

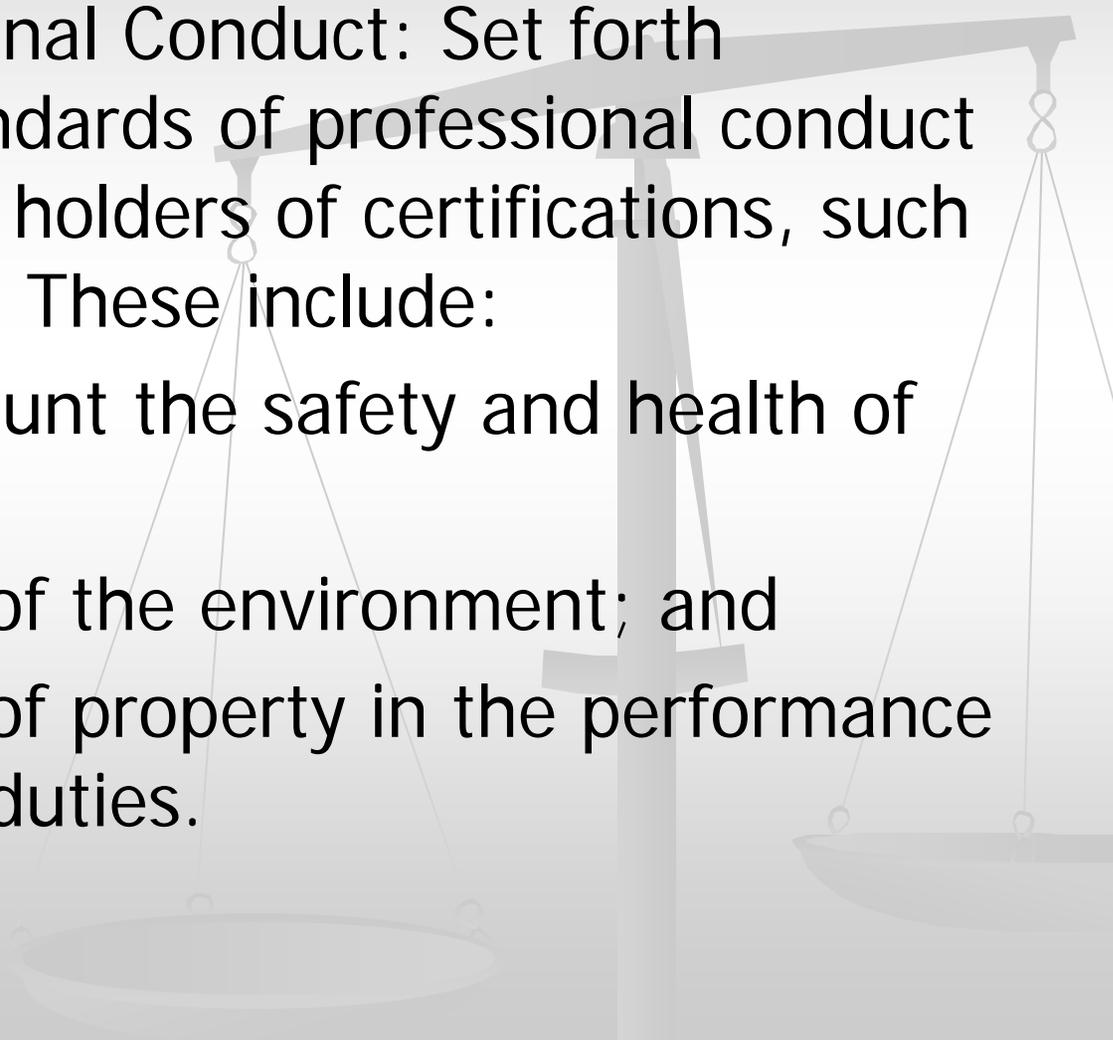


Due Diligence and the ESH Professional

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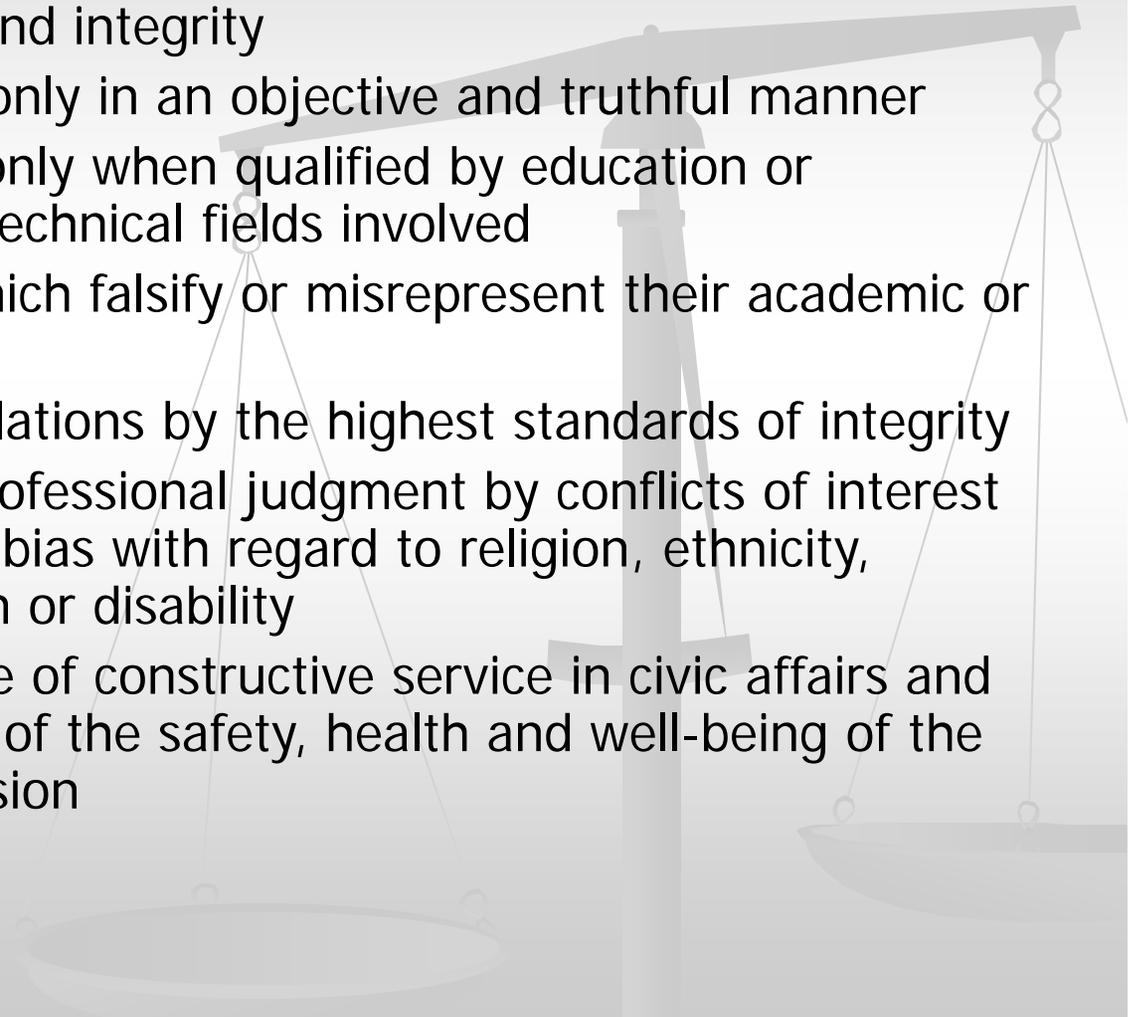
Codes of Professional Conduct



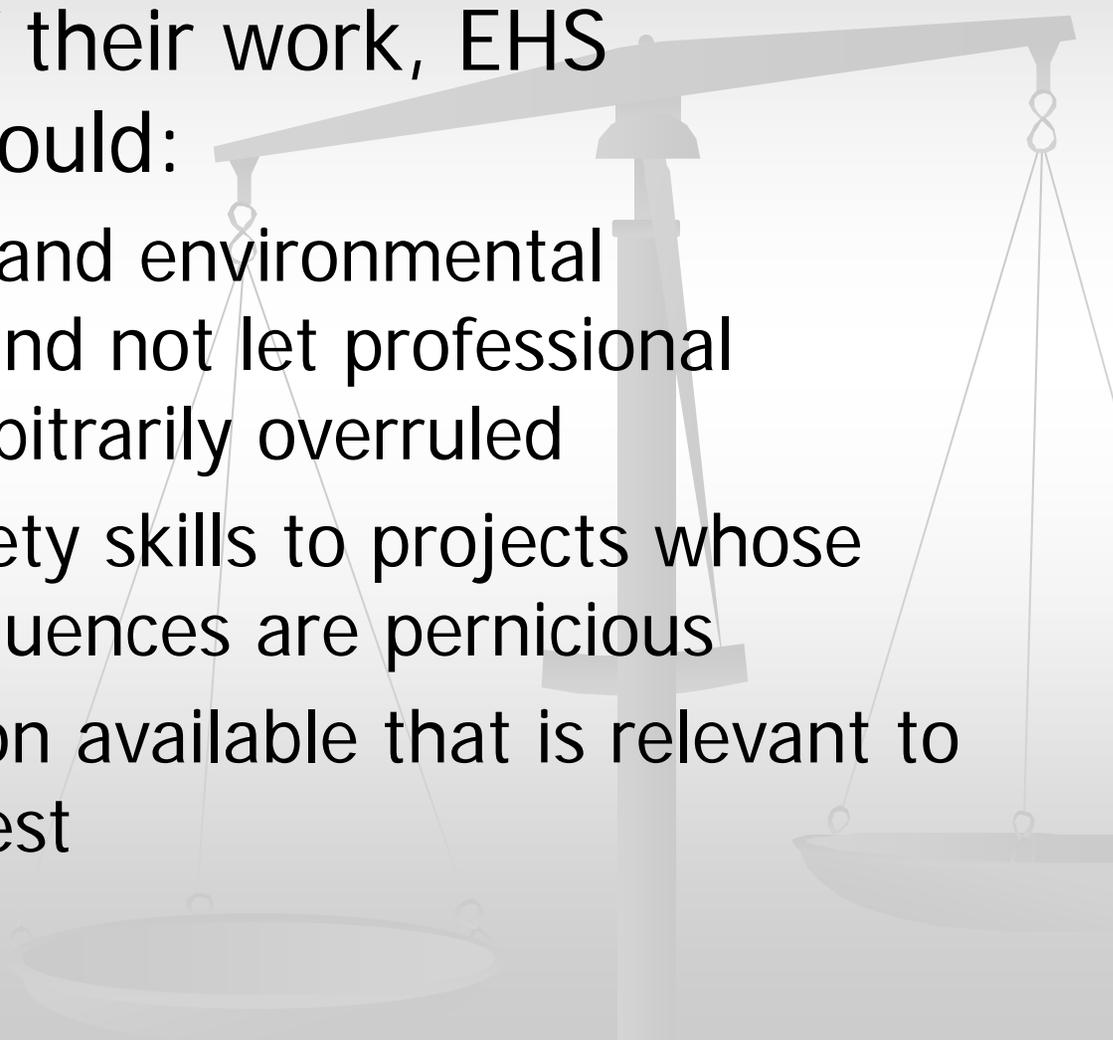
- Codes of Professional Conduct: Set forth principles and standards of professional conduct to be observed by holders of certifications, such as CIHs and CSPs. These include:
 - Holding paramount the safety and health of people;
 - The protection of the environment; and
 - The protection of property in the performance of professional duties.

