



Wind of Change: MSHA's Final Rule Governing Workplace Examinations for Metal and Nonmetal Mines Becomes Effective June 2, 2018

Insights

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The changes to MSHA's workplace examination rule governing metal and nonmetal mines have garnered significant attention. Stakeholders fought back against the original proposed rulemaking, and MSHA delayed implementation three times. Following outcries from operators, numerous comments, and even litigation, on April 9, 2018, MSHA published its final amended regulation governing "Examinations of Working Places in Metal and Nonmetal Mines."

Effective June 2, 2018 (MSHA has stated it will refrain from issuing citations under the new requirements until October 1, 2018), the regulation states:

56/7.18002: Examination of working places.

(a) A competent person designated by the operator shall examine each working place at least once each shift before work begins or as miners begin work in that place, for conditions that may adversely affect safety or health.

(1) The operator shall promptly notify miners in any affected areas of any conditions found that may adversely affect safety or health and promptly initiate appropriate action to correct such conditions.

(2) Conditions noted by the person conducting the examination that may present an imminent danger shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the Federal Mine Safety and Health Act of 1977) until the danger is abated.

(b) A record of each examination shall be made before the end of the shift for which the examination was conducted. The record shall contain the name of the person conducting the examination; date of the examination; location of all areas examined; and description of each condition found that may adversely affect the safety or health of miners and is not corrected promptly.

(c) When a condition that may adversely affect safety or health is not corrected promptly, the examination record shall include, or be supplemented to include, the date of the corrective action.

(d) The operator shall maintain the examination records for at least one year, make the records available for inspection by authorized representatives of the Secretary and the representatives of

miners, and provide these representatives a copy on request.

What does the new rule mean to mine operators?

- A “competent person” must perform a workplace examination of the location where miners are scheduled to work.
- Examinations must be performed before “miners begin work” or as they “begin work.”
- Operators must “promptly” notify miners in “affected areas” of conditions that may impact them.
- Operators must “promptly initiate appropriate action” to correct “conditions” in “affected areas” that may impact miners.
- Operators must keep specific, detailed records of examinations *and of conditions not “promptly” corrected*.
- Records must be made available to both the Secretary and miners’ representatives upon request.

What changed?

The final rule contains notable changes from previous requirements.

First, the timing for the required examination is clear. Now, the workplace examination must be done at the beginning of the shift or before miners begin working in the area rather than “once per shift.”

Second, operators must now notify miners in the affected area of conditions that may adversely affect the miner’s health or safety when those conditions are not corrected.

Third, the examination must be recorded before the end of the shift. The record must include the name of the competent person conducting the exam; the date; the locations examined; a description of each adverse condition that is not corrective promptly; and the date of corrective action for those adverse conditions not promptly corrected.

Fourth, the records must be made available to miners’ representatives in addition to MSHA.

So, really, what does this mean?

MSHA stated its purpose in its September 2017 publication concerning the rule: “Effective working place examinations are a fundamental accident prevention tool used by operators of metal and nonmetal (MNM) mines; they allow operators to find and fix adverse conditions and violations of health and safety standards before they cause injury or death to miners.”

Words like “prompt” are inherently subjective. What is prompt to an operator may not be “prompt” to MSHA. However, in the September 12, 2017 Federal Register, MSHA noted that it “interprets ‘promptly’ to mean before miners are potentially exposed to adverse conditions.” But what if an operator does not see a potential adverse condition before a miner is exposed?

Likewise, keeping records of known hazards that are not “promptly” corrected seems like a pitfall for the mining community. As mentioned above, the record keeping requirements state that “the record shall contain the name of the person conducting the examination; date of the examination; location of all areas examined; **and description of each condition found that may adversely affect the safety or health of miners and is not corrected promptly.**” They also require that “[w]hen a condition that may adversely affect safety or health is not corrected promptly, the examination record shall include, or be supplemented to include, the date of the corrective action.” Are such records documenting the later “corrective” dates going to be used by MSHA to demonstrate “employer knowledge” or higher degrees of negligence?

MSHA’s April 9, 2018 publication in the Federal Register states that the amendments “provide mine operators with additional flexibility in managing their safety and health programs and reduce[] regulatory burdens without reducing the protections afforded miners.” While miner safety should always be the paramount concern for operators, operators must also be vigilant in updating their training and policies to comply with the new mandatory standard. Training should include instruction on how to locate and identify potentially hazardous conditions in a workplace.

We will keep you updated as this new rule is implemented and enforced by MSHA.

Related People



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