

Week of **January 5, 2015**

## New OSHA Reporting Requirements Effective in January

Effective January 1, 2015, employers will be required to report all work-related fatalities to OSHA within eight hours and all in-patient hospitalizations, amputations, and losses of an eye within 24 hours of learning about them.

OSHA Assistant Secretary Dr. David Michaels said, "We believe the updated reporting requirements are not simply paperwork but have a life-saving purpose: they will enable employers and workers to prevent future injuries by identifying and eliminating the most serious workplace hazards."

Michaels recounted a 2013 incident in Florida where a 32-year-old employee was killed by a moving part after he entered a large wire manufacturing machine to retrieve a fallen metal bar. Michaels said the death was preventable and occurred because a light curtain had been disabled that would have automatically turned the machine off when the worker entered the machine's danger zone.

"OSHA learned only after his death that two workers at the same factory had been severely injured on the same piece of machinery, including an amputation," said the Assistant Secretary, who added that hospitalizations and amputations are good indicators a workplace contains major hazards. "Having improved, broader and more accurate access to information when injuries happen will help us focus our resources and compliance assistance where they are needed the most," Michaels said. When asked what OSHA considered formal admittance for care, since surgeries can be either outpatient or inpatient, the agency said that determination is made by the hospital or clinic.

Employers can report covered events by calling their nearest area office during normal business hours, by calling the 24-hour OSHA hotline at 1-800-321-OSHA (1-800-321-6742), or by reporting online at [https://www.osha.gov/report\\_online/](https://www.osha.gov/report_online/). According to the agency, confirmation of online reports will be provided by email.

*Jackson Lewis is hosting an upcoming webinar on*

### 2014 Mid-Year Election: Expectations from the 114<sup>th</sup> Congress

Hosted by Jackson Lewis' Government Relations practice group, this complimentary 90-minute webinar will discuss possible congressional responses to the issues mentioned above, as well as anticipated changes in congressional leadership and how those changes could impact the Administration's pro-employee and pro-labor agenda.

**Friday, January 9, 2015** ▪ 12:00 – 1:30PM EST

[Click here for more information and to register.](#)



## Commission Objects to MSHA's Plan to Amend Civil Penalty Assessments

The Federal Mine Safety and Health Review Commission is urging MSHA to withdraw a proposed rule intended, in part, to amend the mine safety agency's procedure for assessing civil penalties.

In a December 3, 14-page submission to MSHA, Commission General Counsel Michael McCord said the adjudicatory agency "strongly opposes" the proposed amendment, pointing to MSHA's alleged lack of statutory authority to make the change as the "paramount flaw" in that portion of the rulemaking proceeding. MSHA in July proposed the change as part of sweeping changes to its Part 100 rules, which prescribe agency criteria and procedures for the proposed assessment of civil penalties.

"Contrary to MSHA's attempt to ignore the statutory language and legislative history, Congressional intent and legislative history do not have a 'shelf life,'" McCord said. "The proposed rule is an impermissible attempt to undo the judgment of Congress regarding the statutory penalty scheme and the respective roles of the Commission and MSHA."

MSHA proposed a new Section 100.9 with two alternatives that would restrict severely the ability of the Commission and its judges to assess civil penalties against mine operators for violations of mine safety and health rules and a third alternative that would essentially maintain the status quo.

Under the current system, MSHA proposes penalties, but the Commission has the ultimate say on penalty amounts in contested cases. The Commission also has final authority to review proposed settlements between MSHA and operators.

MSHA contends change is needed because the existing approach can produce unpredictable and inconsistent fines. In addition, the agency asserted, operators believe they can get a better deal simply by contesting penalties to the Commission. The process also thwarts the intended deterrent effect of monetary fines. Another problem, according to MSHA, is a lack of substantive rules to guide the Commission in its penalty analysis.

McCord argued that Section 110(i) of the Mine Act unequivocally gives the Commission sole authority to assess all civil penalties and that Congressional intent was evident in the legislative history of the 110 provision.

McCord said MSHA's proposal clearly conflicts with the Commission's duly promulgated and long-standing procedural rules and runs counter to Executive Order 12866 (which states that federal agencies are forbidden from issuing rules that are "inconsistent, incompatible, or duplicative with" regulations of other federal agencies). "[MSHA's proposed rule] should be withdrawn for this reason alone," McCord asserted. He also cited case law and "36 years of practice under the Mine Act" to support the Commission's case.

MSHA said it is considering trying to achieve its rulemaking objective by making Part 100 a legislative rule using general rulemaking authority granted it under Mine Act Section 508. However, McCord contended that approach has been precluded by the D.C. Circuit Court of Appeals' ruling that an agency cannot rely on general rulemaking authority to override a specific statutory directive such as Section 110(i).

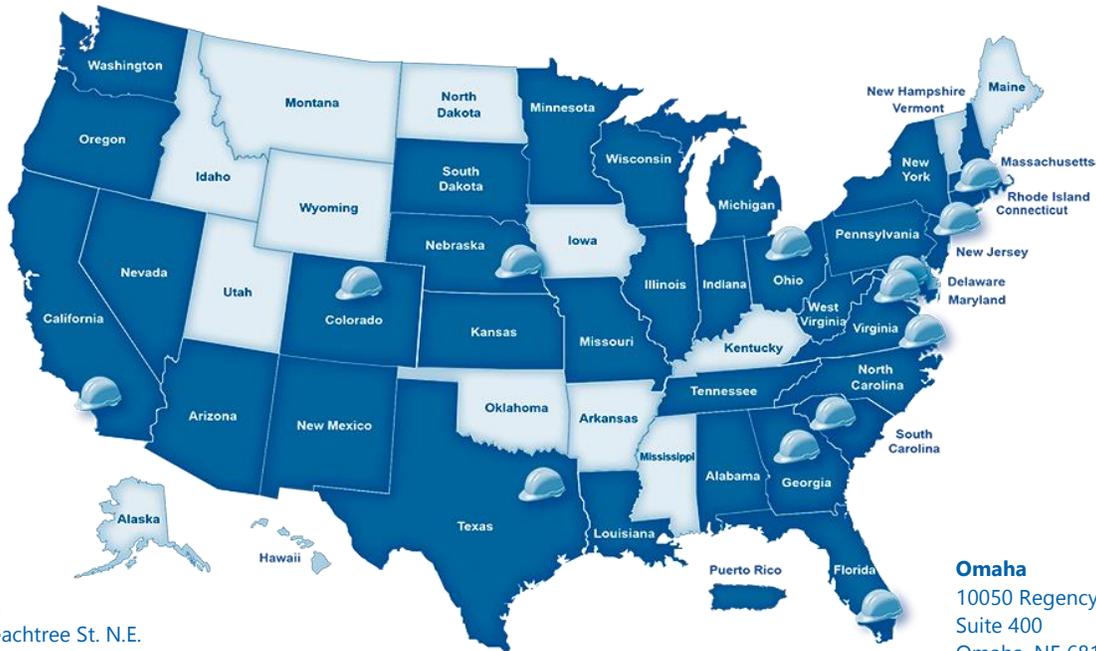
MSHA also has held that its policy decisions are entitled to deference and that the Commission "is essentially just an adjudicatory factfinder," positions McCord rejected. He also disputed the agency's proffered justifications to defend its proposed approach. "It proposes solutions for a problem that does not exist," McCord said.

In a separate submission to the rulemaking record, 10 former Commission members made many of the same arguments in opposition to the MSHA proposal.

MSHA has held two hearings on the penalty proposal and expects to hold two more at dates yet to be specified. The post-hearing comment period had been set to expire in January, but the agency said it would extend it until mid-February.



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