EHS Professional Conduct

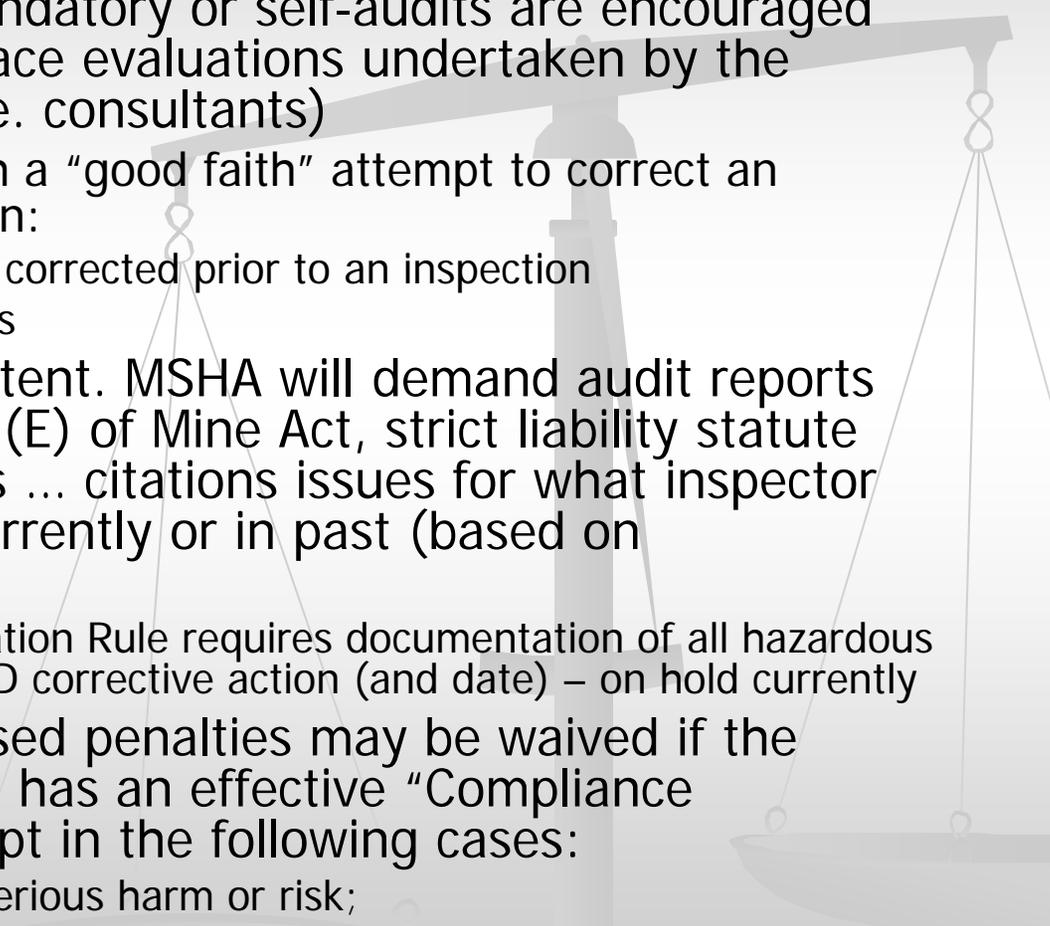
- Being honest, fair and impartial
- Acting with responsibility and integrity
- Issuing public statements only in an objective and truthful manner
- Undertaking assignments only when qualified by education or experience in the specific technical fields involved
- Avoiding deceptive acts which falsify 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



