

Week of **September 22, 2014**

Attorneys Paint Grim Picture of Impact of MSHA Proposal

MSHA's proposed civil penalty rule will bring about a result directly opposed to that which the agency intends. While raising penalties and increasing litigation, it will not encourage operators to increase compliance. So say two Jackson Lewis attorneys experienced in MSHA enforcement actions and familiar with the proposed rule.

In a September 16 webinar presentation, Jackson Lewis attorneys Henry Chajet and Mark Savit painted a grim picture of the impact of MSHA's proposal. Based on a preliminary analysis, they predicted total penalties on mine operators likely will rise between 50% and 200%.

The proposed changes also will increase the number of violations written as "unwarrantable failure"; i.e., aggravated conduct beyond ordinary negligence, the attorneys said. More mines will fall under the agency's draconian pattern of violations (POV) enforcement weapon and there will be more closure orders.

These consequences are far from what MSHA says it intends. Penalties overall will decline slightly, the agency predicted. Operators would be encouraged to be more proactive and accountable in addressing safety and health hazards, there would be more clarity transparency about various penalty assessment criteria and less litigation. The citation-writing process would be simpler.

But the devil is in the details. MSHA proposes to cut the number of choices an inspector will have in several citation criteria. For instance, the number of options for negligence would drop from five to three – no negligence, negligent and reckless disregard. Chajet and Savit agreed those changes would streamline the citation writing process, but contended it would allow MSHA to avoid dealing with shortcomings in the training of inspectors. "They're not well-trained now, and that's why there's the level of litigation that there is," Savit said.

Rather than add clarity and transparency, cutting the number of categories will muddy the waters further, the attorneys warned. For instance, one of the five existing categories of

negligence is high negligence. When it goes away, how will high negligence be categorized under the proposed scheme? Will inspectors choose the less severe "negligent" or the more severe "reckless disregard"? Their decision will have a profound impact on penalty points and hence the size of the monetary penalty imposed.

The two lawyers stated that, when faced with options, inspectors likely will choose the one associated with the tougher sanction. Under the proposal, the "permanently disabling" option will be dropped, cutting inspectors' choices for severity from four to three. As a result, citations that otherwise might have been marked "permanently disabling" probably will be up-written to "fatal," said Savit. This will produce more penalty points and a higher fine.

A proposed change in the definition of the word "occurred" will negate a key element in the long-standing legal test for defining a significant and substantial (S&S) violation. This will lead to more S&S violations and higher fines, the attorneys said. Worse, since an S&S finding is a necessary requirement for classifying violations as unwarrantable failure and for designating a mine as POV-eligible, those enforcement actions will increase, too. POV-designated mines are subject to profound business disruption through repeated closure orders.

Savit presented graphs demonstrating how the suggested rule could backfire. Operators with a better compliance record will fare worse relative to bad operators under the new rule, he said, referencing violation history, repeated violations of a standard, and negligence. This will reduce the incentive for operators to be proactive about mine safety. "It is clear that MSHA has not thought through what they did ...the result ... is that the proposed rule will not accomplish what they want," Savit said.

One of MSHA's goals is to reduce litigation, but its proposed changes will have the opposite effect. Operators went to court in increasing numbers after MSHA amended its civil penalty regulation in 2007, and they will do so again, Savit predicted.

The agency's proposal also includes a section that would change the existing relationship between MSHA and the Federal Mine Safety and Health Review Commission.

Commission judges now review contested cases independently and issue decisions that determine the penalties operators must pay. Judges also review and approve settlement agreements. In what Chajet called a

"pure power grab" by the agency, MSHA has presented options that would totally eliminate or severely restrict the Commission's discretion in these areas.

The agency initially had set a deadline of September 30 for receipt of stakeholder comments. However, in response to requests for more time, MSHA has extended the deadline to December 3.

OSHA Revises Serious Injury Reporting Rule

Fatalities and accidents involving serious injuries will have to be reported to OSHA promptly under the agency's new requirements.

The proposed rule specifies that every work-related fatality must be reported within eight hours and any hospitalization, amputation or loss of an eye within 24 hours by every employer, regardless of size, under OSHA's jurisdiction. Previously, employers were required to report only work-related fatalities and in-patient hospitalizations of three or more employees. Reporting single hospitalizations, amputations or loss of an eye was not required. The new requirements appeared in the *Federal Register* on September 18 and goes into effect on January 1, 2015.

"Hospitalizations and amputations are sentinel events, indicating that serious hazards are likely to be present at a workplace and that an intervention is warranted to protect the other workers at the establishment," said OSHA chief Dr. David Michaels. "This new data will enable the agency to identify the workplaces where workers are at the greatest risk

and target our compliance assistance and enforcement resources accordingly."

OSHA is developing a web portal for employers to report incidents electronically. The electronic reporting form is under development. Until it is available, employers can report by calling OSHA's free and confidential number at 1-800-321-OSHA (6742) or by contacting the nearest OSHA area office.

In addition to the new reporting requirements, OSHA has updated the list of industries exempt from having to routinely keep injury and illness records due to their relatively low occupational injury and illness rates. The previous list was based on the old Standard Industrial Classification (SIC) system. The new rule uses the North American Industry Classification System (NAICS) to classify establishments by industry. The new list is based on updated injury and illness data from 2007 through 2009 from the Bureau of Labor Statistics.

Any employer with 10 or fewer employees, regardless of their industry classification, is exempt from the requirement to routinely keep records of worker injuries and illnesses.

