



SEPT. 15, 2006

## INSIGHTS ALERT

### ***MSHA TO INCREASE MINE ACT PENALTIES***

MSHA has issued a proposal to significantly increase civil penalties under the Mine Safety and Health Act of 1977 (Mine Act) and the Mine Improvement and New Emergency Response Act of 2006 (MINER). On Friday, September 8, the Department of Labor's Mine Safety and Health Administration (MSHA) issued the proposed regulations (71 Fed. Reg. 53054-53075). The changes, when they become effective, will impact coal mines and metal and nonmetal mines.

MSHA estimates that, unless the higher penalties result in a large decrease in citations, the proposed rule would result in the following increases in penalties:

- 176% in total civil penalty assessments (average increase from \$213.00 to \$587.00);
- 367% for special assessments issued to agents of mine operators;
- 84% for special assessments [many of which will now be processed as regular assessments because the proposed regulations would make it easier to make high dollar regular assessments]; and
- An indeterminate increase in penalties due to the new flagrant violation penalties.

Currently, MSHA has three penalty processes, special assessments, single assessments, and regular assessments. The maximum penalty for special assessments is \$60,000.00. Single penalty assessments (not significant and substantial) are \$60.00. Regular assessments (generally significant and substantial violations) can fall anywhere within the \$72.00-\$60,000.00 at range (although usually below \$20,000), depending on a point system that evaluates the size of the business, its history of previous violations, the degree of negligence, the gravity of the violation, good faith abatement, and the effect of the penalty on the operator's ability to continue in business. The maximum daily penalty for failure to correct a violation is \$6,500.00 and the maximum penalty for smoking or carrying smoking materials underground is \$275.00. These apply to coal mines and metal and nonmetal mines.

The new regulations would address civil penalties related to prompt incident notification and flagrant and unwarrantable violations. A "flagrant" violation is defined as reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury. It will also subject citations and orders issued on or after June 16, 2006 to significant penalties for violations involving failure to promptly notify MSHA within 15 minutes. There are also new, large penalties for unwarrantable failures to comply.

MSHA will alter the existing process by proposing to:

- (1) Change the point system under the regular assessment provisions;
- (2) Add a provision to address repeat violations;
- (3) Eliminate the single penalty provision [a controversial proposal in that 65% of penalties assessed in 2005 were single penalty assessments];
- (4) Increase penalties by raising the dollar value of the points in the regular assessment process;
- (5) Make it possible for all violations to be subject to the special assessment process; and
- (6) Shorten the time allowed to request a conference from 10 days to 5 days.

New penalty provisions are also proposed to implement MINER. These include:

- (1) Failure to promptly notify MSHA of serious accidents [not less than \$5,000.00 and up to \$60,000.00];
- (2) Set the stage for huge penalties for flagrant violations [up to \$220,000.00]; and
- (3) Set minimum penalties for unwarrantable failure to comply [\$2,000.00 for citations or orders under Section 104(d)(1), \$4,000.00 for orders under section 104(d)(2)].

Six public hearings will be held:

- September 26, 2006 in Arlington, Virginia
- September 28, 2006 in North Birmingham, Alabama
- October 4, 2006 in Salt Lake City, Utah
- October 6, 2006 in St. Louis, Missouri
- October 17, 2006 in Charleston, West Virginia
- October 19, 2006 in Corapolis, Pennsylvania

A more comprehensive summary of the MSHA proposal to increase penalties will be sent to our clients and friends in the next few days.

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