

# Proposed Legislative Changes to Protect the Safety of All Workers and Prevent Future Disasters

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*An alarming series of tragedies has befallen our nation's workplaces in recent months. In the wake of the recent disaster at the Upper Big Branch Mine, there was substantial public outcry about the mine's disturbing safety record, and the systemic barriers that prevented these recurring safety problems from being addressed. Similar concerns have been raised in other industries in the aftermath of workplace fatalities. Some of these deaths received national attention – like the explosion at the Tesoro refinery in Washington or the Kleen Energy facility in Connecticut – but the vast majority get little attention beyond affected family and friends.*

*This concept paper outlines legislative proposals that would address these serious concerns – increasing incentives for mine operators and other employers to comply with safety laws, empowering workers to speak up about safety concerns, and giving MSHA the tools it needs to put unsafe mines back on track. It is the hope of the authors that this paper can form the basis of productive discussions with Congressional colleagues and interested stakeholders, and can be the starting point for bipartisan legislation that will protect all our workers and prevent future disasters by improving compliance with mine and occupational safety and health laws.*

## **Putting Mines with Deteriorating Safety Records Back on Track**

- ***Change MSHA's "pattern of violations" process from a primarily punitive to a rehabilitative process, wherein mines with significantly degraded safety records are given remedial safety plans and must meet benchmarks demonstrating that they are making progress on safety issues.***

The "pattern of violations" system was intended to be the most important tool to address mines with recurring safety problems. Unfortunately, this tool cannot be effectively utilized under current law. In addition, the harshly punitive nature of the current system does not serve the goal of helping unsafe mines improve their performance and return to operations safely.

We propose that mines with a pattern of significant safety problems (withdrawal orders, flagrant violations, citations for "significant and substantial" violations, accidents and injuries, etc.) should be placed on "pattern of violation" status if their safety and compliance record falls below thresholds established by MSHA. These thresholds should be appropriate to the size and type of mine, and both the thresholds and the data that MSHA uses to evaluate mines should be made publicly

available on MSHA's website and updated regularly so that mines can track their status and take preventive measures to avoid being placed on pattern status.

When a mine meets the criteria and is placed on pattern status, miners must be withdrawn to protect their safety, and a remedial order should be issued by MSHA. This remedial order should outline steps that the mine must take to get its safety performance back on track, such as additional training for miners, additional safety personnel, or the creation of a health and safety management program. Miners must remain withdrawn until violations or unsafe conditions identified in the remedial order are remedied, and the operator has commenced or completed other safety actions as identified in the order. Once miners return to the mine, the mine should be in what is effectively a probationary period. The number of annual inspections should increase, and MSHA should periodically assess whether the mine is meeting prescribed safety benchmarks. Mines that meet these benchmarks for one year should be removed from pattern status. Mines that do not meet these benchmarks should face an increase in fines and penalties for safety violations, and potentially a renewed withdrawal order.

### **Giving MSHA Appropriate Enforcement Tools**

- ***Give MSHA additional authority to order training.*** Even outside the pattern of violations context, there are also circumstances where additional training is the appropriate response to a safety concern. MSHA should have the authority to order such additional training in appropriate circumstances.
- ***Give MSHA authority to seek injunctions when there is a course of conduct that constitutes a continuing threat to the health and safety of miners.*** Currently, MSHA has limited authority to pursue injunctive relief in court when there are serial violations that present a risk to the health and safety of miners. MSHA should have the authority to pursue an injunction-stopping these bad practices or temporarily shutting down the mine when there is a course of conduct that constitutes a continuing hazard to the health and safety of miners.
- ***Clarify the definition of a “significant and substantial” violation.*** Currently there is no statutory definition of a significant and substantial violation. The law would benefit from additional clarity by defining a “significant and substantial violation” to include violations where there is “a reasonable possibility that such violation could result in injury, illness or death.”
- ***Give MSHA expanded authority to subpoena documents and testimony.*** Currently, MSHA does not have the authority to subpoena documents or testimony from operators outside the context of a formal, public hearing. MSHA should have this authority in the context of investigations and inspections as well as public hearings.

### **Ensuring that Irresponsible Operators are Held Accountable**

- ***Increase maximum criminal penalties.*** Currently, criminal violations of mine safety laws are a misdemeanor for a first offense. To provide a strong deterrent for such serious misconduct, the penalties for knowing violations of safety standards should be raised to the felony level, including providing felony penalties for miners, operators, and government officials who knowingly provide advance notice of an unannounced inspection.

