



# Preventing Discrimination Complaints Under The Mine Act: Six Steps To Protect Your Company

Insights

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The Mine Safety and Health Administration (MSHA) recently announced what many mine operators and independent contractors have experienced for the past several years – a heightened focus on, and tremendous increase in, the number of discrimination complaints filed by MSHA.

In fact, MSHA tripled the number of temporary reinstatement requests it submitted in FY 2010-2012, to 71 from only 22 filed in FY 2007-2009. Additionally, MSHA nearly doubled the number of discrimination complaints it filed during the same period, to 70 from 39. Mine operators that have been through this process appreciate the challenges of defending a complaint of discrimination, not to mention the difficulties of reinstating a miner who has filed a complaint.

If you are not already experienced with the discrimination complaint process, and prepared to defend your company in the event a complaint is filed, now is the time to familiarize yourself with Section 105(c) of the Mine Act.<sup>[1]</sup> Most mine operators are aware that they cannot discriminate against a miner for protected activity under the Act. But what happens when a miner makes a complaint, then starts showing up late every day, or begins to have performance issues at work? Discrimination complaints can be incredibly challenging and require mine operators to know the law and consider in advance the potential consequences of taking an adverse employment action against an employee who has lodged a complaint.

## What Constitutes Discrimination Under The Mine Act?

Miners (which under the Act include any employee at your site, including managers) have the right to file or make a complaint of an alleged danger or safety or health violation and to participate in proceedings under the Act. Miners may make such complaints either internally, to managers, or externally, to MSHA. Either way, the Act protects miners from any type of discrimination based on a complaint, refusal to work in unsafe conditions, or participation in a proceeding, all of which is considered “protected activity” for purposes of proving discrimination.

Examples of discriminatory acts (also referred to as adverse employment actions) may include: discharge or termination; layoff; demotion; refusal of employment; reduction in benefits, vacation, bonus, or rate of pay; change in hours of work; threats of reprisal; transfer to a less desirable position at less than the pay received prior to transfer; or interference with a miner’s right to complain to MSHA or participate in proceedings under the Act.

## **When Will A Miner Be Temporarily Reinstated?**

One major difference between discrimination proceedings under the Act and other types of retaliation claims (such as retaliation based on race, sex, or age) is the availability of temporary reinstatement. MSHA will request temporary reinstatement when it believes a miner has a legitimate claim of discrimination – which MSHA has been doing more frequently. In a temporary reinstatement proceeding, the Administrative Law Judge (ALJ) will consider all the evidence in the light most favorable to the complaining miner and reinstate the miner unless the ALJ decides that the case was “frivolously brought.”

If you’re not a lawyer, you should know that this is just about the lowest burden of proof available – it means that in almost every case, the miner will be reinstated to his former position pending the outcome of the full discrimination hearing, even if the mine operator has a legitimate reason for taking the adverse action. Given the Commission’s current backlog, the full discrimination hearing may not happen as quickly as a mine operator would hope.

## **What Happens Next?**

In order to prove discrimination, MSHA (or a plaintiff’s attorney, if MSHA decides not to pursue the case), must demonstrate that: 1) the miner engaged in protected activity; 2) the miner suffered an adverse employment action; and 3) there was a causal connection between the protected activity and the adverse employment action. Typically, the first two elements will not be difficult to prove because the discrimination complaint likely would not be filed absent finding protected activity and adverse employment action.

Instead, the case will usually focus on whether the miner was discriminated against because of the protected activity, or whether the adverse employment action was legitimately based on another reason. For example, consider a situation where a miner makes a safety complaint on October 1, and starts missing shifts on November 1, violating company no call-no show policy. In this scenario, an employer would have the decision-makers testify at a hearing regarding the reason for termination.

The ALJ would consider the testimony of the miner, his witnesses, and the employer’s witnesses, in addition to the length of time that had elapsed between the complaint and the termination. The ALJ would decide whether the employer’s reason was credible, or whether the employer’s explanation was a pretext for discrimination under the Act.

## **How Do I Avoid Discrimination Claims?**

MSHA may say the obvious answer is – don’t discriminate! But, as you can see, even a baseless complaint of discrimination can be incredibly difficult for an operator to successfully defend. In addition to the costs (and thorny issues) associated with temporarily reinstating a miner pending the discrimination hearing, the remedies available to a miner proving discrimination may include permanent reinstatement with back pay interest and all costs, including attorneys’ fees.

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As with any form of liability exposure, there is no way to completely insulate your company from discrimination claims. But there are several steps you can take to limit your potential exposure to such a claim.

### ***1. Draft an anti-retaliation policy***

If you do not already have an anti-retaliation policy, you should consider creating a policy and distributing it to your employees. Your policy should define retaliation under the Act (and other applicable federal and state law), provide specific examples, and create a complaint procedure with more than one level of authority, affording the employee multiple avenues to make an internal complaint. You may also want to create a hotline for your employees to call in complaints. Your policy should also include a disciplinary procedure for violations.

### ***2. Train your supervisors and managers***

Your supervisors and managers should be trained about protected activity under the Act and how to properly react if a miner refuses to work or complains about an unsafe condition. They should also be prepared to answer any questions about your policy.

### ***3. Educate and assure your miners***

Your miners should be educated about their rights under the Act and be assured that your company will not discriminate against them for identifying safety hazards at your mine site. Encouraging your miners to report unsafe or hazardous conditions to their supervisors, and demonstrating that your Company follows through on correcting such conditions, will go a long way to prevent miners from complaining externally.

### ***4. Investigate and take remedial action***

If you receive an internal complaint of discrimination, you should fully investigate the complaint. Although the company should make every lawful effort to keep the facts learned during the investigation confidential, you should interview all witnesses and document their stories. If the complaint is confirmed, you should take appropriate remedial action in accordance with your written policy.

### ***5. The 3 D's – document, document, document***

Document any internal complaints made by a miner, including any corrective actions taken in response to the complaint. Document safety meetings where concerns have been addressed. Document any performance problems, policy violations, or other reasons for taking an adverse action against a miner. The ALJ will be more likely to believe your witnesses if they are able to rely on documents created at or near the time of the events giving rise to the complaint.

## **6. Consult legal counsel**

In the event an employee informs you that he is considering, or has already filed a complaint with MSHA, you may want to seek legal counsel as early as possible. Your attorney should be able to help you navigate the discrimination process and help you position yourself to best defend your company.

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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. Labor Department.*

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[1] 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.

### **Related People**



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