

What Leeway Do You Have Under OHS Laws to Implement Alternative Safety Measures?



Variances may be acceptable when they provide at least equivalent safety protection.

There may come a time when the required procedures, materials, equipment and other safeguards simply don't work nearly as well for your particular company or situation as alternatives not listed in the OHS regulations. It's frustrating to think that you can't take advantage of these alternatives. Or can you? In fact, the OHS regulations do leave some leeway for alternatives. But there are 2 big conditions:

1. The alternatives must provide protection that's at least equivalent to what the regulations require; and
2. In most jurisdictions, you must get written authorization to vary from the regulations.

Here's a look at the [OHS variance rules](#) and how to take advantage of them.

Defining Our Terms

While they're available in most places, the term for acceptable alternatives varies by jurisdiction, including variances, acceptances, modification, substitutions, exemptions and deviations. For simplicity sake, we'll refer to

these collectively as 'variances.'

The Law of OHS Variances

The [rules for getting a variance](#) are typically set out in the jurisdiction's OHS Act. There are 3 basic approaches:

1. Application Required for Variances

In 9 jurisdictions'AB, BC, MB, NB, NL, NS, PEI, SK, YK'employers must apply to the appropriate OHS regulatory official for a variance. The OHS laws in Alberta, B.C., Nova Scotia and Yukon set out specific application rules and procedures, typically including:

- The requirement that the applicant (which generally includes an employer, prime contractor or owner) apply in writing;
- The information the applicant must include in the application, typically including information demonstrating that the proposed alternative offers at least equivalent protection;
- The applicant's obligation to post a copy of the application in the workplace and also give a copy to the joint health and safety committee (JHSC) or health and safety representative (safety rep) for the site, if any; and
- The applicant's duty to post a copy of the decision, once the OHS official delivers it'typically for 7 days in case of a rejection and for as long as the variance remains in effect for an acceptance.

Manitoba, New Brunswick, Newfoundland, Prince Edward Island and Saskatchewan require employers to apply for a variance in writing but don't establish specific application procedures. And unfortunately, they don't provide any guidance filling in these details.

2. Employer Discretion Over Variances

Ontario and Qu bec allow for variances without requiring employers to apply for written regulatory approval. In Ontario, employers, constructors and owners at construction projects and industrial establishments are allowed to ‘vary a procedure. . . or the composition, design, size or arrangement of a material, object, device or thing,’ as long as the variance offers at least equivalent protection. On a construction project, the JHSC or safety rep must get written notice of the variance.

In Qu bec, allowance for variances comes not from the *OHS Act* but in the OHS regulations in the provisions that list the particular requirement that include language giving employers discretion to implement ‘equivalent safety precautions’ as an alternative to those measures. **Example:** If installation of a protective device on a machine would make operation of the machine ‘reasonably impractical,’ the employer can forgo installing the protective device, as long as it takes ‘precautions that ensure the equivalent safety of workers’ [*Regulation respecting occupational health and safety*, Sec. 183].

3. No General Provision for Variances

Federal, Northwest Territories and Nunavut OHS laws don’t include a general provision allowing for variances. However, the *Canada Labour Code* allows employers at coal mine operations to apply to the Coal Mining Safety Commission for variances.

How to Comply

How you go about taking advantage of variance rules depends on where you operate. Thus, variances aren’t an option if you’re subject to Fed, NT or NU regulation. If you’re in Alberta,

B.C., Nova Scotia or Yukon, follow the application process set out in the OHS laws. Things get a bit trickier in the 5 provinces (Manitoba, New Brunswick, Newfoundland, Prince Edward Island and Saskatchewan) that require government approval without outlining a specific application process. **Best Practice:** Use the AB/BC/NS/YK template as a general navigation aid.

Step 1: Include All Required Information in Variance Application

The application must be in writing and list crucial information allowing the regulatory agency to review and determine if the variance would provide at least equivalent protection, including:

- The location of the workplace;
- Contact information on the company applying for and anyone affected by the variance;
- A description of the work process;
- A cite to the regulation for which you're seeking the variance;
- What you propose to do in lieu of following the requirement set out in the regulation;
- A statement explaining why you want the variance, including why it isn't reasonable or 'practicable' to comply with the requirement in the regulation;
- Information on the benefits and drawbacks and potential impact on workers' health and safety if the variance is granted; and
- Any technical information the government needs to evaluate the application.

Step 2: Provide Notification of Variance Application

Post the variance application in a conspicuous place in the

workplace to notify workers that you've asked for permission not to comply with a certain OHS requirement and give them a chance to weigh in on the matter. Give a copy of the application to the workplace JHSC or safety rep, or the workers themselves if there is no JHSC or rep.

Step 3: Provide Notification of Variance Decision

Repeat the notification process when you get the decision. If the variance is denied, post it for at least 7 days, unless the OHS official specifically orders you to post it for a longer period; if the variance is granted, keep it posted for as long as it remains in effect, including any subsequent modifications, suspensions or revisions.

Ensure Compliance with Variance

If a variance is in effect, be aware that it effectively replaces the OHS regulation's requirements. As a result, you must ensure that all affected workers are aware and trained to comply with the variance. If not, you're inviting liability for an OHS violation.

Example: An Ontario Ministry of Labour (MOL) inspector noticed that there were no guardrails along the perimeters of the second, third and fourth storeys of a construction site. Since workers had access to those unguarded locations, the inspector issued a stop work order. In addition, the court found the constructor, employer and 2 supervisors guilty of fall protection violations. The defendants argued that they didn't need guardrails because there were 'alternative methods and procedures' in place to protect workers from falling. But they couldn't come up with enough evidence to prove it. And even if they had, they would have still lost because they never notified the JHSC of the decision to implement 'varied' alternative fall protection measures [*R. v. Bradsil 1967 Ltd.*,

[1994] O.J. No. 837].