

## Chapter 2 - PART 72 and PART 90

Part 90 consists of mandatory health standards that provide protection for miners with evidence of the development of Coal Worker's Pneumoconiosis. Inspection personnel must be familiar with these standards to make decisions as to whether the operator is in compliance during inspections and investigations, and to implement an effective enforcement program. In conjunction with Part 90, inspection personnel must also be familiar with the medical surveillance standard in Part 72, Subpart B.

### A. Medical Surveillance -- Periodic Examinations

The periodic examinations standard at 30 CFR 72.100 applies to all surface and underground coal mines including facilities such as loadouts and preparation plants. Section 72.100(a) requires each coal mine operator to provide to each miner periodic examinations, including chest x-rays, spirometry, symptom assessment, and occupational history at no cost to the miner and at frequencies specified in 72.100(b) and 72.100(c). Mine operators must use facilities approved by the National Institute for Occupational Safety and Health (NIOSH) to provide the examinations.

If a miner is beginning work at a coal mine for the first time (i.e., is new to the coal mining industry) after August 1, 2014, the operator must provide the examinations no later than 30 days after the miner begins employment or within 30 days of NIOSH approval of a plan. The operator must provide follow-up examinations to the miner within 3 years after the initial examinations. If, from the follow-up examinations, the chest x-ray shows evidence of pneumoconiosis or the spirometry results indicate decreased lung function, another follow-up examination must be provided within 2 years if that miner is still engaged in coal mining.

If a miner was employed at a coal mine on or before August 1, 2014, the operator must provide the miner the opportunity to have the examinations at least every 5 years.

### B. Examination Plans and Posting

In accordance with Section 72.100(d), each operator must develop and submit for approval to NIOSH a plan in accordance with the NIOSH regulations at 42 CFR Part 37, for providing miners with the examinations required under section 72.100(a). In addition, under section 72.100(e), each operator must post the NIOSH-approved plan on the mine bulletin board at all times.

Each operator must also submit to NIOSH a roster specifying the name and current address of each miner covered by the plan. Unlike the required posting of the NIOSH-approved examination plan, however, the roster should not be posted.

### C. Miner Notification

After interpretation of a miner's chest x-ray, NIOSH, on behalf of the Chief, Division of Health (DOH), informs the miner of any rights he or she may have under Part 90 and includes a copy of the NIOSH report of medical findings. If the interpretation reveals evidence of pneumoconiosis

based on the chest x-ray, the miner also receives a form that is to be used to exercise the option to work in a low dust area of a mine and a notification of his or her privacy rights. MSHA is not informed of this medical evidence until a miner exercises Part 90 rights. Miners that do not have sufficient evidence of pneumoconiosis are notified by NIOSH of the findings; however, NIOSH does not provide this notification to MSHA. It is possible for a coal miner, at his or her own expense, to be examined at a “NIOSH-approved facility” that will submit the medical information to NIOSH. NIOSH will evaluate the x-ray in the same manner as if it were submitted under the operator’s plan. If the findings from the approved facility show evidence of the development of pneumoconiosis, the miner will be notified of the right to exercise the Part 90 option.

#### **D. Privacy of Part 90 Miner Information**

All medical findings resulting from participation in the periodic medical examination program are kept confidential by NIOSH and MSHA. However, when a miner exercises his or her rights under Part 90 by signing and dating the option form, MSHA informs the appropriate officials at the mine that the miner is a “Part 90 miner” and is entitled to protection under the rule. Medical findings are confidential information, and mine operators are prohibited from requiring any miner to disclose his or her medical information.

A mine operator must keep all paper records identifying Part 90 miners in locked files when the information is not being used. Similarly, any records in electronic format that identify Part 90 miners must be kept secure and confidential. These paper and electronic records include, but are not limited to, all Part 90 miner messages and input forms, all Part 90 correspondence between the miner, operator and MSHA, the operator’s Part 90 dust control plans, and all information resulting from inspections and investigations that identifies a Part 90 miner.

#### **E. Exercising the Part 90 Option**

When an eligible coal miner receives an exercise of Part 90 option form, only that miner can exercise his or her Part 90 option. If the miner is exercising the option for the first time, this is accomplished by the miner signing, dating, and mailing the form in the preaddressed envelope to:

Chief, Division of Health  
Coal Mine Safety and Health  
201 12th Street South - Suite 400  
Arlington, VA 22202-5452

Each request should include the name and address of the mine operator and the mine where the miner is employed.

