



## MSHA Finalizes Workplace Exam Requirements

By Adele L. Abrams, Esq, CMSP

On April 9, 2018, the federal Mine Safety and Health Administration (MSHA) released its final rule modifying workplace examination requirements for operators of surface and underground metal and nonmetal mines. 83 Fed. Reg. 15055. The revised standard requires each “working place” to be examined at least once each shift for conditions that may adversely affect safety or health of miners, before work begins or as miners begin work in that place. Mine operators must promptly notify miners in affected areas of any uncorrected conditions that may adversely affect them and must promptly initiate appropriate corrective action. A record must be made by the end of the shift, and kept for 12 months, after being updated to reflect the date of corrective action.

The rule takes effect on June 2, 2018, but MSHA has indicated it will generally refrain from issuing citations under the new requirements until October 1, 2018, but reserves the right to do so. In the interim, mine operators must continue to comply with the original rule’s requirements and can be cited for any deficiencies. The final rule retained most of the added requirements from the 2017 version but clarified that the exam could be done contemporaneously with workers entering the area, and exempted from recording or notifying miners of any conditions “promptly corrected” by the end of the shift on which they were identified. However, it remains unclear whether citations would be issued if workers were exposed to the hazards while working, even if they are corrected later in the shift. The agency

backed away from efforts to make the metal/nonmetal rule more similar to the coal mine examination requirements, which dictate that those mines must be examined before miners enter to start their shift.

MSHA also announced a series of public stakeholder meetings, some of which will be teleconferences, running from May 1 through June 6, 2018, at various locations around the U.S. The briefings provide MSHA’s view on the rule’s requirements and interpretation, and offer a forum for interested parties to pose questions to both headquarters and district office personnel. Transcripts of the meetings are being prepared for public review, and MSHA has also posted various fact sheets on the requirements at [www.msha.gov](http://www.msha.gov). In addition, MSHA has posted the training materials that it is using to prepare its inspectors for implementation of the rule and consistent enforcement. MSHA stressed that this is part of their transparency and desire for both enforcement personnel and employers to be in sync concerning requirements.

The April 2018 version modifies both the original 1970s-vintage rule (currently in effect) but also the Obama Administration’s January 2017 final rule, which was sent to the Federal Register just before the transition and was published on January 23, 2017, just after the inauguration. Implementation of that rule was initially stayed as part of the Trump Executive Order regulatory freeze, then was further delayed repeatedly, and finally reopened for further comment, hearings and subsequent changes. Industry groups, including the National Stone, Sand & Gravel Association, had challenged the rule in the U.S. Court of Appeals, and that litigation is still pending but is likely to be dismissed as a result of the new rulemaking.

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## MSHA Workplace Exam, cont.

The following are the key changes between the current rule and the new requirements:

### Documentation of workplace examinations:

- Old Rule: It requires a record indicating the work area being examined, the date and shift, and the name of the examiner. No record of the hazards found, or corrective action taken is required.
- New Rule: The record must now include a description of all hazards that are not “promptly corrected” by the end of that shift. Ongoing uncorrected hazards need only be recorded on the initial record. The record must also include the date that corrective action was taken, but does not have to indicate what corrective action was taken. If no hazardous conditions are identified, there is no requirement to affirmatively state this on the report form, but it may be prudent to confirm that an exam was completed. There is no specified format for the record, although MSHA plans to make model forms available in the future. The records can consist of checklists, work orders, or electronic forms, as long as they are maintained and can be produced to MSHA by the end of the inspection day. It is not advisable to include non-safety related repair information on these forms as those entries might be misconstrued as representing hazardous conditions. All information related to adverse conditions should be in a single record for the shift, including the dates of corrective action.

### Notification of miners:

- Old Rule: Not required but if an imminent danger is discovered, all affected miners must be withdrawn except for those working on abatement of the hazard.
- New Rule: Workers must be notified of any hazardous conditions that have not been promptly corrected. Notification can be verbal, or through the use of signage or warning devices such as barricades, caution tape or fencing (as long as it is clear what hazards are being referenced by the warning). The new rule carries over the requirement to withdraw miners where an imminent danger is present.

### Timing of examination:

- Old Rule: The exam could be conducted any time during the workshift.
- New Rule: The exam must be conducted at the

start of the shift or before miners begin work in the area. If there are consecutive shifts, MSHA will permit the exam to be performed just before the next shift commences. Other mandated inspections, such as for ground and highwall conditions (30 CFR 56/57.3401), or for defects on equipment affecting safety (56/57.14100), can be performed and documented at the same time as the workplace exam under 56/57.18002.

