatement of violations, and proposed penalties if appealed by an employer or by an employee or authorized representative of employees.

R 408.22305. Definitions: A to C.

Rule 1305. (1) "Act" means the Michigan Occupational Safety and Health Act, Act No. 154 of the Public Acts of 1974, as amended, being §408.1001 et seq. of the Michigan Compiled Laws.

(2) "Authorized employee representative" or "representative of employee" means a person designated by a labor organization certified by the national labor relations board or employment relations commission as defined in section 2(c) of Act No. 176 of the Public Acts of 1939, being §423.2 of the Michigan Compiled laws, as the bargaining representative for the affected employees. In the absence of certification, it shall be a person designated by the organization having a collective bargaining relationship with the employer and designated as having a collective bargaining relationship with the employer by the affected employees. If a labor organization is not certified or if no organization has a collective bargaining relationship with the employer, "authorized employee representative" or "representative of employee" means a person designated by the affected employees to represent them for the purpose of proceedings under this act.

(3) "Board" means the board of health and safety compliance and appeals created in section 46 of the act.

(4) "Citation" means a written communication issued by the department to an employer pursuant to section 33 of the act.

R 408.22307. Definitions D to E.

Rule 1307. (1) "Department" means the Michigan Department of Labor or the Michigan Department of Public Health.

(2) "Director" means the director of the Michigan Department of Labor or the director of the Michigan Department of Public Health.

(3) "Employee" means a person permitted to work by an employer.

(4) "Employer" means an individual or organization, including the state or a political subdivision, which employs 1 or more persons.

(5) "Establishment" means a single physical location where business is conducted or where services or operations are performed; for example, a factory, mill, store, hotel, restaurant, movie theater, farm, ranch, bank, sales office, warehouse, central administrative office, a single school within a school district, a city garage within the department of public works, a branch office of the department of state, or a police station within the police department of a city. Where distinctly separate activities are performed at a single physical location, such as contract construction activities operated from the same physical location as a lumberyard, each activity shall be treated as a separate establishment.

R 408.22309. Definitions; I to W.

Rule 1309. (1) "Imminent danger" means a condition or practice in a place of employment which is such that a danger exists which could reasonably be expected to cause death or serious physical harm, either immediately or before the imminence of the danger can be eliminated through the enforcement procedures otherwise provided.

(2) "Inspection" means the examination or survey of a place of employment to detect the presence of an existing or potential occupational safety or health hazard or to determine compliance with the act, rules or standards promulgated or orders issued pursuant to the act.

(3) "Investigation" means the detailed evaluation or study of working conditions, including equipment, processes, substances, air contaminants, or physical agents, with respect to the actual or potential occurrence of occupational accidents, illnesses, or diseases.

(4) "Trade secret" means a confidential process, formula, pattern, device, or compilation of information which is used in the employer's business and which gives the employer an opportunity to obtain an advantage over competitors who do not know or use it.

(5) "Working day" means any day other than a Saturday, Sunday, or state legal holiday. (In computing 15 working days, the day of receipt of any notice shall not be included, and the last day of the 15 working days shall be included.)

R 408.22311. Posting of notice; availability of the act, rules, and applicable standards.

Rule 1311. (1) Each employer shall post a notice to be furnished by the department, informing employees of the protections and obligations provided for in the act, and informing them that, for assistance and information, including copies of the act and of specific safety and health standards, employees may contact the department. The notice shall be posted by the employer in each establishment in a conspicuous place where notices to employees are customarily posted. Each employer shall take steps to insure that the notice is readable and is not altered or defaced.

(2) A separate notice shall be posted in each establishment. Where employers are engaged in activities which are physically dispersed (such as agriculture, construction, transportation, communications, and electric, gas, and sanitary services) the notice required by this rule shall be posted at the location to which employees report each day. Where employees do not usually work at, or report to, a single establishment (such as traveling salesmen, technicians, engineers, etc.), such notice shall be posted at the location from which the employees operate to carry out their activities. In all cases, the notice shall be posted pursuant to subrule (1) of this rule.