The eligible miner is under no time limit as to when he or she can exercise the Part 90 option. However, the mine operator is not required to comply with Part 90 until MSHA receives an exercise of option form from the miner. MSHA personnel should inform the miner that the exercise of option form must be signed, dated and submitted to the Chief, Division of Health.

**F. Part 90 Dust Standard**

Part 90 was revised and published on May 1, 2014, and became effective on August 1, 2014. Part 90 provides a miner, who has evidence of the development of pneumoconiosis and has exercised the Part 90 option, with greater protection from respirable coal mine dust. Part 90 requires each mine operator to maintain the average concentration of respirable dust in the mine atmosphere during each shift to which the Part 90 miner in the active workings of the mine is exposed at or below  $1.0 \text{ mg/m}^3$  as of August 1, 2014, at or below  $0.5 \text{ mg/m}^3$  beginning August 1, 2016, or the standard established when quartz is present (referred to as the “applicable respirable dust standard” or “applicable standard”) as measured with a CPDM.

**G. Waiver of Part 90 Option**

A Part 90 miner may waive his or her Part 90 rights by (1) giving written notification to the Chief, Division of Health, Coal Mine Safety and Health; (2) applying for and accepting a position in an area of a mine which the miner knows has an average respirable dust concentration exceeding  $1.0$  milligrams per cubic meter of air ( $0.5 \text{ mg/m}^3$  beginning August 1, 2016) or exceeding a reduced standard due to the presence of quartz; or (3) refusing to accept another position at the same coal mine which meets the requirements of 30 CFR 90, Sections 90.100, 90.101 and 90.102(a) when sample results show that the applicable dust standard is exceeded in his or her current position.

When a miner does waive Part 90 rights, protection under Part 90 terminates until the miner re-exercises the option. There is no limit on the number of times a Part 90 miner may waive his or her rights. Once these rights are waived, the miner may re-exercise the option at any time, as long as he or she is employed at any coal mine.

Under 30 CFR 90.210, the mine operator shall report in writing or by electronic means the change in status of any Part 90 miner who waives his or her rights within 3 working days after the status change has occurred. The inspector shall establish facts through reviewing position bidding documents, company records, and through discussions with the Part 90 miner and operator to ensure that the Part 90 miner was not coerced into making the decision to waive their rights under 30 CFR Part 90.

**H. MSHA Notification to Mine Operator**

After a signed and dated exercise of option form or written request to re-exercise the option is received from a miner, the Chief, Division of Health, will notify officials at the appropriate mine in writing of the miner’s exercise of the Part 90 option. Also, MSHA will send copies of this written notification to the affected miner and the appropriate District Manager.

**I. Grace Period (20 Calendar Days)**

When an operator receives written notice from MSHA that a miner at the mine exercised the Part 90 option, the operator is provided a 20 calendar-day grace period during which the operator must comply with the notification requirements discussed in paragraph J. After the 20 calendar-

day period, the operator must comply with the applicable dust standard for the Part 90 miner and paragraphs K through Q apply. MSHA will not sample that Part 90 miner during the 20-day grace period.

#### **J. Operator's Written Notice to MSHA**

During the 20-day grace period, the mine operator must give the District Manager written notification of the occupation and, if applicable, the mechanized mining unit to which the Part 90 miner will be assigned on the 21st calendar day. The notice should include the Part 90 miner's shift or shift rotation and, if assigned to a non-face position, the area of the mine.

#### **K. Compliance with the Applicable Respirable Dust Standard**

An operator can comply with the applicable respirable dust standard by using engineering controls to lower the concentration of respirable dust in the mine atmosphere to which the Part 90 miner is exposed in his existing work position or by transferring the Part 90 miner as discussed below. During the 20-day grace period, the mine operator may conduct sampling to determine the concentration of respirable dust in an occupation. The mine operator must inform the District Office in writing prior to the intended sampling shift and include the date and shift(s) to be sampled. These samples should not be submitted to MSHA, as they are not taken to satisfy any sampling requirements in 30 CFR Parts 70, 71, or 90. After the 20-day grace period, the requirements in section 90.207 concerning quarterly sampling apply. This is discussed in paragraph N. 2. below.

