



TIMOTHY R. OLSON
Attorney at Law

Phone: (303) 659-5040

E-mail: tim@tro-law.com

Website: www.tro-law.com

MINE SAFETY & HEALTH LAW

Bulletin

Vol. 3, No. 1
April 27, 2010

DOL'S NEW "PLAN/PREVENT/PROTECT" REGULATORY AND ENFORCEMENT STRATEGY

On April 26, 2010, the Department of Labor (DOL) announced its new "Plan/Prevent/Protect" regulatory and enforcement strategy. DOL's website introduces the "Plan/Prevent/Protect" strategy in the following way:

Employers and others must "find and fix" violations — that is, assure compliance — before a Labor Department investigator arrives at the workplace. Employers and others in the Department's regulated communities must understand that the burden is on *them* to obey the law, not on the Labor Department to *catch them* violating the law. This is the heart of the Labor Department's new strategy.

We are going to replace "catch me if you can" with "Plan/Prevent/Protect."

In various ways, employers and other regulated entities will be asked to assemble plans, create processes, and designate people charged with achieving compliance. They will be required to implement these plans and evaluate their effectiveness in achieving compliance. While the Labor Department can be flexible about which path is chosen to achieve compliance, compliance will be non-negotiable under the "Plan/Prevent/Protect" system.

See <http://www.dol.gov/regulations/2010RegNarrative.htm> (emphasis in the original).

DOL's "Plan/Prevent/Protect" strategy will require all regulated entities, including mine operators, to take three steps to ensure safe and secure workplaces and compliance with the law:

- **"Plan"**: DOL will propose a requirement that employers and other regulated entities create a plan for identifying and remediating risks of legal violations and other risks to workers — for example, a plan to search their workplaces for safety hazards that might injure or kill workers. The employer or other regulated entity would provide their employees with opportunities to participate in the creation of the plans. In addition, the plans would be made available to workers so they can fully understand them and help to monitor their implementation.
- **"Prevent"**: DOL will propose a requirement that employers and other regulated entities thoroughly and completely implement the plan in a manner that prevents legal violations. The plan cannot be a mere paper process. The employer or other regulated entity cannot draft a plan and then put it on a shelf. The plan must be fully implemented for the employer to comply with the "Plan/Prevent/Protect" compliance strategy.

- **“Protect”**: DOL will propose a requirement that the employer or other regulated entity ensures that the plan’s objectives are met on a regular basis. Just any plan will not do. The plan must actually protect workers from violations of their workplace rights.

DOL states that employers and other regulated entities who fail to take these steps to address comprehensively the risks, hazards, and inequities in their workplaces will be considered out of compliance with the law and, depending upon the agency and the substantive law it is enforcing, subject to remedial action.

MSHA’S SPRING 2010 UNIFIED AGENDA

The Mine Safety and Health Administration’s Spring 2010 Unified Agenda (“the Agenda”) was published on April 26, 2010. See <http://www.msha.gov/regs/unified/april2010/April2010UnifiedAgenda.pdf>. The Agenda lists all regulations that are expected to be under review or development between April 2010 and April 2011. The Agenda also lists all rulemaking actions that were completed by MSHA in the six-month period preceding the publication of the Agenda.

Each of MSHA’s rulemaking actions addressed in the Agenda are summarized below; however, the following actions are particularly noteworthy because they are identified by DOL as being integral to the “Plan/Prevent/Protect” regulatory and enforcement strategy discussed above:

- **Pattern of Violations Regulation Review.** MSHA will review its existing Pattern of Violations (POV) regulation. MSHA states that its goal will be “to assure that mine operators like Massey Energy with large numbers of serious and substantial violations of the Mine Act and its implementing regulations will be subjected to significantly enhanced enforcement activities.” According to MSHA, the regulation will simplify and improve consistency in the procedures and criteria for placing mine operators into the POV program. For example, MSHA is considering how it could use the POV process to require operators to implement effective comprehensive safety and management programs aimed at fixing problems before they occur. MSHA is also considering simplifying the procedures for applying the pattern criteria so that operators would be required to more quickly and effectively address systemic hazards and allow MSHA the flexibility to investigate different kinds of patterns.
- **Safety and Health Management Programs for Mines.** MSHA currently requires development and approval of plans for control of specific hazards. For coal mines, the Mine Act requires unique mine plans for ventilation, roof control, dust control, and other mining issues in addition to mandatory and specific mine operator inspections designed to identify and correct hazards. MSHA will work on regulations to improve the effectiveness of these existing plans, but MSHA will also publish a Request for Information (RFI) about the possible imposition of a new requirement of a comprehensive health and safety management program for all mines. The RFI will solicit information in the areas of management commitment and employee involvement; work site analysis; hazard prevention controls; safety and health training; pre-shift inspection; violations of any mandatory safety or health standards and correction of those that are identified; and, program evaluation.
- **Pre-Shift Examination of Work Areas in Underground Coal Mines for Violations of Mandatory Safety and Health Standards.** To complement the RFI concerning Safety and Health Management Programs for Mines, MSHA will issue a proposed rule to reinstitute the provision in section 303(d)(1) of the Mine Act that requires underground coal mine operators to conduct pre-shift examinations in areas where miners work or travel to search for violations of mandatory safety or health standards.

COMPLETED ACTIONS

Completed actions are actions or reviews that MSHA has completed or withdrawn since publishing its last unified agenda. Completed actions also include items that MSHA began and completed between issues of the unified agenda. The following actions are listed as complete in the Agenda:

1. **High-Voltage Continuous Mining Machine Standard for Underground Coal Mines.** This direct final rule revises MSHA’s electrical safety standards for the installation, use, and maintenance of high-voltage continuous mining machines in underground coal mines. *See* 75 Fed. Reg. 17529. It also revises MSHA’s design requirements for approval of these mining machines. The rule allows mine operators to use high-voltage continuous mining machines with enhanced safety protection against fires, explosions, and shock hazards and will facilitate the use of advanced equipment designs. *The effective date of the rule is June 7, 2010.*
2. **Coal Mine Respirable Dust: Continuous Personal Dust Monitor (CPDM).** On June 24, 2003, MSHA announced that all work on its Plan Verification and Single-Sample Respirable Coal Mine Dust final rules would cease and the rulemaking record would remain open in order to obtain information concerning CPDMs being tested by NIOSH. A Federal Register notice was published on July 3, 2003, extending the comment periods indefinitely. NIOSH issued a report on the CPDM in September 2006, and another report concerning test results in June 2007. MSHA issued an RFI on October 14, 2009. *See* 74 Fed. Reg. 52708. The comment period for the RFI ended on December 14, 2009. *MSHA is combining this rulemaking action with the rulemaking “Lowering Miners’ Exposure to Coal Mine Dust Including Continuous Personal Dust Monitors” (RIN 1219-AB64).*
3. **Smoke Density and Toxicity.** On June 19, 2008, MSHA published an RFI to solicit public input on the criteria for testing density and toxicity of smoke from burning conveyor belts or similar materials. *See* 73 Fed. Reg. 35057. *MSHA now states that it does not anticipate doing additional rulemaking at this time.*
4. **Coal Mine Dust Sampling Devices.** The final rule updates approval requirements for the existing “coal mine dust personal sampler unit” to reflect improvements in this sampler over the past 15 years. The final rule also establishes criteria for approval of a new type of technology, the “continuous personal dust monitor,” which is worn by the miner and will report dust exposure levels continuously during the shift. *See* 75 Fed. Reg. 17512. *The effective date of the rule is June 7, 2010.*
5. **Criteria and Procedures for Proposed Assessment of Civil Penalties/Recordkeeping and Reporting: Immediate Notification.** This direct final rule makes nonsubstantive organizational changes to MSHA’s existing regulations for reporting accidents and determining penalty amounts for failure to report certain accidents. *See* 74 Fed. Reg. 68918. These changes will allow MSHA to automate the Agency’s assessment process for violations involving immediate notification of an accident. MSHA states that it received comments on the direct final rule indicating that some members of the mining industry misunderstood the Agency’s intent. For clarification, the Agency intends that the phrase, “any other accident,” as used in paragraph (d) of MSHA’s standard at 30 C.F.R. § 50.10 refers to (1) an entrapment of an individual for more than 30 minutes and (2) any other accident as defined in 30 C.F.R. § 50.2(h)(4)–(12). *The effective date of the rule is March 29, 2010.*