EHS Professional Conduct

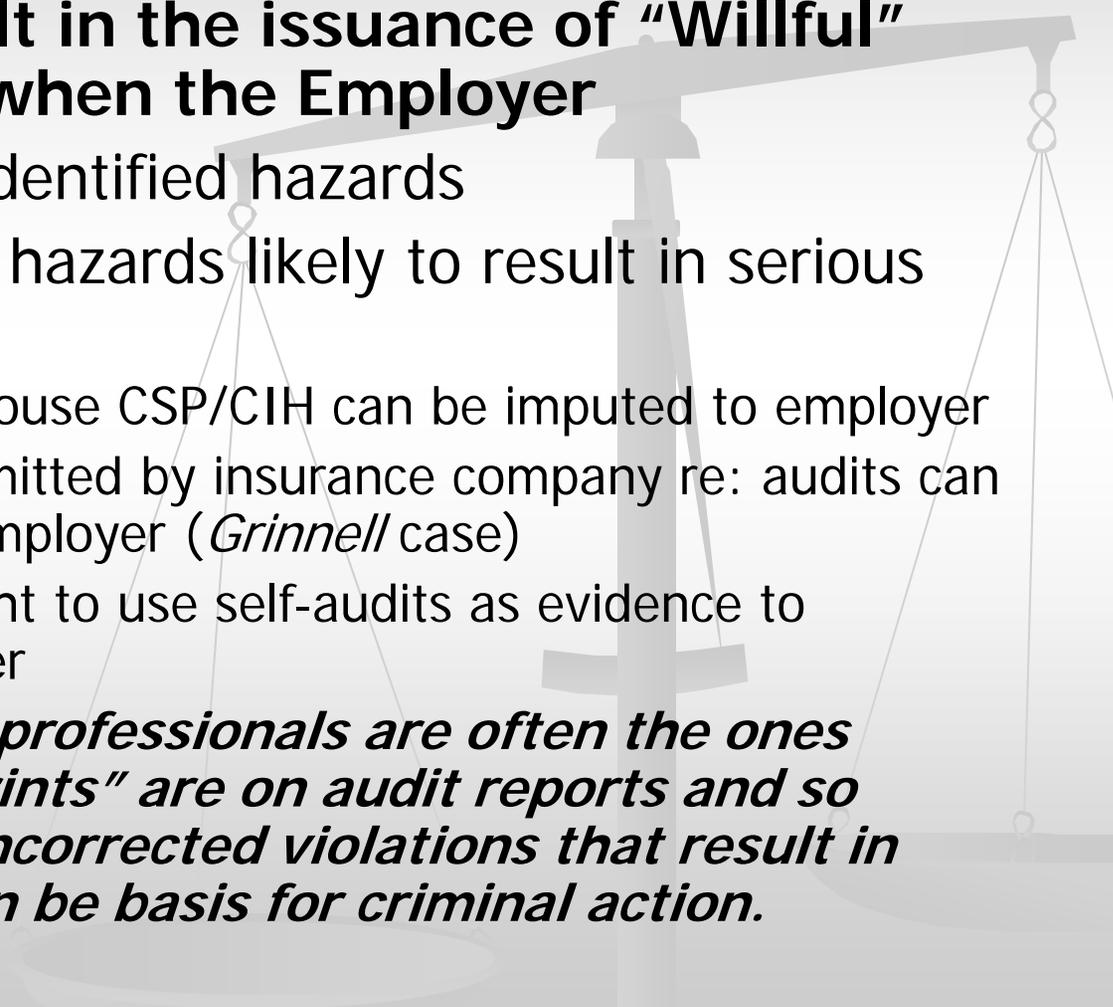
- In the course of their work, EHS Professionals should:
 - Consider social and environmental consequences and not let professional judgment be arbitrarily overruled
 - Not commit safety skills to projects whose purpose/consequences are pernicious
 - Make information available that is relevant to the public interest
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Audit Issues



- 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
- MSHA Audit Policy: Non-existent. MSHA will demand audit reports under Sec. 103(a)/108(a)(1)(E) of Mine Act, strict liability statute with no statute of limitations ... citations issued for what inspector “believes” was a violation currently or in past (based on docs/statements)
 - New MSHA Workplace Examination Rule requires documentation of all hazardous conditions found each shift AND corrective action (and date) – on hold currently
- 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.