#### **L. Transfer of Part 90 Miner**

1. Defining Transfer - Part 90 defines a transfer as "any change in the work assignment of a Part 90 miner by the operator and includes (1) any change in occupation code of a Part 90 miner; (2) any movement of a Part 90 miner to or from an MMU; or (3) any assignment of a Part 90 miner to the same occupation in a different location at a mine."
2. Transfer Protection
  - a. **Shift Protection** - If, at any time, a Part 90 miner is transferred in order to meet the applicable respirable dust standard, the operator is restricted in the positions to which the Part 90 miner may be assigned. Except as provided in paragraph "b" below, the Part 90 miner must be transferred to an existing position at the same coal mine on the same shift or shift rotation on which the miner was employed immediately before the transfer.
  - b. **Written Agreement** - If, at any time, a Part 90 miner is transferred in order to meet the applicable respirable dust standard, the mine operator may assign the Part 90 miner to a different coal mine (either surface or an underground coal mine), a newly-created position, or a position on a different shift or shift rotation only if the miner agrees in writing to a transfer of this nature. It is important to

note that any Part 90 miner who is transferred to another position by the operator remains a Part 90 miner at the new position, whether at an underground or surface mine.

3. Transfer After Grace Period - Part 90 requires that after the 20-day grace period, the mine operator shall notify the District Manager in writing before any transfer of a Part 90 miner occurs. This notification must include the scheduled date of transfer.

#### **M. Part 90 Miner Compensation**

1. Same Position - A Part 90 miner is compensated at not less than the regular rate of pay received by that miner immediately before exercising the option. Also, a Part 90 miner must receive any wage increases applicable to the position. Example: The miner is earning \$17.00/hour, exercises the option, and the operator leaves the Part 90 miner in this position because it meets the applicable respirable dust standard. The Part 90 miner continues to receive \$17.00/hour and any wage increases in that position.
2. Transfer to a New Position - Whenever a Part 90 miner is transferred, the operator must compensate the miner at not less than the regular rate of pay received by that miner before the transfer. Also, a Part 90 miner must receive wage increases that accrue to the new position.

Example: The miner is earning \$18.00/hour in Position 1, exercises the option, and the operator transfers the Part 90 miner to Position 2. In Position 2, the Part 90 miner must continue to be paid \$18.00/hour, although other miners in the same position may be receiving \$17.00/hour. If a pay increase occurs in which the miners in Position 2 receive a \$0.50 wage increase from \$17.00 to \$17.50/hour, the Part 90 miner must receive the \$0.50 increase from \$18.00 to \$18.50/hour. If the Part 90 miner is then transferred to Position 3, the miner must be paid \$18.50/hour and must receive any wage increases that accrue to Position 3.

3. Temporary Employment - Part 90 addresses compensation of miners who are temporarily employed in an occupation other than his or her regular position classification for 2 months or more before exercising the Part 90 option. In this case, once the option is exercised, the Part 90 miner must receive the higher of the temporary or regular rates of pay and also receive any future wage increases in the assigned position.

Example: The miner is in Position 1 earning \$16.25/hour but the operator temporarily assigns him to Position 2 at \$16.50/hour. While in Position 2 after 3 months, the miner exercises the option to work in a low dust area of a mine. The operator transfers the Part 90 miner to Position 3 which usually pays the hourly rate of \$16.00/hour. Because the Part 90 miner worked at least 2 months in the temporary Position 2 before exercising the option, under this rule, the miner must now be paid at

least \$16.50/hour and will receive any future wage increases in the new position.

#### **N. Sampling Part 90 Miner and Noncompliance Determinations**

Sampling under the Part 90 rule must be performed within specified time frames and must be “valid” dust samples.

1. Exercise of Option or Transfer Sampling (Five Valid Samples - 15 days) - The mine operator must maintain the average concentration of respirable dust in the mine atmosphere during each shift to which the Part 90 miner in the active workings of the mine is exposed at or below the applicable respirable dust standard:
  - (a) After the 20<sup>th</sup> calendar day following receipt of notification from MSHA that a miner at the mine exercised the Part 90 option, and
  - (b) After a transfer of a part 90 miner that occurs after the 20-day grace period.

