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**MSHA Issues Workplace Exam Revisions As “Midnight Rule”
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It came down to the wire, but the Mine Safety & Health Administration (MSHA) released its final rule modifying workplace examination requirements for metal/nonmetal mines on January 17, 2017, to be published in the January 23rd Federal Register. The rule, which takes effect on May 23, 2017, modifies existing standards 56/57.18002 to require each mine operator to (1) have a “competent person” conduct working place examinations to identify hazards before work begins in an area; (2) notify affected miners of hazardous conditions that are not corrected immediately, and promptly initiate corrective action; and (3) record the locations examined, the adverse conditions found, and the date of the corrective action.

The records must be retained for 12 months and made available for MSHA review upon demand. The person conducting the examination must be named on the record, but it does not have to include a signature of the examiner. MSHA deleted a proposed requirement that would have mandated inclusion of each corrective action and the name of the person reporting the correction. The original definitions of “working place” and “competent person” were not altered in the revised rule. If the examiner identifies any conditions that present an “imminent danger,” they must bring them to the attention of the mine operator.

Under the old rule, while each active working area needed to be examined each shift, it could occur any time during the shift and did not need to include a list of the hazards identified nor any information on corrective actions taken (or when). The new requirement will make it easier for MSHA to prove that examinations were “inadequate” if the agency finds hazards that were not identified on the inspection form or checklist. Hazards that have been listed, but not corrected in a timely manner, could also trigger citations with elevated action. The examiner (if found to be an “agent of management” due to the authority to initiate corrective actions or otherwise direct the workforce) may also be held personally liable and fined up to \$70,000 under Section 110(c) of the Mine Act for conducting examinations in a highly negligent manner. In its information on the rule, MSHA notes that in 16 recent fatality cases, mine operators were issued “unwarrantable failure” Section 104(d) citations or orders and MSHA claims these accidents would not have occurred if hazardous conditions had been recorded during the exam.

The new rule requires all working places to be examined if miners will work in the extraction or milling processes in those areas, including roads traveled to and from working places. However, roads not directly involved in the mining process, and it also excludes from the inspection requirements all administrative office buildings, parking lots, lunchrooms, toilet facilities, and inactive storage areas. Mine operators would have to examine isolated, abandoned or idle

areas of mines or mills only when miners will have to perform work in those areas during a shift.

MSHA estimates the economic impact of the rule to be \$34.5 million per year for the metal/nonmetal sector, but it has not quantified a benefit for the rule because “the prior examinations rule had already anticipated all the benefits of effective examinations.” But MSHA says that the anticipated previous benefits were not realized and this rule will do so by improving the effectiveness of examinations.

Because the standard was issued so late in the Obama administration’s term (actually coming out post-Inauguration), it could be subject to rescission under the Congressional Review Act, if it is included in the “hit list” now being prepared by Congress and the White House. Legislation has already passed the U.S. House of Representatives to eliminate “midnight rules” en masse rather than requiring Congress to act separately on each rule under scrutiny.

For more information on the practical impact of the new rule, and how to effectively conduct workplace examinations, contact the Law Office at 301-595-3520.