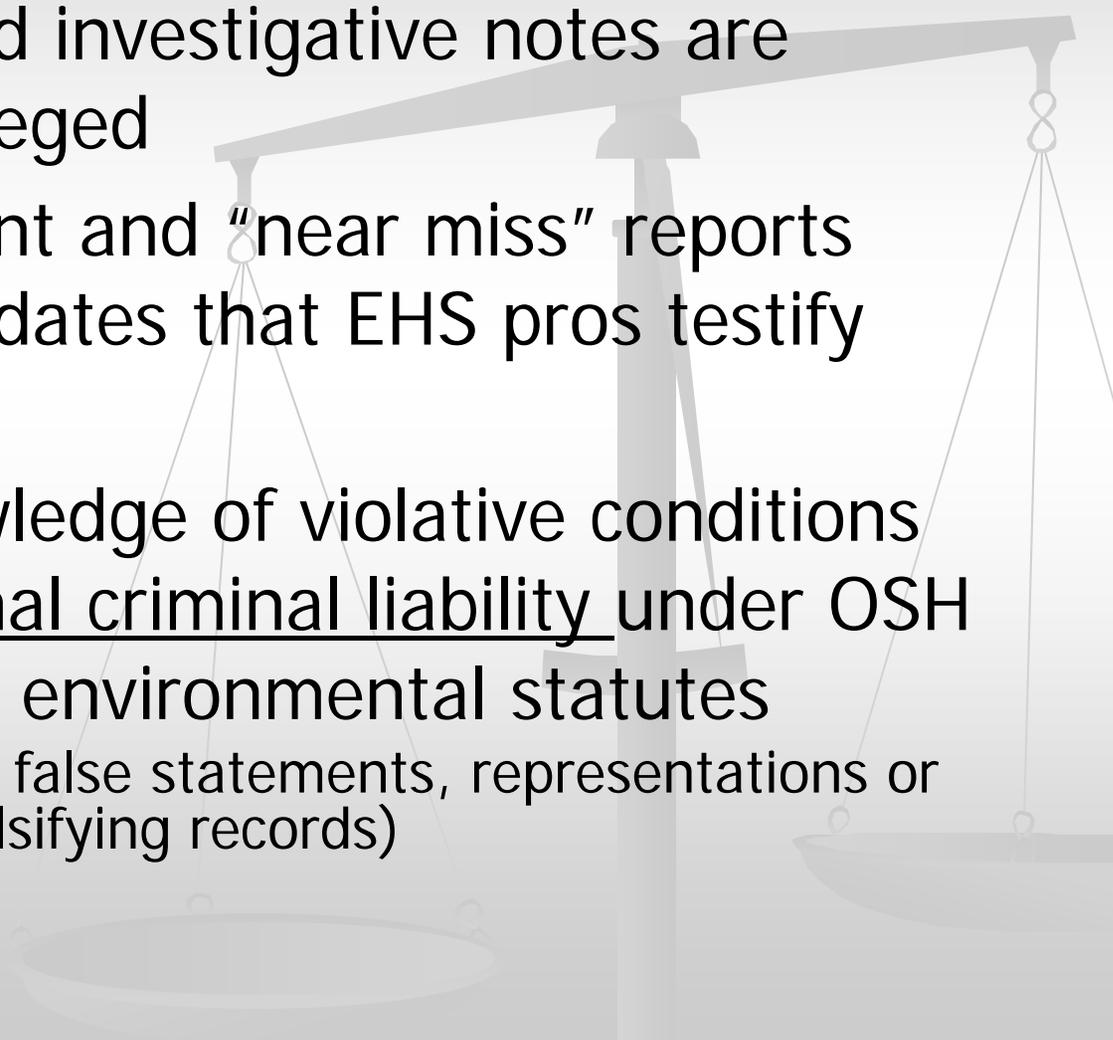
Audit Issues



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
 - ***Safety & health professionals are often the ones whose “fingerprints” are on audit reports and so identified but uncorrected violations that result in injury/death can be basis for criminal action.***

Investigations & Inspections

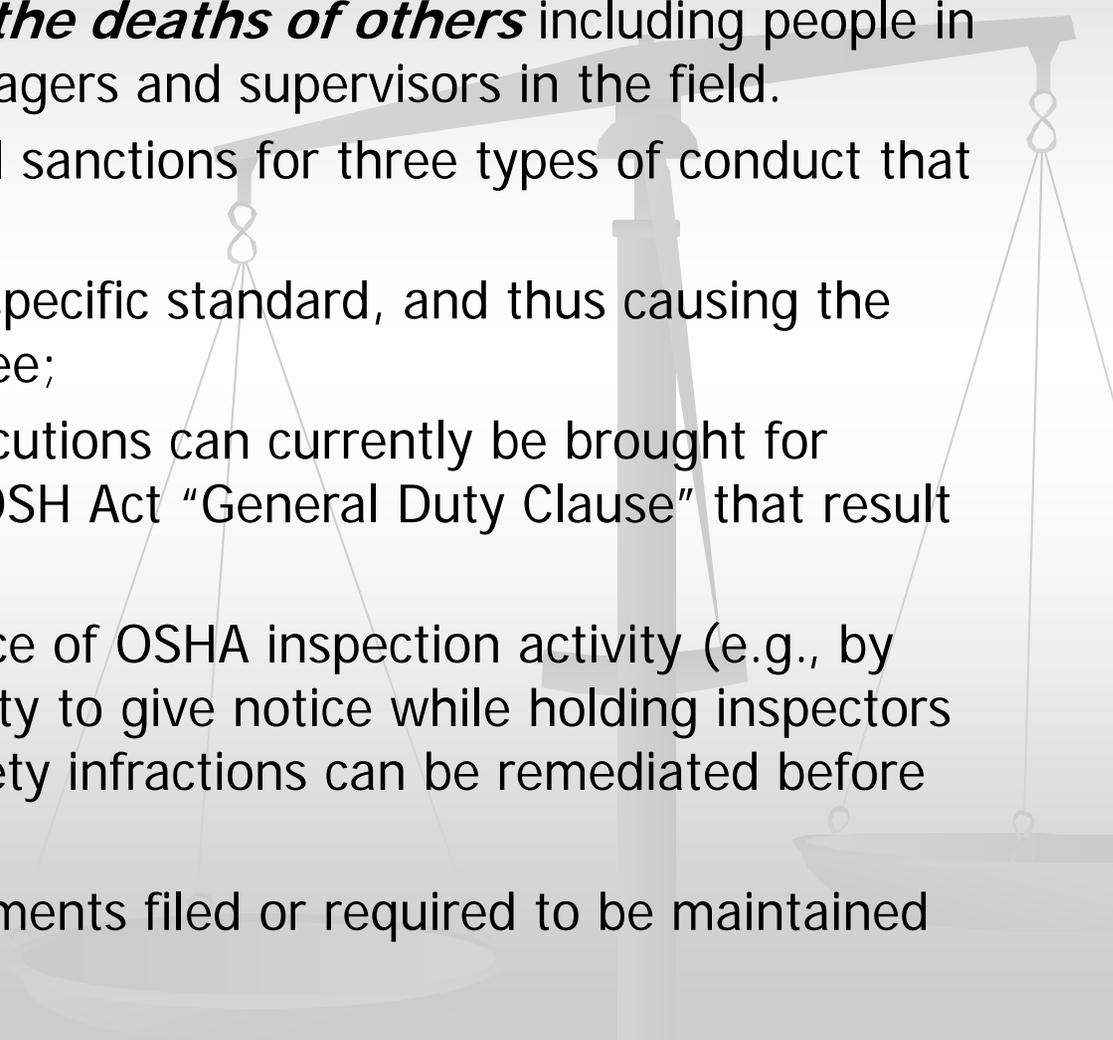


- EHS inspection and investigative notes are normally not privileged
- Inspection, accident and “near miss” reports may result in mandates that EHS pros testify against employer
- Documented knowledge of violative conditions can lead to personal criminal liability under OSH Act, Mine Act, and environmental statutes
 - Providing knowingly false statements, representations or certifications (i.e. falsifying records)

DOL/DOJ MOU: Criminal Prosecution

- 12/17/15: DOL/DOJ entered an MOU to work cooperatively in bringing more criminal prosecutions under the OSH Act and Mine Act, and under other federal statutes with more stringent sentences
- US Attorneys are urged to use EPA laws (with felony provisions) and 18 USC (obstruction of justice, conspiracy, false statements, witness tampering) to impose sentences that could reach 20+ years
- DOL/DOJ MOU suggests that workplace violations may be prosecuted creatively by using Clean Air Act, Resource Conservation & Recovery Act, and Toxic Substances Control Act
 - DOL will also seek criminal prosecution for violations of child labor laws that endanger workers.

