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IN PRACTICE

WORKPLACE SAFETY

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How To Navigate OSHA's Safe Harbor

A new policy helps employers around the shoals of voluntary safety and health audits — but it's not all clear sailing

Advising employers whether to perform an occupational safety and health audit is tricky business. If you do, and the client follows the advice, the findings of the audit can be held against the company in an enforcement proceeding, if the conditions the audit finds remain unabated.

On the other hand, the benefits of an occupational safety and health audit are invaluable. It identifies conditions that can cause injuries and illnesses in the workplace, establishes a rapport with the work force and assists employers with their obligations to comply with safety and health regulations.

The bottom line is that if an employer undertakes the task of performing an occupational safety and health audit, that employer must be prepared to follow through with correcting any hazardous condition the audit reveals.

To overcome natural reluctance on the part of employers, the Occupational Safety and Health Administration adopted a safe harbor policy, effective on July 28, 2000. It states that OSHA will not routinely request the findings of any voluntary audit at the initiation of an inspection. Nor will the agency use such reports as a means of identifying hazards on which to focus during an inspection.

However, if OSHA has an independent basis to believe that a specific safety or health hazard warranting investigation exists, the agency may exercise its authority under the Occupational Safety and Health Act to obtain relevant proportions of the audit relating to that particular hazard. For example, an inspector might seek access to voluntary audit information when investigating the circumstances of a fatal or catastrophic accident, in order to assess compliance and to ensure that hazardous conditions are corrected.

Negating the Willfulness Element

The safe-harbor policy provides that if an employer is responding in good faith to a violation discovered by a voluntary audit, and the condition is detected during an inspection, OSHA will not use the findings of the audit as evidence that the violation is willful. This will only be the case when the employer learns of the violation though the voluntary audit and promptly takes diligent steps to correct the violation and to bring the harmful condition into compliance while providing interim employee protection as necessary.

A violation is considered willful if an employer has (i) intentionally violated a requirement of the act; (ii) shown a reckless disregard for whether it was in violation of the act; or (iii) demonstrated plain indifference to employees' safety and health.

An employer will also be eligible for a good faith reduction in any penalty assessed by OSHA during an inspection if the employer provides the agency with a copy of the findings from the employer's voluntary audit of the workplace. The good faith reduction in penalty can be as high as 25 percent of the assessed fine.

OSHA has authority to issue citations for violations documented in the workplace within six months prior to its inspection. To allay employers' possible fears that self-audits would document such violations, the policy states that OSHA will refrain from issuing a citation for a violation discovered through a voluntary audit, but on two conditions. The employer must have corrected the condition prior to the OSHA inspection and must have taken appropriate steps to prevent a recurrence of the same.

To be eligible for the OSHA safe harbor, the audit must be a "systematic,

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documented, and objective review conducted by, or for, an employer of its operations and practices related to meeting the requirements of the Act," and must not be mandated by the act, rules or orders issued pursuant to the act or settlement agreements.

A systematic audit must be planned and specifically designed to be appropriate to the scope of the hazards it addresses and to provide a basis for corrective action. Ad hoc observations made by an employer or a supervisor and ad hoc communications concerning a hazardous condition made during the ordinary course of business are not sufficient to qualify for protection under OSHA's voluntary audit policy.

The findings resulting from a systematic audit must be documented contemporaneously (at the time the condition is discovered) or immediately after completion of the audit to ensure that they receive prompt attention. The audit must be conducted by or supervised by a competent professional capable of identifying the relevant workplace hazards. Such competent professionals include employees that have the necessary experience or training to conduct an effective and thorough self-audit.

An audit does not have to be comprehensive in order to qualify for inclusion under OSHA's voluntary audit policy. For example, a voluntary audit designed to identify hazards associated with a particular process or hazard will qualify for consideration.

Information obtained from an audit as well as any analyses and recommendations will be protected under OSHA's voluntary audit policy. The only exception to this involves records that OSHA has the right to access pursuant to its rules and regulations, namely, 29 CFR 1910.1020.

Attorney Work-Product Privilege

Given OSHA s newly enacted policy, employers should reconsider their position regarding occupational safety and health audits. To the extent possible employers should involve their legal counsel in performing any such audits. Especially since OSHA's policy is intended only as general internal OSHA guidance and is to be applied flexibly, in light of all appropriate circumstances.

OSHA vows, within limits, not to request routinely the findings of any voluntary audit at the initiation of an inspection nor to use such reports to identify hazards to focus on during an inspection.

The advantage of utilizing legal counsel is that an argument can be made that the attorney work-product doctrine applies to the performance of the audit and is, therefore, privileged information.

In order for the attorney work-product doctrine to be applicable, counsel must direct that the audit be conducted and provide instructions that the results and report generated from such audit be kept confidential. This instruction must be done in counsel's legal capacity and not in the capacity as an official of the corporation.

Second, the audit must be done so as to provide counsel with information he/she needs to advise the company of its legal obligations. In other words, the audit must be done with the intent of providing legal assistance to the company. Further, counsel should retain or direct the consultant or individual who will perform the audit.

Third, counsel must make a determination that litigation is anticipated and, as such, he/she is requiring that the audit be conducted and a report generated. It is beneficial to label all reports and each page of each report as "Confidential-Attorney Work Product Prepared in Anticipation of Litigation."

Finally, the distribution of the report should be limited to key individuals on a need-to-know basis only. In an extremely sensitive situation, it may be helpful to forego any written report and rely on oral reports.

The attorney work-product doctrine is a qualified protection that can be overcome under the right factual scenario. If OSHA can present convincing evidence as to why the attorney work-product doctrine should be disregarded, it will be necessary for the employer to release the confidential information to OSHA.

In general, the factors that a court (or the Occupational Safety and Health Review Commission) will use in evaluating whether a party has demonstrated need and hardship to overcome the attorney work-product privilege are the following: (a) the importance of the material; (b) the difficulty in obtaining the material from different sources; and (c) whether those different sources would supply substantial equivalent of the materials sought.

Thus, it is important that any consultant or individual performing an audit must work in cooperation with counsel in an effort to ensure that all reports assessing the workplace can be kept confidential. ■