

# THE NATIONAL LAW REVIEW

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## MSHA Tests New Informal Conference Process

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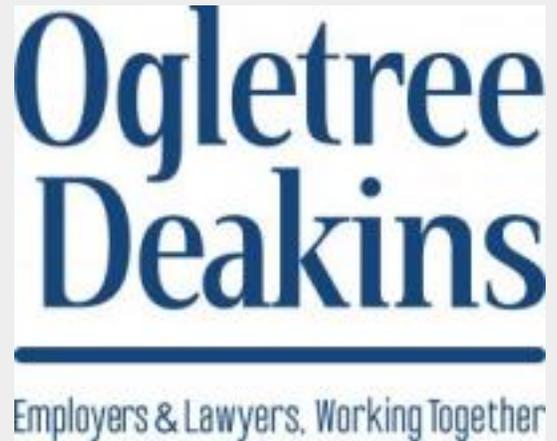
The Mine Safety and Health Administration (MSHA) has begun a three-month pilot project to see if the agency and operators can reach a final resolution regarding citations at the informal health and safety conference stage. For conferences conducted under the pilot project, MSHA will not make any modifications to issued citations unless operators sign binding agreements at the end of conference negotiations accepting the modifications offered by MSHA and relinquishing all rights to later contest the citations in cases before the Federal Mine Safety and Health Review Commission. The new conference process is being tested in two districts: Coal Region 3 and the Metal/Nonmetal Southeast District.

MSHA long has been concerned that operators can obtain modifications to citations in conferences and then go on to contest the modified citations and seek further changes in cases before the Commission. With this pilot project, the agency intends to commit operators to results achieved via conference and thereby reduce the number of cases to be contested.

While MSHA sometimes offers to make changes during conferences, in many circumstances, significant issues remain that need to be addressed through the contest process. Such issues can seriously impact ongoing abatement and future enforcement if they are not resolved. If MSHA is willing to make good-faith settlement offers in the conference process that will address all such issues, then the settlement program offered through this pilot project may well prove helpful to operators seeking early resolutions.

The pilot program has just started, and it is too early to tell whether it will be a worthwhile process for operators. Based on what we know about the pilot program thus far, the following points may be worth considering:

- In the conference request, an operator may want to consider asking MSHA to provide a copy of the agency's inspection file so that it can be reviewed before the conference is held. If necessary, the file may be requested under the Freedom of Information Act. There is almost always valuable information in inspectors' notes and photographs.
- Involving counsel in conferences can help operators evaluate the merits of the agency's final offers.
- Any citation or order that could trigger a special investigation is potentially problematic unless MSHA includes in the settlement agreement a commitment not to issue any associated 110(c) penalties. MSHA intends for the pilot project to be used only to conference 104(a) citations that are subject to regular penalty assessments. This system should reduce the risk of special investigation, but in instances in which citations allege high negligence or reckless disregard, it may make sense to request such a commitment.
- Careful thought should be given to whether to include nonadmissions language in a settlement agreement.
- What is said in a conference may be used as evidence at a hearing if the operator decides not to accept the conference results.



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