



TIMOTHY R. OLSON, P.C.
Attorney at Law

Phone: (303) 659-5040
E-mail: tim@tro-law.com
Website: www.tro-law.com

MINE SAFETY & HEALTH LAW

Bulletin

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MSHA PUBLISHES ITS PROPOSED RULE FOR ALCOHOL- AND DRUG-FREE MINES

The Mine Safety and Health Administration's proposed rule for Alcohol- and Drug-Free Mines (hereinafter, the "proposed rule") was published in the Federal Register on September 8, 2008. *See* 73 Fed. Reg. 52136 (Sept 8, 2008) which is available on MSHA's website at <http://www.msha.gov/DrugFree/DrugFreeMines.asp>. The proposed rule would establish a uniform standard for all mines, including coal mines, regardless of size of workforce. The proposed rule would become 30 C.F.R. subchapter N (Uniform Mine Safety Regulations) part 66 and would replace the existing metal and nonmetal standards for the possession and use of intoxicating beverages and narcotics at 30 C.F.R. §§ 56.20001 and 57.20001.

In sum, the proposed rule would:

- (1) prohibit possession of alcohol or drugs on mine property;
- (2) prohibit the use of or impairment from alcohol and a specific array of drugs;
- (3) require alcohol and drug testing of miners who perform "safety-sensitive job duties" and their supervisors; and
- (4) require that mine operators implement alcohol- and drug-free mine programs that consist of a written policy, employee education, supervisory training, alcohol- and drug-testing for miners that perform safety-sensitive job duties and their supervisors, and referrals to assistance for miners who violate the policy.

MSHA estimates that the total cost to all coal and metal/nonmetal mine operators and mine contractors for the initial year of the proposed rule would be approximately \$16,008,983. The estimated annual recurring cost would be \$13,008,951, which includes \$7,150,544 for alcohol and drug testing, \$5,094,004 for training, and \$764,403 for record keeping.

MSHA is soliciting public comments on the proposed rule. All comments must be received by midnight eastern standard time on October 8, 2008.

A summary of the specific requirements of the proposed rule follows.

EFFECTIVE DATE AND IMPLEMENTING LANGUAGE

The proposed rule provides for either a one-year or two-year phase in of the new requirements, depending on whether or not a mine operator has an "alcohol- and drug-free mine program" in place prior to the effective date of the rule. MSHA defines an alcohol- and drug-free mine program as "[a] program that prohibits the possession or misuse of prohibited substances while working and includes five elements (written policy, education, training, testing, and referrals for assistance) designed to prevent impairing effects that can compromise workplace safety." *See* proposed 30 C.F.R. § 66.3.

Mine operators that *do not have* an alcohol- and drug-free mine program in place prior to the effective date of the rule must implement all of the requirements of the proposed rule within one year of the effective date. MSHA considers one year to be an appropriate timeframe for such mine operators to reach compliance because the agency intends to “provide significant compliance assistance tools, including policy templates and training materials to the many small operators who do not already have such programs.”

Mine operators that *do have* an alcohol- and drug-free mine program in place prior to the effective date of the rule will be considered to be in compliance with the proposed rule provided the program’s prohibitions and training requirements are consistent with those in the proposed rule even if differing drug-testing technologies are being used. However, mine operators with pre-existing drug-free mine programs would need to come into compliance with all requirements of the proposed rule, including drug testing technologies, within two years of the rule’s effective date. MSHA states that its decision to consider existing programs as in compliance with the rule for a two-year period is based on the desire to minimize the regulatory burden to mine operators that already have programs deemed effective and in keeping with the purpose of the proposed rule.

As is customary at the proposed rule stage, MSHA has not specified an effective date for the rule. If the proposed rule ultimately becomes a final rule, MSHA will make the final rule effective upon its publication in the Federal Register *or* MSHA will designate some date after the final rule is published in the Federal Register as the effective date.

SUBPART A - GENERAL

All coal and metal/nonmetal, surface and underground mines would be covered by the proposed rule. Although the general prohibitions against using or possessing alcohol and/or drugs while on mine property apply to everyone working at mines, the alcohol- and drug-testing and training provisions of the proposed rule would apply only to those who perform “safety-sensitive job duties,” which are any work activities where “a momentary lapse of critical concentration could result in an accident, injury, or death.” For the purpose of enforcing the proposed rule, MSHA would consider any miner who is required to take comprehensive safety training under 30 C.F.R. parts 46 and 48 to be a miner that is performing a safety-sensitive job duty. *See* proposed § 66.2. The alcohol- and drug-testing and training requirements of the proposed rule would also apply to management and administrative personnel who supervise the performance of safety-sensitive job duties.

