


SEPTEMBER 9, 2021 | MSHA LEADERSHIP, RULEMAKING & STANDARDS

MSHA Publishes Proposed Rule on Safety Programs for Surface Mobile Equipment

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Today, September 9, 2021, the Mine Safety & Health Administration (“MSHA”) published its proposed rule on [Safety Programs for Surface Mobile Equipment](#). A rule, that if finalized, would become incorporated in 30 C.F.R. §§56, 57, and 77, for surface Metal/Nonmetal (“M/NM”) and coal mining, and surface areas as underground M/NM and coal mines. Importantly, in its proposed state, the rule specifically *excludes* belt conveyors, which MSHA historically groups with mobile equipment under its Powered Haulage category for enforcement and data collection.

While it isn’t a surprise the MSHA published the proposed rule, the agency has discussed the rulemaking on its quarterly stakeholder calls in 2021 and since early 2020, it is somewhat surprising that a Trump Administration rulemaking continued to move forward under the Biden Administration. Additionally, so, as MSHA still does not have an Assistant Secretary of Labor for MSHA confirmed, or even nominated. 

The rulemaking process for the Safety Programs for Surface Mobile Equipment began to gain momentum after MSHA issued a June 2018 request for information (“RFI”) from industry stakeholders. The RFI, entitled *Safety Improvement Technologies for Mobile Equipment at Surface Mines, and for Belt Conveyors at Surface and Underground Mines*, sought feedback regarding accident and injury reducing technologies that could be (or have been successfully) implemented in the mining industry. In addition to the RFI, MSHA also held six stakeholder meetings (and one webinar) to discuss the same. The RFI and MSHA’s efforts also aligned with MSHA initiation of a Powered Haulage Safety (and enforcement) Initiative, which continues to this day.

As a result of the RFI and stakeholder meeting process, MSHA determined to develop a rule focusing on mandating the implementation of operator created safety programs rather than the incorporation of new technologies, such as mandatory seat belt interlocks, proximity sensors or back-up cameras to name a few. MSHA determined that each operator would be best situated to determine the appropriate and feasible technology for its mine, but this decision also provides MSHA with a more open ended regulation that is not beholden to the technology of today 20-30 years from now.

The Proposed Rule

MSHA proposes three regulations to be created by the rulemaking, §56.23000 – 23004, §57.23000 – 23004,

and §77.2100 – 2104. The three standards as proposed contain the same obligations. For review purposes, below is the proposed language of §56.23000 – 23004.

56.23002 Written safety program.

(a) Each operator subject to this subpart shall develop and implement a written safety program for surface mobile equipment that contains the elements in this subpart, no later than [DATE 6 months after the effective date of the final rule].

(b) Each operator subject to this subpart shall designate a responsible person to evaluate and update the written safety program, no later than [DATE 6 months after the effective date of the final rule].

56.23003 Requirements for written safety program.

(a) The mine operator shall develop and implement a written safety program that includes actions the operator would take to:

- (1) identify and analyze hazards and reduce the resulting risks related to the movement and the operation of surface mobile equipment;***
- (2) develop and maintain procedures and schedules for routine maintenance and non-routine repairs for surface mobile equipment;***
- (3) identify currently available and newly emerging feasible technologies that can enhance safety at the mine and evaluate whether to adopt them; and***
- (4) train miners and other persons at the mine necessary to perform work to identify and address or avoid hazards related to surface mobile equipment.***

(b) The responsible person shall evaluate and update the written safety program annually or as mining conditions or practices change, as accidents or injuries occur, or as surface mobile equipment changes or modifications are made.

56.23004 Record and inspection.

The mine operator shall make the written safety program available for inspection by authorized representatives of the Secretary, miners, and representatives of miners, and provide a copy, upon request.

The rule, as drafted, applies to all surface M/NM and coal mines and surface areas of underground M/NM and coal mines with six or more persons employed. Mines with five or fewer miners would not be obligated to follow the provisions of the regulation, and MSHA would make Educational Field and Small Mine Services resources available these operators to provide assistance in developing and implementing safety programs.

§§56/57.23003(a)(1)/77.2103(a)(1)

For those operators with six or more employees, the operator must first develop and implement a safety program that, "identif[ies] and analyze[s] hazards and reduce[s] the resulting risks related to the movement and the operation of surface mobile equipment." This is vague demand from the agency, but one that MSHA feels would

require operators to review of accident and/or near miss data for each the mine, and maintenance or operations accidents. This seems simple enough, but if there are not events to review at a mine, what will MSHA expect of operators? To review data from other locations in the same company, or to review MSHA fatality reports?

