



## Key Safety Documents: Sword or Shield?

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### EHS Documents: Shield or Sword?

- Regulatory compliance
- Investigation of complaints of Workplace Harassment, Retaliation & Discrimination (Sec. 11C of OSH Act/Sec. 105C of Mine Act)
- Workers Compensation cases & related accident investigations
- Investigation/responses to safety/health hazard complaints
- Responses to other whistleblower complaints investigated by OSHA (EPA, DOT, Sarbanes-Oxley)
- Drug testing reports
- CBA-required, insurance-required, or state plan-required documents (e.g., S&H Committee minutes, IIPP)



## Routine Safety & HR Documents

- Employee handbooks and disciplinary policies,
- Safety & Health handbooks and policies,
- Forms for reporting occupational injuries and illnesses (for worker's comp and OSHA/MSHA recording purposes),
- Job SOPs including essential job functions,
- Personnel files, payroll & leave records, evaluations, disciplinary reports
- Documentation concerning misconduct allegations and responsive actions
- Employee or third party complaints concerning workplace conditions
- Minutes from S&H meetings, CBA grievance actions, etc.
- ✓ **The universe of documents at issue includes both paper and electronic - internal and external communications**



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## Third Party Documents

- Outside non-attorney investigators
- Safety, health, environmental and financial auditors
- Insurance company correspondence and recommendations
- Contracts with general contractors/subcontractors, vendors and customers
- Union correspondence and contracts
- Outside counsel
- Outside experts – testifying or non-testifying???



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## Legal Privileges

- There is no “Consultant-Client” privilege BUT
- Some audits may be protected as “Attorney-Client” communications
- Attorney Work Product doctrine applies where audits or preparation of other documents are directed by counsel, in anticipation of litigation, and copy is given to counsel for use in litigation preparation/defense.
  - May include consultants hired by attorney who produce documents for attorney’s use.
- Documents MUST be labeled as privileged to avoid inadvertent disclosure.
  - But see *BHP Copper v. Sec’y of Labor* (May 2016): FMSHRC Judge ordered disclosure of “privileged” accident report, holding documents prepared in the normal course of business or to meet regulatory requirements are not considered documents prepared in anticipation of litigation (similar holding in US Ct. of Appeals, 4<sup>th</sup> Cir.)



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## Legal Privilege

- Nature & purpose of document being created will dictate to large extent whether it can be protected from disclosure by a legal privilege
- Government claims more privileges than available to private litigant
- Documents that must be maintained by law cannot be privileged because they are mandatory (statutes/regs require disclosure to agency rep)



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## Attorney-Client Privilege

- Attorney-client privilege protects communications between client and client's attorney that are intended to be, and were actually kept, confidential for the **purpose of obtaining or providing legal advice**
  - Party asserting privilege has burden of demonstrating its applicability – any ambiguities are construed against privilege protections
- Applicable to both outside counsel and in-house counsel communications, but ...
- Purpose of information provided by employees to counsel must be for purpose of company obtaining legal advice – communication seeking merely business advice from in-house counsel will not be protected



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## Work Product Doctrine

- Fed R. Civ. P. 26(b)(3)(A) – Documents protected as counsel's work product when prepared by **or under direction of** counsel in anticipation of litigation
- Privilege extends to documents created by non-attorney consultants who conduct investigations at direction of in-house or outside counsel for purpose of representing employer in future legal proceedings
  - Privileges will not apply to communications with client that are in furtherance of fraud or other criminal acts!!!
- Fact Work Product – op. party must show substantial need for info and cannot obtain equivalent without undue hardship
- Core Work Product – contains attorney's mental impressions, conclusions, opinions or legal theories and remains privileged unless op. party shows "highly persuasive showing of need"
- Work product can extend to materials created prior to events giving rise to litigation, if created with eye toward anticipated litigation



