Session 510

Effective Methods Of Legal Risk Management For Safety And Health Professionals

Adele L. Abrams, Esq., CMSP
Law Office of Adele L. Abrams, P.C.
Beltsville, Maryland

Safety and health professionals awaken. How can they sue thee . . . let me count the ways!

1. Civil and criminal liability under the Federal Mine Health and Safety Act (Mine Act), as amended (30 USC § 801 et seq.).
2. Criminal liability under the Occupational Safety and Health Act of 1970 (OSH Act), as amended (29 USC § 651 et seq.).
3. Criminal charges at the state level for reckless endangerment or negligent homicide.
4. Tort liability for negligent safety supervision at multi-employer worksites.
5. Negligent training.
6. Negligent inspections/audits.
7. Malpractice as consultants and/or expert witnesses.
8. . . . and more.

Document Privileges and Pitfalls

Documentation created by safety and health professionals can be used as both a shield against litigation and, if improperly prepared, as a sword used by government agencies and plaintiff attorneys against the professionals, their employers and clients. On one hand, it is critical to document work and training, to demonstrate that responsibilities have been fulfilled and to support claims of regulatory compliance. Outside professionals often create reports as part of audits, accident investigations and root cause analyses. Those professionals who work as expert witnesses will create reports to be used in court proceedings, and will review documents in the creation of those reports and in the preparation of their testimony.

The problem is that unless the document creation is accompanied by some sort of privilege – e.g., attorney/client privilege or documents created under the attorney work product doctrine – they will be discoverable in litigation (both private sector and against federal/state governmental agencies) and can be used by the adverse party to show prior knowledge of hazards and regulatory violations, or negligence in terms of satisfying a duty of care. OSHA has subpoena power that it can utilize (through a *subpoena duces tecum*) to obtain all non-privileged documents such as in-house and outside safety professionals' workplace examination records, audit reports, checklists, memoranda, calibration records, photographs, videotapes, training records and syllabus, diaries, logs, and e-mails. The agency can, and does, use this power before any citations have been issued and the safety professional's documentation of hazards can be the basis for enforcement actions against employers and clients. Therefore, it is critical when noting hazardous

conditions to also document all remedial action that was taken to show that the safety professional acted responsibly to initiate appropriate corrective action. One pitfall to avoid is using the terms “hazard” and “violation” interchangeably in documents: they are not the same thing and using the term “violation” constitutes an admission against interest that can lead to imposition of heavy civil penalties and open the door to possible criminal prosecution, as discussed below.

Obviously, documents created by an actual attorney (some of whom are safety and health professionals) will be attorney work product and, when sent to a client, will be protected as attorney/client communications. There are other forms of privilege that can be extended to documents created by non-attorneys. If safety consultants are hired by an attorney and told to produce documents for attorney’s use or references, the privilege can be extended. This includes documents such as internal accident investigation reports, witness interviews, laboratory analyses, and other opinion documents that are prepared in anticipation of litigation.

It is critical to note, however, that such documents must be labeled as “privileged and confidential . . . prepared at direction of counsel in anticipation of litigation” in order to avoid inadvertent disclosure. Moreover, such “attorney work product” must have a controlled circulation to maintain the privilege. The best practice is to create the report or document, send it to the attorney who directed its production, and then let the attorney handle the dissemination of the document or information to maximize its protection. And remember: there is no “consultant/client privilege.”

Finally, if the safety professional is also in charge of document maintenance and retention programs, it is important to segregate mandatory records and reports (those maintained for compliance purposes that must be provided to an OSHA or MSHA inspector upon request) from other non-mandatory documents (e.g., near miss reports, audit reports, safety committee documents). Non-required records should never be released without corporate or legal approval, and it is good practice to always require OSHA to request non-mandatory records in writing, to give counsel an opportunity to evaluate the legitimacy of the request.

Expert Witnesses and Documents

Non-testifying experts who are retained by counsel (in-house or outside) to render advice, analysis and opinions on a particular matter can similarly create privileged reports as described above. However, testifying experts (those anticipated to testify at a hearing) will have to be identified early in the litigation process and any documents they review in forming their opinions, as well as any documents they create (including draft documents) will be subject to production in discovery.

The expert will likely be asked to bring to any deposition copies of all documents, reports, notes, photos, test results, and other written and electronic communications that they have reviewed so that they can be quizzed on it by the attorney taking the deposition. More than one expert has inadvertently waived privilege for otherwise confidential documents by having reviewed such a document in the preparation of his/her opinion. This is why it is critical for all privileged documents to be visibly identified and care taken to avoid giving these to a testifying expert. Moreover, the testifying expert should refrain from creating any written reports until

his/her opinion is fairly final and has been discussed with the client before being committed to paper (or electronic format).