### Document retention:

- Old Rule: Rolling 12-month window, records must be made available to MSHA upon request. However, the MSHA Program Policy Manual (PPM) had long stated that once an inspection had occurred, the employer could dispose of the previous records as long as the company would certify that the entire 12 months of inspections were performed.
- New Rule: MSHA retained the 12-month retention period, and said it will rescind the PPM position allowing disposal of records. In addition, records must be made available to both MSHA and to the miners or miner’s representative upon request.

### Key Definitions: MSHA did not alter the definition of “Working Place” or of “Competent Person.”

- For purposes of the rule, “working place” is defined as any place “in or about a mine where work is being performed.” Travelways are included if they must be traveled to get to or from a work area. The agency clarified that working places need only be examined if they are active, not inactive areas or roadways. Moreover, the agency guidance states that the examination requirements in the new rule do not apply to administrative buildings, parking lots, toilet facilities, lunchrooms, and inactive storage areas. However, MSHA can issue citations for violative conditions in these locations and accidents occurring in these areas of a mine site must be reported to MSHA.
- Anyone trained and designated by the employer can serve as the competent person to perform examinations, whether salaried or hourly. The competent person must have abilities and experience that fully qualifies him/her to perform the duty assigned. This means, for purposes of the new rule, they must be able to recognize hazards and conditions that are expected or known to occur in a specific work area, or which are predictable to someone familiar with the mining industry.

Past legal precedent (FMSHRC decision in the 2009 *Nelson Quarries* case) indicated that hourly workers who

## MSHA Workplace Exam, cont. (2)

performed the exams could be considered agents of management, for purposes of individual civil or criminal penalties under Section 110 of the Mine Act, because they must be able to promptly initiate corrective action, but MSHA has indicated in conjunction with this new rule, that conducting examinations will not (absent other indicia of agent status) be a trigger for personal prosecutions.



MSHA Metal/Nonmetal administrator Kevin Stricklin explains the workplace examination requirements.

Although not specifically included in the new final rule, MSHA clarified in a 2015 Program Policy Letter that all persons performing workplace exams under this standard must be “competent” and have documented Part 46 or 48 task training (depending on the commodity being mined) on the task of conducting workplace examinations. If a workplace exam is performed but MSHA finds uncorrected hazards in the work area that are not barricaded off, and deems the exam inadequate, the employer can be cited both for an inadequate inspection and also for insufficient task training of the examiner.

The workplace examination requirements, codified at 30 CFR 56.18002 (surface) and 57.18002 (underground), also apply to contractors performing work at non-coal worksites, such as drilling and blasting companies, electrical and mechanical contractors, and equipment manufacturer representatives who may perform service work or maintenance on mining equipment. Covered mine sites include cement plants, stone quarries, sand and gravel operations, phosphate operations, metal mines such as gold, silver, copper and lead, and facilities that process raw taconite and alumina.

Companies performing construction work at such operations are also affected. In addition, a 2016 ruling by the Federal Mine Safety & Health Review

Commission in the Sunbelt Rentals case held that both contractors and the host mine operator can be issued citations if the contractor’s examination of its working place is not “adequately” examined and MSHA finds citable hazards in its work area. Recent agency comments at the initial MSHA stakeholder meeting suggested that a contractor who works in an area already examined by the host mine operator might be able to rely upon that inspection. However, this is contrary to prevailing case law and it is prudent for contractors to still examine their discrete work areas and document any uncorrected hazards, because they are technically included within the Mine Act’s definition of “mine operator.” Moreover, they enter the working place hours after the initial inspection was completed, and a mine’s dynamic nature means that new hazards can arise at any time during a workshift.

MSHA maximum penalties were hiked to \$259,725 per citation effective January 1, 2018, and the Mine Act is a strict liability statute with no limitations period for issuing citations. MSHA can cite employers based upon “evidence” that makes an inspector “believe” that a violation has occurred, even if it occurred in the past and had been corrected prior to the inspection. Unlike OSHA, MSHA does not have a “safe harbor” policy for self-audits.

For more information on compliance with the revised rule, safety and health audit assistance, or for training under Part 46/48, contact the Law Office at [www.safety-law.com](http://www.safety-law.com).

### MSHA Focuses on Powered Haulage Safety During Quarterly Training Call By Joshua Schultz, Esq. MSP

During an April 30, 2018 Quarterly Training Call, the Mine Safety and Health Administration (MSHA) emphasized powered haulage safety, noting three target areas: large vehicles striking smaller vehicles, seat belt usage, and conveyor belt safety.

Assistant Secretary of Labor for Mine Safety and Health David Zatezalo addressed MSHA’s Request for Information (RFI), soliciting comments from the regulated industry for systems to improve powered haulage safety. The agency has released a list of these suggestions on their [website](#). These strategies include increased training, risk assessments, comprehensive traffic plans, and engineering controls. Secretary Zatezalo left open the possibility for new regulations regarding powered haulage safety.

