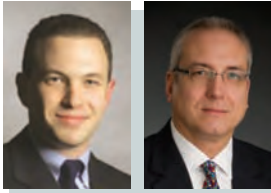


EXPECTATIONS AND STRATEGIES FOR A NEW ERA IN MINE SAFETY

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Two weeks before the presidential election, then-Senator Barack Obama sent a letter to John Gage, the national president of the American Federation of Government Employees, AFL-CIO. The “failure to ensure mine safety”

has been “one of the worst disasters of the Bush administration,” he wrote. In my Department of Labor, the Administrator of Mine Safety and Health will be an advocate for miners’ safety and health, not for the mining companies’ bottom lines. Our mine safety program will have the staffing and the enforcement tools needed to get the job done.”

After a series of disasters, of course, the Mine Safety and Health Administration (MSHA) already has been breaking enforcement records over the last couple years. In December, MSHA announced that for the first time in its history, it completed all mandated regular annual inspections. Over the last two years it hired hundreds of new enforcement personnel. Its inspectors issued more than 170,000 citations and \$162 million in penalties in 2008 alone.

Nonetheless, as the new administration takes shape it seems from President-elect Obama’s appointments that this enforcement trend is likely to continue and intensify. On December 19, President-elect Obama announced Congresswoman Hilda L. Solis as his nominee for Secretary of Labor. Upon accepting the nomination, the four-term congresswoman said, “As Secretary of Labor, I will work to strengthen our unions and support every American in our nation’s diverse workforce... We also must enforce federal labor laws and strengthen regulations to protect our nation’s workers.” AFL-CIO President John Sweeney said his union looks forward to working with her as she “charts new territory.” Unions and management alike expect Solis to push for stricter regulations and tougher enforcement.

Joining Rep. Solis in heading up the Department of Labor transition team is the former Assistant Secretary for Mine Safety and Health under President Clinton, Davitt McAteer. He, along with Joe Main, former head of safety for the United Mine Workers of America, are rumored leading candidates to head up MSHA or be appointed to the Mine Safety and Health Review Commission. In addition, Mike Davis, former MSHA Birmingham district manager for metal/non-Metal, also has a reputation for a strong enforcement approach and will succeed Bob Friend as a career civil servant deputy assistant secretary.

Based on the makeup of the likely incoming team and Obama’s campaign promises, 2009 should set records above even 2008 for enforcement actions. We should expect MSHA to issue more citations, levy more fines, increase criminal prosecutions, and issue more closure orders. Since 2008 saw MSHA issue its first-ever pattern of violations notice, the expected increase in the number and severity of citations likely means many more such notices and closure orders are to come. MSHA (and the Occupational Safety and Health Administration) will also face pressure to conduct new rulemaking, including reductions in the coal dust and silica standards.

And, the new 111th Congress may make even broader changes in the law. In 2008, the U.S. House of Representatives passed the S-MINER Act. Although the bill died in committee in the Senate, it could re-emerge in the new Congress, where Democrats now are just shy of a filibuster-proof majority. The S-MINER Act, as passed by the House in the 110th Congress, had the support of organized labor but was opposed by a broad business coalition. Industry representatives were concerned that the bill would have imposed at least 16 new mandates (including mandatory health standard adoptions), provided MSHA with additional authority to issue withdrawal orders, and restricted the Review Commission’s ability to reduce penalties.

How can a mine, quarry, or cement plant succeed in this new enforcement era, particularly while facing challenging economic times? We suggest that companies rededicate themselves to a proactive, preventive approach to MSHA. There are a few things you can do that will make a big difference. First, you’ll want to take full measure of your current safety and health compliance programs. Experienced counsel can assist you in conducting a comprehensive MSHA-related records audit. The audit should include at least the self-inspection records and training records mandated by MSHA to reveal what is working and what is not, where your programs could improve, and where your good policies may not be followed into practice. It can also reveal lapses that could lead to severe penalties and provide an opportunity to correct them before MSHA discovers them.

Second, you should review and, if necessary, expand your training and disciplinary programs for safety rule violations. Of course, the bare minimum is to ensure that all employees are receiving the appropriate mandated safety training at the appropriate times and that your rules are enforced. But, in addition, in a period when many inspectors are systematically issuing more numerous and more serious citations, further training should focus on empowering your employees to prevent citations before they occur, and disciplining them for failure to do so. This means educating your mine site management and personnel about how MSHA enforcement works, how to handle inspections, and how to deal with inspectors appropriately and effectively without making damaging admissions. Among other benefits, this kind of training will minimize admissions of high penalty, high risk “knowing or willful” violations (e.g. “we knew about it but couldn’t get to it because we were busy loading trucks.”).

Third, key mine site personnel should learn to participate in the Alternative Case Resolution Initiative (ACRI) process without outside counsel. ACRI training empowers your employees to deal effectively with ACRI-trained MSHA personnel and successfully challenge routine, unjustified citations and penalties. Prepare your key employees by sending them to an ACRI workshop developed by qualified attorneys and safety consultants, or hold an ACRI workshop in-house.

These are but a few strategies you can employ to minimize unjustified MSHA citations and penalties. With growing regulatory costs and a difficult economy, companies should not wait to act proactively.

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