Audit Issues

Non-mandatory or self-audits are certainly a beneficial safety tool and have been encouraged by OSHA. In many cases, these voluntary workplace evaluations are undertaken by outside safety and health professionals. In general, OSHA has a “safe harbor” for audit information, but this only extends insofar as prompt and appropriate corrective action has been taken with respect to any hazards or regulatory violations identified in the audit report. If a “good faith” attempt has been made to correct an existing hazard, normally no citation will be issued. Even if the agency determines this is a citable situation, credit in terms of penalty reductions will usually be given for the cost of abatement actions.

OSHA reserves the right to use audit information to document “willful” violations if recorded hazards have not been addressed. Therefore, safety and health professionals should not commence an audit unless there is commitment from the appropriate levels to expend the necessary resources for timely remedial action. Otherwise, the individual conducting the audit can face personal liability if he/she has knowledge of violations or hazards that are uncorrected and an accident involving that hazard subsequently occurs.

Coordination of Responsibilities on Multi-Employer Projects

OSHA and MSHA citations can be introduced in some state tort actions to prove “negligence *per se*.” This legal theory simplifies a plaintiff's burden of proof on the "breach" element of a prima facie negligence case. Negligence *per se* allows the plaintiff to prove the defendant’s “breach” of a duty of care by showing simply that the defendant violated a statute or regulation that (a) covers the class of activities giving rise to plaintiff's injuries, and (b) was designed to protect the class of persons to which plaintiff belongs. Therefore, to the extent that safety and health professionals are responsible for worksite safety supervision in locations where non-employees (e.g., subcontractors) or members of the public are present, they must take and document all appropriate action to manage risks from the outset and ensure compliance with applicable federal, state and local laws.

Those who undertake site-specific hazard (or more detailed) training of third parties must ensure that the training thoroughly covers the assigned subjects, document what information was provided, and include an evaluative phase in the training to verify that the information was understood by the students/workers. This is critical to defend against an allegation of negligent training. Such allegations most often arise after an accident has occurred, when the victim alleges that they were never “taught” not to do the unsafe act that lead to their injuries (or, their estates make this claim in fatal cases). To the extent that OSHA or MSHA issue citations for inadequate training of such third parties, that increases the likelihood of a civil tort action against the trainer in his/her individual capacity as well as against any other defendants who can feasibly be included (e.g., the trainer’s company, a general contractor on the worksite etc.).

When performing work, whether as an in-house safety and health professional or as an outside consultant, failure to forge a safety partnership with all present at the worksite -- prior to initiation of work -- and a lack of clear role delineation and legal responsibilities will heighten the

potential for disaster, complicate insurance claims, and could even result in criminal prosecution in a worst case scenario.

As a general rule, any OSHA standards that require development of written programs, certifications, or specific employee training or competency should be carefully reviewed as they may contain requirements that place additional obligations on safety and health professionals. For example, to comply with 29 C.F.R. § 1926.20(a)(1), all employers who perform any part of a construction project must ensure that no employees must work in surroundings or under conditions which are: unsanitary, hazardous, or dangerous to health or safety. This is not a duty that can be delegated to another party or contracted away, but it is a duty that often is assigned to a safety and health professional. In addition, specific safety and health standards contain mandates to share information with contractors and/or non-employees who may be present at the worksite. Again, it is the S&H professional who may be tasked with this and must do a thorough job of sharing the information to avoid OSHA liability and potential tort exposure.

For example, if a hazardous chemical is in use at a worksite, known to the S&H professional, but that information is not shared with contract workers so they can take appropriate protective steps, and an injury occurs, the negligence accusations would fall squarely on the safety professional's shoulders. As an agent of management, any knowledge possessed by the safety and health professional is imputed to his/her employer for negligence purposes and can, as noted, also give rise to joint and several liability in the event that the professional is named separately as a co-defendant in a tort action arising from a workplace incident.

OSHA standards that may involve transmission of safety-related information (or identification of worksite hazards) to third parties include: OSHA's hazard communication standard (29 C.F.R. §1910.1200); confined space standard (29 C.F.R.§1910.146); lockout/tagout standard (29 C.F.R. §1910.147); emergency action and fire prevention plans (29 CFR §1910.38); process safety management (29 C.F.R. §1910.119 and § 1926.64); asbestos standards (29 C.F.R. §1926.1101); hazardous waste operations and emergency response (29 C.F.R. §1926.65); steel erection (29 C.F.R. Part 1926, Subpart R); and, rules governing hazardous air contaminants such as lead (29 C.F.R. §1926.62).

