

LEGAL UPDATES

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# Agency Indicates It Will Enforce New Mine Safety Rule

Despite opposition from industry and a new administration, the Mine Safety and Health Administration (MSHA) appears poised to press forward with the planned rollout and enforcement of its final rule on workplace examinations. The rule imposes significant new requirements on metal and non-metal mine operators that may warrant new compliance procedures.

In a letter sent February 9, 2017, to the Mining Coalition, a group of mining companies represented by Husch Blackwell, MSHA indicated it would not withdraw the workplace exam rule for a 60-day review period as the Mining Coalition had requested. The Coalition had argued that MSHA should review the rule under the Trump administration's January 20, 2017, memorandum that instructed administrative agencies to withdraw unpublished but finalized regulations. Further, the Mining Coalition understands that MSHA is planning a series of public compliance education meetings around the country as part of its continuing rollout of the rule.

As explained in detailed comments submitted by the Mining Coalition during rulemaking, the new workplace examination rule imposes a number of significant new requirements on "metal/non-metal" mine operators. Although a long-standing regulation already requires mine operators to conduct examinations of work areas during each shift to ensure compliance with safety requirements, MSHA believed that a far stricter regulation was necessary. In June 2016, MSHA issued a proposed rule, followed by a truncated notice-and-comment period. It finalized the rule a few days before President Trump took office.

## Final Rule Imposes Significant New Costs but No Estimated Benefits

The final rule requires workers to examine work areas at the beginning of each shift (rather than at appropriate times during the shift). It states that they must examine all areas where miners are expected to work or actually work during a given shift, including mining-related roads on which they will travel. It also imposes significant paperwork obligations, requiring mine operators to make and keep records that detail the name of the person conducting the examination, the location examined, the date, a description of conditions found that may adversely affect safety, and the date on which corrective action was taken. Finally, the mine operator must notify miners in the area of any such adverse conditions. The rule is set to take effect on May 23, 2017.

The Mining Coalition request to withdraw the rule noted that MSHA did not support the rule with any estimate of its benefits. While MSHA estimated the rule's costs at \$34.5 million annually, a much lower figure than some industry estimates, MSHA admitted that it "is not claiming a monetized benefit for this rule." MSHA said that it simply is "unable to quantify the benefits." In addition, MSHA acknowledged that it could not separate any additional benefits from the new rule from "those benefits attributable to conducting a workplace examination under the existing standards."

### **Last-Minute Rule Escaped Regulatory 'Freeze'**

In the final days of the Obama administration, MSHA submitted the rule to the Office of Federal Register for public review and publication. However, the rule's scheduled publication date of January 23, 2017, was three days after President Trump took office. A White House memorandum issued to all federal agencies on President Trump's first day in office required agencies to withdraw pending regulations that were not yet published, consistent with Office of Federal Register procedures. The day after the rule appeared in the Federal Register, the Mining Coalition wrote to the White House Counsel and to the Acting Secretary of Labor, requesting that MSHA withdraw the rule for review pursuant to the White House memorandum.

In its latest reply, however, MSHA stated that Office of Federal Register procedures "precluded its withdrawal" because the rule was already on public display at the time of the memo. Furthermore, MSHA noted that while the White House memo requires a 60-day review period, the workplace exam rule does not take effect until May. As a result, "MSHA has sufficient time to 'review questions of fact, law and policy that may be raised by the rule,' as contemplated by the COS Memorandum." It is unclear if this means that MSHA will continue reviewing the rule for possible modification or withdrawal prior to its effective date, but current indications are that the agency is pushing ahead with implementing the rule.

The rule will have sweeping effect. Metal and non-metal miners extract a wide range of minerals, from silver and gold to potash, limestone, clay, salt, cement, alumina, stone, sand, gravel and other minerals regulated by MSHA. According to MSHA, these operations employed 218,864 people in the United States in 2015.

## **What This Means to You**

As MSHA continues to move forward with this regulation, mine operators should work with their counsel to develop compliance plans to meet the new requirements. In many cases, this will require new systems, procedures and even staffing for:

Completing and handling additional paperwork.

Checking records to be sure that proper follow-up occurs in documenting corrective actions.

Retraining all miners on the new protocols.

Auditing crews to ensure that they perform all required examinations of the right places (all work areas) at the right times (before work begins) and with notice to miners of adverse conditions found.

## **Contact Us**

Husch Blackwell's Safety & Health team is closely following these developments. For assistance with developing a compliance plan or for more information about the workplace exam rule or the Mining Coalition, please contact Avi Meyerstein or your Husch Blackwell attorney.