

JANUARY 19, 2017 | MINE SAFETY & HEALTH (MSHA)

Breaking News: MSHA to Publish Final Rule for Workplace Exams in Metal and Nonmetal Mines

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As a parting gift from Joe Main, the departing Assistant Secretary of Labor for the Mine Safety & Health Administration (MSHA), MSHA released this week the final rule for [Examinations of Working Places in Metal and Nonmetal Mines](#). MSHA first proposed rebooting [30 C.F.R. §56/57.18002](#) on June 8, 2016. After an extended public comment period, ending on September 30, 2016, MSHA modified elements of the proposed rule while crafting the final version which will be formally published in the Federal Register next Monday, January 23, 2017.



The effective date, when MSHA will begin enforcement of the new provisions within the final rule, is May 23, 2017 or 120 days following publication on January 23rd. Until the effective date, the existing provisions of

§56/57.18002 will remain the standard for enforcement purposes.

Under the current standard mine operators must perform a workplace examination at least once per shift, maintain a record for twelve (12) months which must include the name of the examiner, locations of areas examined and the date.

The final rule, announced on January 18, 2017, will increase the responsibilities for mine operators to comply with the workplace exam standard. **Effective May 23, 2017** operators must:

1. Perform a workplace examination **BEFORE** any miners begin work in an area;
2. Promptly notify miners of any adverse conditions in their working area before they are exposed to the adverse conditions;
3. Maintain a record of the examination for twelve (12) months, which includes:
 - The name of the examiner
 - Date of the exam
 - Locations examine;
 - Descriptions of any and all adverse conditions found during examination (even if corrected immediately)
 - Date of corrective action
4. Make records available to MSHA inspectors AND miner representatives, providing copies upon request.

The proposed rule, published by MSHA in June 2016, contained several elements that were eliminated from the final rule as a result of industry push-back. Notably, MSHA eliminated the requirements to:

1. Provide a description of the corrective action taken for each recorded adverse condition;
2. Maintain the name of the individual who performed the corrective action; and
3. Sign and date the workplace exam record by the examiner.

Before Miners Enter an Area

The final rule requires that the workplace exam occur prior to miners beginning work in an area. Therefore, the competent persons assigned to conduct workplace examinations must complete these prior to miners entering an area for work each shift. MSHA further stated "once per shift," meant once per each shift at an operation. Some relief was provided in that MSHA stated that in situations where shifts are continuous, such as a 24/7 operation, the previous shift could complete the workplace exam for the following shift if completed within close temporal proximity to when the following shift begins work in the area.

Additionally, MSHA states that this requirement only applies to areas, or an area, where miners will be working. If miners are not scheduled to work in a certain area until later in the shift, that area can be examined prior to miners entering that specific area, not prior to the entire shift beginning.

MSHA further clarifies what constitutes a working place for the purposes of workplace examinations. Working places include:

1. All locations where miners work in the extraction and milling processes, including haul roads;
2. All roads traveled to and from a work area; and

3. Inactive, isolated, or abandoned areas of a mine, **ONLY** when miners must perform work in these areas during shift.

MSHA expressly states that working places do not include:

1. Roads not directly involved in the mining process;
2. Administrative buildings;
3. Parking lots;
4. Lunchroom;
5. Toilet facilities; and
6. Inactive storage areas.

The Agency did not change, or provide any clarification regarding, what constitutes a competent person. This remains up to operators' discretion if they determine the individual has the requisite experience and training to conduct workplace examinations.

Promptly Notify Miners

A new provision requires that miner operators promptly notify miners of any adverse conditions not immediately corrected in the work area which they are assigned. Operators must provide notice to miners before they are exposed to the adverse condition.

Notice can be provided by:

1. Verbal communication;
2. Prominent signage; OR
3. Other written notification.

It would be wise to document notice to miners, to ensure that the operator can prove compliance with this requirement prior to miners being exposed to any adverse condition, should an injury occur and notice be called into question through enforcement.

Additionally, operators must promptly initiate corrective action to remove any adverse condition from the workplace or protect miners from the adverse condition. This element remains unchanged from the current workplace exam standard.

Workplace Examination Record Requirements

Under the final rule, MSHA expands the recordkeeping requirement for mine operators. Not only must operators create and maintain a record of the workplace exam for twelve (12) months from the date of the examination, but the contents require more detail. Operators can create the record at any time before the end of shift on the day of examination. Also, operators can maintain the record electronically, if kept in a system "not susceptible" to alteration.

To comply with the final rule, the record must include:

1. Name of the examiner;

2. Date of exam;
3. Location of areas examined;
4. Descriptions of each condition that may adversely affect the safety and health of miners (the description should be sufficient enough to allow operators to notify miners of the condition and take prompt corrective action); and
5. Date of the corrective action.

The description requirement applies even to conditions which were corrected immediately, i.e. removing a trip hazard such as tools from a walkway. If corrective action is taken at a later date than the day of the inspection, the exam record must be amended to include the date of the corrective action. Conditions that exist for multiple days need not be documented with descriptions on each consecutive day the condition exist, but the date of the corrective action must be recorded and miners must be made aware of and protected from the condition.

Lastly, and not insignificantly, MSHA will now require that miner operators make available the workplace examination records to not only MSHA personnel upon request but also miner representatives of the workforce. If an inspector or representative requests copies of the records, these must be provided.

What's Next?

Per the listed effective date, once the final rule is published on January 23rd, it will become enforceable 120 days later. While the comment period ended long ago, industry can still fight this overbearing regulation. Since MSHA finalized the rule as the current administration leaves office, the table is set for Congress to possibly invoke the powers contained within Congressional Review Act (CRA). The CRA provides the opportunity for Congress to pass a resolution of disapproval within 60 days of receiving a final copy of a rule or the rule being published in the Federal Register. The President then has the ability to veto Congress' vote of disapproval or sign the resolution, thereby eliminating the rule.

In the past, Congress exercised this power to revoke OSHA's attempted ergonomics standard in 2000. Similar to the environment under which the MSHA Workplace Exam rule just became final, a Democratic administration was departing office as a Republican controlled Congress and White House took over. Therefore, operators still have the opportunity to have this rule removed from the books, but must communicate their concerns with both industry associations and representatives, urging that action is taken quickly.

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For more information on the evolution of the rule from the initial proposal to final rule released yesterday, see our previous review of the [Proposed Rule](#) and [Webinar](#) (see below). Also plan to join the attorneys in Conn Maciel Carey's MSHA Practice for complimentary monthly webinars about important MSHA issues as part of the firm's [2017 MSHA Webinar Series](#). To register for the entire 2017 series, click [here](#) to send us an email request, and we will register you.

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