

MSHA FINALLY RELEASES PROPOSED SILICA RULE: WHAT SHOULD YOU DO NOW?

Insights
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The Mine Safety and Health Administration (MSHA) recently posted its long-awaited proposed silica rule on its website — and the agency is expected to officially publish the proposal in the Federal Register on Thursday. Employers affected by the rule should note that publication triggers various deadlines, including the time you have to submit comments or testify at a public hearing about the rule and its potential impact on your workplace. What are the seven key points you should note about the proposed rule, and how can you provide feedback to regulators?

7 Key Points to Note About the Proposed Rule

1. The proposed rule contains the expected change to the current rule, lowering of the Permissible Exposure Limit (PEL) from 100 $\mu\text{g}/\text{m}^3$ to 50 $\mu\text{g}/\text{m}^3$.
2. It also includes requirements concerning the implementation of engineering controls followed by administrative controls to meet the PEL, exposure sampling, and medical surveillance for metal/nonmetal similar to what currently existed in the coal industry in Part 90.
3. The proposed rule applies to both coal and metal/nonmetal mining but has somewhat different provisions for the two industries.
4. The proposed PEL is a full shift exposure calculated as an eight-hour time weighted average. With respect to this provision, that means that if the miner works a 10- or 12-

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hour shift (or longer) the result is calculated based on 480 minutes which means the PEL is actually less for longer shifts.

5. To meet the requirement an operator would have to implement engineering controls followed by administrative controls if supplementary protection is needed. The example of administrative controls that MSHA gave would be to ensure miners clean off their clothes so they are not exposed after their shift.
6. MSHA has proposed to incorporate by reference ASTM F-3387-19, "Standard Practice for Respiratory Protection," which allows for the use of respirators in limited situation on a temporary basis to supplement engineering and administrative controls.
7. Rotation of miners to keep exposure below the PEL is expressly prohibited.

How to Provide Comments and Testimony

The regulated community should now turn its attention to preparing comments and providing testimony in response to the proposed rule. As required by the Administrative Procedure Act, MSHA must provide the public with an opportunity to provide its views on the proposed rule and must consider that information when producing a final rule. Here, the regulated community may provide input in one of two ways:

1. Through the submission of written comments, which must be submitted within 45 days of publication of the proposed rule in the Federal Register; or
2. By testimony at a public hearing in either Arlington, Va., or Denver.

The Arlington hearing will be held 21 days after publication in the Federal Register, and the Denver public hearing will be held 37 days post-publication. If the anticipated publication date of July 13 holds, comments would be due on August 28, while the public hearings will occur on August 3 in Arlington and August 19 in Denver.

You should note that these deadlines may be extended, and additional public hearings may be scheduled. At present, however, the deadline for comments is shorter than



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expected and the number of public hearings is fewer than expected given the breadth and technical nature of the rule.

MSHA is inviting comments on “all relevant issues” related to the proposed rule but has also called for specific input on 50 specific questions. The topics include comments on:

- MSHA’s determination of the health effects of the rule,
- MSHA’s preliminary risk analysis;
- The technological feasibility of the proposed rule;
- How the rule will affect small mines; and
- The prohibition against rotation of miners as an administrative control, among other topics.

Commenters should be as specific as possible in providing their views and should focus on MSHA’s questions, to the extent possible.

Comments should include the identification of either RIN 1219-AB36 or Docket No. MSHA-2023-0001. They may be submitted to the [Federal E-Rulemaking Portal](#) or [by email](#) or regular mail (MSHA, Office of Standards, Regulations and Variances, 201 12th Street South, Suite 4E401, Arlington, VA 22202-5450), or hand delivery or courier to the same address, or by fax to 202-693-9441.

Conclusion

Fisher Phillips will continue to monitor this development and will provide timely updates as they occur. Make sure you are subscribed to [Fisher Phillips’ Insight System](#) to get the most up-to-date information directly to your inbox. For further information, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Mine Safety and Health team](#).