SUBPART B - PROHIBITED SUBSTANCES AND BEHAVIORS

The proposed rule states that “prohibited substances ... shall not be permitted or used on or around mine property.” *See* proposed § 66.100(a). MSHA defines “prohibited substances” as alcohol, and the following controlled substances, except when used according to a valid prescription:

- Amphetamines (including methamphetamines);
- Barbiturates;
- Benzodiazepines (*e.g.*, Valium, Librium, Xanax);
- Cannabinoids (marijuana/THC);
- Cocaine;
- Methadone;
- Opiates (*e.g.*, heroin, opium, codeine, morphine);
- Phencyclidine (PCP);
- Propoxyphene (*e.g.* Darvon);
- Synthetic/semi-synthetic opioids (*i.e.*, hydrocodone, hydromorphone, oxycodone); and
- any other controlled substances designated by the Secretary.

The proposed rule provides that miners who possess or have used a prohibited substance will not be in violation of Subpart B provided a Medical Review Officer has determined that the miner has a valid prescription for the substance and is using it as prescribed. *See* proposed § 66.100(b). An MRO is defined as “[a] licensed physician who is responsible for receiving and reviewing laboratory results generated by a mine operator’s drug-testing program and evaluating medical explanations for certain drug test results.”

Under the terms of the proposed rule, “[m]iners determined to have used a prohibited substance and/or to be under the influence of a prohibited substance ... shall not be allowed to perform safety-sensitive job duties.” See proposed § 66.101(a). Specifically, miners must not report for duty or remain on duty if they: (1) are under the influence or impaired by alcohol as verifiable by a Blood Alcohol Concentration (“BAC”) of 0.04 percent or greater; or (2) have used a prohibited substance as verifiable by a positive drug test, unless an MRO has determined that the miner has a valid prescription for the controlled substance and is using it as prescribed; or (3) have refused to submit to a drug or alcohol test or have adulterated or substituted his/her specimen in any such test. See proposed § 66.101(b).

SUBPART C - PROGRAM REQUIREMENT

The proposed rule would require each mine operator to implement the following five elements of an alcohol- and drug-free program: A written policy, employee education, supervisory training, referrals to assistance for miners who violate the policy, and alcohol- and drug-testing for miners that perform safety-sensitive job duties and their supervisors. The first four of these elements are discussed in this section and the last element, alcohol- and drug-testing, is discussed later in this bulletin.

1. **Written policy.** The alcohol- and drug-free mine program must contain a written policy statement that must be provided to all employees/miners. See proposed § 66.201(a). The written policy statement must inform employees/miners of the purpose of the policy; the prohibitions against the possession or use of prohibited substances; alcohol- and drug-testing requirements; the consequences of policy violations; and training requirements. The mine operator must ensure that every miner has been informed of the policy and must provide a copy of the written policy to the miners’ representative or post the policy on a bulletin board in a common area in the event that the miners do not have a representative. See proposed § 66.201(b). A sample model policy statement is provided on MSHA’s website at <http://www.msha.gov/DrugFree/DrugFreeMines.asp>; however, each mine operator is free to develop its own written policy statement provided the statement meets the requirements of the proposed rule.
2. **Education and awareness program for nonsupervisory miners.** Each newly hired miner must receive a minimum of 60 minutes of training before such miner is assigned to safety-sensitive job duties. The training must inform them of: (1) the mine’s alcohol- and drug-free mine policy, including alcohol- and drug-testing requirements; (2) the dangers of alcohol and drug use and the impact of such use on safety in the mines; (3) actions to take when others are suspected of violating the policy; and (4) information about any available drug counseling, rehabilitation, and employee assistance programs (“EAPs”). See proposed § 66.202(a)(1). On an annual basis, all nonsupervisory miners must receive a minimum of 30 minutes of training to review these four topics. See proposed § 66.202(a)(2).