MSHA noted that powered haulage accounted for 50% of mining fatalities in 2017 and presently 57% of the

## Powered Haulage Safety, cont.

fatalities in 2018 involved powered haulage. Agency representatives reviewed the 2018 fatalities involving powered haulage, discussing the root causes of these accidents and best practices which may help prevent similar occurrences in the future.

When asked if MSHA would fine individuals who are not wearing seat belts on mine sites, MSHA responded that they do not have individual fines for lack of seat belt use at present, but are considering a rule in the future. It is worth noting that MSHA can fine supervisors and other agents of management individually for failure to utilize seat belts under Section 110(c) of the Mine Act. MSHA frequently will issue a 104(d) unwarrantable failure citation to a supervisor who fails to put on his or her seatbelt when driving the inspector around the mine site.

Secretary Zatezalo additionally emphasized that he is a proponent of new safety technology and advocated for the adoption of safety technologies even without a federal regulatory requirement. The Secretary mentioned specifically the Final Rule on Proximity Detection Systems for Continuous Mining Machines in Underground Coal Mines, which took effect March 16, 2015. He noted that some companies are still not in compliance with this rule. Mr. Zatezalo emphasized there have been numerous fatalities involving a failure to use a seat belt or a failure to lock out tag out power. He suggested the possibility for new rules requiring technology which would interlock these safety tools.

## Kentucky Legislation Leaves Radiologists Behind in Black Lung Cases

By Sarah Ghiz Korwan

Recent legislation in Kentucky now excludes radiologists from reading x-rays in state workers' compensation black lung cases. This includes those certified as demonstrating proficiency in classifying radiographs of the pneumoconiosis (known as "B readers") by the National Institute for Occupational Safety and Health (NIOSH) and out-of-state radiologists who are licensed to practice in Kentucky. The legislation mandates the diagnosis of black lung disease, often a fatal condition triggered by a coal miner's heavy exposure to coal dust, be made by a pulmonologist. Currently, there are six pulmonologists in Kentucky, four of whom typically work for the coal companies. This leaves speculation that the coal lobby wrote the legislation.

NIOSH, the federal research agency that trains, tests and certifies the physicians who read X-rays and diagnose the deadly disease, has stated that it was not consulted by Kentucky lawmakers in the 14 months they considered the new law. Christina Spring, a spokeswoman for NIOSH told National Public Radio (NPR) that, "there is no evidence that performing ILO classification, a standardized process for describing findings present on chest radiographic images used in evaluating black lung cases, is done differently by B Readers with medical backgrounds in radiology vs. pulmonology." In addition, she noted that radiologists have a slight edge, with 90 percent passing the exams in the last 10 years, while 85 percent of pulmonologists were recertified.

Coal miners in Kentucky suffering from black lung can seek state or federal compensation for black lung disease, although state benefits may be greater and easier to obtain. Reportedly, this legislation will virtually eliminate the state workers' compensation black lung program, according to Timothy Wilson, an attorney in Lexington, KY, who represents coal miners. He is president of the Kentucky Workers' Association and participated in confidential negotiations focused on the black lung claims legislation.

NPR reported that many are calling for repeal of this legislation, including one of the nation's leading groups on pulmonology and respiratory disease. According to Dr. Robert Cohen, a pulmonologist at the University of Illinois, Chicago, who has spent 30 years focused on black lung disease, the law "seems to have been specifically passed to exclude physicians who are neutral." Dr. William Thorwarth, CEO of the American College of Radiology, called on the Kentucky legislature to not only repeal the changes, but make larger "reforms" of the state's workers' compensation law. He commented that "to have that established process superseded by legislators and a political process is inappropriate. This is a matter of life and death for many people." Thorwarth added, "politics should be left out of it."

In addition, the executive director of the American College of Occupational and Environmental Medicine, Bill Bruce, a group representing 5,000 physicians who specialize in occupational and environmental injury, illness and disability, reportedly said that the revised law is "off base." He told NPR that, "there is no rationale for limiting X-ray interpretation to pulmonary physicians," and that "qualified physicians in other specialties should be allowed to do so if they have demonstrated competency."

Reportedly, Rep. Adam Koenig, a Republican and real

## Black Lung Cases, cont.

estate agent from Erlanger, Kentucky, and the lead sponsor of the legislation, told NPR he "relied on the expertise of those who understand the issue — the industry, coal companies and attorneys" during the 14 months he spent working on the changes to the law. Koenig said "not everyone who had a specific interest was involved. ... I'm not sure I was even aware of NIOSH." He added that he is willing to revisit the legislation with a hearing on possible new changes in the law during legislative interim committee meetings this summer and fall.