(3) Copies of the act, all procedural rules promulgated pursuant to the act, and all applicable standards shall be available from the department. If an employer has obtained copies of these materials, he shall make them available upon request to an employee or his authorized representative for review in the establishment where the employee is employed at the earliest time mutually convenient to the employee or his authorized representative and the employer.

(4) An employer failing to comply with the provisions of this rule shall be subject to citation and penalty pursuant to section 35 of the act.

(5) Reproductions or facsimiles of the state poster shall constitute compliance with the posting requirements of this rule where the reproductions or facsimiles are at least 8-1/2 inches by 14 inches and the printing size is at least 10 point. The caption or heading on the poster shall be in large type, not less than 36 point.

R 408.22321. Authority for inspection or investigation.

Rule 1321. (1) The department representatives, upon presenting appropriate credentials, may enter, without delay and at reasonable times, any factory, plant, establishment, construction site, or other area, workplace, or environment where work is performed by an employee of an employer to inspect and investigate, during regular working hours and at other reasonable times and within reasonable limits and in a reasonable manner, any such place of employment, and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein; to question privately any employer, owner, operator, agent, or employee; and to review records required by the act and rules promulgated pursuant to the act, and other records which are directly related to the purpose of the inspection or investigation.

(2) Prior to inspecting areas containing information which is classified by an agency of the federal government in the interest of national security, departmental representatives shall obtain the appropriate security clearance.

R 408.22322. Objection to inspection or investigation.

Rule 1322. (1) Upon a refusal to permit a department representative, in the exercise of his official duties, to enter, without delay and at reasonable times, any place of employment or any place therein to inspect, to investigate, to review records, or to question any employer, owner, operator, agent, or employee, pursuant to R 408.22321, or to permit a representative of employees to accompany the department representative during the physical inspection or investigation of any workplace pursuant to R 408.22326, the department representative shall terminate the inspection or investigation or confine the inspection or investigation to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records, or interviews concerning which no objection is raised.

(2) The department representative shall endeavor to ascertain the reason for such refusal, and he shall immediately report the refusal and the reason therefore to the department director or authorized representative. The department director or authorized representative shall take appropriate action and, if necessary, apply to the proper judicial officer for a warrant commanding the sheriff or a peace officer to aid the department in the conduct of an inspection or investigation as provided in section 29 of the act.

R 408.22323. Entry not a waiver.

Rule 1323. Permission to enter, inspect, investigate, review records, or question a person shall not imply or be conditioned upon a waiver of any cause or action, citation, or penalty under the act. Department representatives are not authorized to grant any such waiver.

R 408.22324. Advance notice of inspection or investigation.

Rule 1324. (1) Advance notice of inspections or investigations shall not be given except in the following situations:

(a) In cases of apparent imminent danger, to enable the employer to abate the danger as quickly as possible.

(b) In circumstances where the inspection or investigation can most effectively be conducted after regular business hours, or where special preparations are necessary for an inspection or investigation.

(c) Where necessary to assure the presence of representatives of the employer and employees or the appropriate personnel needed to aid in the inspection or investigation.

(d) In other circumstances where the department director or his designee determines that the giving of advance notice would enhance the probability of an effective and thorough inspection or investigation.

(2) In the situations described in subrule (1) of this rule, advance notice of inspections or investigations may be given only if authorized by the department director or his designee.

(3) When advance notice is given, it shall be the employer's responsibility promptly to notify the authorized representative of employees of the inspection or investigation, if the identity of such representative is known to the employer. Upon the request of the employer, the department representative shall inform the authorized representative of employees of the inspection or investigation, provided that the employer furnishes the department representative with the identity of such representative and with such other information as is necessary to enable him promptly to inform such representative of the inspection or investigation. An employer who fails to comply with his obligation under this rule promptly to inform the authorized representative of employees of the inspection or investigation or to furnish such information as is necessary to enable the department representative promptly to inform such representative of the inspection or investigation, is subject to citation and penalty under section 35(3) of the act.

(4) Advance notice in any of the situations described in subrule (1) of this rule shall not be given more than 24 hours before the inspection or investigation is scheduled to be conducted, except in apparent imminent danger situations and in other unusual circumstances.

