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OSHA COMPLIANCE – CREATING LEGAL PRIVILEGES FOR COMPANY INVESTIGATIONS AND AUDITS

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I. INTRODUCTION

With the recent appointment of David Michaels as the new head of OSHA, the Obama Administration has affirmed its commitment to workplace safety, with an increased focus on industrial hygiene. Dr. Michaels' appointment signals a more aggressive OSHA, with an active enforcement agenda as part of a "bold campaign to change the workplace culture of safety." As OSHA implements its agenda, employers should proactively develop procedures for responding to OSHA inspections, including preemptively assessing their liability through audits. This article outlines recommendations for developing those procedures in a way that affords employers protection for sensitive information that is developed and analyzed by ensuring that available

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evidentiary privileges, particularly the work product privilege, are created and preserved to the greatest extent allowed by law.

II. OVERVIEW OF LEGAL PRIVILEGES

When OSHA issues a citation that the employer contests, the citation becomes a contested proceeding before the Occupational Safety and Health Review Commission, which is the adjudicatory arm of OSHA. While the rules of procedure before the Review Commission are somewhat relaxed compared to the federal courts, the Review Commission does follow, generally, the Federal Rules of Civil Procedure. As in any litigation, both OSHA and the employer (and, where it has elected to participate as a party in the proceeding, the union) have the ability to obtain relevant documents and information through discovery.

Under the Federal Rules of Civil Procedure, all documents and information that is reasonably calculated to lead to the discovery of admissible information are discoverable. However, the Rules recognize an important exception. "A party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation for trial by or for another party or by or for that other party's representative . . . ***only*** upon a showing that the party seeking discovery has a substantial need of the materials in preparation of the party's case . . . ." Fed. R. Civ. Pro. 26(b)(3) (emphasis added). Thus, Rule 26 implicitly recognizes that materials prepared by or at the direction of a party's representative (i.e., legal counsel) in anticipation of litigation are protected from discovery unless the party seeking discovery can show an exceptional need for those materials.

While many have characterized this evidentiary privilege as the "attorney work product doctrine;" however, the protection is not limited to materials prepared by an attorney. Rather,

the privilege extends to materials prepared by any person at the direction of an attorney, as long as the materials are prepared "in anticipation of litigation."

The Review Commission has recognized the validity of the work product privilege in contested OSHA proceedings. *See Sec. of Labor v. Bally's Park Place Hotel & Casino*, 15 O.S.H. Cas. (BNA) 1337 (Rev. Comm'n Nov. 7, 1991), *aff'd Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252 (3rd Cir. 1993). In *Bally's Park Place*, the employer refused to release to the union a report containing the results of iodine emissions testing for a particular piece of machinery that has caused employee health complaints. The employer's position was that the report had been ordered by the company's General Counsel after the company received a letter from OSHA listing numerous complaints about the machine. The employer asserted that the report had been prepared at the direction of the in-house attorney because the company anticipated litigation potentially arising out of OSHA's complaint letter and the report was developed in order to allow the in-house the ability to advise the employer on its potential legal liability.

OSHA then cited the employer for a willful citation for violating 29 C.F.R. 1910.1020 for failing to release exposure records to an authorized employee representative. The Administrative Law Judge affirmed the citations, but the Review Commission reversed and vacated the citations. The Review Commission held that the emissions report qualified for protection from disclosure because it had been prepared in anticipation of litigation at the direction of the employer's attorney by the company's consultant or agent. On appeal, the Third Circuit agreed that the report was protected from disclosure.

The Review Commission has also held that the work product protection can apply to post-accident investigative reports prepared in the aftermath of an incident such as an explosion or a fatal accident. In *Sec. of Labor v. Continental Oil Co.* for example, the Review Commission held that the employer was not required to give OSHA reports prepared by the company's expert consultants hired by the company's attorneys to investigate a refinery explosion. 9 O.S.H. Cas. (BNA) 1737 (Rev. Comm'n Apr. 27, 1981). The Review Commission found that the employer's attorneys hired a team of experts to investigate the cause of the explosion and to report their findings directly to the company's attorneys. Importantly, the Review Commission acknowledged that the work product privilege is "broad enough to encompass the work of persons who are not attorneys." In addition, the Review Commission held that the reports were prepared "in anticipation of litigation" even though no litigation had been initiated. The Review Commission recognized that materials need not be prepared for any specific litigation, but only "with an eye toward litigation" in order to qualify for the evidentiary privilege.

III. RECOMMENDATIONS

The *Bally's Park Place* and *Continental Oil* cases illustrate how important it is for employers to have procedures in place to ensure that sensitive documents and materials (such as post-accident investigation reports and internal self-audits or analyses) are protected from disclosure to OSHA. If not protected, these reports can become "smoking gun" documents containing potential admissions of liability that may be used by OSHA to support issuance of citations, including willful citations, resulting in significant monetary penalties and negative visibility for the employer.

It is recommended that employers establish procedures to create and preserve evidentiary privileges as follows:

- Ensure that Company personnel at all locations are trained and required to contact in-house or outside counsel as soon as an OSHA inspector arrives at the location. The attorney should be involved throughout the inspection, including participating in interviews of management personnel and opening/closing conferences. If the attorney cannot participate in any part of the inspection, the attorney should designate a management representative to act on the attorney's behalf by taking notes, photographs, or otherwise documenting the progress of the inspection.

- Ensure that personnel at company locations contact in-house or outside counsel in the event of an investigation into a workplace fatality or accident. The attorney should be engaged to direct the investigation, including any "root cause" investigation or report, as well as the decision to retain an independent expert consultant.

- Keep the in-house or outside attorney apprised of important developments by copying the attorney on email and other correspondence and asking the attorney to participate in telephone conferences and meetings.

- Ensure that memoranda, emails, letters, or other communications that contain legal advice are not distributed beyond company representatives involved in critical decision-making. Generally speaking, disclosing communications with an attorney to a party outside the company, or outside of those company representatives who are considered to be in the employer's "control group" by reason of their decision making authority, will result in a waiver of a claim of attorney-client confidentiality.

- Engage an in-house or outside attorney whenever the employer desires to conduct an internal safety or health self-audit to assess potential safety or health hazards. The attorney will be able to engage an outside safety expert to conduct the audit at the attorney's direction.