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ETHICS & THE EHS PROFESSIONAL

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CODES OF PROFESSIONAL CONDUCT

Codes of Professional Conduct: Set forth principles and standards of professional conduct to be observed by holders of certifications, such as CIHs and CSPs. These include:

- *Holding paramount the safety and health of people;*
- *The protection of the environment; and*
- *The protection of property in the performance of professional duties.*

EHS PROFESSIONAL CONDUCT

Being honest, fair and impartial

Acting with responsibility and integrity

Issuing public statements only in an objective and truthful manner

Undertaking assignments only when qualified by education or experience in the specific technical fields involved

Avoiding deceptive acts which falsify or misrepresent their academic or professional qualifications

Conducting professional relations by the highest standards of integrity

Avoiding compromise of professional judgment by conflicts of interest Acting in a manner free of bias with regard to religion, ethnicity, gender, age, national origin or disability

Seeking opportunities to be of constructive service in civic affairs and work for the advancement of the safety, health and well-being of the community and the profession

EHS PROFESSIONAL CONDUCT

In the course of their work, EHS Professionals should:

- *Consider social and environmental consequences and not let professional judgment be arbitrarily overruled*
- *Not commit safety skills to projects whose purpose/consequences are pernicious*
- *Make information available that is relevant to the public interest*

AUDIT ISSUES

EPA Audit Policy: Gravity-based penalties may be waived if the company can demonstrate it has an effective "Compliance Management Program" except in the following cases:

- Those that may result in serious harm or risk;
- Those that reflect repeated noncompliance, and
- Those in which corporate officials condone criminal behavior.

AUDIT ISSUES

OSHA Audit Policy: Non-mandatory or self-audits are encouraged by OSHA - voluntary workplace evaluations undertaken by the Employer or third parties (i.e. consultants)

OSHA: self-audits coupled with a "good faith" attempt to correct an existing hazard may result in:

- *No citation if hazard has been corrected prior to an inspection*
- *May result in penalty reductions*

AUDIT ISSUES

Failure to correct hazards identified through self-audits may result in the issuance of "Willful" OSHA citations when the Employer

- *Blatantly ignores identified hazards*
- *Refuses to correct hazards likely to result in serious injury or death.*
  - Knowledge of in-house CSP/CIH can be imputed to employer
  - Information transmitted by insurance company re: audits can be used against employer (*Grinnell* case)
  - OSHA reserves right to use self-audits as evidence to prosecute employer

INVESTIGATIONS & INSPECTIONS

EHS inspection and investigative notes are normally not privileged

Inspection, accident and "near miss" reports may result in mandates that EHS pros testify against employer

Documented knowledge of violative conditions can lead to personal criminal liability under OSH Act and environmental statutes

- *Providing knowingly false statements, representations or certifications (i.e. falsifying records)*

PRIVILEGES AND PITFALLS

There is no "Consultant-Client" privilege BUT

Some documents may be protected as "Attorney-Client" communications

Attorney work products are protected where document preparation is directed by counsel. May include consultants hired by attorney who produce documents for attorney's use.

Documents must be labeled as privileged to avoid inadvertent disclosure.

SUBPOENA ISSUES

OSHA may issue subpoenas (for testimony or document production - "*duces tecum*") to the following:

- *Employer*
- *3rd party consultants (I.e. industrial hygienists and safety professionals)*
- *Contractors and sub-contractors*

SUBPOENA ISSUES

Documents sought by OSHA can include:

- self-inspection forms,
- sampling results,
- purchase orders,
- consultants' logs,
- calibration records,
- training syllabi and
- training attendance records.

OSHA can subpoena these documents PRIOR to the issuance of citations, and can also compel testimony from the creator/custodian of records.

DOCUMENT RETENTION

Worksites should have document retention/destruction policies

S&H professionals must abide by these (avoid "packrat" tendencies) and inform these (know mandatory retention periods for OSHA specified docs such as medical surveillance, training)

Even if statutory limits are exceeded, the policy should clarify that documents must 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/or give rise to liability against S&H professional.

- *Following document retention policy also provides defense to "spoliation" claims that documents were destroyed to thwart prosecution of citations or tort claims*

OTHER DOCUMENT ISSUES

Records and reports maintained for compliance purposes (which must be provided to inspector upon request) should be segregated from other non-mandatory documents.

Non-required records should never be released without corporate or legal approval.

Always require OSHA to request records in writing.