(5) A person who gives advance notice of an inspection or investigation to be conducted under the act, without authority from the department director or his designees, shall, upon conviction, be punished by a fine of not more than \$1,000 or by imprisonment for not more than 6 months, or by both as provided in section 35(8) of the act.

R 408.22325. Conduct of Inspections or Investigations.

Rule 1325. (1) Subject to the provisions of R 408.22321, inspections and investigations shall take place at such times and in such places of employment as the department director or his designee may direct. At the beginning of an inspection or investigation, the department representatives shall present their credentials to the owner, operator, or an agent in charge at the establishment; explain the nature and purpose of the inspection or investigation; and indicate generally the scope of the inspection or investigation and the records specified in R 408.22321 which they wish to review. However, such designation of records shall not preclude access to additional records specified in R 408.22321.

(2) Department representatives may take air, environmental, and material samples; take or obtain photographs related to the purpose of the inspection or investigation; employ other reasonable investigative techniques; and question privately any employer, owner, operator, agent, or employee of an establishment (See R 408.22331 on trade secrets).

(3) In taking photographs and samples, the department representatives shall take reasonable precautions to ensure that such actions with flash, spark-producing, or other equipment are not hazardous. Department representatives shall comply with all employer safety and health rules and practices at the establishment being inspected, and they shall wear and use appropriate protective clothing and equipment.

(4) The conduct of inspections or investigations shall be such as to preclude unreasonable disruption of the operations of the employer's establishment.

(5) Following the completion of an inspection or investigation by the department representative, an opportunity for a conference shall be afforded the employer or his representative and the employee or employee representative to informally advise them of any apparent safety or health violations disclosed by the inspection or investigation. During such conference, the employer or employee shall be afforded an opportunity to bring to the attention of the department representative any information regarding conditions in the workplace pertinent to the apparent safety or health violations.

(6) Inspections or investigations shall be conducted pursuant to the requirements of this part.

R 408.22326. Representatives of employers and employees.

Rule 1326. (1) Department representatives shall be in charge of conducting inspections or investigations, and may question persons affected by the inspection or investigation. A representative of the employer and a representative authorized by employees shall be given an opportunity to accompany the department representative during the physical inspection or investigation of a workplace for the purpose of aiding the inspection or investigation. A department representative may permit additional employer representatives and additional representatives authorized by employees to accompany him when it is determined that the additional representatives may further aid the inspection or investigation. A different employer and employee representative may accompany the department representative during each different phase of an inspection or investigation if this does not interfere with the conduct of the inspection or investigation.

(2) Department representatives may resolve all disputes as to who is the representative authorized by the employer and employees for the purpose of this rule. If there is no authorized representative of employees, or if the department representative is unable to determine with reasonable representative shall consult with a reasonable number of employees concerning matters of safety and health in the workplace.

(3) If, in the judgment of the department representative, good cause is shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection or investigation of the workplace, the third party may accompany the department representative during the inspection or investigation.

(4) Department representatives may deny the right of accompaniment under this rule to a person whose conduct interferes with a fair and orderly inspection or investigation. The right of accompaniment in areas containing trade secrets shall be subject to the provisions of R 408.22331(4). With regard to information classified by an agency of the federal government in the interest of national security, only persons authorized to have access to the information may accompany a department representative in areas containing such information.

R 408.22331. Trade secrets.

Rule 1331. (1) Information reported to, or otherwise obtained by, a department representative in connection with an inspection, investigation, or proceeding under the act, which contains or which might reveal a trade secret, shall be considered confidential. Such information may be disclosed only to other department representatives concerned with carrying out the act or when relevant in any proceeding under the act. In any such orders as may be appropriate to protect the confidentiality of trade secrets.

(2) Information which contains, or which might reveal, a trade secret is not subject to public inspection and copying.

(3) At the commencement of an inspection or investigation, the employer may identify areas in the establishment which contain, or which might reveal, a trade secret. If the department representative has no clear reason to question the identification, information obtained in such areas, including all negatives and prints of photographs, and environmental samples, shall be labeled "confidential — trade secret" and shall not be disclosed except in accordance with the provisions of section 63 of the act.