Training must be delivered by a competent person knowledgeable about workplace substance abuse, the proposed rules regulatory requirements, and the mine operator’s policy. See proposed § 66.202(a)(3). Mine operators have the option of using the training materials on MSHA’s website at <http://www.msha.gov/DrugFree/DrugFreeMines.asp>. Training may be supplemented by written materials, including a list of company or community resources that miners can contact for assistance. Videos or other audio visual materials may be used to supplement interactive training but cannot serve as the sole means of training. See proposed § 66.202(b).

The training requirements of the proposed rule can be delivered as part of other new miner and annual nonsupervisory miner refresher training required under 30 C.F.R. parts 46 and 48, but must be delivered in addition to the other topics required and cannot displace other existing requirements of 30 C.F.R. parts 46 and 48. See proposed § 66.202(c).

3. **Training program for supervisors.** Every supervisor authorized by the mine operator to make reasonable suspicion and post-accident testing determinations shall receive an initial two hours of training and one hour annually, that, at a minimum: (1) reviews the topics covered in the nonsupervisory miner training, discussed *supra*; (2) makes them aware of their role in enforcing the alcohol- and drug-free

workplace policy; (3) reviews the physical, behavioral, and performance indicators of probable drug use or alcohol misuse and prepares them to recognize and adequately document their observation of these signs of alcohol or drug impairment; (4) trains them to make reasonable suspicion determinations and what procedures to follow when such determinations are made; (5) trains them to make post-accident determinations and what procedures to follow when such determinations are made; (6) trains them to make referrals to Substance Abuse Professionals (“SAPs”) and/or to community resources if they suspect a miner has an alcohol or drug problem but there has not been a known violation of the policy and there is insufficient evidence to warrant a reasonable suspicion test; and (7) trains them on what constitutes safety-sensitive job duties so that they understand who is subject to drug testing. *See* proposed § 66.203(a)(1). On an annual basis, all supervisors must receive a minimum of 60 minutes of training to review these seven topics. *See* proposed § 66.203(a)(2).

Training must be delivered by a competent person knowledgeable about workplace substance abuse, the proposed rules regulatory requirements, and the mine operator’s policy. *See* proposed § 66.203(a)(3). Mine operators have the option of using the training materials on MSHA’s website at <http://www.msha.gov/DrugFree/DrugFreeMines.asp>. Training may be supplemented by written materials, including a list of company or community resources that miners can contact for assistance. Videos or other audio visual materials may be used to supplement interactive training but cannot serve as the sole means of training. *See* proposed 66.203(b).

4. **Miner assistance following admission of use of prohibited substances.** Mine operators must make miners and other employees who admit to the illegitimate and/or inappropriate use of prohibited substances aware of available assistance through an employee or miner assistance program, a SAP, and/or other qualified community-based resources. *See* proposed § 66.204(a). Miners who voluntarily admit to the illegitimate and/or inappropriate use of prohibited substances prior to being tested and seek assistance shall not be considered as having violated the mine operator’s policy but shall be subject to the return-to-duty process specified in subpart E, discussed below. *See* proposed § 66.204(b). However, a positive test result during the normal return-to-duty process will be considered as a violation of the mine operator’s policy.

SUBPART D - TESTING REQUIREMENTS

The alcohol- and drug-testing requirements in the proposed rule are complex and a full discussion of the subject is beyond the scope of this bulletin. Notwithstanding, mine operators should be aware that the proposed rule would require all mines to implement an alcohol- and drug-testing program that is “valid, reliable, and protects the privacy and confidentiality of the individual to be tested.” *See* proposed § 66.300(a). The proposed rule would require mine operators to follow the U.S. Department of Transportation’s (“DOT”) requirements found in 49 C.F.R. part 40, Procedures for Transportation Workplace Drug Testing Programs, in which references to “DOT” shall be read as “MSHA” with the following exceptions: the split sample method of collection shall be used, and use of “bifurcated” alcohol level for testing is excluded. *See* proposed § 66.300(b).

Under the proposed rule, mine operators would be required to test for all of the “prohibited substances” discussed *supra*, as well any additional substances that the Secretary may designate. *See* proposed §§ 66.301 and 66.302. Testing would be required in the following circumstances: Pre-employment; randomly at unannounced times; post accident if the miner may have contributed to the accident; based on reasonable suspicion that a miner has used a prohibited substance; and as part of a return-to-duty process for miners who have violated the rule. *See* proposed § 66.303.

