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Ethics & the EHS Professional

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Presented By

Adele L. Abrams is an attorney, Associate Safety Professional (ASP) and Certified Mine Safety Professional (CMSP) who is senior counsel at Littler Mendelson PC, based in Washington, DC. She represents employers in OSHA and MSHA litigation nationwide, and also handles employment law matters in a large number of states. Abrams also provides employment and safety law consultation, safety audits, industrial hygiene assistance, and training services to companies in a variety of industries. Prior to joining Littler, Abrams was president of the Law Office of Adele L. Abrams for 25 years.

She is a member of the Maryland, D.C., and PA Bars; the U.S. District Courts of Maryland, D.C., and TN; the U.S. Court of Appeals, D.C. Circuit 3rd Circuit, and 4th Circuit; and the United States Supreme Court. She also serves on the adjunct faculties of the Catholic University of America in Washington, D.C., and the University of Colorado-Boulder, where she teaches on employment, labor and occupational safety law.

Abrams is a professional member of ASSP and is an active member of the National Safety Council, where she was awarded the Distinguished Service to Safety Award (DSSA) in 2017. She is also an Avetta Fellow. Abrams has coauthored several textbooks on employment law, occupational and mine safety and health, and is a regular columnist on safety law issues for multiple magazines.

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Codes of Professional Conduct

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- 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.

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EHS Professional Conduct

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- 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

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EHS Professional Conduct

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- 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

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Audit Issues

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- 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.
- 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

➤ **NOTE: MSHA has NO self-audit protections, and all non-privileged audits are discoverable b/c of warrantless search authority!**

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Audit Issues

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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**

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Investigations & Inspections

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- 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 Mine Act and environmental statutes
 - Providing knowingly false statements, representations or certifications (i.e. falsifying records)

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EHS & Worker Privacy

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- Workers generally have a right to privacy regarding their medical information but employers can ask for certain health-related info to ensure workplace safety AND worker's ability to safely perform the job
- EHS professionals will have access to that information even though employees have the right to keep their medical info confidential (HIPAA) and are generally not required to discuss their full medical history, diagnoses, or treatment details with employer
- Employees have reasonable expectation of privacy in their medical information and work-related health and injury information – but tension with OSHA reporting and posting requirements (with privacy log consideration) and fitness for duty assessment (prescription meds)
- Employees in safety-sensitive positions may have diminished expectation of privacy regarding testing such as drug/alcohol, lead and radiation monitoring
- Employers generally need consent to collect, use or disclose personal medical information – unless legally required.

➤ **OSHA and MSHA are EXEMPT from HIPAA as public health agencies – but what about EPA and CSB?**

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Privileges and Pitfalls

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- There is no “Consultant-Client” privilege BUT
- Some documents (including audits) 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.

➤ **NOTE: Documents prepared at direction of in-house counsel may lack privilege if considered “business records” prepared routinely**

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EHS Professionals: Documentation

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MANY EHS DOCUMENTS HAVE LEGAL & ETHICAL CONSIDERATIONS.

- Those kept to document regulatory compliance (DOL, OSHA/MSHA, IRS, ICE, SEC, OSHA, EEOC, EPA, state laws etc.)
- Investigation of complaints of Workplace Harassment, Retaliation & Discrimination
- Workers Compensation cases & related accident investigations
- Investigation/responses to safety/health hazard complaints
- Responses to other whistleblower complaints investigated by government
- Drug testing reports
- CBA-required, insurance-required, or state plan-required documents (e.g., S&H Committee minutes, IIPP)
- Actions taken by EHS professional also raise legal & ethical issues, including:
 - Audits
 - SEC Reports
 - Trial Testimony
 - Expert Witness Work

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Subpoena Issues

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- 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

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Subpoena Issues

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- OSHA may issue subpoenas (for testimony or document production - "*duces tecum*") to employers, contractors/subs, and third parties (EHS consultants)
- Documents sought by OSHA can include:
 - self-inspection forms,
 - sampling results,
 - purchase orders,
 - consultants' logs,
 - calibration records,
 - training syllabi and
 - training attendance records.

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

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Tips on Document Retention

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- Worksites should have document retention/destruction policies
- EHS 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 EHS professional.
 - Following document retention policy also provides defense to "spoliation" claims that documents were destroyed to thwart prosecution of citations or tort claims

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Other Document Issues

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- 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.

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Federal OSHA Criminal Sanctions

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- 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.

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OSHA State Plan States

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- In the 22 “state plan states,” 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
- NOTE: Maryland & Virginia have brought criminal charges arising from workplace fatalities

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Expert Witness Issues

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- 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

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Malpractice Issues

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- 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???
 - What exposure to licensure revocation or censure?

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Sarbanes-Oxley Act

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- 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" include systems mandated under OSHA's process safety management standard (29 CFR 1910.119) and other environmental/OHS programs***
- SOx provides "whistleblower protection" similar to OSH Act Section 11(C) actions, and OSHA investigates these cases
- There are 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 SOx Act.

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Final Thoughts & Pitfalls

- 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

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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

➤ **REMEMBER: OSH Act Sec 11C & Mine Act Sec 105C protect EHS professionals who refuse to violate the law or who report concerns to the agencies!**

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QUESTIONS?

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