(4) Upon the request of an employer, any authorized representative of employees accompanying the department representative in an area containing trade secrets shall be an employee in that area or an employee authorized by the employer to enter that area. Where there is no such representative, the department representative shall consult with a reasonable number of employees who work in that area concerning matters of safety and health.

R 408.22333. Consultation with employees.

Rule 1333. Department representatives may consult with employees concerning matters of occupational safety and health to the extent they deem necessary for the conduct of an effective and thorough inspection or investigation. During the course of an inspection or investigation, an employee shall be afforded an opportunity to bring any violation of the act which he has reason to believe exists in the workplace to the attention of the department representative.

R 408.22338. Complaints by employees.

Rule 1338. (1) Any employee or representative of employees, who believes that a violation of the act which threatens physical harm exists in a workplace where the employee is employed, may request an inspection or investigation of the workplace by giving notice of the alleged violation to the department. The notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employee or representative of employees. A copy shall be provided the employer or his agent by the department or department representative no later than at the time of inspection or investigation, except that, upon the request of the person giving the notice, his name and the names of individual employees referred to therein shall not appear in the copy or on any record published, released, or made available by the department.

(2) If, upon receipt of such notice, the department determines that the complaint meets the requirements set forth in subrule (1) of this rule, and that there are reasonable grounds to believe that the alleged violation exists, the department shall cause an inspection or investigation to be made as soon as practicable to determine if the alleged violation exists. Inspections or investigations under this rule need not be limited to matters referred to in the complaint.

(3) If the department determines that an inspection or investigation is not warranted because the written complaint does not meet the provisions of subrule (1) of this rule, the department shall notify the complaining party, in writing, of such determination. The determination shall be without prejudice to the filing of a new complaint meeting the requirements of subrule (1) of the rule.

(4) Prior to or during an inspection or investigation of a workplace, an employee or representative of employees employed in the workplace may notify the department representative, in writing, of any violation of the act, or of any rule promulgated under the act, which he has reason to believe exists in such workplace. Any such notice shall comply with the requirements of subrule (1) of this rule.

(5) When an employee or a representative of employees believes that a condition exists which may present an imminent danger to an employee, he may notify either department in the most expedient manner without regard to a written notice. Upon notification of an alleged imminent danger, the department shall cause an immediate inspection to be made or take other action that it finds necessary to abate the danger as provided by R 408.22342 of this part.

(6) If a citation is issued for a violation alleged in a request for inspection under subrule (1) of this rule or a notification of violation under subrule (4) of this rule, a copy of the citation issued shall be sent to the employee or representative of employees who made such request or notification.

(7) A person shall not discharge, or in any manner discriminate against, an employee because the employee filed a complaint or instituted, or caused to be instituted, a proceeding under, or regulated by, the act; or because the employee testified, or is about to testify, in any such proceeding; or because of the exercise by such employee, on behalf of himself or others, of any right afforded by the act.

R 408.22339. Informal review of complaints by employees.

Rule 1339. (1) The department shall notify a complaining party, in writing, when any of the following determinations are made regarding a complaint under R 408.22338.

(a) There are no reasonable grounds to believe that an inspection or investigation should be conducted.

(b) Based on an inspection or investigation conducted pursuant to the complaint, there are no reasonable grounds to believe that the alleged violation exists.

(2) The department shall notify the employer, in writing, of any determination made pursuant to subrule (1)(b) of this rule.

(3) The complaining party may obtain informal review of a determination made pursuant to subrule (1) by submitting a written statement of position to the department. The department may hold an informal conference in which the complaining party may orally present his views. The employer may attend the informal conference at the discretion of the department.

(4) After considering all written and oral views presented, the department shall do either of the following:

(a) Affirm, modify, or reverse the determination made in subrule (1)(a) of this rule.

(b) Order a reinspection or reinvestigation, issue a citation if it is believed that the inspection or investigation disclosed a violation, or affirm the determination made in subrule (1)(b) of this rule.