MSHA similarly has requirements to disseminate hazard information to third parties at mine sites in such areas as hazard communication (30 CFR Part 47), noise (30 CFR Part 62), worksite examinations/preshift examinations (30 CFR §§56/57.18002); and mandatory training for all persons exposed to mine hazards (30 CFR Part 46 (surface aggregate and cement operations) and Part 48 (all underground metal/nonmetal mines and all coal mines).

The training mandated under Part 46 and Part 48 must be provided by a qualified trainer (Part 46 requires a "competent person" to be identified on the company's training plan; Part 48 trainers must have advance approval from MSHA and also be listed on training plans), and appropriately documented in a Form 5000-23.

Falsification of training records is among the major triggers for felony prosecutions of safety directors and trainers under the Mine Act. Penalties include $250,000 fines and up to five (5) years imprisonment for the first offense! And, unlike the OSH Act, no injury or fatality need occur for MSHA to bring criminal prosecutions against individuals. MSHA also has the power to levy personal civil penalties against individual, including safety and health professionals, who

have actual or constructive knowledge of violations and fail to initiate corrective action. These civil penalties, under Section 110(c) of the Mine Act, can reach $60,000 per violation.

Therefore, the stakes are quite high and documentation that proper action was taken is essential. Information communicated to third parties must cover basic safety and health rules and regulations, known hazards to which third parties may be exposed, as well as specific requirements for the jobsite. The communication is most effective when verbal instructions are supplemented by a written contractor/employee handbook that includes both safety and health information and other site-specific material (such as contact telephone numbers and addresses for key personnel, PPE requirements, rules on alcohol/drugs/smoking/eating at the worksite, and emergency procedures). It is recommended that the safety and health professional obtain written documentation of the receipt of the handbook from the third party (individuals or their company's supervisor) to acknowledge distribution of critical safety information.

Negligent Training and Supervision Issues

Many courts (and juries) increasingly make damage awards against companies based on the tort of negligent supervision or negligent training. Negligent supervision and negligent training cases presume that a company is subject to liability for negligent acts of its supervisors and/or trainers where it knows or should have known that its employee's conduct would subject third parties to an unreasonable risk of harm. This may subject employers, their agents (e.g., safety directors) and outside contractors who provide safety services to tort action for the negligent actions that result in injury to a third party. For injuries to employees of the company, most tort actions are barred against in-house safety professionals because of the exclusivity of the worker's compensation remedy (there are some state exclusions for willful actions, often substantiated by OSHA citations). However, outside consultant can still be faced with tort claims brought by their clients' workers, or the workers' estates, unless such actions are expressly waived in advance by the worker. An employer is not legally empowered to waive tort claims on behalf of their workers.

As noted above, because of the increasing frequency of these tort actions, it is critical for all trainers to document the training provided, and to determine the line of supervision appropriate to each part of a particular project and each area of the worksite. Many OSHA and MSHA standards have specific training requirements, often involving operation of specific types of equipment. For example, first aid training is mandated under 29 C.F.R. § 1926.50, while § 1926.21 requires that all construction industry employers (both prime and subcontractors) provide training to their workers on subjects including: recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury; safe handling and use of flammable liquids, gases, or toxic materials; and, how to work safely in confined or enclosed spaces. If a safety director, or outside safety professional elects to provide such training, he/she may be exposed to negligent training litigation if the worker subsequently is injured while performing a task involving hazards on which he/she was purportedly trained by the professional.

Therefore, whether training is simply a "toolbox talk" or is a comprehensive 30-hour OSHA course or 40-hour MSHA Part 48 new miner training class, all training must be documented and copies of training materials (or at least a syllabus) maintained for the state-specific statute of limitations period following any incident that could give rise to tort litigation or prosecution by OSHA/MSHA.

Assignment of Financial Liability Among Joint "Tort-Feasors"

The concept of "joint and several" liability was noted *supra*. A number of states are adopting either the "Uniform Contribution Among Tort-feasors Act" or the Uniform Apportionment of Tort Responsibility Act. These model laws initially were promulgated when contributory negligence on the part of a claimant in a negligent tort action was an absolute defense against liability and a small contribution of fault by the plaintiff was enough to bar compensation for injury. The Acts address the questions of multiple liability when there is more than one tort-feasor responsible for injury, and provide for joint and several liability, with right of contribution in the event one tort-feasor pays another tort-feasor's share -- even when there is no action in concert. This permits an injured person to receive full compensation even if some tort-feasors do not actually provide compensation.