- ***Increase maximum civil penalties.*** Raising maximum civil penalties for “significant and substantial” violations of mine safety laws would also be beneficial to ensure that operators have a strong economic incentive to comply with the law.
- ***Ensure that operators pay penalties in a timely manner.*** Currently, MSHA is trying to collect about \$27 million in unpaid penalties for fully adjudicated violations. Operators who accrue penalties that are affirmed by the Commission, but never paid, effectively get away with violating the law. MSHA should have the authority to withdraw miners from a mine that is more than 180 days in arrears on fully-adjudicated penalties, if that mine is not participating in a payment plan.

### **Protecting Workers Who Speak Out About Unsafe Conditions**

- ***Strengthen protections for workers who speak out about unsafe conditions.*** Workers who go into a mine every day are in the best position to find safety hazards. It is essential that miners have the strongest possible protections to ensure that they can raise safety concerns on the job without fear of retaliation. We propose to strengthen existing whistleblower protections, including requiring one hour annually of “miner’s rights training” to inform workers of the law’s protections, giving miners an express right to refuse unsafe work, expanding the time limit for complaining about retaliation from 60 to 180 days, and authorizing punitive damages and criminal penalties for knowing retaliation against workers who raise safety concerns.
- ***Ensure that miners don’t lose pay for safety-related closures.*** Fear of losing a paycheck can also deter miners from raising safety issues. Miners should receive full pay when they are idled by a MSHA-initiated safety-related closure and cannot be re-assigned to work in an open portion of the mine.
- ***Ensure that miners can speak freely during investigations.*** The ability of miners to communicate openly with MSHA during investigations is key to uncovering and correcting safety problems. MSHA should have the ability to interview mine employees and other individuals with relevant information privately if the individual requests or consents to a private interview.

### **Increasing Accountability**

- ***Provide for an independent investigation of the most serious accidents.*** Everyone benefits from having the best possible information about serious accidents, not only to learn about what went wrong, but also to learn whether government officials acted properly before the accident, in responding to the crisis, and in their subsequent investigation. We support requiring an independent investigation by a NIOSH-appointed team of independent experts for any accident involving 3 or more deaths.
- ***Ensure that all safety personnel are well-qualified.*** A key component of mine safety is ensuring that those responsible for the day-to-day safety decisions meet the highest standards of qualification. MSHA should institute a process to certify the qualifications of foremen, superintendents, and other high-level safety officials if there is not an adequate state-based certification process in place.

- ***Ensure that inspections are comprehensive and well-targeted.*** Inspections by MSHA are the cornerstone of our mine safety system, and MSHA's limited inspection resources should be well-distributed over all shifts and days of the week when mines are operating to protect all miners.
- ***Require pre-shift reviews of mine conditions, and communication to ensure that appropriate safety information is transmitted.*** Responsible practices and good communication is the first line of defense in keeping our mines safe. Operators should be required to institute a pre-shift review of mine conditions, and to implement a communication program to ensure that each miner is made aware of the current conditions of the mine at the start of his/her shift. This would be accomplished through required verbal communication between incoming and outgoing foreman, assistant foreman, and other officials responsible for safety conditions on each shift. These verbal communications should also be recorded in writing in a log.

### **Reducing Safety Risks**

- ***Reduce the Risk of Coal Dust Explosions.*** It is essential to take all possible steps to reduce known risks to miner's safety. To reduce the risk of dangerous explosions, we must require greater amounts of rock dusting, mandate new monitoring technology to improve rock dust measurements, and require the study and subsequent use of continuous atmospheric monitoring systems.

### **Increasing Safety in Other Workplaces**

- ***Provide similar protections in other workplaces covered under the Occupational Safety and Health Act.*** Unfortunately, mines are not our nation's only dangerous workplaces. All workers deserve to come home safe after work each day. Accordingly, we also support improving protections for workers in other workplaces by strengthening whistleblower protections, increasing criminal penalties where workers are killed due to a safety violation, updating civil penalties which have not been increased since 1990, preventing litigation from delaying the correction of hazards that could lead to serious injury or death, and providing greater rights for victims of accidents and their family members to participate in proceedings under the OSHAct.

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\* The office of the late Senator Robert C. Byrd also participated in the preparation of this paper. The authors gratefully acknowledge these contributions.