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## OSHA Subpoena Powers

- OSHA may issue subpoenas *duces tecum* to the following:
    - Employer
    - 3<sup>rd</sup> party consultants (I.e. industrial hygienists and safety professionals)
    - Insurance companies (*Grinnell* case)
    - Contractors and sub-contractors
- **Subpoenas are often issued PRIOR to citations, as part of investigative process, where documents are not voluntarily produced during inspection, or where witnesses refuse to give statements.**



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## Subpoena *duces tecum*

**Documents sought by OSHA can include all non-privileged:**

- Accident reports
- Audits and workplace examinations
- Self-inspection forms
- Insurance company audits
- Worker's compensation reports
- Sampling results,
- Purchase orders,
- Consultants' logs,
- Calibration records,
- Training syllabi and
- Training attendance records.

**OSHA can subpoena these documents before or after the issuance of citations, and can also compel testimony from the creator/custodian of records ... or from other witnesses (direct and third party)**



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## What About MSHA?

- Mine Safety & Health Administration (MSHA) has warrantless search authority and no statute of limitations – applies to mine owners & contractors at mine
  - Has limited subpoena power for public hearings only, but this would be expanded under pending Byrd Mine Safety Act of 2017
- Power to cite for refusing to provide documents under:
  - Section 103(a) – impeding inspection/investigation (used when operator did not force insurance company to reveal files)
  - Section 103(h) – failure to produce documents needed to verify injury and illness data
  - 30 CFR 50.41 – failure to produce information related to accident, injury or illnesses which MSHA considers “relevant”
- MSHA can also seek injunction in US Dist. Ct. to compel production of documents necessary to carry out agency’s activities per Sec. 108(a)(1)(E) of Mine Act



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## Documenting Investigations

- Consider significance of allegations to determine appropriate resources needed ... but don’t assume that anything is a small matter in light of newly raised penalties, potential for tort actions, or retaliation claims under Sec. 11(c)/105(c)
- Information to be recorded during internal investigations typically includes:
  - Memos and letters sent to/from employees, complainant or government
  - Written summary of date/time/place/people involved in incident or allegations
  - Any work documents involved
  - Notes from meetings
  - Witness statements (employees and third parties)
  - Investigation interviews
  - Related personnel files
  - Discipline records, payroll records, leave requests, requests for accommodation, WC reports
  - Mandatory OSHA/MSHA documents related to employee training, workplace exams, equipment inspections, injury logs, safe work procedures etc.
  - Documentation concerning remedial measures (both considered and implemented)



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## Document Preservation Issues

- Essential to preserve all documentary evidence – including:
  - electronic communications (make sure that these cannot be deleted or altered) – IT expert may be needed
  - personnel files, reviews, disciplinary actions
  - supervisor notes and workplace/equipment inspections,
  - written documentation of prior and current similar complaints from workers,
  - drug/alcohol tests,
  - Other documents relating to allegations (e.g., photos from inspection, accident reports, video or audio surveillance tapes)
- Critical to maintain “chain of custody” on health tests or other evidence subject to review by opposing party or testing – avoid spoliation of evidence claims!
- Remember that witness interview notes will be disclosed as part of litigation discovery unless privileged through counsel in advance
- Document any remedial action taken, in responding to discrimination or safety/health complaints or OSHA/MSHA citations



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## Other Documentation Issues

- If you investigate the incident, hazard complaint or whistleblower complaint ...
  - Keep notebook to track documents obtained from various sources during course of inquiry
  - Identify all documents as to when received, from whom, source of document (work rules, policy manual, witness correspondence) and note which ones were prepared at direction of counsel (make sure mark as privileged!)
  - Make sure to maintain a copy of rules and policies in place at time of incident/complaint, as employer may update original electronic files
  - Make sure original documents are not altered in any way – highlighting or notes should only be used on copies
  - Watch out for document spoliation issues and litigation holds
  - Confirm who should be the recipients of your report, and watch out for cc's on correspondence that could waive any applicable privileges



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## Osha Policy on Self-Audits