In layman's terms, the company with the deepest pockets (e.g., the general contractor) will often bear the entire financial burden for a plaintiff's injuries, even if they were not primarily at fault for the action or conditions that lead to the damages. As noted above, an OSHA citation against the general contractor may be all that is necessary to establish "negligence *per se*" and establish a basis for awarding such monetary damages to a non-employee arising from a workplace injury or illness.

Insurance Issues

As noted in the discussion above, both in-house and outside consultant safety and health activities involve legal risk – both from OSHA/MSHA enforcement actions and from third party tort claims where non-employees are injured or killed based on alleged negligent conduct, supervision or training at the worksite. It is possible for safety and health professionals to obtain insurance against such exposures (other than criminal prosecution), either through policies available to consultants or else through coverage by an employer (not all employers offer this and, therefore, the scope of coverage should be clarified when accepting a job).

Among the risks that may be insurable are:

- Errors and omissions
- Libel and slander
- Negligence (e.g., training, supervision)
- Oral and written publication of information that causes damages (e.g., audit reports that fail to disclose hazards, mold assessment inspections, operations manuals or training videos that do not identify risks or which contain information constituting regulatory violations)
- Infringement upon copyrighted materials
- Product liability claims (where the safety professional participates in assessment of a company's products)
- Malpractice (going outside area of expertise, inadequate risk assessment)

Consensus Standards And Imputed Knowledge

It is increasingly common for safety professionals to become involved in standard development organizations (SDOs), such as ANSI, ASTM, NFPA, ASME etc. National consensus safety and health standards, such as ANSI Z10's *Occupational Health and Safety Management Systems*, reflect the opinions of safety and health professionals and end-users working at all levels of the public and private sectors in technology development, manufacturing, training and academia.

Consensus organizations work to develop voluntary consensus standards[1] that are often relied upon by federal and state regulatory agencies looking for guidance on "best practices" in a particular safety or health area, or for a recognized system that can effectively sample or analyze substances or air contaminants. Courts also regularly take judicial notice of consensus standards when determining a duty to a plaintiff, or setting a "standard of care" for a company or industry sector.

Under the Technology Transfer Act of 1995,[2] as implemented by OMB Circular A-119,[3] federal regulatory agencies have been directed – when instituting a rulemaking – to determine whether a consensus standard exists that addresses the issue to be regulated. If so, the agency is to adopt the consensus standard or offer an explanation of why it chooses to depart from the consensus standard's approach.[4] Therefore, consensus standards today have increasing importance from a legal perspective.

Many of OSHA's existing standards were originally ANSI consensus standards, adopted by the agency in an initial rulemaking following enactment of the OSH Act of 1970.[5] OSHA continues to update these older consensus standards through the Administrative Procedure Act's rulemaking procedures. In addition, OSHA often references ANSI, ASTM and other consensus standards when issuing citations under Section 5(a)(1) of the OSH Act, known as the "General Duty Clause."

To sustain a General Duty Clause citation, OSHA has the burden of proving that: 1) the employer failed to keep its workplace free of a "hazard," 2) the hazard was "recognized" either by the cited employer individually or by the employer's industry generally, 3) the recognized hazard was causing or was likely to cause death or serious physical harm and 4) there was a feasible means available that would eliminate or materially reduce the hazard. By definition, the GDC requirements of Section 5(a)(1) encompass recognized threats that result in occupational illness or injury. Thus, recognized experts' findings that a series of actions or conditions are required to prevent harm to workers are likely to satisfy the requirement for GDC applicability under the applicable legal tests. National consensus standards, therefore, have great utility in supporting GDC citations.[6]

---

[1] A voluntary consensus standards body is defined by the following attributes: (i) openness. ; (ii) balance of interest.; (iii) due process; and (vi) an appeals process. Thus, they are distinct from standards set by other organizations, such as the American Conference of Governmental Industrial Hygienists (ACGIH), which do not have the same transparency in standards development, nor which provide for public comment and appellate procedures. Although governmental agencies, including OSHA and MSHA, have relied upon or incorporated by reference ACGIH standards in the past, the US Department of Labor is currently being sued by private sector litigants over this practice.

[2] Pub. L. 104-113; 15 U.S.C. § 272.

[3] *Federal Participation in the Development and Use of Voluntary Consensus Standards in Conformity Assessment Activities* (Feb. 10, 1998).

[4] OMB A-119 states: "All federal agencies must use voluntary consensus standards in lieu of government-unique standards in their procurement and regulatory activities, except where inconsistent with law or otherwise impractical."