The Law Office will continue to follow this legislation as well as others that affect the coal mining industry.

### Lack of Training/Familiarity with OSHA Standards May Be Basis for a Willful Violation By Gary L. Visscher, Esq.

In OSHA enforcement cases, the issue of whether employees have received adequate training and instruction usually arises in the context of OSHA's burden to prove "employer knowledge" or the employer's defense of "employee misconduct." In either context, employee training on the hazards of the job and the applicable OSHA standards is pertinent to whether the employer had an adequate safety program.

A recent decision by the U.S. Court of Appeals for the Eleventh Circuit held that an employee's training – or lack thereof – on OSHA standards may also be the basis for finding that an employer's violation of a standard is willful, particularly if the lack of training involved an employee who is acting as a supervisor or foreman.

In *Martin Mechanical Contractors v. Sec. of Labor* (11th Cir., Mar. 27, 2018), the contractor was installing HVAC units on a flat roof of a warehouse. The installation was about four feet away from several large skylights. The skylights were not guarded or covered (except by thin plastic). The foreman told the crew to be careful working around the skylights, but he did not direct them to use fall protection. During the installation of the HVAC system, a crew member's saw became stuck in the metal roof, causing him to lose balance and fall through a skylight. He was seriously injured in the fall and later died from his injuries.

OSHA cited the employer for a willful violation. According to the Court of Appeals, evidence at the hearing showed that the foreman recognized the hazard – he had warned the crew to be careful and to "stay away from the skylights." But he did not insist that the crew use fall protection because, he said, the work was on a flat roof.

The employer defended against the willful violation, in part, by asserting that the foreman was unfamiliar with OSHA's fall protection standards. The Court of Appeals not only rejected the employer's "ignorance of the rules" defense, but said that the foreman's lack of familiarity with the standards reinforced, rather than countered, the "willful" charge. The foreman's "unfamiliarity serves, if anything, only to underscore the inadequacy of [the employer's] training program. To hold that such inadequacy – and the resulting unfamiliarity – precludes classification of a violation as willful would perversely allow [the employer] to use its ineffective training as a defense against OSHA's most serious charge."

### 2018 Regulatory Agenda Released By Gary L. Visscher, Esq.

The government-wide Regulatory Agenda is published two times per year, spring and fall. The Regulatory Agenda lists the regulations which each federal agency is actively working on, and anticipates taking some action on, over the next 12 months. Items on the Agenda are listed as "final rule," "proposed rule," or "pre-rule" stage. A separate list of "Long Term Actions" shows items on which the agency continues to work, but no specific step in the regulatory process is anticipated in the next year.

The OSHA Spring 2018 Regulatory Agenda was released on May 9. According to the latest Agenda, OSHA expects to issue four final regulations in the next 12 months – each intended to make minor corrections and updates to existing agency rules or standards.

Several items listed in the "proposed rule" stage are notable. OSHA plans to issue a proposed rule on construction crane operator qualifications this year, an item that has been on the Regulatory Agenda in some form since 2010. The Spring 2018 Agenda states that OSHA plans to issue a proposed rule in May 2018, though the calendar suggests that target date may not be met. OSHA also plans additional rulemaking on

## 2018 Regulatory Agenda, cont.

beryllium exposure. OSHA issued a final rule on beryllium in January 2017 and subsequently delayed enforcement of the rule. Earlier this month OSHA announced that it would begin enforcement of certain parts of the rule on May 11, 2018; specifically, OSHA is enforcing the permissible exposure limits (PEL) in general industry, construction, and maritime, and some ancillary provisions (exposure assessment, respiratory protection, medical surveillance, and medical removal) in general industry. The notice of proposed rulemaking is to eliminate the ancillary provisions, but not the PEL, for construction and shipyards. OSHA expects to issue the proposed rule in December 2018.

In addition, under “proposed rules,” OSHA states that it plans to issue updates to the 2012 Hazard Communication Standard (HCS). The 2012 HCS was adopted to conform with the Globally Harmonized System, or GHS, on chemical hazards communication. Since 2012, the internationally–negotiated GHS has been revised, and OSHA will propose modifications to HCS accordingly.

Also, under “proposed rules” is OSHA’s scheduled revisions to the “Tracking of Workplace Injuries and Illnesses” rule. The rule, which is currently in effect, requires establishments with 250 or more employees to electronically file their injury and illness records (Forms 300, 300A, and 301) with OSHA, and establishments of 20 or more (for certain industries) to electronically file the annual report, Form 300A, with OSHA. OSHA plans to revise the rule to remove the requirement to file the Form 300 and 301 and to make other changes in the rule to reduce duplication with Bureau of Labor and Statistics injury and illness data collection.