Here the agency is unclear, and the vagueness will act shift the onus to operators to collect and review data to create the program, and then be in the position of having to defend that data to enforcement personnel if the adequacy of the plan is called into question. This safety program would also join the list of required documents that must be produced to MSHA personnel upon request, and also made available to miners or miners' representatives upon request.

§§56/57.23003(a)(2)/77.2103(a)(2)

The next subsection will require operators to evaluate the maintenance needed by surface mobile equipment, both routine and non-routine. MSHA will expect operators to incorporate this review with existing manufacturer maintenance recommendations to create a schedule. Most operators have already completed this process in order to maintain equipment in a functional state year in and year out. However, in the proposed rule, this process will need to be documented and listed out to satisfy MSHA's recordkeeping obligations.

The provision seems innocent enough, but it could certainly have a task training feeling to it, where it is unclear how basic the details of the plan or training need to be until called into question by MSHA. It has long been used as a question for MSHA regarding how far task training records must reach, do you need to task train a mechanic to change oil on equipment? This is the mechanics expertise and why they are hired, and MSHA typically does not ask for such detailed task training records until an incident occurs, and then if the mine doesn't have records of training to the level MSHA desires, citations are issued.

The same could be true for maintenance, will operators be required to include such detail as the preventative maintenance schedule, such as oil changes, in the safety program? The vagueness of the standard leaves this to later determination.

§§56/57.23003(a)(3)/77.2103(a)(3)

Of the sections included in the proposed rule, subsection (a)(3) would appear to be the most concerning. Here MSHA state operators must:

identify currently available and newly emerging feasible technologies that can enhance safety at the mine and evaluate whether to adopt them

While MSHA managed to avoid listing specific technologies which must be included or implemented for surface mobile equipment – which would almost certainly result in legal challenge by stakeholders – the agency instead pushed that responsibility on operators. But, in doing so MSHA gives no guidance or specific obligation on the required implementation or technologies.

If the rule was to be adopted in this configuration, the provision places any operator who has a surface mobile equipment accident at their mine in the unenviable position of MSHA sitting back and listing available technologies that it feels could have prevented the accident, and then siting the operator for not implementing

the technologies. Therefore, operators aren't told by MSHA what safety features are required, but operators will be in the position to have to defend not having any safety technology on mobile equipment that MSHA determines was feasible or appropriate after the fact.

This both eliminates MSHA's responsibility to defend the required implementation of certain technologies in the rulemaking process as technically or financially feasible, and also puts MSHA in the position to issue enforcement for an operator's alleged failure to implement any unknown number of technological safety features that exist now or may exist in the future.

§§56/57.23003(a)(4)/77.2103(a)(4)

This provision is relatively straightforward, requiring operators to train those miners (*or other persons at the mine*) with respect to identifying, addressing, or avoiding hazards associated with surface mobile equipment. And, this will undoubtedly need to be a new entry on the task training list for each operator and contractor.

The interesting part of this provision is that MSHA includes the language "*other persons at the mine necessary to perform work*" in the standard. MSHA goes on in the proposed rule to include office workers as those satisfying that definition. Office workers as a group are not typically considered miners for comprehensive training, and not usually exposed to mining hazards if they only conduct office work duties. It would be beneficial for stakeholders to know under what circumstances MSHA would consider office workers "*necessary to perform work*" related to surface mobile equipment, deeming training on the program required.

§§56/57.23003(b)/77.2103(b)

Additionally, MSHA would require that the responsible person(s) for the safety program complete review at least annually, or when changes occur at the mine which could impact the safety program. This may include the introduction of new equipment, new traffic patterns or practices, or changes mandated by seasonal work or weather conditions.

It will be both important to date the documents, but also ensure that annual review is completed, and documented. This is a regular practice in document management, but not one that operators are typically called on by MSHA, here the agency will expect to see dates of annual review.

Comment Period

Stakeholders have the opportunity to submit comments on the proposed rule to MSHA for the next 60 days. Comments must be received or postmarked by midnight Eastern Time on Monday, November 8, 2021.

In addition to general comments on the rule, MSHA specifically requested comment on the following topics by stakeholders:

- Whether MSHA should require all mines, regardless of the number of miners, to create a written plan;
- MSHA's decision to exclude belt conveyors;
- Best practices that all mines might use to develop safety programs; and
- Whether or not six months is enough time to develop and implement a safety program, including naming a

responsible person.

If you have any questions regarding the proposed rule, or are interested in submitting comments, do not hesitate to contact [Nick Scala](#), or another member of [Conn Maciel Carey's MSHA Practice Group](#).