Federal OSHA Criminal Sanctions

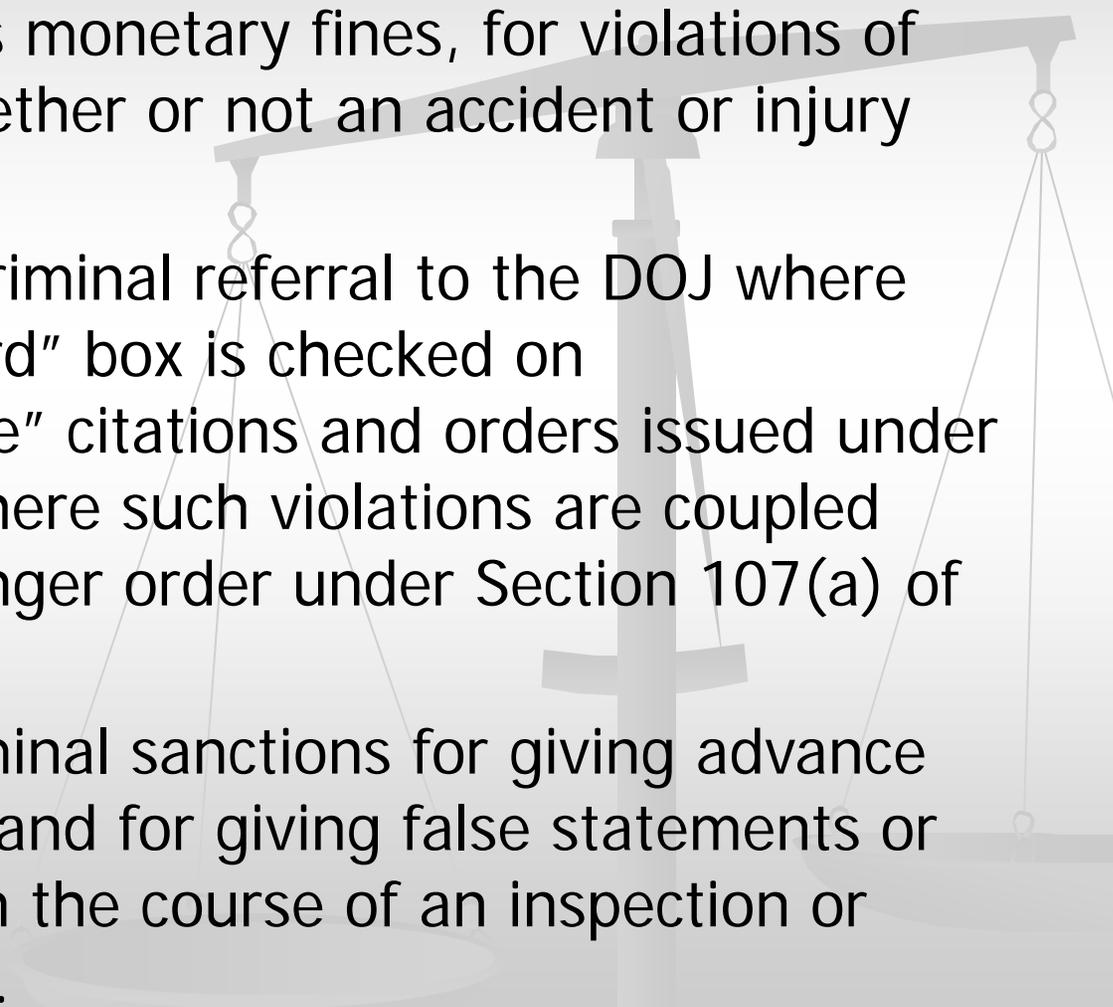


- DOJ/DOL MOU prosecutions will be open to ***the ones making the decisions that lead to the deaths of others*** including people in the corporate office, managers and supervisors in the field.
- OSH Act provides criminal sanctions for three types of conduct that impact worker safety:
 - (1) willfully 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.