(5) The department shall furnish the complaining party with a written notification of the final disposition of the complaint and the reasons therefor. The final disposition of the complaint by the department shall not be subject to further departmental review.

R 408.22342. Imminent danger; cease operation order.

Rule 1342. (1) When a department representative concludes, on the basis on the basis of an inspection or investigation, that conditions or practices exist in a place of employment which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by the act, the department representative shall inform the employer and affected employee of the danger and afford the employer the opportunity to voluntarily eliminate the danger.

(2) If the employer does not immediately take steps to eliminate the imminent danger, the department representative shall recommend to the department director that a cease operation order be issued pursuant to section 31(1) of the act to require that steps be taken as may be necessary to avoid, correct, or remove the imminent danger. Appropriate citations and notices of proposed penalties may be issued with respect to violations associated with an imminent danger, even though, after being informed of such danger by the department representative, the employer immediately eliminates the imminence of the danger and initiates steps to abate such danger.

(3) Upon the failure of the employer to promptly comply with a cease operation order issued pursuant to subrule (2) of this rule, the department shall petition the circuit court having jurisdiction to restrain any condition or practice in a place of employment which the department determines causes the imminent danger to exist.

R 408.22344. Citations.

Rule 1344. (1) The inspection or investigation report of the department representative shall be reviewed by a department designee. If, on the basis of the report, the department designee believes that the employer violated a requirement of section 11 of the act, a requirement of any standard or rule promulgated pursuant to the act, or a requirement of any order issued pursuant to the act, he shall issue to the employer a citation by registered mail. An appropriate citation shall be issued even though, after being informed of an alleged violation by the department representative, the employer immediately abates, or initiates steps to abate, the alleged violation. A citation shall be issued with reasonable promptness after termination of the inspection or investigation. A citation shall not be issued under this rule after the expiration of 90 days from the completion of the physical inspection or investigation of the establishment.

(2) A citation shall be in writing and describe with particularity the nature of the alleged violation, including a reference to the provision of the act, standards, rule, regulation, or order alleged to have been violated. A citation shall also fix a reasonable time for the abatement of the alleged violation.

(3) A citation shall contain, on its face, a statement that it is an allegation of a violation. The issuance of a citation does not constitute a finding that a violation of the act has occurred unless there is a failure to appeal, either initially to the department or subsequently to the board as provided R 408.22351 and R 408.22354 of this part, or, if appealed to the board, unless the citation is affirmed by the board.

R 408.22346. Proposed penalties.

Rule 1346. (1) After, or concurrent with, the issuance of a citation, and within a reasonable time after the termination of the inspection or investigation, the department shall notify the employer by registered mail of the proposed penalty as provided by section 35 of the act, or that no penalty is being proposed. The notice of the proposed penalty shall include statements informing the employer that the proposed penalty shall become a final order of the Board and not subject to review by any court or agency unless, within 15 working days from the date of receipt of such notice, the employer notifies the department in writing that he intends to appeal the citation or the notification of proposed penalty (see R 408.22351). Payment of the penalty shall be made to the department, payable to the State of Michigan, within 5 working days of the date the penalty became a final order of the board.

(2) The department shall determine the amount of a proposed penalty, giving due consideration to the appropriateness of the penalty with respect to the size of the business, the seriousness of the violation, and the history of previous citations, pursuant to section 36 of the act.

(3) Appropriate penalties may be proposed with respect to an alleged violation, even though, after being informed of the alleged violation by the department representative, the employer immediately abates, or initiates steps to abate, the alleged violation. Penalties shall not be proposed for violations which have no direct or immediate relationship to safety or health.

R 408.22348. Posting of citations.

Rule 1348. (1) Upon receipt of a citation issued under the act, the employer shall immediately post the citation or a copy thereof, unedited, at or near the place of each alleged violation referred to in the citation, with the following exceptions:

(a) Where, because of the nature of the employer's operations, it is not practicable to post the citation at or near the place of alleged violation, the citation shall be posted, unedited, in a prominent place where it is readily observable by all affected employees. For example, where employees are engaged in activities which are physically dispersed, the citation may be posted at the location to which employees report each day.

