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ENVIRONMENTAL AND WORKPLACE SAFETY AUDITS: CREATING AND PRESERVING LEGAL PRIVILEGES

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I. INTRODUCTION

Under the Obama Administration, many federal agencies, including the Occupational Safety and Health Administration ("OSHA") and the United States Environmental Protection Agency ("EPA") have redoubled their efforts to enforce existing laws and regulations. OSHA and EPA, in particular, have seen significant increases in their inspection and enforcement budgets, including the hiring of more inspectors and a call for more inspections. Accordingly, it is more important than ever for companies regulated by these agencies to identify potential compliance gaps and take corrective action before the agency conducts an inspection.

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Conducting a compliance audit is one way businesses can get ahead of the curve in terms of their environmental and workplace safety compliance. Before such an audit is conducted, however, it is important for the company to take measures to protect the eventual audit report from disclosure to a government agency or private litigant pursuant to subpoena or discovery request. This article outlines legal privileges potentially available for environmental and workplace safety audit reports and recommends actions companies can take to avail themselves of those privileges.

II.

AVAILABLE LEGAL PRIVILEGES

A. Attorney-Client Communications

Perhaps the best-known legal privilege that can apply to compliance audit reports is the protection for attorney-client communications. In order to establish this privilege, three factors must apply: 1) there must be an attorney-client relationship; 2) the communication must be for the purpose of seeking or obtaining legal advice; and 3) there must be an expectation that the communication be kept confidential. In some cases, the attorney-client privilege can extend to a document prepared by a third party where the client provides information to the third party retained by the attorney for the primary purpose of obtaining legal advice from the attorney. *See, e.g., U.S. v. Bornstein*, 977 F.2d 112, 117 (4th Cir. 1992).

Recently, the Occupational Safety and Health Commission ("Review Commission") held that a workplace safety audit report that was prepared by a third party retained by the attorney who needs the services of the third party to translate technical or complex information provided to the third party by the client in order to

have effective legal consultation on the information between the client and the attorney and the third party prepares the documents for that purpose may be protected as an attorney-client communication. In *Sec'y of Labor v. Delek Refining Ltd.*, 23 O.S.H. Cas. (BNA) 1567 (O.S.H.R.C. July 11, 2011) ("*Delek*"), the Review Commission overturned the Administrative Law Judge's decision that a draft process safety management compliance audit report prepared by a third-party consultant was not privileged. In response to OSHA's request for subpoena for the draft audit report, the employer argued that the draft report was an attorney-client communication and was, therefore, not subject to disclosure to OSHA. The Judge rejected this argument, finding that the employer had undertaken the audit in order to comply with OSHA's Process Safety Management Standard, which specifically requires such an audit, and therefore the report was not privileged.

The Review Commission remanded the case back to the Judge with instructions to evaluate the audit report in order to determine whether the attorney-client privilege applied. Specifically, the Review Commission found that the employer had shown that the audit was *not* undertaken to comply with the Process Safety Management standard's audit requirement but rather was prepared to assist the employer's attorneys with technical issues associated with compliance with the Process Safety Management Standard. The Review Commission held, therefore, that the audit report was potentially protected by the attorney-client privilege, and additional evaluation is necessary before determining whether the employer was required to turn over the report to OSHA. The Judge's decision after remand still is pending.

B. Attorney Work Product

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, which could include internal audits that may have uncovered potentially damning information. Rule 26(b)(3), however, implicitly recognizes that materials prepared by or at the direction of a party's representative (*i.e.*, legal counsel) in anticipation of litigation are generally protected from discovery.

This evidentiary privilege is sometimes referred to as the "attorney work product doctrine," but the protection is not limited to those materials prepared directly 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 recognizes 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 give its employees' union a report containing emissions testing results for a piece of machinery that caused employee complaints. The employer argued that the company's General Counsel requested the testing after receiving a letter from OSHA containing complaints about the machine. The employer argued that it had anticipated litigation potentially arising out of OSHA's complaint letter, and the report was developed to allow the attorney the ability to advise the employer on its potential liabilities.

OSHA issued Bally's Park Place a willful citation under 29 C.F.R. § 1910.1020 for failing to release exposure records to the union. The Review Commission vacated the citations, holding that the report qualified for protection from disclosure because it had been prepared in anticipation of litigation at the direction of the employer's attorney. On appeal, the Third Circuit agreed.

The Review Commission has also held that the work product protection can apply to investigative reports prepared after an incident such as an explosion or a fatal accident. In *Sec. of Labor v. Continental Oil Co.*, 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. In addition, the Review Commission held that the reports were prepared "in anticipation of litigation" even though no litigation had been initiated, recognizing that materials need not be prepared for any specific litigation, but only "with an eye toward litigation" to be protected from discovery.

C. Environmental Audit Privilege

The EPA (as well as many States) has a policy, entitled "Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations," (the "Audit Policy") to encourage regulated entities to voluntarily conduct environmental compliance audits and to disclose incidents of non-compliance to the EPA (or the

relevant State environmental authority). One piece of the Audit Policy is the elimination of gravity-based penalties where the company meets certain criteria.[‡] For example, where the non-compliance is discovered through a routine environmental audit or compliance management system, the company discloses the non-compliance within 21 calendar days after discovery, then EPA may eliminate the entire gravity-based penalty. The Audit Policy also allows up to a 75% offset in gravity-based penalties for self-disclosure, even where the non-compliance was not discovered during a routine environmental audit or compliance management system, as long as the non-compliance is discovered independently of a government investigation or private litigation. In addition, the EPA applies the Audit Policy to new owners who discover incidents of environmental non-compliance in recently acquired facilities. Such non-compliance must generally be disclosed within 45 days following closing to qualify for the penalty offsets.

The second key feature of the Audit Policy is an evidentiary privilege for audit reports generated in connection with environmental compliance audits. Under the Audit Policy, EPA will not request environmental compliance audit reports during a routine investigation. Individual states, such as Illinois, Ohio, Michigan, Texas, and Colorado, have enacted statutes that expressly provide an evidentiary privilege for environmental audit reports.

[‡] Notably, OSHA provides no incentive for employers to voluntarily self-disclose incidents of non-compliance.

III.

RECOMMENDATIONS

The foregoing cases illustrate how critical 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 and/or EPA so the reports cannot become "smoking gun" documents containing potential admissions of liability to support issuance of citations, including willful citations and high-gravity civil 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 a serious accident or environmental release occurs at the worksite or when an OSHA or EPA 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.

- The attorney should be engaged to direct any post-incident or other audit or investigation, including any "root cause" investigation or report, as well as the decision to retain an independent expert consultant. The attorney must be kept apprised of important developments by copying the attorney on email and other correspondence.

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

- Involve the attorney to develop a strategy for promptly disclosing instances of environmental non-compliance to ensure that all applicable criteria for invoking the Audit Policy or applicable state audit privilege law are met.