



Should Mine Operators Expect A COVID-19 Emergency Temporary Standard?

Insights

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Within the first days of taking office, President Biden signed many Executive Orders – one of which directs the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA) to consider whether any emergency standards related to COVID-19 are necessary, particularly whether masks should be required in the workplace. If it determines such a standard is needed, OSHA must issue this emergency standard by March 15, 2021. No deadline was specified for MSHA.

The executive order also requires OSHA to update and revise its guidance on COVID-19 by February 4, introducing some uncertainty as to what additional guidance OSHA will issue related to the pandemic. Up to this point, MSHA has directed mine operators to OSHA and the Department of Labor (DOL) for COVID-19 information and guidance. OSHA, in turn, provided employers with the information and policy developed by the Centers for Disease Control and Prevention (CDC). In response to OSHA's order to update its guidance, we will see if MSHA develops its own mining-specific guidance.

With the nomination of Boston Mayor Marty Walsh to be the next Secretary of Labor – the first union member to fill this role in nearly 50 years and soon to be in charge of the agency that oversees OSHA and MSHA – it is nearly certain that OSHA will enact a new emergency standard on COVID-19 mitigation in the workplace. What remains to be seen is whether MSHA will follow suit and issue its own emergency standard for the mining industry.

In July 2020, the United Mine Workers of America petitioned the D.C. Circuit Court of Appeals to compel MSHA to issue an emergency standard for infectious diseases. In its response, MSHA assured the D.C. Circuit that an emergency standard for COVID-19 was not necessary because MSHA's existing health and safety standards already require mine operators to reduce or eliminate COVID-19 hazards. MSHA also told the court that it was issuing citations to mine operators for COVID-19 safety and health violations.

With the current sharpened focus on COVID-19 health and safety issues, MSHA's position may very well change in response to the president's executive order and a pro-labor shift in leadership – particularly if OSHA enacts a temporary standard. OSHA has maintained its position that it has the general duty clause to enforce COVID-19 issues, so MSHA's position that it is adequately addressing

COVID-19 issues would be even more tenuous since the mine safety agency does not have a general duty clause.

Mine operators should begin preparing now for managing a workplace under the Biden administration and ensure their COVID-19 safety policies and procedures are consistent with current CDC guidance. Mine operators should continue to provide safe workplaces for employees and invest resources into identifying and eliminating workplace safety hazards at their worksites, in anticipation of these greater enforcement efforts from MSHA during the next four years.

We will continue to monitor developments related to this area, so make sure you are subscribed to [Fisher Phillips' alert system](#) to get the most up-to-date information. If you have specific questions and need guidance, feel free to reach out to your mine safety lawyer or [any attorney in our Mine Safety & Health group](#).

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