Opinions should not be included in non-privileged documents.

- *Avoid naming individuals, to extent possible, if documents could support a finding of regulatory violation or legal liability (e.g., "near miss" reports)*

Documents containing opinions should bear the caption, "Privileged and Confidential, Attorney Work Product, Prepared in Anticipation of Litigation"

Identified hazards should not be referred to as violations.

MALPRACTICE ISSUES

Negligent training

Negligent inspection/Failure to warn

Inaccurate assessments of risk

Fraudulent or inaccurate inspection reports

Ethical violations

- *What whistleblower protections do safety professionals have???*

EXPERT WITNESS WORK

Testifying versus non-testifying

Do you pass legal test for admissible testimony

Differences between civil, criminal and administrative proceedings

When are reports appropriate?

Watch out what you rely on in forming opinions – can result in privilege waivers

LEGAL ETHICAL ISSUES

Certifying “compliance”

Electronic communications

Getting outside area of expertise

Participation in standards organizations – Impact for employer under GDC

Activity in trade associations – imputation of information to employer

FEDERAL OSHA CRIMINAL SANCTIONS

DOJ/DOL MOU prosecutions will be open to ***the ones making the decisions that lead to the deaths of others*** including people in the corporate office, managers and supervisors in the field.

OSH Act provides criminal sanctions for three types of conduct that impact worker safety:

(1) *willfully violating a specific standard, and thus causing the death of an employee;*

- ✓ No criminal prosecutions can currently be brought for violations of the OSH Act "General Duty Clause" that result in death

(2) *giving advance notice of OSHA inspection activity (e.g., by calling inside a facility to give notice while holding inspectors outside, so that safety infractions can be remediated before discovery); and*

(3) *falsification of documents filed or required to be maintained under the OSH Act.*

OSHA STATE PLAN STATES

In the 22 "state plan states" (e.g., MD, NC, SC, VA), criminal prosecutions are brought more often because the state attorney generals can rely on state statutes with longer prison terms and higher criminal monetary penalties:

- *involuntary manslaughter,*
- *negligent homicide,*
- *reckless endangerment*
- *assault and battery*

CRIMINAL PROSECUTION: 18 USC

18 USC 3331-4120 also can be triggered in obstruction/conspiracy cases

- *Increases fines against individuals to $250,000 per violation*
- *Additional corporate fines of up to $500,000 per violation.*

These penalties do not impact terms of imprisonment under OSH Act or Mine Act/MINER Act

- *MSHA also has personal "agent" civil penalties of up to $90K per violation and their "special investigations under Sec. 110 of the Mine Act are used for both civil/criminal prosecution purposes*

SARBANES-OXLEY ACT

Financial audit requirements may indirectly include obligation to be "truthful" in safety, health and environmental audits because of the potential liability exposures.

SEC rules require reporting of all MSHA "S&S" and "elevated actions" when issued and also at final disposition

Shareholders can face financial harm for losses due to litigation arising from regulatory violations or harm to persons, property and environment.

- **What about the ESG regulations?????**

SARBANES-OXLEY ACT

Title IV, Section 404 (Management Assessment of Internal Controls) requires annual report by covered firms under the Securities & Exchange Act of 1934.

- *Must state responsibility of management for establishing and maintaining adequate internal control structure and procedures for reporting*
- *Must include assessment of effectiveness of internal control structure*

➢ ***"Internal control structures" could include systems mandated under OSHA's process safety management standard (29 CFR 1910.119)***

SARBANES-OXLEY ACT

The S-O Act provides "whistleblower protection" similar to OSH Act Section 11(C) actions, and OSHA investigates these cases

- *ONLY covers employees of publicly traded companies but MAY cover contractors working for such entities depending on the facts*

S-O Act has procedures for complaints received by audit committee

Such auditing matters may include EHS audits conducted in-house or by third parties

Employees who believe audits are invalid or misrepresent conditions can voice concerns through S-O Act.

ETHICAL DECISION-MAKING

Think proactively and talk with team members and colleagues

Think about what you SHOULD do rather than what you WANT to do

Ethical knowledge is not necessarily ethical behavior-behavior happens within unique and varied situations and in “real time”

Much of what goes wrong is due to good people doing bad things, without knowing what they are doing is bad. When facing an issue, consider ethical consequences at time of initial discussion

Consult professional ethic codes, mentors and colleagues

QUESTIONS?

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