- Non-mandatory or self-audits are encouraged by OSHA
- OSHA Policy: 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 inspection
  - May result in penalty reductions
  - **Failure to correct hazards identified through self-audits may result in the issuance of “Willful” citations when the Employer**
    - Blatantly ignores identified hazards
    - Refuses to correct hazards likely to result in serious injury or death.
- OSHA reserves right to use self-audits to prosecute employer
- ✓ **If counsel participates in (and write up) or directs the audit (or investigation or interviews), it may be possible to privilege the documents (except photos & test results)**



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## OSHA's General Duty Clause

- Section 5(a)(1) of OSH Act permits issuance of citations to exposing employer for recognized hazards that could cause death or serious bodily injury
- Necessary elements to prove a violation of the general duty clause:
  - The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
  - The hazard was recognized;
  - The hazard was causing or was likely to cause death or serious physical harm; and
  - There was a feasible and useful method to correct the hazard.
- Actual exposure(s) must have occurred within the six months immediately preceding the issuance of the citation to serve as a basis for a violation, except where the employer has concealed the violative condition or misled OSHA.



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## Employer “Recognition” & GDC

- Recognition of a hazard can be established on the basis of employer recognition, industry recognition, or “common-sense” recognition.
- Evidence of employer recognition may consist of written or oral statements made by management personnel during inspection.
- Employer awareness of a hazard may also be demonstrated by a review of company memorandums, safety work rules that specifically identify a hazard, operations manuals, standard operating procedures, and collective bargaining agreements. In addition, prior accidents/incidents, near misses known to the employer, injury and illness reports, or workers’ compensation data, may also show employer knowledge of a hazard.
- Employee complaints or grievances and safety committee reports to supervisory personnel may establish recognition of the hazard, but the evidence should show that the complaints were not merely infrequent, off-hand comments.
- An employer’s own corrective actions may serve as the basis for establishing employer recognition of the hazard.



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## Injury Reports to OSHA/MSHA

- OSHA’s Severe Injury Reporting Final Rule took effect 1/1/2015 – report to local office during normal hours or call 1-800-321-OSHA (6742) (or file on line)
- Rule expands the list of severe work-related injuries that all employers **must report** to OSHA.
  - The revised rule retains the current requirement to report all work-related fatalities within 8 hours
  - Adds the requirement to report all work-related in-patient hospitalizations, amputations and loss of an eye within 24 hours to OSHA. Employers only have to report an inpatient hospitalization, amputation or loss of an eye that occurs within 24 hours of a work-related incident
- **MSHA requires all fatalities and injuries with “reasonable potential to result in death” to be reported within 15 MINUTES or it is a mandatory \$5903 minimum penalty!**
- **MSHA requires an incident investigation report (separate from Form 7000-1) for all injuries at worksites with <20 employees**



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## OSHA & MSHA Criminal Penalties

- The OSH Act and Mine Act are criminal statutes – never forget this!
- Imprisonment is possibility where fatality or serious injury occur
- False statements/falsified documents can result in fines/prison time
- Destruction of requested documents (mandatory or otherwise) can lead to charges under 18 USC for obstruction of justice or conspiracy.
- State officials can prosecute under criminal statutes – e.g. manslaughter, assault and battery



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## Audit Mandatory S&H Records

- Training Records
- OSHA 300/301 Log (electronic submission may be required in 2017)
- MSHA 7000-1, 7000-2 and Part 46/48 records and training plan
- Hazard Communication program materials
- Worksite examination reports
- Hearing conservation program
- Mobile equipment inspection reports
- Other equipment inspection records (e.g., hoists, cranes etc.)
- Respiratory Protection programs
- Electrical test reports
- Analyses performed with respect to toxic substances (e.g., lead, asbestos, crystalline silica, beryllium, HexChrom)



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## Volks Rule: OSHA SOL for Records