[5] See 29 U.S.C. § 652(9).

[6] In *B & B Insulation, Inc. v. OSHRC, Et. Al.,* 583 F.2d 1364, 1367-1368 (5th Cir. 1978), the court clarified that the General Duty Clause requires only those protective measures which the knowledge and experience of the employer's industry would clearly deem appropriate under the circumstances. *But see National Realty & Construction Co., Inc. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973, in which the court stated:

In some instances, OSHA will also impute knowledge of such consensus standards to safety and health professionals, as they are considered part of the general literature with which a trained professional would be familiar.[7] Companies with in-house safety professionals, therefore, may be held to a higher standard in terms of what constitutes a "'recognized" hazard.

Finally, as indicated above, a national consensus standard that is "known generally" in a particular industry can reasonably be construed as providing the requisite actual or constructive knowledge to support a cause of action in litigation brought by private sector third parties.[8] *See United States v. B&L Supply Co.*, 486 F.Supp. 26 (N.D.Tex. 1980) (recognized hazard is one known after taking into account standard of knowledge in the industry, and employer cannot defend citation by claiming ignorance of the practice/condition or its potential for harm). Consequently, safety professionals may have a duty of care to their employers (or clients, if serving as a consultant) to be aware of new consensus standard developments in their area(s) of expertise – in order to foster compliance with applicable OSHA/MSHA standards that may incorporate such standards, to avoid citations under the General Duty Clause, and to avoid tort liability. The fundamental difference between an ordinary suit for negligence and a suit for malpractice lies in the definition of the prevailing standard of care.[9]

Conclusion

As noted above, the practice of safety and health carries substantial legal exposure in our increasingly litigious society. More than even, safety professionals find themselves named as co-defendants in tort actions, and targeted for civil and criminal prosecution by MSHA, OSHA and state agencies as a result of knowledge they obtained about workplace hazards and, most commonly, errors of omission in terms of remediation of such conditions.

Other legal/ethical pitfalls can include:

"[t]he question is whether a precaution is recognized by safety experts as feasible, not whether the precaution's use has become customary." ANSI or ASTM adoption of a consensus standard, developed by a panel of safety and health professionals, infers feasibility.

[7] On the other hand, a safety and health professional who is familiar with the latest consensus standards may be more attuned to this area then OSHA staff. Compliance with "best practices" in a consensus standard may be a valid defense to a citation issued under an outdated OSHA regulation, in terms of substantiating an "equivalent or greater protection" affirmative defense, or demonstrating that following strictly OSHA's requirements would pose a "greater hazard" to exposed workers than adhering to the practices in a consensus standard. Thus, there are legal benefits to involvement with the standards development community.

[8] Some of the following discussion is drawn from an legal opinion paper that the author prepared for the American Society of Safety Engineers, Legal Perspectives on ANSI Z10-2005, A. Abrams, *Professional Safety Journal*, December 2005. See http://www.asse.org/search.php?varSearch=abrams+AND+Z10.

[9] W.P. Keeton, D.B. Dobbs, R.E. Keeton, & D.G. Owen, *Prosser & Keeton on Torts*, West Publishing, Fifth Edition (Hornbook Series, pp. 185-193). If an individual is sued for ordinary negligence, the court will compare his/her behavior to what any reasonable person would have done under the circumstances. However, if a safety and health professional is sued for malpractice, the court will compare his/her behavior to what a reasonable member of the profession would have done. Professional standards are much higher and much better documented and often ANSI standards serve to satisfy the evidentiary burden and to determine the appropriate standard of care.

- Certifying “compliance” where this is not a practicable thing to do (e.g., in a dynamic work environment such as mining or construction);
- Creating electronic communications that are not privileged and get disseminated to the wrong entities; and
- Practicing outside one’s area of expertise (especially if working in assessment/remediation of conditions such as mold or asbestos, which are already likely to trigger tort and personal injury litigation).

Any of the above can give rise to malpractice and breach of contract claims, as well as tort actions that have been discussed above.

Finally, worksites should have document retention/destruction policies and safety and health professionals must abide by these to avoid spoliation of evidence claims or even criminal conspiracy and obstruction of justice charges in a worst case scenario. It is also critical to know the mandatory retention periods for OSHA/MSHA required docs such as medical surveillance, training records, equipment inspection etc. Even if statutory limits are exceeded in a company document retention policy, the program must clarify that documents will be disposed of after their useful life. This will assure compliance with legal requirements, prevent accumulation of records that could be used against the company’s interests in litigation, and will minimize liability against safety and health professionals.