During the 15 calendar days after the 20-day grace period (21<sup>st</sup> through 35<sup>th</sup> day after notification) or a transfer, the operator must collect five valid representative samples for the Part 90 miner while he or she is performing normal work duties (90.2 and 90.206(a)(1)). Unlike the quarterly sampling requirement discussed below, these five valid samples do not need to be collected on consecutive days.

If all five samples show compliance with the applicable respirable dust standard (i.e., below the ECV that corresponds to the applicable respirable dust standard and required sampling device), the mine operator must sample that Part 90 miner on a quarterly basis starting with the next quarterly period specified in 30 CFR 90.207(a). If one sample shows noncompliance, no action is required; however, noncompliance is demonstrated if: (1) two or more valid representative samples meet or exceed the ECV that corresponds to the applicable standard and required sampling device; or (2) the average for all five valid representative samples meets or exceeds the corresponding ECV. In that case, MSHA will issue a citation and the operator must comply with section 90.207(f). MSHA will usually wait until all 5 valid representative samples have been submitted before making a noncompliance determination.

2. Quarterly Sampling (Five Valid Samples) - The mine operator is required to collect five valid samples during each quarterly period for each Part 90 miner while he or she is performing normal work duties. The samples must be collected on consecutive work days.

If one quarterly sample collected by the operator for a Part 90 miner meets or exceeds the ECV that corresponds to the applicable respirable dust standard and required sampling device, the mine operator is required to comply with 30 CFR 90.207(c)(1)-(c)(3). In addition, noncompliance is demonstrated if: (1) two or more valid

representative samples meet or exceed the ECV that corresponds to the applicable standard and required sampling device; or (2) the average for all five valid representative samples meets or exceeds the corresponding ECV. In that case, MSHA will issue a citation and the operator must comply with section 90.207(f). MSHA will usually wait until all 5 valid representative samples have been submitted before making a noncompliance determination.

3. Part 90 Miner Sample Results – Operator’s CPDM Dust Data Card and MSHA Report of Operator Sampling Results – Each CPDM paper record (Dust Data Card) of the sample run taken for a Part 90 miner must be printed and signed by the person certified in sampling. Each completed card must have information specified in section 90.209(c), including the miner’s MIIN number on the card. Within one hour after the start of the miner’s next work shift, the operator is required to provide the Part 90 miner with a paper record (Dust Data Card) of the sample run. The operator is prohibited by 30 CFR 90.209(d) from posting the original or a copy of this data on the mine bulletin board.

Also, under 90.209(b), the operator must provide the sampled Part 90 miner a copy of the MSHA Report of Operator Sampling Results. The operator is prohibited from posting an original or copy of this report on the mine bulletin board.

4. Transmittal of Samples – The operator must transmit electronically each CPDM sample to MSHA within 24 hours after the end of the sampling shift. Each sample is assumed to be taken to fulfill the sampling requirements of Part 90, unless the operator has identified in writing to the District Manager, before the intended sampling shift, that the sample will be used for purposes other than required by 30 CFR Part 70, 71, or 90. Any sample not taken to satisfy any sampling requirements in 30 CFR Part 70, 71, or 90 should not be submitted to MSHA.

## **O. Part 90 Miner Dust Control Plan**

1. Dust Control Plan

If the mine operator abates a violation of the applicable respirable dust standard in the environment of a Part 90 miner by implementing additional dust control measures at the Part 90 miner’s work position, the operator must submit a written respirable dust control plan for that miner to the District Manager for approval within 15 days after the citation is terminated. Mine operators are required to provide a copy of the Part 90 miner dust control plan to the affected miner, but the operator is prohibited from posting the original or a copy of this plan on the mine bulletin board.

2. Dust Control Plan Content

The plan must include specific details on the control measures that were implemented to reduce the respirable dust and abate the violation, and the specific time, place and

manner that the control measures will be used to continuously maintain compliance with the standard.

3. No Plan Required

If the mine operator abates a violation of the applicable respirable dust standard by transferring the Part 90 miner to another position that complies with the applicable standard, the operator is not required to submit a dust control plan to the District Manager for approval.