OSHA State Plan States

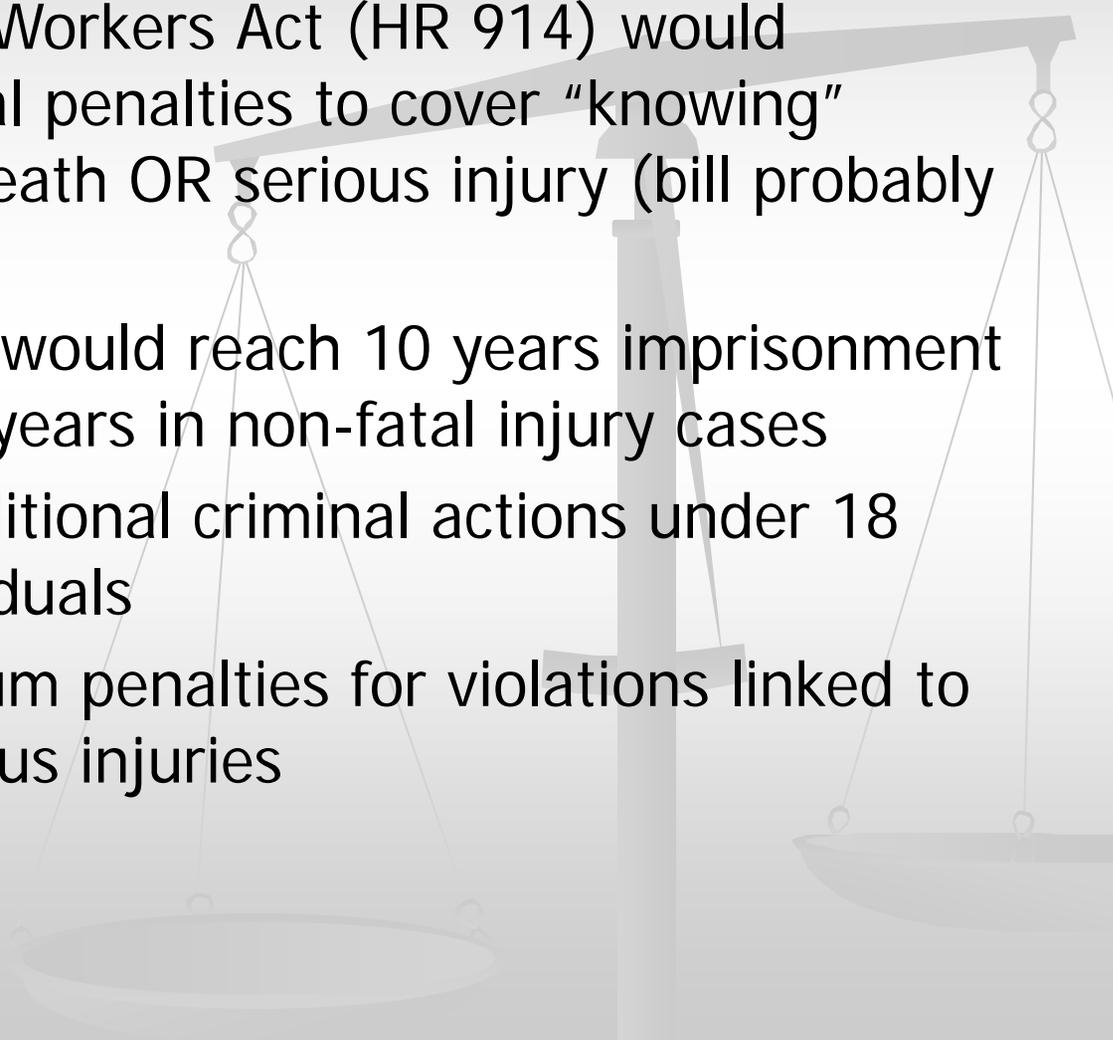
- In the 22 “state plan states,” criminal prosecutions are brought more often because the state attorney generals can rely on state statutes with longer prison terms and higher criminal monetary penalties:
 - involuntary manslaughter,
 - negligent homicide,
 - reckless endangerment
 - assault and battery

MSHA Criminal Sanctions



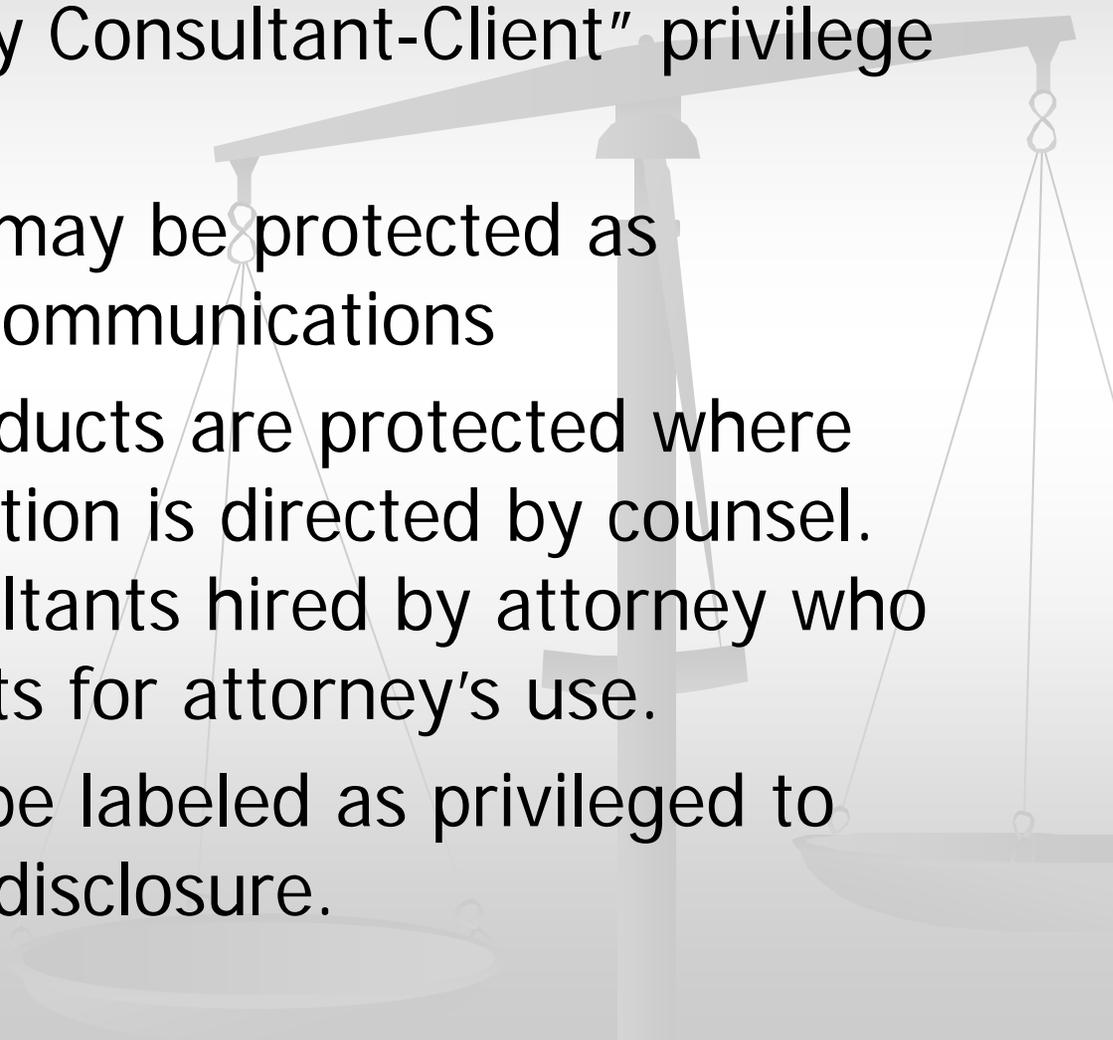
- The Mine Act carries possible penalties of up to one year in federal prison, plus monetary fines, for violations of MSHA standards, whether or not an accident or injury occurred.
- MSHA often does a criminal referral to the DOJ where the “reckless disregard” box is checked on “unwarrantable failure” citations and orders issued under Section 104(d), or where such violations are coupled with an imminent danger order under Section 107(a) of the Mine Act.
- MSHA also seeks criminal sanctions for giving advance notice of inspections and for giving false statements or falsified documents in the course of an inspection or incident investigation.

