

MINE SAFETY OFFICIALS ANNOUNCE NO VACCINE MANDATE ON THE HORIZON

Insights
Oct 4, 2021

When the [Biden administration announced on September 9 that the Occupational Safety and Health Administration \(OSHA\) would be issuing a rule](#) requiring employers to ensure its workers are vaccinated against COVID-19 or regularly tested, OSHA's companion agency – the Mine Safety and Health Administration (MSHA) – remained silent. That was until a September 29 stakeholder call when MSHA leadership stated for the first time it will not require vaccination or testing at mine sites. But what does this mean for those covered under MSHA's jurisdiction, and ultimately the "grave danger" OSHA must prove exists to implement its emergency rulemaking?

MSHA Breaks its Silence

Responding to questions during a Q&A session on the stakeholder call, Acting Assistant Secretary of Labor for Mine Safety and Health, Jeannette J. Galanis, stated MSHA will not be issuing an Emergency Temporary Standard (ETS) pertaining to vaccines or testing at mine sites. She stated that the President's Executive Order addressing an OSHA ETS does not apply to MSHA and that OSHA could not enforce any ETS it may issue on mine sites. According to Ms. Galanis, MSHA has considered whether to issue its own ETS and decided not to.

In explaining that decision, Ms. Galanis referred to "the nature of the Mine Act and strength of the Mine Act" as reasons for not issuing a vaccine-related ETS. However, when pressed on this point during a follow-up question, Ms. Galanis stated that the Mine Act is "much stronger" than the Occupational Safety and Health Act and that if MSHA "finds

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that a mine is...spreading COVID, [MSHA] is able to temporarily shut [it] down." Presumably, Ms. Galanis refers to [Section 107\(a\) of the Mine Act](#), which authorizes MSHA to issue a closure order if an inspector finds an imminent danger exists. To be valid, however, a 107(a) order must be [predicated upon an immediate threat to miners](#) at the time that the order is issued.

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If MSHA does not issue an ETS of its own, Ms. Galanis is likely correct that OSHA could not enforce its own ETS at MSHA-regulated sites. The OSH Act states specifically that nothing in OSHA's laws "[shall apply to working conditions of employees with respect to which other Federal agencies... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.](#)" Therefore, since MSHA, and not OSHA, regulates safety and health at mine sites, OSHA may not enforce its rules and regulations there.

But, that may not be the end of the story for companies with MSHA-regulated sites. It remains to be seen if MSHA will maintain the position it announced on the stakeholder call when OSHA comes out with its own ETS. It is expected that OSHA's ETS will receive significant attention in the media and with labor advocates. MSHA may be forced to revisit its position in the face of that attention.

Additionally, the line of demarcation between MSHA and OSHA-regulated facilities is not always clear. For example, questions abound over whether a facility engages in "milling," which falls under MSHA, or "manufacturing," which is covered by OSHA. Additionally, support facilities have proven to be a jurisdictional grey area, with highly fact-dependent outcomes. For example, [in a 2017 case](#), the Sixth Circuit Court of Appeals found that an offsite rebuild and repair shop owned by a mining company did not fall under MSHA jurisdiction. Contrastingly, [in a 2000 decision](#), the Federal Mine Safety and Health Review Commission (FMSHRC) found that an offsite supply facility was covered by MSHA.

Companies with facilities that may be "close to the line" should take a keen look on how they will approach the vaccine issue to account for potential uncertainty on agency jurisdiction. Finally, companies that have facilities delineated clearly as being covered by MSHA or OSHA will need to

address company-wide policies on vaccines considering the contradictory approaches by the two agencies.

MSHA's Position Hamstrings OSHA's Proof of a Grave Danger

Under [Section 6\(c\)\(1\) of the OSH Act](#), OSHA shall issue an ETS only if the agency determines that employees are exposed to a "grave danger" from exposure to substances or agents determined to be toxic or physically harmful or from new hazards (e.g., COVID-19) and an ETS is necessary to protect employees from such danger.

When OSHA issued the [Healthcare ETS](#), the preamble for the emergency rule noted that, for the first time in its 50-year history, OSHA faced a new hazard so grave that it has killed nearly 600,000 people in the United States in barely over a year, and infected millions more. Providing that the impact of this new illness has been borne disproportionately by the healthcare and healthcare support workers tasked with caring for those infected by this disease.

However, OSHA's forthcoming ETS isn't focused on any specific industry. It instead applies to all employers with 100 or more employees. The 100-employee threshold has already been scrutinized by many as being arbitrary. By MSHA seemingly thumbing its nose at adopting OSHA's ETS, the sister agency may be hindering OSHA's proof for the existence of a grave danger necessitating an emergency rule. Indeed, rationalizing that a large mining operation with hundreds or thousands of employees would be immune to OSHA's grave danger simply because OSHA does not have jurisdiction is a difficult argument to maintain.

Furthermore, MSHA's leadership may be missing the point of the ETS and the President's proclamation. Indeed, according to the Biden administration's [Path out of the Pandemic](#), the plan is to increase vaccinations rates to ensure the use of every available tool to combat COVID-19 and save more lives, while also keeping businesses open and safe, thereby protecting the economy from lockdowns and damage. It isn't, as suggested by Ms. Galanis, to temporarily shut down operations where COVID-19 spreads. Rather, it aims to protect workers' against the health risks posed by COVID-19 *before* an outbreak occurs *while also* keeping businesses open.

Conclusion

Any business subject to dual MSHA/OSHA jurisdiction [should begin preparing now](#) for the forthcoming Emergency Temporary Standard and the disparate rules you may encounter. Those covered only under MSHA should nevertheless prepare for the possibility that MSHA could make an about-face and adopt, or recommend complying, with the requirements of the ETS.

We will monitor these developments and provide updates as OSHA drafts and implements the Emergency Temporary Standard. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our [Vaccine Resource Center for Employers](#) or contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our [FP Vaccine Subcommittee](#).