

SEPTEMBER 30, 2019 | MSHA LEADERSHIP, RULEMAKING & STANDARDS

# MSHA Finally Comments on D.C. Appeals Court Ruling for M/NM Workplace Exam Rule: Announces 2017 Rule Effective Immediately

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Today, September 30, 2019, MSHA published a notice in the Federal Register regarding [30 C.F.R. §56/57.18002, Examinations of Working Places in Metal and Nonmetal Mines](#). The notice marks the first official public comment by MSHA since the U.S. Court of Appeals for the District of Columbia ruled in favor a union challenge to MSHA's 2018 Amendments to the workplace exam rule – which is the version of the rule that went into effect late last year. ([See our in depth analysis of the D.C. Court's ruling from June 11, 2019](#))

The notice puts into effect the 2017 Final Rule version of the workplace exam standard as of today, September 30th. However, the notice also states that MSHA will recognize a 90-day period for implementation of the 2017 Final Rule requirements. This effectively gives operators until December 29, 2019 to become compliant with the new provisions. During this time period, MSHA will hold (and announce a later date) stakeholder meetings, while also release compliance assistance materials for operators to utilize.

The 2017 Final Rule included two provisions that were slightly modified by the 2018 Amendments, as explained in our [June post](#):

*"In reinstating the 2017 Rule, the Court of Appeals put into effect two requirements operators previously did not have to comply with:*

1. *All workplace exams must be done **BEFORE** miners enter a working area; and*
2. *All adverse conditions observed during a workplace exam must be recorded, even if corrected/abated prior to miners entering the working area [or being exposed to the adverse condition]."*

The process of updating the workplace exam rule to this point can be described as tumultuous at best, and there is yet still another challenge to the rule pending – this time the challenge being brought by an operator stakeholder association. Getting to this point in the rule's implementation has been circuitous, and a timeline of the workplace exam rule's procedural history explains this best:

- **January 23, 2017:** MSHA publishes 2017 Final Rule.

- **September 12, 2017:** MSHA reopens record and proposed limited changes to 2017 Final Rule.
- **April 9, 2018:** MSHA publishes Amended Final Rule (2018 Amendments).
- **May 9, 2018:** Challenge filed by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC, and United Mine Workers of America International Union.
  - The unions argued the 2018 Amendment violated “no-less protection” requirement under §101(a)(9) of the Mine Act and that the 2018 Amendment was arbitrary and capricious under the Administrative Procedure Act.
- **June 11, 2019:** Court of Appeals for the District of Columbia issues decision vacating the 2018 Amendment and reinstating 2017 Final Rule.
- **July 25, 2019:** MSHA files a petition for rehearing before the same court.
- **August 14, 2019:** The Court denies MSHA’s petition for rehearing.
- **August 23, 2019:** Court issues mandate to MSHA to enforce 2017 Final Rule.
- **September 30, 2019:** MSHA publishes in Federal Register that provisions of 2017 Final Rule are ineffect immediately, but there will be a 90-day implementation and compliance assistance time period.

While the next chapter of this rule may still be unwritten, at this time operators must make arrangements to implement the provisions of the 2017 Final Rule into their workplace exams. Along with announcing the 2017 provisions are effective as of today, MSHA was also sure to make note that operators have an additional 90-days to “fully implement” the rule. While this is not a reprieve to ignore the new provisions until December 29, operators (including independent contractors) should seriously consider contesting any citations issued for allegedly violation the 2017 rule while roll-out is in progress.