PROPOSED RULE STAGE

Actions for which MSHA plans to publish a Notice of Proposed Rulemaking (NPRM) as the next step in its rulemaking process or for which the closing date of the NPRM comment period is the next step are considered to be at the “proposed rule stage.” The Agenda lists the following actions as being at the proposed rule stage:

1. **Revising Electrical Product Approval Regulations.** Part 18 of 30 C.F.R. describes the approval requirements for electrically operated machines and accessories intended for use in underground gassy mines, and for related matters, such as approval procedures, certification of components, and acceptance of flame-resistant hoses and conveyor belts. MSHA is proposing revisions to improve the efficiency of the approval process, recognize new technology, add quality assurance provisions, address existing policies through the rulemaking process, and reorganize portions of the approval regulations. The agency

is addressing this rulemaking in phases. The first phase, which concerns flame-resistance testing of mining materials, was completed on December 31, 2008, with the publication of a final rule that amended 30 C.F.R. §§ 18.1, 18.2, 18.6, 18.9, and 18.65. See 73 Fed. Reg. 80580. *The second phase of the rulemaking, concerning intrinsic safety requirements, will be the subject of an NPRM that MSHA expects to publish in September 2010.*

2. **Lowering Miners' Exposure to Coal Mine Dust Including Continuous Personal Dust Monitors.** In February 1996, the Secretary of Labor convened a Federal Advisory Committee on the Elimination of Pneumoconiosis Among Coal Miners ("Committee") to assess the adequacy of MSHA's current program and standards to control respirable dust in underground and surface coal mines, as well as other ways to eliminate black lung and silicosis among coal miners. The Committee represented the labor, industry, and academic communities. The Committee submitted its report to the Secretary of Labor in November 1996, with the majority of the recommendations unanimously supported by the Committee members. The Committee recommended that MSHA consider lowering the coal dust PEL. NIOSH data indicates increased prevalence of coal workers pneumoconiosis "clusters" in several geographical areas; particularly in the Southern Appalachian Region. *MSHA states that it will publish an NPRM in September 2010 to lower the coal mine dust permissible exposure limit.*
3. **Notification of Legal Identity.** MSHA believes that currently required information does not provide sufficient information for MSHA to identify all of the mine "operators" responsible for operator safety and health obligations under the Mine Act, as amended. This new regulation would expand the information required to be submitted to MSHA and "allow the Agency to better focus on the most egregious or persistent violators, and more effectively deter future violations by imposing penalties and other remedies on those violators." *MSHA states that it will publish an NPRM in January 2011.*
4. **Criteria and Procedures for Proposed Assessment of Civil Penalties.** MSHA believes that the procedures for assessing civil penalties can be revised to improve the efficiency of the Agency's efforts and to facilitate the resolution of enforcement issues. *MSHA states that it will publish an NPRM in January 2011.*
5. **Pattern of Violations.** MSHA will review the Pattern of Violation regulations in 30 C.F.R. Part 104 with the goal of simplifying them to improve the process and to improve consistency in the application of the POV notice. MSHA is considering how it could use the POV process to require operators to implement effective comprehensive safety and management programs aimed at fixing a problem before it occurs. MSHA is also considering simplifying the procedures for applying the pattern criteria so that operators would be required to more quickly and effectively address systemic hazards and allow MSHA the flexibility to investigate different kinds of patterns. *MSHA states that it will publish an NPRM in January 2011.*
6. **Preshift Examination of Work Areas in Underground Coal Mines for Violations of Mandatory Safety or Health Standards.** The proposal would complement the RFI to address Safety and Health Management Programs for Mines (RIN 1219-AB71). MSHA states that the proposed rule would require underground coal mine operators to "*find and fix all hazards* including violations of health or safety standards." See <http://www.dol.gov/regulations/factsheets/msha-fs-preshift-examinations.htm#> (emphasis added). *MSHA states that it will publish an NPRM in March 2011.*

