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Workplace Safety and Health Update

Week of ***April 14, 2014***

Coal Companies' Constitutional Case against MSHA Employees Fails

A district court has rejected a lawsuit brought by several Kentucky coal companies to recover damages against MSHA employees following their refusal to allow the operator to recover mining equipment before it was ruined by flooding.

The plaintiffs charged MSHA District Manager Irwin Hooker and at least five other agency employees with devising a "coercive scheme" to shut down Left Fork's Straight Creek #1 Mine in Bell County, Kentucky. Besides seeking monetary and punitive damages, the companies charged the MSHA employees with trespass, civil conspiracy, abuse of process and intentional interference with a contract.

The lawsuit, filed in January 2013, claimed unlawful search and seizure under the Fourth Amendment of the Constitution and was based on a successful 1971 case brought against federal narcotics agents. The U.S. Supreme Court in 1971 carved out a narrow source of relief, the so-called *Bivens* remedy, for constitutional violations by federal officials acting in their official capacity.

Left Fork exercised its rights under the Mine Act, but the wheels of justice turned too slowly to save the mine from ruin. The case began with a March-2011 MSHA order over elevated methane levels, which were traced to a missing ventilation curtain. However, the agency also determined seals in the mine were not being properly maintained. The operator was required to draw up a remediation plan for approval by the district manager. Ten months went by as the two sides discussed its contents. Meanwhile, the mine essentially was closed.

The next blow came in January 2012, when government officials issued an order to de-energize power and withdraw miners for the alleged failure to abate violations. Throughout, no mine company employees had been allowed to enter. Loss of power caused the mine to begin to flood. The operator's request to retrieve the equipment was denied. Left Fork appealed for an expedited proceeding before the Federal Mine Safety and Health Review Commission, but an administrative law judge's decision some three months later in favor of the operator came too late.

In the interim, the district manager finally approved the seals remediation plan; however, his approval was restricted to rescue personnel, who were unable to extract the equipment.

The court noted that damages are not available to the plaintiffs under the Mine Act for the flooded mine and loss of equipment. "But none of these facts justify recognition of a new *Bivens* remedy in the face of the Mine Act's statutory structure," the court said.

OSHA Moves to Cut Whistleblower Claim Settlement Time

Looking to shorten from months to weeks the time needed to settle whistleblower complaints, OSHA is expanding use of an alternative dispute resolution process that has been judged a success in two of its regions.

In October 2012, the agency announced it would devote at least a year to testing a pilot program to settle whistleblower claims. Region 5, in the upper Midwest, and Region 9, which covers three Western states, Hawaii, American Samoa and Guam, were selected. During fiscal year 2013, 289 requests were made by employers or employees in those regions to attempt a settlement through alternative dispute resolution. Both parties consented in 87 of those cases, and 54 settlements resulted.

That data was reason enough for OSHA to expand the alternative dispute resolution process into other regions, starting with Region 2, in the Northeast, Richard Mendelson, acting director of OSHA's Directorate of Whistleblower Protection Programs, told a whistleblower advisory committee in March, as reported by *Bloomberg BNA*.

The OSHA regional office plays a central role in the dispute resolution process. Once a complaint is filed, the office writes the worker and employer to offer to facilitate a settlement, according to the program's directive. If both parties agree, the regional coordinator contacts them to determine if there is common ground. If there is, the coordinator then writes a proposed settlement and assists the parties in reaching an accord.

The goal is to reach a settlement within 20 days of receipt of OSHA's initial letter. If there is no agreement, OSHA's investigation into the complaint continues.

A second pilot program involving mediation using the Federal Mediation and Conciliation Service was deemed less successful and has ended, Mendelson said. In that program, the goal was for the mediator to help negotiate a settlement during a day-long session. Other than making contact with the parties, OSHA's whistleblower staff played no significant role in the mediation process, which may have led to disappointing results, Mendelson speculated.

The agency also has tested the idea of designating an assistant administrator for whistleblower protection. After testing in Region 5 and in Region 4, in the Southeast, last year, the change is being implemented in all 10 OSHA regions, the acting director said. The purpose of designating administrators is to ensure consistency in policies throughout OSHA. Mendelson noted that administrators will have no direct oversight of field investigators.

Finally, Mendelson reported that 742 complaints were filed in the three months since OSHA began accepting whistleblower complaints online in December 2013.

