

## Challenge to Mine Safety POV Rule Stayed for Settlement Talks

By Raymond Perez, II

May 17, 2017

An Ohio court case on the validity of the Mine Safety and Health Administration's 2013 rule on "pattern of violation," or "POV," may be near an end.

At the joint request of the plaintiffs and MSHA, a judge for the U.S. District Court for the Southern District of Ohio issued a 120-day stay in the lawsuit in which mine operators and mining groups sued MSHA to stop the agency from implementing a rule that the plaintiffs allege was unfairly put in place. *See Ohio Coal Assoc. et al. and Murray Energy Corp. et al. v. Sec'y of Labor*, Nos. 2:14-CV-2646, 2:15-CV448 (S.D. Ohio June 16, 2016).

They said, "Rather than concurrently litigating and negotiating a possible settlement of the dispute, the parties are open to negotiating a mutually agreeable resolution that could avoid further litigation."

They noted, "Following a May 1, 2017 meeting of counsel and representatives of the plaintiffs in both related cases, the Department of Justice, the Department of Labor, and MSHA, all parties agreed that such settlement negotiations were sufficiently promising to warrant seeking a stay of this litigation. The parties have since discussed their commitment to a structured series of conferences to consider a negotiated resolution."

In issuing the rule, published in January 2013 ([78 Fed. Reg. 5056](#)), MSHA said the final rule "simplifies the existing POV criteria, improves consistency in applying the POV criteria, and more effectively achieves the Mine Act's statutory intent." MSHA said it also "encourages chronic safety violators to comply with the Mine Act and MSHA's health and safety standards." The initial 1990 POV rule was put in place to allow the agency to commence a process that could lead to a citation against a mine for a "pattern of violation," or "POV." The citation can be a precursor to shutting down a mine. MSHA calls the rule its "harshest enforcement mechanism."

In their lawsuit, the plaintiffs allege that MSHA and the Secretary of Labor violated the Administrative Procedure Act by failing to consider the economic implications of its January 2013 rule and the rate at which significant and substantial violations are overturned. They allege the POV rule exceeds the statutory authority granted to MSHA by the Mine Act because the new rule uses non-final citations. The plaintiffs argue the Mine Act requires the use of finalized violations in a pattern of violations determination. The plaintiffs also argue that MSHA failed to subject the POV and Corrective Action Plan criteria to notice-and-comment rulemaking and that the POV rule was arbitrary and capricious.

They also allege that MSHA did not explain why the rule replaced the potential pattern of violation notice, which they said yielded miner-safety improvements. The court previously dismissed their due process claims.

Jackson Lewis attorneys are available to answer inquiries regarding this and other workplace developments.

©2017 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 950+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit <https://www.jacksonlewis.com>.

### Meet the Author



Raymond Perez, II

Of Counsel  
Atlanta 404-586-1895  
Email

### Practices

Workplace Safety and Health

---

©2022 Jackson Lewis P.C. All rights reserved. Attorney Advertising. Prior results do not guarantee a similar outcome. No client-lawyer relationship has been established by the posting or viewing of information on this website.

\*The National Operations Center serves as the firm's central administration hub and houses the firm's Facilities, Finance, Human Resources and Technology departments.