



OSHA's Twin Sister Is In Your Backyard

Insights

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You would be hard-pressed to find someone who has not heard of OSHA. OSHA's presence is felt by employers across broad segments of American industry, from construction to food service. What many people don't realize, however, is the pervasiveness of OSHA's (older) sister agency, the Mine Safety and Health Administration, or MSHA.

Formerly known as the Bureau of Mines, MSHA has been in existence since 1910, when there were more than 2,000 mine fatalities annually. Congress created the current enforcement scheme with the Federal Mine Safety and Health Act of 1977 (the Mine Act). After four major mining accidents in 2006, Congress passed the Mine Improvement and New Emergency Response Act, drastically increasing MSHA penalties associated with health and safety violations.

Are You Subject To MSHA?

MSHA's title can be misleading; the agency's jurisdiction is far more expansive than many people realize. In addition to the obvious industries that are affected – coal mining, quarries, and other mineral extraction, including sand and gravel pits, limestone, gold, etc. – MSHA's reach extends to related industries including construction, trucking, blasting, milling, manufacturing and supply, engineering firms, and many more. Even the person who restocks the vending machine at the mine site must be given some minimal safety training.

Geographically, MSHA's presence can be felt in every state. Mine operators and industry service providers are typically subject to both federal and state regulation. And of course many mines employ hundreds of workers, subjecting mine owners to a variety of labor and employment concerns.

Expect An Inspection

Armed with the Mine Act and a thick book of regulations, federal inspectors conduct warrantless inspections of every mine in America. In fact, unlike OSHA, MSHA inspectors are required to inspect every inch of surface mines twice a year and underground mines every quarter. For some large underground mines, this means having at least one federal inspector in the mine every day.

MSHA inspections include examination of training records, "preshift" and "onshift" inspection reports required by the Mine Act, and thorough inspection of every piece of equipment on mine property. MSHA inspectors have the authority to cite safety violations to the mine operator and to any

independent contractors on the property – often, inspectors are instructed to issue the same citation to both companies, which is permitted by the Mine Act.

MSHA's authority differs from OSHA in another very significant respect. In all cases where an MSHA inspector identifies what is believed to be a safety violation, the company is required to "fix" the cited safety issue *before* being given the opportunity to contest the violation. This sometimes involves purchasing expensive equipment or undergoing significant repairs. And if the company does not comply with the inspector's orders within a "reasonable time" it is subject to further violations and penalties.

MSHA inspectors also have the authority to shut down certain areas of the mine, or the entire mine, all before the operator has an opportunity to challenge the inspector's determination. Despite the availability of "expedited hearings," these powers can prove extremely costly for affected companies.

Full Speed Ahead!

And MSHA is not slowing down. In fact, the Assistant Secretary of Labor for MSHA, Joe Main, formerly with the United Mine Workers of America, recently released the third phase of a campaign to target certain health and safety standards for increased enforcement. MSHA's "Rules to Live By III: Preventing Common Mining Deaths," identifies 14 safety standards – eight in coal mining and six in metal and nonmetal mining – that MSHA cited as contributing to a significant number of fatal accidents over the past decade.

By April 1, 2012, federal inspectors will be trained to "increase scrutiny" and "carefully evaluate" violations of these standards, which will inevitably lead to higher penalties and more litigation. This campaign is just one tool the government is using to regulate the mining industry.

Over the past several years, the government has bombarded the mining industry with increased regulation. Tactics have included the implementation of a "pattern or practice" standard to identify repeat offenders, monthly "impact inspections" that blitz mine operators with as many as six inspectors entering the mine at once, issuance of "flagrant" violations up to \$220,000 per citation, and an injunction to shut down a mine permanently. Notably, a West Virginia coal company recently paid over \$200 million to settle civil and criminal liabilities, amounting to the largest penalties in MSHA's history.

MSHA's authority and penalty structure can be disastrous for mines of all sizes. Employers subject to MSHA regulations can be found everywhere, including right in your backyard. If you would like to discuss MSHA regulations further, or the mining industry generally, we would be happy to speak with you.

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Before joining Fisher Phillips, Matthew Korn litigated more than 150 cases on behalf of MSHA as an attorney with the U.S. Department of Labor, Office of the Solicitor. Each of his cases involved

attorney with the U.S. Department of Labor, Office of the Solicitor. Each of his cases involved technical mining and engineering concepts, industry terminology, and complex regulations. Matthew was part of the Mine Safety and Health Litigation Backlog Project, an effort by the government to clear a backlog of more than 10,000 cases before Administrative Law Judges at the Federal Mine Safety and Health Review Commission (FMSHRC). This backlog was created, and continues to exist, as a result of increased government enforcement, increased civil penalties, and an increased contest rate.

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