The Regulatory Agenda anticipates a number of actions on items in the “pre-rule” stage. OSHA anticipates initiating the Small Business Regulatory Enforcement Fairness Act (SBREFA) reviews this year for the Communications Tower construction rule, a comprehensive Emergency Response and Preparedness rule, a Tree Care standard, and a standard on Prevention of Workplace Violence in Health Care and Social Assistance.

In addition, OSHA anticipates publishing Requests for Information or Advance Notice of Proposed Rulemaking on Updating the Mechanical Power Presses standard, updating the Powered Industrial Truck standard, updating the Lock-Out Tag-Out standard, and lowering

the Blood Lead Level for Medical Removal for general industry and construction. OSHA also plans to issue a Request for Information regarding revisions to Table 1 in the Silica standard for Construction, to begin consideration of adding additional tasks or work practices.

### MSHA

MSHA’s regulatory agenda lists one final rule (“Reopening of the record in the Refuge Alternatives for Underground Coal Mines” rulemaking) and 5 rulemakings at the “pre-rule” stage.

Of note is that MSHA continues to list a rule on exposure to respirable crystalline silica as a “Long-Term Action,” which indicates that MSHA does not anticipate taking any specific actions on the rule over the next 12 months.

### Joint Employer & FLSA “white collar” exemption rules

Two other items of interest from the Spring 2018 Regulatory Agenda: The National Labor Relations Board (NLRB) states that it plans to issue a proposed rule on affiliated businesses and “joint employers.” The NLRB has previously dealt with this issue through decisions in individual cases, but the Board’s most recent decision was vacated due to an alleged conflict of interest of one of the Board members. No date was given for the proposed action.

Also, the Department of Labor, Wage and Hour Division, anticipates issuing a proposed rule in January 2019 to set a new minimum salary level for the Fair Labor Standards Act (FLSA) “white collar” exemption (exemption for executive, administrative, and professional employees). The Obama Administration issued a rule which had doubled the salary level threshold for the exemption. At the time that the previous rule was withdrawn, Secretary of Labor Acosta announced that the Administration planned to issue a new salary threshold, likely somewhere between the existing threshold (\$23,660) and the previous rule (\$47,476).

## **2018 ‘Dirty Dozen’-Employers Who Put Workers and Communities at Risk** By Joshua Schultz, Esq., MSP

As part of Workers’ Memorial Week, the National Council for Occupational Safety and Health (COSH) issued a report on 12 companies who place employees in unnecessary risk in the workplace due to a failure to observe safety practices. COSH evaluated companies

## Dirty Dozen, cont.

according to several factors, including severity of injuries to workers; exposure to unnecessary and preventable risk; repeat citations by relevant state and federal authorities; and activity by workers to improve their health and safety conditions.

The COSH report blames, in part, a decrease in funding for the Federal Occupational Safety and Health Administration, noting that in the five-year period from 2012-2016, the Agency's budget decreased by 12 million and the number of full-time OSHA staff was cut from 2,305 to 2,173, a reduction of 5.7%.

The report also notes that Latino workers, immigrants, older workers, and contract employees are most at risk in the workplace. In 2013, OSHA launched their Temporary Worker Initiative with the stated goal of preventing work-related injuries and illnesses for temporary workers. Since the beginning of this initiative, OSHA has issued more citations and steeper fines to employers when temporary workers are involved. Under OSHA's Multi-Employer Citation Policy, the Agency may frequently cite the host employer, the staffing agency or both.

COSH notes a wide range of safety issues with the 12 employers on the list, including repeated OSHA citations for trench collapses; complaints about sexual harassment and abuse; fatalities resulting from exposure to toxic chemicals; and failure to report injuries. COSH and other advocacy groups comb through OSHA press releases and citation histories when drafting reports such as the Dirty Dozen. In addition to bad publicity, these reports pressure OSHA and state plans to increase scrutiny and inspections at local operations. Taking proactive steps such as frequent safety audits and comprehensive well-documented training will enable employers to avoid the accidents and citations which draw the attention of such reports. Additionally, contesting unwarranted citations to keep your record free and clean of serious and repeat violations may serve to keep your company off the radar for this type of negative publicity.

## Whistleblower Matters

By Gary L. Visscher, Esq.

In addition to enforcing the employee protection provisions of the OSH Act, OSHA receives and investigates complaints of unlawful retaliation under 21 other federal laws. These laws protect employees who report violations of airline, commercial motor vehicle,

consumer product, environmental, financial reform, food safety, health care reform, nuclear, pipeline, public transportation, railroad, maritime, and securities laws. Two recent whistleblower investigations by OSHA resulted in orders to reinstate the employee and award backpay and compensatory damages against the employer.