Jackson Lewis is co-sponsor of the upcoming 2-day seminar on

"Understanding MSHA Litigation"

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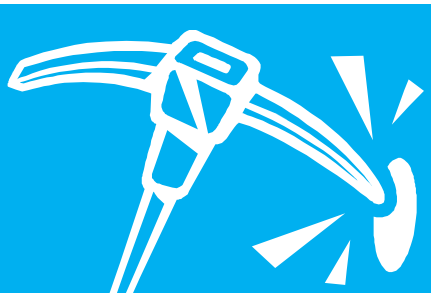

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Ask a Jackson Lewis Attorney

Q:

Our offer letters state that newly-hired employees must undergo a 90-day "probationary" period, during which they can be terminated for any reason or no reason. We went to a seminar and learned this language is not recommended. What's wrong with this provision?

Answer provided by Teresa Burke Wright, a shareholder in the Washington, D.C. Region office:

Many companies require that employees undergo a 90-day "probationary" or "introductory" period, and they include such statements in their offer letters and/or employee handbooks. The concern about these statements is that they may imply to employees that upon completion of this 90-day period, they have a right to continued employment rather than remaining "at-will" employees.

In order to address this issue, your offer letter and/or handbook should state that upon completion of the 90-day period, employees remain at will and can be terminated or resign for any reason or no reason, with or without notice, cause or liability. Although completion of the 90-day probationary period does not result in a legal change in the employee's status, it still is useful to convey that employees should use this 90-day period to assess whether they like the job, and that managers similarly will be assessing whether the employee is a good fit for the position and the company.

Do you have an employment law question that may be of interest to other employers? If so, please send it to Regan Harrison at regan.harrison@jacksonlewis.com for consideration in upcoming issues of this newsletter.

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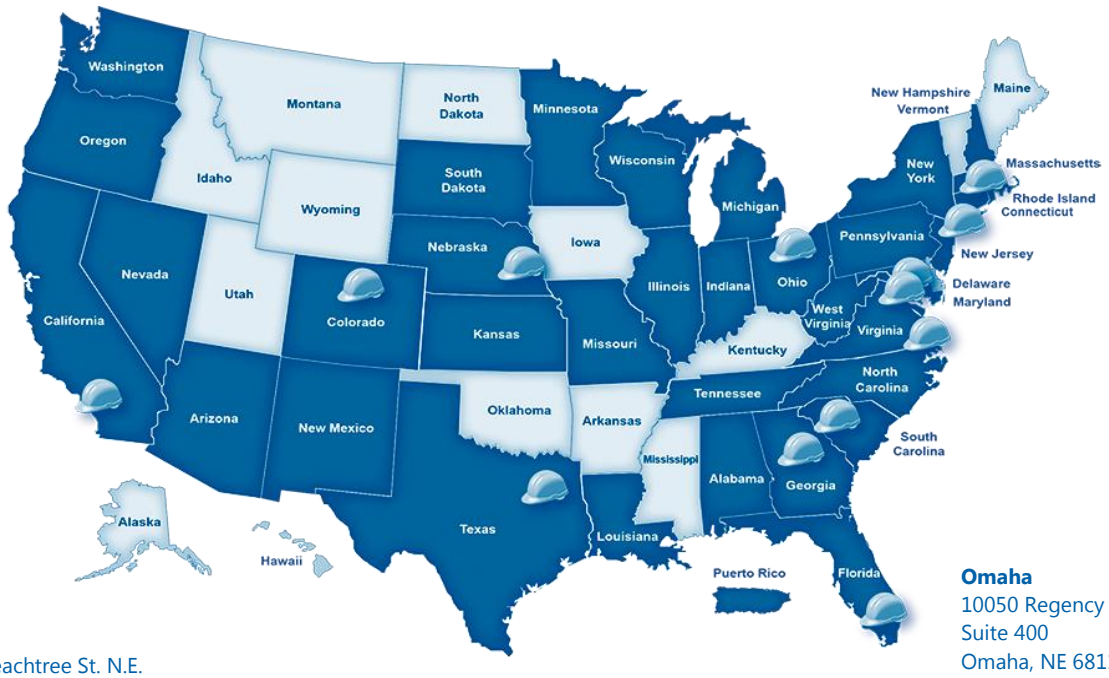

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