**P. Report of Status Changes**

Any change in status of a Part 90 miner that affects sampling must be reported in writing or by electronic means by the mine operator to the MSHA District office or any office designated by the District Manager within 3 working days after the change in status has occurred. Section 90.210 shall be cited when the operator has failed to collect samples for a Part 90 requirement and MSHA has determined that the operator did not notify the District Manager in writing within 3 days after a status change has occurred.

Whenever changes occur that affect a Part 90 Miner's option, the procedures listed below shall be followed:

1. Miner Declines Option or Waives Rights

Investigate to determine whether the miner freely made the decision not to complete the transfer. Explain Part 90 rights and assure that the miner has knowledge of the circumstances and how this decision may affect his/her health. Promptly notify the Division of Health (DOH) in writing of the investigation results.

2. Miner Terminated

Promptly inform DOH in writing after this is verified and include the reason for termination, such as long-term injury or illness, lay off, retirement, mine closure or death, and effective date of the action.

3. Miner in Unavailable Status for More Than One Year

Verify this status with the mine operator and/or the miner and the reason for this prolonged condition. Record this action in the miner's file and submit a copy to DOH.

When DOH receives information concerning paragraph 1 or 2 above, DOH informs the miner that he/she is being removed from active Part 90 status and that the Part 90 rights can be reestablished at any time, provided the miner is employed at a coal mine and submits a written request to the DOH Chief to re-exercise the Part 90 option.



**Q. Ineligibility of Option**

Under 30 CFR 90.103(g) when a miner is notified of Part 90 transfer rights, exercises these rights, and MSHA subsequently notifies the miner that the notice of eligibility to exercise the Part 90 option was incorrect, the operator shall retain the affected miner in his or her current position at the same rate of pay, including actual wage increases accruing to the classification in the miner's current position, until one of the following resolutions occurs.

1. The miner and operator agree in writing for the miner to be assigned to a position with pay at not less than the regular rate of pay for the agreed-upon occupation; Part 90 protection will terminate. The agreed-on position may be a different position or the miner's current job.
2. Absent an agreement in paragraph 1., if a position at this same mine becomes available in both the same occupation and on the same shift in which the miner was employed immediately before exercising the option, the mine operator must offer this position in writing to the affected miner with pay at not less than the regular rate of pay for that occupation. The miner has 15 days to accept in writing the operator's written offer. If the miner accepts the position, the mine operator is required to make the reassignment. However, if the miner does not accept the available position in writing or fails to act on the operator's written offer within 15 days after notice of the offer, the miner may be reassigned and protections under Part 90 shall not apply.

**R. MSHA's Technical Inspections and Investigations**

Prior to inspections and investigations that may involve Part 90, inspection personnel shall familiarize themselves with the field office records. The Uniform Mine File will indicate whether Part 90 miners are employed at the mine. When this record indicates "yes," the inspector shall review the Part 90 miner files to determine the status of the miner in relation to execution of the option, transfer, sampling, dust control plan, correspondence and existence of citations and orders. Because, in general, access to personally identifiable medical or other sensitive information raises privacy concerns, the following procedures, like those for Part 50 audit information, must be followed to protect the information collected.

1. Filing of information. Part 90 information shall be kept in a file (electronic or manual) separate from the uniform mine file or any other inspection records, and shall be identified by the mine name and mine identification number. The cover of the file shall have a label stating: "May contain personally identifiable medical or other sensitive information -- Authorized Users Only."
2. Storage of information. Information shall be stored in a locked file cabinet, safe, or secure room when not being reviewed.
3. Authorized users. Access to the information shall be limited to persons whose official duties require them to work with such information, but may include persons who have a need to know the information to perform related duties.

4. Access control system. A log or other method shall be used to identify persons who have access to the information and to account for removal of information from the stored area.
5. Safeguarding during transport. Persons shall maintain control of the information during transport and shall protect the information from unauthorized or unintentional access, disclosure, modification, or destruction.
6. Destruction or disposition of records. Information shall not be destroyed or disposed of except according to the approved General Record Schedule NC1-433-85-1, Item No. 1, or by a court order.

Posting Medical Examination Plans - At each coal mine, the inspector shall check the mine bulletin board for a NIOSH-approved medical examinations plan. If the plan is not posted, a citation for a violation of section 72.100(e) shall be issued. The citation shall be terminated when the operator has posted the required documents.

Sampling Frequency - MSHA personnel shall sample each Part 90 miner during each inspection quarter.