In a March 2018 decision, OSHA ordered the reinstatement of a pilot who was terminated after reporting violations of Federal Aviation Administration (FAA) safety rules. The pilot believed that a new scheduling policy by the employer did not provide pilots with the required FAA rest time. He initially complained to the employer. He then complained to the FAA and declined two flight assignments which he felt violated the rest time regulations. The employer fired him for declining to take the assignments. OSHA investigated and concluded that he was fired for protected activity under the Wendell Ford Aviation Investment and Reform Act. Along with reinstatement, OSHA ordered the employer to pay back pay, \$100,000 in compensatory damages, and attorney's fees.

In a second case, OSHA ordered reinstatement and compensation for an employee who was fired after he reported concerns about the safety of his employer's production of flavored liquids for e-cigarette vapor inhalers to the California Department of Environmental Protection. OSHA determined that his complaints to California DEP were protected activity under the federal Toxic Substances Control Act and Solid Waste Disposal Act, and were a motivating factor in his termination.

OSHA is beginning a series of public meetings on "key issues facing the agency's whistleblower program." The first meeting will focus on the administration of the whistleblower provisions in the railroad and trucking industries – the Federal Railroad Safety Act, the Surface Transportation Assistance Act, and the National Transit Systems Security Act, as well as section 11 (c) of the OSH Act as it pertains to employers and employees in the railroad and trucking industries. The meeting will be held on June 12, 2018, from 1 – 3 pm. Advance registration, by May 29, is required to attend and/or to participate in the meeting. Information on the meeting and on registration is in the May 4, 2018 Federal Register and on the OSHA website.

## Mine Act – FMSHRC Allows Remedy in Interference Case

Section 105 (c) of the Mine Act protects not only against adverse actions such as discharge or discrimination because of listed activities, but also prohibits employers'

## Whistleblower Matters, cont.

“interference” with the exercise of “the statutory rights of a miner, representative of miners, or applicant for employment.”

“Interference” cases present the issue of an appropriate remedy if unlawful interference is found. The person or persons alleging unlawful “interference” may not have suffered any financial loss, such as a loss in pay or benefits. Thus, the remedies in these cases, where unlawful interference is found, generally include “cease and desist” orders, orders to conduct additional training on miners’ rights under the Mine Act, and assessment of civil penalties to the employer.

A different type of remedy was recently upheld by the Federal Mine Safety and Health Review Commission (FMSHRC). The decision related back to interference complaints filed in 2014 by several miners employed by Murray Energy, after the company held mandatory “Awareness Meetings” which included a message from the CEO noting a rise in complaints to MSHA and requesting that mine management be informed when a complaint was made to MSHA, in order to give the company an opportunity to fix the problem before MSHA investigated. The Commission had previously affirmed the ALJ’s finding that the message to miners constituted unlawful interference with miners’ rights. *Sec’y obo McGary and Bowersox v. Marshall County Coal, et al.*, 38 FMSHRC 2006 (2016).

As a part of the remedy for the unlawful interference, the ALJ ordered the CEO of Murray Energy, Robert Murray, to read a statement to miners which informed them that, contrary to the message at the previous Awareness Meetings, miners are not required to contact management when making a complaint to MSHA. The ALJ’s order was appealed to the Commission, and the Commission remanded the case to the ALJ for clarification of certain aspects of the order, including who would write the statement and whether the CEO must appear in person at each mine site to deliver it. On remand, the parties were unable to agree on the language to be read, so the ALJ mandated a message and ordered the CEO to deliver it at each mine either in person or by video conference.

The company again appealed, this time arguing that by requiring the CEO to read the approved statement to miners, the remedy ordered by the ALJ “was punitive rather than remedial.” The Commission again granted review, but held that Murray Energy had not previously

argued to the ALJ that the remedy, by requiring the CEO to read a personal message, was punitive, and therefore the company had not preserved this issue for appeal. In March 2018, the Commission unanimously dismissed the appeal and allowed the ALJ’s ordered remedy to go forward. *Sec’y obo McGary and Bowersox v. Marshall County Coal, et al.*, WEVA 2015-583-D (March 2018).

## EEOC Sues Albertsons Over Restrictive Language Policy

By Diana Schroeder, Esq.

