MSHA's Proposed New Rules on Workplace Examinations May Increase Individual 110(c) "Agent" Exposure.

Insights
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The Mine Safety and Health Administration ("MSHA") recently proposed new rules on workplace examinations that may significantly impact mine operators and employers. In recent years, MSHA has been far more willing to use Section 110(c) of the Mine Act – under which monetary penalties and criminal actions can be assessed against individuals - to prosecute matters against lower level employees, increasing the anxiety felt in the mining industry.

MSHA's proposed new rules on workplace examinations may be a vehicle for even more individual liability.

Many of MSHA's proposed changes have been met with questions and skepticism from the industry, causing MSHA to extend the comment period until September 30, 2016. Mine operators and employers who have workers subject to the Mine Act should critically review the proposed rules and give consideration to the comment process.

Here's what's at stake.

Some of MSHA's Potential Changes.
On June 8, 2016, MSHA published a proposed rule concerning the Examinations of Working Places in Metal and Nonmetal (MNM) mines. MSHA's stated purpose for the proposal was to "ensure that mine operators identify and correct conditions that may adversely affect miners' safety or health." After conducting public hearings on the proposed rule, MSHA received many questions and comments.

The following is a list of the changes that may create the questions for employers in the mining industry:

- An examination of each working place at least once each shift, before work begins in an area, for conditions that may adversely affect the safety or health of miners.
- New requirements addressing the contents of the examination record including the continued requirement that a record of the working place examination be made.
- A requirement that the competent person conducting the examination sign and date the record before the end of the shift for which the examination was made.

- Requiring the signed record to include the locations examined and a description of any adverse conditions found.
- Requiring the record to include, where any adverse condition is found: (1) a description of the action taken to correct the adverse condition; (2) the date that the corrective action was taken, and; (3) the name of the person who made the record of the corrective action and the date the corrective action was taken.

What is "prompt" and sufficient notification under the proposed rule?

Under the proposed rule, MSHA seeks to require metal and nonmetal mine operators to "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. Understandably, during the public hearing phase, comments and testimony illuminated the need for MSHA to clarify its requirement as to what it means by "promptly notifying miners." MSHA has attempted to clarify its position that "promptly notifying miners" is satisfied by "any notification to the miners that alerts them to adverse conditions in their working place so that they can take necessary precautions to avoid an accident or injury before they begin work in that area."

MSHA further muddied the waters by going on to opine that while the "notification could take any form that is effective to notify affected miners of the particular condition," including verbal notification, prominent warning signage, other written notification, etc., and that "verbal notification or descriptive warning signage would be necessary in most cases to ensure that all affected miners received actual notification of the specific condition in question." Additionally, to be "prompt," the notification must occur *before* the miners are *potentially* exposed to the condition; *e.g.,* before miners begin work in the affected areas, or as soon as possible after work begins if the condition is discovered while they are working in an area. This requirement could prove to be subjective. In MSHA's opinion, an example of compliance is notification that occurs when miners are given work-shift assignments (i.e., pre-shift).

It is important to also point out, that like the existing rule, the proposed rule requires the examination be made by a "competent person" designated by the mine operator. MSHA emphasized that the competent person should be able to recognize any adverse conditions that are expected or known to occur in a specific work area or that are predictable to someone familiar with the mining industry. Again, this is another area that potentially leave employers open to being second guessed by MSHA. Nonetheless, MSHA has stated in various PPLs that while a "best practice" is to have a foreman or other supervisor conduct the examination, an experienced non-supervisory person may also be designated as a "competent person." As noted above, this is a potential area where MSHA could seek the expansion of 110(c) actions. MSHA has requested comments on the requirements of "competent persons" under the Mine Act.

What is the extent of the workplace examination?

Regarding the extent of the proposed required examination, concern was expressed that the proposed rule would require mine operators and employers to conduct examinations of the *entire*

mine before the start of each shift. Again, MSHA put a haze over what might have been clear guidance. Specifically, MSHA responded that it is not its *intent* to require mine operators to examine the entire mine before work begins, but instead, an examination of "each working place" . . . "before work begins in an area." The proposed rule, like the existing rule, requires examinations only in those areas where work will be performed.

However, under the current and proposed rules, a "working place" is not the entire mine *unless* miners will be working in all areas of the mine during that particular shift. Accordingly, the fundamental question in making this decision is determining when and where miners might be working during any particular shift. As one could imagine, scenarios could exist where mine operators are forced to examine the entire mine due to the nature of their operations and activities on any given shift.

The proposed rule – in MSHA's opinion – would not change the existing definition of "working place" since the existing rules define a "working place" as any place in or about a mine where work is being performed. A "working place" applies to all locations at a mine where miners work in the extraction or milling processes. MSHA has also clarified, that consistent with the existing definition of "working place," this includes roads traveled to and from a work area. MSHA further explained that a working place would not include roads not directly involved in the mining process, administrative office buildings, parking lots, lunchrooms, toilet facilities or inactive storage areas. Unless required by other standards, mine operators would only be required to examine isolated, abandoned, or idle areas of mines or mills when miners have to perform work in these areas during the shift.

What is the significance of the signature requirement?

The proposed rules also require the "competent person" – who may be a non-supervisory employee – conducting the examination *sign* and date the record of examination before the end of the shift. In light of the increase in 110(c) actions by MSHA, many in the mining industry expressed concern that the proposed requirement to *sign* the record will increase the potential for "agent" liability under Section 110(c). In response to some of these concerns, MSHA has stated that "agent" liability under section 110(c) relates to the "substantive duties and delegated responsibilities of the person in question." MSHA also claims the single act of printing one's initials or name, as opposed to *signing* one's name, adds no more and no less to the substantive duties and qualifications of the person who conducts the examination. Nonetheless, many remain concerned that the signature requirement will actually discourage miners from conducting working place examinations and would actually have a negative impact on the quality of the examination. As a result, MSHA now seeks comments on an alternative approach of simply requiring that the name of the competent person, rather than the signature, be included in the examination record.

MSHA's proposed new rule may significantly impact many employers and their individual employees. We will keep you updated on this development.

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