

Protecting Your Mining Operation from 105(c) Discrimination Complaints

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Congress enacted the ***Federal Mine Safety and Health Act*** in 1977 in order to establish a comprehensive and pervasive regulatory scheme governing mine safety and health. A critical component of the statute's enforcement mechanism is found in Section 105(c), which is designed to encourage miners to actively voice concerns or complaints about mine safety while protecting them against any possible discrimination which they might suffer as a result of voicing such concerns.

Under Section 105(c), a miner who believes he or she has been discharged or otherwise discriminated against in retaliation for voicing health or safety concerns may file a complaint with the Secretary of Labor. According to MSHA, Section 105(c) discrimination complaints are given priority over all other special investigation cases and all available special investigation resources are used to ensure the timely initiation and completion of Section 105(c) investigations.

For operators, Section 105(c) complaints can be costly, disruptive and time consuming. There are several steps that mine operators can take to protect their operation from such complaints. First, operators should encourage familiarity with Section 105(c) among employees, particularly management-level employees. Management-level employees should be trained to recognize examples of protected activity under the Mine Act and trained what to do – and what not to do – in response to those activities. If MSHA commits all available resources to initiate and complete Section 105(c) investigations, operators should likewise commit resources and conduct training to help prevent such complaints and investigations in the first place.

Second, operators can avert conditions that may adversely affect safety and health, and therefore limit the filing of complaints related to health or safety concerns, by placing an increased emphasis on workplace examinations and promptly abating conditions found during examinations. MSHA recently placed an increased emphasis on workplace examinations, particularly in the metal/nonmetal industry. As such, all mine operators, regardless of whether engaged in the coal industry or the metal/nonmetal industry must ensure that all designated examiners are properly trained on applicable examination requirements. Examiners must be able to recognize conditions that may adversely affect safety and health, have the authority and the resources necessary to initiate appropriate corrective action, and then promptly initiate such action. Operators should also conduct regular safety meetings with their employees to discuss conditions found during examinations and during the regular work day and ways to prevent those conditions from developing.

Third, operators should carefully document any health or safety complaint from an employee. Such documentation should include, but not be limited to, the name of the employee making the complaint, the date and time of the complaint, and all actions taken by the operator in response to the complaint. Complaints should be investigated immediately and operators should consider designating a particular person to investigate all health or safety complaints. Operators should also consider advising the employee who made the complaint of the status of the company's investigation, including the outcome of the investigation, to show that the company takes employees' health and safety concerns seriously.

Fourth, operators should develop a well-crafted anti-discrimination policy that provides examples of activities protected under the Mine Act and discriminatory acts prohibited by the Mine Act. Operators should communicate the policy to its employees and provide them with an opportunity to ask questions. Many operators already have anti-discrimination policies in place, such as policies against discrimination on the basis of age, sex or race, but few are devoted specifically to discrimination under Section 105(c) of the Mine Act.

Fifth, operators should develop a disciplinary policy and apply it regularly and consistently. Operators should also document all disciplinary actions taken against an employee, including the reason for any suspension or termination. Many Section 105(c) complaints are filed by employees after they have been suspended or terminated for legitimate, non-discriminatory reasons. Having documentation to show that the employee's suspension or termination was for legitimate, non-discriminatory reasons is critical. Further, and as noted above, operators should apply its disciplinary policy consistently as many Section 105(c) complaints include allegations of disparate treatment. Ensuring that discipline is applied consistently and uniformly will limit such allegations.

Finally, it should be noted that during an investigation of an employee's Section 105(c) complaint, MSHA investigators routinely examine company records, including training records and accident and injury records, and often issue enforcement actions related to those records during the investigation into the Section 105(c) complaint. As such, operators should routinely audit records that are required to be kept under the Mine Act to ensure that all records are maintained and up to date.

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