



Fisher Phillips Makes 5 Mine Safety Predictions for 2023

Insights

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As the calendar turns to a new year, the Mine Safety and Health Administration appears to have found its footing – and that means mine operators need to be on their toes in 2023. After a presidential administration change, retirements throughout the inspector ranks, and an anemic regulatory agenda, MSHA now appears to be pointed in a new and more robust direction. What do we expect to see in the new year? The following forecast is our best estimation on the five most likely agency actions and changes that operators can expect in 2023 in key areas such as the regulatory agenda, enforcement, and policy.

1. Long-Anticipated Regulatory Agenda Will Finally Come to Pass

MSHA's regulatory agenda has featured a proposed rule on silica and a final rule on powered haulage since early 2022. Will 2023 be the year operators see these rulemaking initiatives come to fruition? We think so.

Silica Rule

The agency has been working on a proposed silica rule for months. We will most likely be seeing it in the first half of 2023.

MSHA has been clear about prioritizing a proposed rule lowering the level of silica in respirable dust. Beginning in 1974, the National Institute for Occupational Safety and Health (NIOSH) has recommended an exposure limit for respirable crystalline silica (quartz) of .05 mg/m. In 2016, the Occupational Safety and Health Administration (OSHA) amended its existing respirable crystalline silica standards to establish a permissible exposure limit (PEL) of .05 mg/m.

MSHA has indicated that it will replicate this lowered standard in a proposed rule. One of the several unanswered questions is whether the proposed rule will allow the use of personal protective equipment such as respirators to achieve compliance with a lowered standard.

Mine operators and other interested parties should prepare to provide robust comments on all issues of importance when the proposed rule is published.

Powered Haulage Rule

On September 9, 2021, MSHA published a proposed rule that would require mine operators employing six or more miners to develop and implement a written safety program for mobile and powered haulage equipment at coal and metal-nonmetal surface mines and surface areas of underground mines. The written safety program would include actions mine operators would take to identify hazards related to surface mobile equipment.

The rulemaking record opened and closed several times, finally closing on February 11, 2022, with MSHA receiving numerous comments to the proposed rule. According to MSHA's regulatory agenda, a final rule should have been issued months ago. However, the agency has signaled that silica is taking priority overpowered haulage.

The powered haulage rule is not going away though, and operators should expect to see it sometime in 2023.

2. Enforcement Activity Will Increase

The Mine Act sets forth a system of both mandatory and discretionary enforcement. MSHA is required to inspect each surface mine twice per year and each underground mine four times per year, for example. However, the agency also has a number of regulatory tools that it may use at its discretion, such as additional inspections, enhanced gravity and negligence designations for citations and orders, and the initiation of special investigations under Section 110 for potential individual liability. MSHA appears to be utilizing these discretionary tools in greater force.

Enforcement numbers are steadily rising. Fisher Phillips launched [the first-ever MSHA Violations Tracker](#) in 2022 – tracking the number and type of enforcement actions the mine safety agency is issuing. The data shows an increase in enforcement actions issued in 2022 over 2021 with the S&S rate holding at 20% of all citations/orders issued. We expect this trend to continue, as new inspectors get out into the field and compliance efforts ramp up.

We have also seen a marked increase in special investigations under Section 110 into potential agent liability. MSHA has stated that such investigations are important to the current administration's agenda. Mine operators and their agents should recognize that a 110 investigation could result in either civil or criminal liability against individuals.

3. Settlement Review Will Continue to Be Subject of Inter-Agency Battle

The Mine Act requires that settlement of contested citations and orders be approved by the Federal Mine Safety Review Commission or one of its Administrative Law Judges. The question of what is required for a settlement to be approved continues to be an issue. For years there has been a struggle between the solicitor's office (and their delegates, including CLRs) and Commission Administrative Law Judges as to what is required for settlement approval.

Multiple cases are currently pending on appeal before the Review Commission addressing certain issues related to the approval of settlement. Such issues include: (1) whether MSHA can unilaterally vacate a citation that is in contest; and (2) whether MSHA must factually support the deletion of an S&S designation. This fight is largely between the two government agencies, but operators should keep tabs on it as it may impact their ability to achieve settlements.

4. MSHA Will Boast New Personnel

Like many employers, MSHA is experiencing staffing shortages in its workforce. The agency has seen a wave of retirements by experienced personnel at both the national and district levels and among the inspectorate.

MSHA has established several initiatives to attract new personnel, and we expect those efforts to bear fruit in the new year. As new inspectors come on board, mine operators can expect to encounter inspectors who may have limited experience with both the industry in general and their operations in particular. Operators should prepare to address this reality when they accompany new inspectors on inspections.

5. Whistleblower Cases Expected to Be On the Rise

The Mine Act provides miners with substantial whistleblower protections in the form of Section 105(c). MSHA is required to investigate all complaints of retaliation under Section 105(c). However, agency initiatives may spur more complaints to be filed.

MSHA launched aggressive miner education on whistleblower rights under the leadership of Assistant Secretary Joe Main and the results were record numbers of whistleblower complaints during those years. We expect to see a similar initiative by the agency in 2023 – which may in turn result in another uptick of complaints filed.

Operators should take steps to ensure their policies and practices comply with Section 105(c) while also planning for how to respond in case a complaint is filed.

Conclusion

It appears that MSHA has a lot in store for 2023. Mine operators are encouraged to redouble their compliance efforts and stay apprised of new initiatives from the agency.

Fisher Phillips will continue to monitor these developments and will provide timely updates to our clients and friends as they occur. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information directly to your inbox. For further information, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Mine Safety and Health team](#).

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