On May 3, 2018, the federal EEOC (Equal Employment Opportunity Commission) filed a complaint in federal court in California on behalf of a class of Hispanic workers accusing their employer, Albertsons, LLC, of national-origin discrimination in violation of Title VII when it implemented an unwritten, “no-Spanish” policy. Albertsons is a national food and drug retailer operating under 19 banners (including Safeway, Acme, Vons and Shaws), with over 280,000 employees in 35 states. In *U.S. Equal Employment Opportunity Commission v. Albertsons Companies Inc.*, No. 18-0852, S.D. Calif. (filed May 3, 2018), the EEOC claims that Albertsons’ policy prohibited Hispanic employees from speaking Spanish even while on breaks, and even if assisting a Spanish-speaking customer. The policy was effectively an “English only” policy. Spanish-speaking employees in the San Diego store were harassed, publicly reprimanded for violating the policy, and threatened with further discipline.

The EEOC’s regulations prohibit blanket English-only rules in the workplace. The 1980 regulation and later-issued guidance provide that a blanket policy disadvantages an individual’s opportunities on the basis of national origin, and that “rules requiring employees to speak English in the workplace at all times will be presumed to violate Title VII.” 29 CFR § 1606.7; *EEOC Enforcement Guidance on National Origin Discrimination*, No. 915.005 (Updated 11.18.16) (see Guidance [here](#)). The EEOC acknowledges that if an employer’s English-only policy is applied “only at certain times” during the workday, then it may not be presumptively discriminatory. However, it is the employer’s burden to show that the policy is “job-related” for the employee’s position, and “justified by business necessity” in that the policy should apply only to those workers, work areas, circumstances, times and job duties in which it is necessary “to effectively promote safe and efficient business operations.” Employees must also be notified of the employer’s

## EEOC Sues Albertsons, cont.

policy, per EEOC regulations. State laws may also govern an employer's ability to limit or prohibit use of any language.

The Albertsons lawsuit seeks injunctive relief prohibiting further discrimination, compensatory and punitive damages for the class of employees harmed. According to EEOC's Press Release, EEOC attorneys advise employers to review their language-restrictive policies to ensure compliance with the regulations, warning that censoring a particular language "is often synonymous with targeting a particular national origin, which is illegal and highly destructive to workplace morale and productivity". Given that employers face substantial risks if they implement language-restrictions in any form in the workplace, careful review to ensure compliance and uniform application across the workforce, is prudent.

## MSHA Stakeholder Meeting on Workplace Exams

By Tina M. Stanczewski, Esq., MSP

During the MSHA stakeholder meeting at headquarters in Virginia on May 10<sup>th</sup>, practical advice was provided on how MSHA will implement the Workplace Exam Rule and how operators need to respond. The takeaway for operators is that you must apply the new workplace exam rule to your site conditions and procedures. Here are the key topics and guidance from MSHA:

### Documentation of Hazards

Operators must document hazards and when they are corrected, if not corrected immediately. The question was presented: if a hazard is found and documented on a Monday, but not corrected until Wednesday, does the operator need to continue documenting the hazard until it is corrected? MSHA's response was no, the operator does not need to document it on Tuesday and Wednesday. However, if procedures require daily documentation of hazards and the operator chooses to document it on Tuesday and Wednesday, then operators need to mark each entry as corrected when it is corrected. This provides mines flexibility within their procedures, but the key takeaway is that if operators have documented a hazard, then it must have a corresponding entry of correction. Ensure that if the operator has decided to abandon an area instead of correcting, then it is clear on the record that the area has been abandoned.

Some operators document correction of a hazard by attaching a completed work order. MSHA confirmed that this is up to the operator and not necessary. It also could trigger additional investigation if the work order offers too much detail for an investigator to read.

MSHA confirmed that operators must ensure contractors are competent to conduct examinations if they rely on the contractor to complete an exam. In some situations, MSHA may expect the operator to be involved in the examination that a contractor is undertaking. Contractors exam records are expected to be on site at the mine property.

MSHA advised that operators audit examination records to ensure all items documented have been corrected and documented.

### Examination for Hazards

For those operations running three shifts, three examinations are required. If miners move into a new area that was not expected or scheduled at the beginning of the shift, then the examination must occur first. Exams can occur concurrently to miners "entering" the area. Although exams are not required for such areas as bathroom facilities, parking lots, lunchrooms and offices, if mining activity is occurring within these areas or adjacent to these areas, then an exam is required.

An operator offered a scenario about an hourly miner who operates the water truck. The miner arrives at work one hour before anyone else to water the roads. MSHA suggested that he be trained and designated as the competent person and conduct one pass to examine for hazards and then he could begin work. At first, it was suggested that the exam and watering of the road could occur together, but it was suggested that if a hazard is encountered and the miner became injured, then a violation may have occurred since the miner was exposed to the hazard.