- Congress enacted H. Res. 83, rescinding OSHA's new rule on "continuing violations" for recordkeeping citations beyond the 6 mo. Statute of Limitations
    - OSHA has published *Fed Reg* notice withdrawing those sections of 29 CFR Part 1904
  - OSHA rule had reversed USCA "Volks" decision and said that failure to keep injury/illness records for entire 5-year period could be cited as "continuing violation"
    - OSHA reviews I/I records for errors and omissions and to identify pattern/practice of hazards that result in injuries, as well as to identify emergent hazards
  - Impact of rescission on other OSHA documentation requirements that extend beyond 6 months is now at issue – Training Docs, Inspections, Exposure Monitoring etc.
- **NOTE: MSHA has NO statute of limitations for citing violations or paperwork requirements**



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## Guidelines for Mandatory Documents

- Records maintained for compliance purposes should be segregated from other non-mandatory documents and personnel files to prevent inadvertent disclosure.
  - Opinions should not be included in non-privileged audit or accident investigation reports.
  - Documents to be privileged should bear the caption, "Privileged and Confidential, Attorney Work Product, Prepared in Anticipation of Litigation"
- **NOTE: Testifying experts – counsel must produce all documents considered in forming opinion ... even if privileged! Decide early on which S&H expert will testify and screen off from privileged communications.**



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## Avoiding Documentation Pitfalls

- Do not share privileged information with testifying experts – get opinions verbally before expert commits to writing as drafts are discoverable.
- Hazards identified in documents should be promptly corrected and supported by written documentation.
- Non-required records should never be released without corporate or legal approval.
- Always require OSHA/MSHA to request records in writing.
  - Get counsel involved quickly when responding to, or challenging, an OSHA subpoena (e.g., motion for protective order or motion to quash)
  - Ask MSHA to request non-mandatory documents in writing, but be aware that they can compel production of most non-privileged items



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## Proactive Strategies

- Have written safety programs
  - Give copies to employees and have them sign receipts
- Use Job Safety Analysis/JHA
- Document ALL training
  - Include employee signatures and syllabus
- Use contractor agreements to ensure adherence to mandatory standards (and prequalify contractors)
- Use checklists during walkaround inspections
- KNOW what the mandated retention periods are for all required documents ... don't discard them automatically after 6 mo. despite OSHA SOL (*Volks* case)
- Preserve any documents for which there is a litigation hold or pending subpoena or informal document request from OSHA/MSHA



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## Proactive Strategies

- Understand difference between mandatory (statutorily required) and non-mandatory documents (e.g., internal memoranda, accident investigation reports, worker's comp records, informal notes, work orders, self-inspection checklists)
- Have document production and document retention policies in advance of inspection . . . And follow them!
- You can require OSHA to obtain a warrant, and use a subpoena to compel documents (prior to litigation)
- BUT ... MSHA has warrantless search authority and can cite employer under Sec. 103(a) of Mine Act or get injunction under Sec. 108(a)(1)(E) to force production.



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## Proactive Strategies

- Ensure that corrective actions are both taken AND recorded for any documented hazards or violative conditions
  - Remember that occupational health audits are generally be subject to the records access rule, which guarantees a right of access to employees (29 CFR 1910.1020).
- Document your investigation/resolution of all employee hazard complaints or recommendations from S&H Committees concerning conditions
- Where possible, audits and investigative reports should be arranged through counsel and labeled: **"Privileged and Confidential, Attorney Work Product, Prepared in Anticipation of Litigation"**



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## Conclusion

- Documentation is a key tool for S&H compliance as well as for legal defense
- Improperly prepared or maintained documents can be used as a sword against you by opposing party
- Good documentation can show employer's pattern of compliance, consistency of safety-related discipline, and help establish that any adverse actions were not discrimination-based
- The purpose of each document – and whether it can or is desired to be kept privileged – should be considered before the document is created
- Know which OSHA/MSHA records must be maintained – and for how long
- Keep training records and supporting materials as long as possible
- Electronic records are forever – think before you hit “save” or “send”



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## QUESTIONS???

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