(b) Where employees do not primarily work at, or report to, a single location, the citation may be posted at the location from which the employees operate to carry out their activities.

(2) The employer shall take steps to ensure that the citation is readable and not altered or defaced. The citation may be reproduced for posting purposes if more than 1 location is cited on a single citation.

(3) A citation, or a copy thereof, shall remain posted until the violation is abated, or for 3 working days, whichever is later. The filing by the employer of an appeal, either initially with the department or subsequently with the board as provided in R 408.22351 and R 408.22354 of this part, shall not affect the employer's posting responsibility under this rule, unless the citation is vacated.

(4) An employer failing to comply with subrules (1) and (2) of this rule shall be subject to citation and penalty pursuant to sections 33 and 35 of the act.

R 408.22349. Notification of compliance with citations.

Rule 1349. (1) An employer to whom a citation is issued shall notify the department, in writing, immediately upon compliance with each item of the citation. Upon compliance with an item of the citation, notification to the department shall not exceed 3 working days from the final abatement date on the citation of such item.

(2) Notification, as required in subrule (1) of this rule, may be accomplished by either of the following:

(a) Submitting to the department, signed and dated, the "notification of abatement" copy of the citation, or a copy thereof.

(b) Submitting a document, in writing, to the department certifying compliance.

R 408.22351. Employer appeal petitions of citations.

Rule 1351. (1) An employer to whom a citation or notice of proposed penalty is issued may, under section 41 of the act, petition the department in writing for a modification or dismissal of the citation and any proposed penalty, or for a grant of additional time for compliance. The petition shall be postmarked within 15 working days of the receipt by the employer of a citation or proposed penalty. The petition shall specify which item on the citation is being petitioned, and whether it is directed to the violation, proposed penalty, or abatement date.

(2) An employer shall post a copy of the petition near the location of the violation where the subject citation is posted, or give a copy of the petition to the affected employees or their employee representative.

(3) An employer shall include in the petition to the department a certification that a copy of the petition was posted or given to the affected employees or their employee representative pursuant to subrule (2) of this rule. The certification shall include the date and method of transmittal of the petition.

R 408.22352. Employee appeal petitions of citations.

Rule 1352. Within 15 working days after the employer receives a citation, an employee or employee representative may petition the department, in writing, alleging that the period of time fixed in an item of the citation for abatement of such item is unreasonable. The petition shall specify which item on the citation is being petitioned. The department, upon receipt of the petition, shall promptly submit a copy of the petition to the employer, deleting the name of the employee or employee representative if so requested.

R 408.22353. Department decision on an appeal petition.

Rule 1353. (1) Upon receipt of a petition, the department may:

(a) Modify or dismiss the citation or proposed penalty.

(b) Modify the time period fixed for compliance.

(c) Affirm the citation, including the abatement date and proposed penalty.

(2) The department shall notify the employer by registered mail of the decision regarding a petition within 15 working days of receipt of the petition by the department. The employer shall promptly post the department's decision, together with the appropriate citation, at the location of the posting of the subject citation. The decision shall remain posted until the violation is abated or for 3 working days, whichever is later.

R 408.22354. Employer and employee notices of appeal to the board.

Rule 1354. (1) Within 15 working days after receipt by the employer of the department's decision regarding an appeal petition of a citation:

(a) The employer may appeal the decision to the board.

(b) The employee or employee representative may appeal the decision, with respect to the date fixed for abatement, to the board.

(2) The notice of appeal of the department's decision shall be submitted to the department. The department shall immediately transmit the notice of appeal to the board in accordance with the procedure prescribed by the board.

R 408.22355. Petition for modification of abatement period.

Rule 1355. (1) An employer may file a petition for modification of an abatement date when the employer has made a good faith effort to comply with the abatement requirements of a citation which has become a final order of the board, but the abatement has not been completed because of facts beyond the employer's reasonable control.

(2) A petition for modification of an abatement date shall be in writing and shall include the following information:

(a) Steps taken by the employer, and the dates of those steps, in an effort to achieve compliance during the prescribed abatement period.