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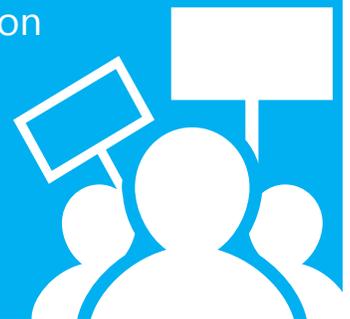
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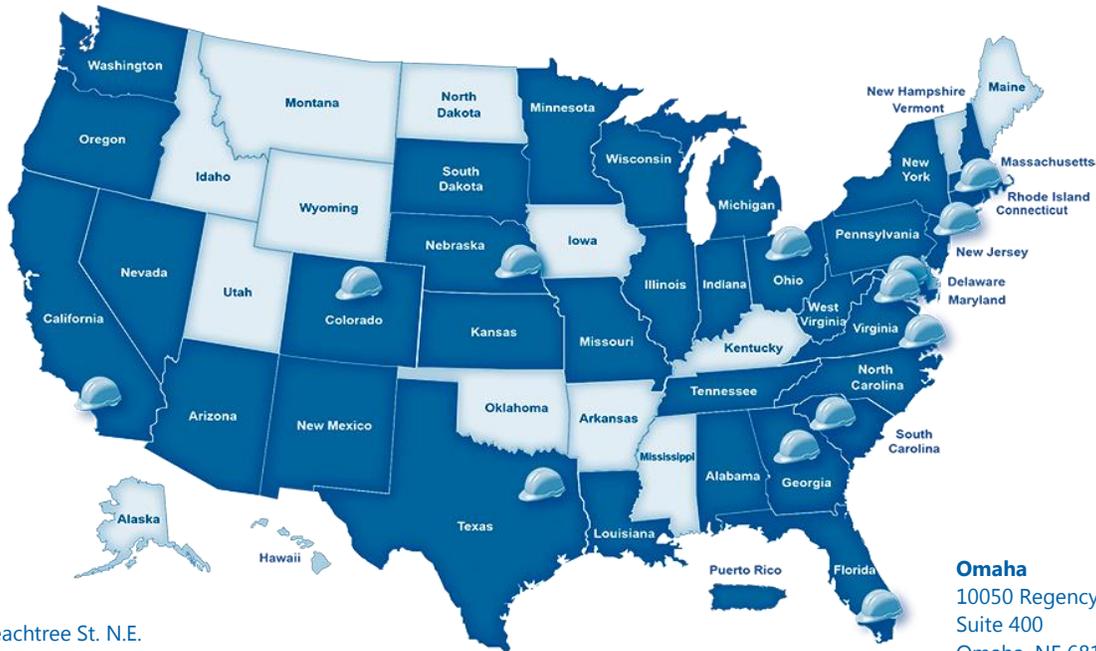
For further information, contact Regan Harrison at regan.harrison@jacksonlewis.com.

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Atlanta

1155 Peachtree St. N.E.
Suite 1000
Atlanta, GA 30309
Carla J. Gunnin, Esq.
Dion Y. Kohler, Esq.

Boston

75 Park Plaza, 4th Floor
Boston, MA 02116
Stephen T. Paterniti, Esq.

Cleveland

6100 Oak Tree Blvd.
Suite 400
Cleveland, OH 44131
Vincent J. Tersigni, Esq.

Dallas

500 N. Akard
Suite 2500
Dallas, TX 75201
William L. Davis, Esq.

Denver

950 17th Street
Suite 2600
Denver, CO 80202
Donna Vetrano Pryor, Esq.
Mark N. Savit, Esq.

Greenville

55 Beattie Place
One Liberty Square
Suite 800
Greenville, SC 29601
Robert M. Wood, Esq.

Los Angeles

725 South Figueroa Street
Suite 2500
Los Angeles, CA 90017
David S. Allen, Esq.
Benjamin J. Kim, Esq.

Metro New York

58 South Service Road
Suite 250
Melville, NY 11747
Ian B. Bogaty, Esq.
Roger S. Kaplan, Esq.

Miami

One Biscayne Tower
2 South Biscayne Blvd.,
Suite 3500
Miami, FL 33131
Pedro P. Forment, Esq.

Norfolk

500 E. Main Street
Suite 800
Norfolk, VA 23510
Thomas M. Lucas, Esq.
Kristina H. Vaquera, Esq.

Omaha

10050 Regency Circle
Suite 400
Omaha, NE 68114
Kelvin C. Berens, Esq.
Joseph S. Dreesen, Esq.

Orlando

390 N. Orange Avenue
Suite 1285
Orlando, FL 32801
Lillian C. Moon, Esq.

Washington, D.C. Region

10701 Parkridge Blvd.
Suite 300
Reston, VA 20191
Henry Chajet, Esq.
Tressi L. Cordaro, Esq.
Garen E. Dodge, Esq.
Bradford T. Hammock, Esq.
R. Brian Hendrix, Esq.
Avidan Meyerstein, Esq.
Michael T. Taylor, Esq.

Jackson|Lewis

For more information on any of the issues discussed in this newsletter, please contact:

Brad Hammock at HammockB@jacksonlewis.com
or (703) 483-8316, Henry Chajet at
henry.chajet@jacksonlewis.com or (703) 483-8381,
Mark Savit at mark.savit@jacksonlewis.com or
(303) 876-2203, or the Jackson Lewis attorney with
whom you normally work.

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