### Notification to Miners

Operators do not need to alert all mine personnel, but only those exposed to the hazard or expected to work in the area where a hazard exists. Now, if unintended miners enter this area and were not notified, then the operator may have violated the notification portion. The key is to know the flow of your personnel and how to communicate with them to prohibit access if someone is not aware of the hazard. This may require barricades to keep contractors and others who may wander out of the area (especially at a

## MSHA Stakeholder Meeting, cont.

large mine site) safe.

Citations may be written if miners begin work in an area, then a hazard is found. This creates problems for concurrent exam and entry of miners. Operators need to assess their site conditions for situations that may cause exposure before identification of the hazard. For problem areas, the operators may want to ensure that all employees entering an area are able to be alerted so they can stop work before further exposure occurs. MSHA suggested that in some situations, the examiner may be able to examine while the miners are performing preshifts on equipment versus beginning “active” mining duties.

Miners do not have to acknowledge notification of a hazard in writing, but if an inspector arrives and asks them about whether they were aware, the miners must be able to communicate what information they were given about the hazards. If hazards are communicated electronically versus in person, then MSHA suggested the operator has a method of written receipt by the miner. For example, the miner may not read a text message or his/her phone battery may have failed and they didn’t read the alert. Verbal communication directly to employees is always acceptable. Miners only need to be notified one time of the hazard.

### Recordkeeping

Electronic records are acceptable, but must be available to the inspector onsite. Any format for the

exam record is acceptable, but a checklist is suggested. MSHA also encouraged operators to have a space for “Other” to capture items that are not part of a boilerplate exam. If electronic records are kept, for example an MS Excel spreadsheet, then the file should be password-protected to ensure limited personnel have access.

Given the information presented at the stakeholder meeting, operators should be aware that not every situation arising at a mine site will necessarily fit neatly into one answer. Operators must assess their site procedures and potential pitfalls. Additional questions to consider are 1) do you have contractors on site and how does this impact the operation, 2) do you have competent examiners 3.)if you notify miners other than verbally, what procedures are in place, 4) even if you notify miners verbally, do you want documentation in case a miner doesn’t remember the notification, 5) should you document a hazard each shift until corrected, 6) what audit procedures should you implement, and 7) what are your policies and procedures if you use electronic recordkeeping? For assistance navigating the best methods to implement the rule within your mine’s situation, please contact the Law Office.



*Adele L. Abrams, Esq. was the keynote luncheon speaker on April 11, 2018 at the ASSE Region IV Professional Development Conference, Tuscaloosa, Alabama*

## 2018 SPEAKING SCHEDULE

### ADELE ABRAMS

May 21: National Electrical Contractors Association, Louisville, KY, presentation on OSHA/MSHA Update  
 May 22: National Safety Council, Mid-Year Division Meeting, Chicago, IL, presentation on crystalline silica in general industry  
 May 24: Business 21: Webinar, Legally Effective Incident Investigation  
 June 4-5: ASSE Professional Development Conference, San Antonio, TX, presentations on ADA, OSHA and Medical Marijuana; Crystalline Silica; and Whistleblower Protections for Safety Professionals  
 June 7: Environmental Information Association, crystalline silica workshop, Cinnaminson, NJ  
 June 12: SafePro Mine Safety Law Institute, Harrods Cherokee Casino, NC  
 June 13: ClearLaw Webinar, OSHA's Walking/Working Surfaces Rule  
 June 14: University of Alabama-Birmingham, Crystalline Silica full day workshop (with Michael Peelish)  
 June 16: LERA (Labor & Employment Law) Annual conference, Baltimore, MD, presentation on OSHA and Drug Testing  
 June 18: BLR Webinar, Temporary Worker Safety  
 June 19: BLR Webinar, Motivating Safe Behavior  
 June 22: MTBMA Annual Meeting, Cambridge, MD, presentation on crystalline silica  
 June 28: Sassaman Safety Training, Presentation on Crystalline Silica, Valley Forge, PA  
 July 19: Pennsylvania Aggregates & Concrete Assn., Webinar on MSHA's New Workplace Examination Rule  
 Sept 6-8, Mining Expo International (MEI), Las Vegas, Presentation on OSHA Crystalline Silica Rule & Impact on Mining  
 Sept. 21: ASSE Region VI PDC, Presentation on OSHA/MSHA Update in the Age of Trump

### TINA STANCZEWSKI

May 24: N.C. Mine Safety & Health Law School, Morganton, NC  
 Sept. 20: N.C. Mine Safety & Health Law School, Castle Hayne, NC

### JOSHUA SCHULTZ

June 7: Joseph A. Holmes Safety Association Joint National Meeting, Denver, CO, presentation on MSHA's Updated Working Place Examinations Rule