PRERULE STAGE

Actions which MSHA will undertake to determine whether or how to initiate rulemaking are considered to be at the "prerule stage." Such actions occur prior to an NPRM and may include an Advanced Notice of Proposed Rulemaking (ANPRM), an RFI, and a review of existing regulations. The Agenda lists the following actions as being at the prerule stage:

1. **Proximity Detection Systems for Underground Mines.** There are no existing 30 C.F.R. regulations that mandate the use of a proximity detection system; however, on February 1, 2010, MSHA published an RFI seeking information on the use of proximity detection systems to address pinning, crushing, and striking hazards associated with the operation of machinery underground. *See 75 Fed. Reg. 5009.* The comment period for the RFI ended on April 2, 2010. *MSHA states that it is analyzing comments received in response to the RFI to determine the next step.*
2. **Metal and Nonmetal Impoundments.** In biennial reports prepared by the Federal Emergency Management Agency (FEMA), MSHA has been criticized for its lack of regulation of metal and nonmetal dams. MSHA will issue an ANPRM to solicit information relative to the proper design, construction, operation, maintenance, and other safety issues for impoundments at metal and nonmetal mines. *The expected publication date of the ANPRM is June 2010.*
3. **Safety and Health Management Programs for Mines.** MSHA will develop an RFI to solicit information from the mining community on suggestions for addressing injury and illness prevention through implementation of comprehensive safety and health management programs. The RFI will solicit information in the areas of management commitment and employee involvement, worksite analysis, hazard prevention and controls, safety and health training, preshift examination for violations of any mandatory safety or health standards and corrections of those that are identified, and program evaluation. *The expected date for publication of the RFI is October 2011.*

LONG-TERM ACTIONS

Items under development but for which MSHA does not expect to have a regulatory action within the 12 months after publication of the Agenda are considered to be long-term actions. The Agenda lists the following long-term actions:

1. **Respirable Crystalline Silica Standard.** MSHA is considering several options to reduce miners' exposure to crystalline silica. MSHA's existing standards are designed to limit miners' exposure to 100 $\mu\text{g}/\text{m}^3$ of silica. NIOSH recommends a 50 $\mu\text{g}/\text{m}^3$ exposure limit for respirable crystalline silica, and the American Conference of Governmental Industrial Hygienists recommends a 25 $\mu\text{g}/\text{m}^3$ exposure limit. *MSHA states that it will publish an NPRM in April 2011 to reduce the exposure limit for respirable crystalline silica.*

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

The Mine Safety and Health Law Bulletin is for informational purposes only and not for the purposes of offering legal advice or a legal opinion on any matter. No reader should act or refrain from acting on the basis of any statement in the Mine Safety and Health Law Bulletin without seeking advice from qualified legal counsel on the particular facts and circumstances involved.

If you would like to receive future copies of the Mine Safety and Health Law Bulletin via e-mail, please provide your name, your job title, your company name, and your e-mail address to Tim Olson at (303) 659-5040 or tim@tro-law.com. You may also provide the same information for other people in your company who wish to receive these bulletins.

If you wish to UNSUBSCRIBE to the Mine Safety and Health Law Bulletin e-mail distribution list, please send an e-mail to tim@tro-law.com and type the word "UNSUBSCRIBE" in the subject line.

TIMOTHY R. OLSON IS RESPONSIBLE FOR THE CONTENTS OF THIS SAFETY AND HEALTH BULLETIN.