(b) The specific additional abatement time needed in order to achieve compliance.

(c) The reasons the additional time is necessary, including the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date.

(d) Available interim steps being taken to safeguard the employees against the cited hazard during the abatement period.

(e) A certification that the petition for modification of an abatement date has been filed and posted in accordance with subrule (4).

(3) A petition for modification of an abatement date shall be filed with the board no later than the close of the next working day following the date on which abatement was originally required. A petition filed later shall be accompanied by the employer's statement of exceptional circumstances explaining the delay.

(4) On the same day that the petition is filed with the board, a copy of the petition shall be filed with the department that issued the citation and a copy shall be posted by the employer in a conspicuous place at or near the place where the citation was required to be posted and remain so posted for a period of 10 working days.

(5) The department, affected employees, or their representatives may file written objection to the petition with the board setting forth the reasons for opposing the petition. An objecting party shall also file a copy of the written objection with the other parties. Failure to file an objection within 10 working days of the date of filing the petition shall constitute a waiver of any further right to object to the petition.

(6) The board may approve without a hearing a petition for modification of an abatement date to which an objection has not been filed.

(7) Where a petition is objected to by the department or affected employees, the petition shall be processed as follows:

(a) The board shall process the petition in the same manner as any other contested case, except that a hearing on the petition shall be handled in an expeditious fashion.

(b) An employer petitioning for a modification of an abatement date shall have the burden of proving by a preponderance of the evidence that he has made a good faith effort to comply with the abatement requirements of the citation and that abatement has not been completed because of factors beyond his control.

R 408.22356. Citation for failure to correct a previously cited violation.

Rule 1356. (1) If an inspection or investigation discloses that an employer failed to correct an alleged violation, for which a citation was issued, within the period permitted for its correction, the department may notify the employer, by registered mail, of the failure and of any additional penalty proposed under section 35(2) of the act by reason of such failure.

(2) The period for the correction of a violation for which a citation was issued shall not begin to run until the date of the final order of the board if a review proceeding before the board is initiated by the employer in good faith and not solely for delay or avoidance of penalties. The period of correction shall not be delayed by a review proceeding initiated by the employer only with respect to the proposed penalty.

(3) An employer receiving a citation for failure to correct a violation and a proposed additional penalty may notify the department, in writing, that he intends to petition for a dismissal of the citation or the proposed additional penalty, or both, pursuant to R 408.22351 of these rules. An appeal petition regarding a citation for failure to correct a violation shall be limited to the subject matter of the failure to correct citation.

(4) Within 15 working days after receipt of the department decision relative to an appeal petition of a citation for failure to correct a violation or a proposed additional penalty, or both, an employer may appeal the decision to the board pursuant to R 408.22354.

R 408.22358. Cease operation order for failure to correct a previously cited violation.

Rule 1358. (1) If an inspection or investigation discloses that an employer failed to correct a violation within the period permitted for its correction by a citation which became a final order of the board, the department may issue a cease operation order directing the employer to cease operating or render inoperable, pursuant to such order, as much of the operation as is necessary to eliminate the hazard which is the subject of the cease operation order.

(2) If an employer fails to obey a cease operation order issued pursuant to subrule (1) of this rule, the department shall refer the matter to the prosecuting attorney of the county in which the violations exist, who shall promptly institute proceedings in the circuit court to enforce the department's order.

R 408.22361. Informal conference.

Rule 1361. At the request of an affected employer, employee, or employee representative, the department may hold an informal conference for the purpose of discussing any issues raised by an inspection or investigation, citation, notice of proposed penalty, or appeal petition. If the conference is requested by the employer, an affected employee or employee representative shall be afforded an opportunity to participate, at the discretion of the department. If the conference is requested by an employee or employee representative, the employer shall be afforded an opportunity to participate, at the discretion of the department. A party may be represented by counsel at the conference. No conference or request for conference shall operate as a stay of the 15 working day period for filing an appeal petition to the department or notice of appeal to the board as prescribed in R 408.22351, R 408.22352, and R 408.22354.



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