SUBPART E - OPERATOR RESPONSIBILITIES, ACTIONS AND CONSEQUENCES

Like the requirements for alcohol- and drug-testing contained in Subpart D, the provisions in Subpart E of the proposed rule are too complex to receive full treatment in this bulletin. However, mine operators should be aware of at least the following key requirements of subpart E of proposed rule:

- A mine operator, upon a miner's verified positive drug test result, an alcohol test with a result indicating a blood alcohol concentration of 0.04 percent or greater, a refusal to test (including by adulterating or substituting a urine specimen), or any other violation of the mine operator's policy prohibiting possession, impairment from or use of alcohol or drugs must not return the miner to the performance of safety-sensitive job duties until or unless the miner successfully completes the return-to-duty process. The miner may be assigned to duties that are not safety-sensitive at the mine operator's discretion. *See* proposed § 66.400(a).
- Mine operators are prohibited from terminating miners who violate the mine operator's policy for the first time (e.g., by testing positive for alcohol or drugs). Rather, those miners testing positive for the first time, who have not committed some other separate terminable offense, shall be provided job security while the miner seeks appropriate evaluation and treatment. The miner will be able to be reinstated and allowed to resume performance of safety-sensitive job duties provided the miner complies with return-to-duty requirements outlined in the proposed rule. *See* proposed § 66.400(b).
- For subsequent violations of the mine operator's policy, the mine operator shall specify appropriate disciplinary steps, up to and including termination. At a minimum, miners shall not be allowed to perform safety-sensitive job duties until such time that they have satisfactorily complied with the return-to-duty process as specified in the proposed rule. *See* proposed § 66.400(c).

The return-to-duty process outlined in the proposed rule is an involved one, beginning with an initial assessment that must be performed by a SAP. *See* proposed § 66.405. Miners must follow the SAP's educational or treatment recommendations, and must have an alcohol test with a blood alcohol concentration of less than 0.04 percent and a negative return-to-duty drug test result before resuming performance of safety-sensitive job duties. *See* proposed § 66.406(a). Additionally, the proposed rule requires mine operators to conduct follow-up testing of each miner that returns to duty. *See* proposed § 66.406(b).

Under the proposed rule, mine operators would generally be cited for failure to comply with the requirements to institute an alcohol- and drug-free mine policy and program; however, MSHA states that it is not its intent to sanction mine operators who implement an alcohol- and drug-free mine program that includes alcohol- and drug-testing as prescribed in part 66, and who demonstrate a good faith effort to enforce their policy. On the other hand, mine operators who fail to implement and enforce these policies would be cited, specifically in cases where failure to enforce the provisions of the rule by monitoring miner compliance results in fatalities, accidents or injuries.

Individual miners would not be cited for failure to comply with the requirements of the proposed rule, notwithstanding requests by the National Mining Association and the National Stone Sand and Gravel Association that MSHA impose some form of monetary penalty on individual miners who violate prohibitions against using or being under the influence of alcohol and drugs at a mine.

SUBPART F - RECORDKEEPING AND REPORTING

Under the proposed rule, records of drug- or alcohol-test results received are confidential communications between the mine operator and the miner. If records are stored electronically, a mine operator must ensure that the records are secure. *See* proposed § 66.500(a).

The proposed rule requires mine operators to keep and retain the following test records for at least three years:

- (1) the number of workers in safety-sensitive positions;
- (2) the total number tested;
- (3) the number of positive alcohol and drug tests for each substance; and
- (4) a record of which miners were tested, the dates of their tests, their test results, and return-to-duty and follow-up test results. *See* proposed § 66.500(b).

Additionally, mine operators would be required to (1) include post-accident test results in accident reports regardless of whether the test(s) are positive or negative and (2) annually compute and retain records of the percentage of positive random alcohol and drug tests. *See* proposed § 66.500(c).

Finally, the proposed rule states that mine operators' alcohol- and drug-free workplace policies and program descriptions should be made available to MSHA inspectors upon their request; however, the proposed rule does not require routine review of alcohol- and drug-free workplace programs by MSHA inspectors. *See* proposed § 66.500(d). The proposed rule requires any and all alcohol- or drug-test results to be made available upon the request of MSHA inspectors or investigators and will be used in assessing overall compliance with safety regulations as well as in determining the cause of accidents.

If you would like any further information or assistance regarding this Safety and Health Bulletin, please feel free to contact Tim Olson at (303) 659-5040 or tim@tro-law.com.

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