

## “Flagrant” Violations Under the MINER Act: What’s a Little More Ambiguity Among Friends?

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**§ 9.01. Introduction.**

**[1] —The MINER Act, Passed in 2006, Provided for a New Enhanced Penalty of Up to \$220,000 for Violations of Mine Safety and Health Standards Deemed to Be “Flagrant.”**

In the aftermath of the Sago and Aracoma mine disasters, the Mine Improvement and New Emergency Response Act of 2006 (“MINER Act”) created new stringent enforcement measures with the announced goal of promoting safer mining practices. One of these measures allows the Mine Safety and Health Administration (MSHA) to issue individual penalties of up to \$220,000 for violations of mine safety or health standards deemed to be “flagrant.”<sup>1</sup>

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<sup>1</sup> These actions are sometimes referred to in this chapter as a “flagrant violation” or “flagrant violations.” It is important to note at the outset that MSHA inspectors are granted

Since the effective date of the MINER Act, MSHA has used the flagrant violation regime, described in detail in this chapter, as a means of further elevating its enforcement goal. Flagrant violations, along with patterns of violation and increased regular penalty assessments, are on the rise. Unfortunately, there is no clear interpretation of the flagrant violation criteria. As a result, mine operators must be proactive in avoiding and defending against the issuance of flagrant violations. In order to fully be prepared against these enforcement actions, operators must be aware of the uncertain and tenuous nature of MSHA's interpretation of § 110(b) of the MINER Act, be aware of § 104(d) unwarrantable failure and § 104(b) failure to abate authority in order to determine possible case outcomes, and develop several different legal defenses.

## **[2] — MSHA Uses Flagrant Violations as a Means of Further Elevating Enforcement.**

The grant of flagrant violation assessment power to MSHA has put one more elevated enforcement tool into its arsenal. According to Richard Sticker, the former Assistant Secretary of Labor, when the MINER Act passed, MSHA believed that “Congress gave us powerful new tools to strengthen mine safety, and we are going to use them fully.”<sup>2</sup> The agency also explained that “[m]ine operators that show reckless disregard for the well-being of their workers must be held accountable for their actions. MSHA will not hesitate to assess stiff penalties against coal companies that fail to comply with safety and health regulations.”<sup>3</sup> According to MSHA, then, flagrant violations are

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authority to issue flagrant violations although the actions are considered and assessed as a civil penalty under § 110(b)(2) of the MINER Act. *See* Procedure Instruction Letter I08-III-2, MSHA (May 29, 2008), accessed April 30, 2009, available at [www.msha.gov/regs/complian/PILS/2008/PIL08-III-2.asp](http://www.msha.gov/regs/complian/PILS/2008/PIL08-III-2.asp) [hereinafter cited as Procedure Instruction Letter I08-III-2].

<sup>2</sup> Press Release, Mine Safety and Health Administration, *MSHA Assistant Secretary Issues New Procedures for Evaluating Flagrant Violations* (October 26, 2006)(on file with authors).

<sup>3</sup> Press Release, Mine Safety and Health Administration, *Mine is First to Be Fined under Flagrant Violation Provision of MINER Act* (April 12, 2007)(on file with authors).