by Matt Morrison, J.D.

Hoteliers beware: OSHA can now subpoena safety audits from insurance carriers

Last month, a federal district court ruled that the Occupational Safety and Health Administration (OSHA) has the right to subpoena safety audits and other records prepared by an employer's insurance carrier. The court also ordered the carrier to testify about the records. The court's decision serves as a reminder that OSHA continues to aggressively wield its enforcement authority, and that safety audits, internal safety reports, and related documents – even when prepared by an insurance company or an outside consultant – may eventually end up in OSHA's hands.

Solis v. Grinnell Mutual Reinsurance Company involved an Illinois accident where two teenage workers were killed and another man seriously injured when they were engulfed by corn at a grain elevator owned by Haasbach, LLC. As part of its investigation, OSHA subpoenaed Haasbach's insurance carrier, Grinnell Mutual Reinsurance Company. The subpoena required Grinnell's custodian of records to testify and to turn over loss control reports, applications for insurance coverage, correspondence, site safety inspections, and other safety-related documents prepared by Grinnell prior to the accident. Grinnell refused to comply, and OSHA brought suit to enforce its subpoena in federal district court.

The court ordered Grinnell to comply with the subpoena, noting that OSHA has broad authority to issue subpoenas during the course of an investigation. Subpoenas are generally enforceable if:

1) they reasonably relate to an investigation within OSHA's authority;
2) the requested documents are relevant to OSHA's investigation;
3) the request is not too vague;
4) proper administrative procedures have been followed; and
5) the subpoena does not demand information for an "illegitimate purpose."

The court found that these conditions were easily met.

The court rejected Grinnell's argument that if OSHA can subpoena and use safety-related documents during an enforcement proceeding, it would create a "chilling effect" that discourages employers and insurers from conducting voluntary safety inspections in the first place. The court also rejected Grinnell's assertion that enforcing the subpoena would open the door for a plaintiff to obtain and use the requested documents in a related lawsuit. Finally, the court disagreed that OSHA's internal policy regarding voluntary self-audits limited its legal authority to subpoena the documents or testimony.

Hoteliers should be aware that OSHA's internal policy regarding voluntary self-audits covers safety and health audits conducted by either an employer or a third party, such as a safety consultant or an insurance carrier. OSHA will not, under the policy, "routinely" request "voluntary self-audit reports" at the beginning of an inspection, or use the audits to identify hazards to inspect. However, as the Grinnell case demonstrates, the policy does not restrict OSHA's legal ability to request documents through a subpoena should it choose to do so.

Hoteliers should also recognize that parties seeking to hold their company liable for health and safety hazards, including OSHA and civil litigants, will routinely attempt to obtain audits, accident reports, and other safety and health documentation from the hotel, its insurance company, or outside consultants. Careful drafting and review of audit documentation, however,

can both minimize a hotel's legal exposure and provide the information necessary to administer an effective safety and health program. Hotels, insurance companies, and consultants should consider these important tips when drafting any safety-related documents:

- *Record the known facts, not opinions or speculation.* Speculation or opinions, particularly as to the cause of an accident or the existence of a hazard, are often misinterpreted as admissions as to what actually happened. If a cause is only "suspected" or "unknown," say so.

- *Avoid placing blame or admitting legal violations.* Statements that supervisors violated company rules or committed "OSHA violations" can significantly impact a company's liability.

- *If a problem is noted, always follow up and document that corrective action has been taken.* Almost all safety audit forms have a space to note recommended or completed corrective action. Failure to take corrective action may be construed by OSHA as willful conduct.

- *Be truthful.* A false statement in a safety audit can be very damaging. Make certain that all audits are carefully reviewed and, if necessary, corrected for accuracy.

- *Consider a safety documentation retention policy.* Depending on your hotel's or management company's needs, it may be unnecessary to retain health and safety audits or other safety documentation indefinitely. Make certain any document retention policy complies with applicable law.

- *Insist that others preparing audits or other safety documentation for your hotel or management company recognize the importance of careful drafting.* Insurance companies, outside consultants, or others providing safety or loss control services often commit the errors discussed above. Discuss your concerns about proper documentation in advance.

- *Seek legal advice immediately after a fatal or catastrophic accident, and in other appropriate circumstances.* Because of potential liability, legal counsel should be consulted in the preparation of accident reports, safety audits, and other documentation. It may be possible to have the hotel's investigation conducted under the "attorney work product" privilege or the "attorney-client communication" privilege, thereby providing protection against disclosure to OSHA or third parties. ✧

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