



# Mining MSHA – What Operators Should Know About Temporary Reinstatement

Insights

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*Welcome to “Mining MSHA,” a regular series of posts focusing on mine safety fundamentals – but designed for both new and experienced mine safety professionals. This series will help safety professionals develop their MSHA legal knowledge as we explore over 40 years of case law developed by the Federal Mine Safety and Health Review Commission and its bench of Administrative Law Judges. You will want to share this series with your safety personnel at all levels, because understanding what MSHA can and cannot legally do is the first step in managing your relationship with this enforcement agency. Join your [Fisher Phillips Mine Safety team](#) as we mine legal knowledge from the body of Federal Mine Safety and Health law.*

We continue to discuss one of the more complex areas of mine safety and health law – discrimination complaints. As we discussed in our previous article, Section 105(c)(2) of the Mine Act allows miners to file a complaint with the Secretary alleging discrimination if they believe they have been discharged, interfered with, or otherwise discriminated against for notifying the operator of an alleged danger or safety or health violation, or other protected activities under the law. 30 U.S.C. § 815(c)(2). The Commission is required to order the immediate reinstatement of the miner pending final order on the complaint if it is determined that the complaint was “not frivolously brought” as per an initial review by the Secretary. This could even happen on an expedited basis if the Secretary makes an application for such action. This article will explain what temporary reinstatement is and what steps operators can take to navigate this area of law successfully.

## What Is Temporary Reinstatement?

Temporary reinstatement proceedings involve cases where a miner has filed a complaint with MSHA stating that they have suffered discrimination and the miner has their position at the mine. As noted above, if the Secretary determines that the miner’s discrimination complaint was not frivolously brought, the Secretary may file an application with the Review Commission for the temporary reinstatement of the miner. Once granted, a miner is temporarily reinstated pending the final decision on the merits of the discrimination complaint.

## What Does “Not Frivolously Brought” Mean?

The operator charged with engaging in discrimination may request a hearing within 10 days after it has received the Secretary’s application for temporary reinstatement. The scope of the hearing is

limited to whether the miner's complaint was "frivolously brought." The Mine Act does not define "not frivolously brought," so the Review Commission has interpreted this standard as "reasonable cause to believe" or "appears to have merit." The Review Commission has taken the position that Congress intended to establish a low threshold to grant temporary reinstatement since the Secretary seeks this relief before completing the investigation process.

## **Economic Reinstatement Is An Option**

Operators may object to bringing a miner back to work if that miner was terminated for violating a safety rule or for some other behavior that negatively impacted operations. If an operator does not want to bring the complaining miner back to work, economic reinstatement is an option – basically paying the miner to stay home until temporary reinstatement ends. Economic reinstatement is subject to the agreement with the solicitor handling the case. It may result in payments to the complainant even if they obtain another job.

## **When Does Temporary Reinstatement End?**

Until 2006, temporary reinstatement ended once MSHA determined the discrimination complaint lacked merit. But after a legal challenge, the Review Commission held that temporary reinstatement continued even if MSHA found no merit to the complaint, reasoning that a complaining miner should be entitled to temporary reinstatement even if they brought their own discrimination case under Section 105(c)(3) of the Mine Act. This interpretation was challenged in the 4th, 6th, and 7th Courts of Appeals, with the 6th and 7th Circuits rejecting the Review Commission's interpretation and the 4th declaring it did not have jurisdiction to review.

## **How Can You Avoid Temporary Reinstatement?**

The best way to avoid temporary reinstatement is to avoid discrimination complaints under Section 105(c) of the Mine Act altogether. Once a discrimination complaint is filed, MSHA actively encourages complaining miners to apply for temporary reinstatement. With an astoundingly low bar to establish temporary reinstatement eligibility, operators find themselves in a position of potentially paying employees to stay at home while the complaint is investigated. Therefore, having a system in place to address miner safety and health concerns is critical, and training HR personnel and frontline supervisors on safety policies can be vital in avoiding discrimination complaints.

In the next issue, we will cover another important topic – Flagrant Violations. Stay tuned and make sure you are [signed up to receive Fisher Phillips Legal Alerts](#) so you won't miss the next edition. Don't forget to reach out to your mine safety lawyer, or [any attorney in our Mine Safety & Health group](#), for specific questions and guidance on any of the topics covered in this series.

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*This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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**Christopher G. Peterson**

Partner

303.218.3653

Email

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