Pending Legislation

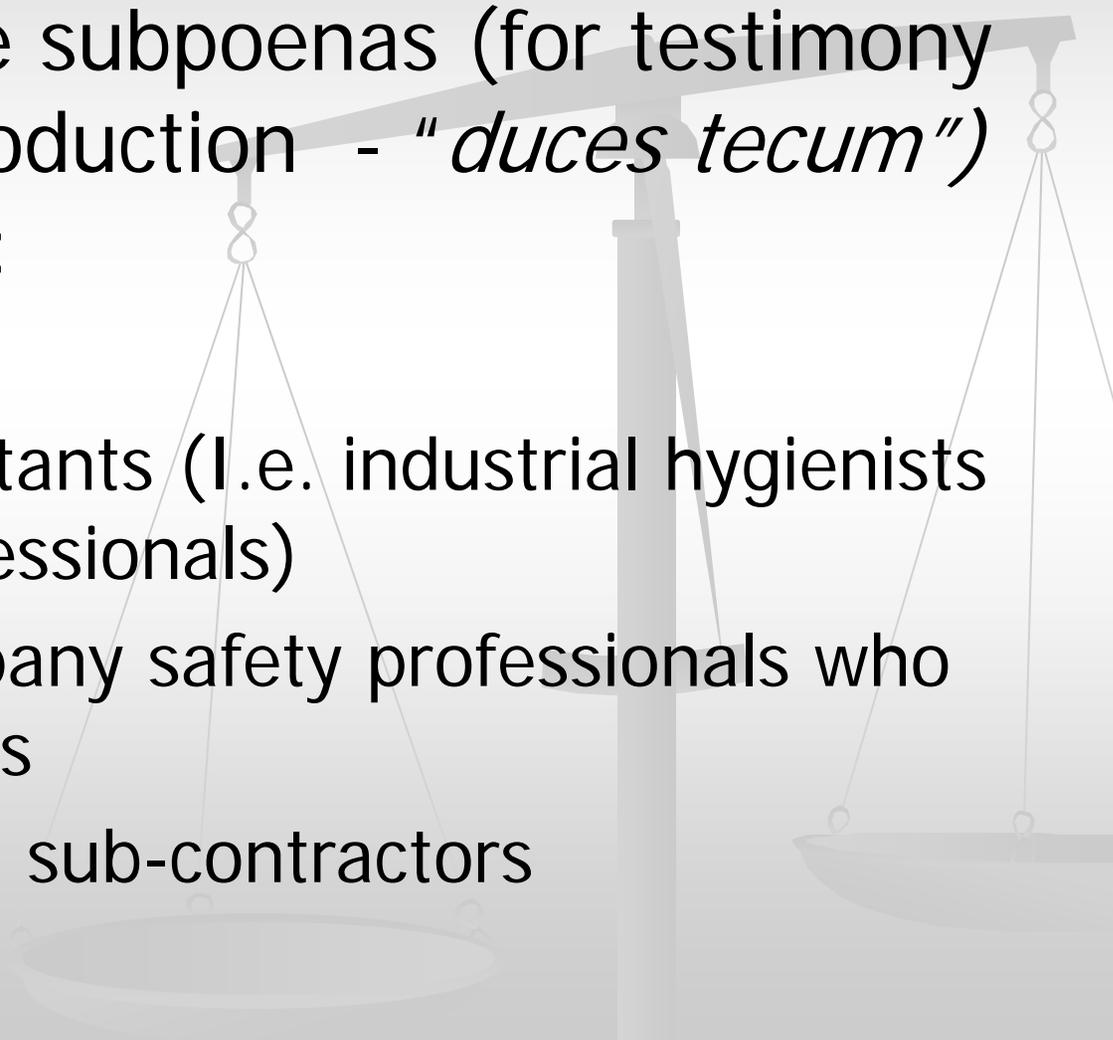


- Protecting America's Workers Act (HR 914) would expand OSHA criminal penalties to cover "knowing" violations involving death OR serious injury (bill probably is DOA)
 - Criminal penalties would reach 10 years imprisonment in fatalities and 5 years in non-fatal injury cases
 - Would not bar additional criminal actions under 18 USC against individuals
 - Mandatory minimum penalties for violations linked to fatalities and serious injuries

Legal Privileges and Pitfalls

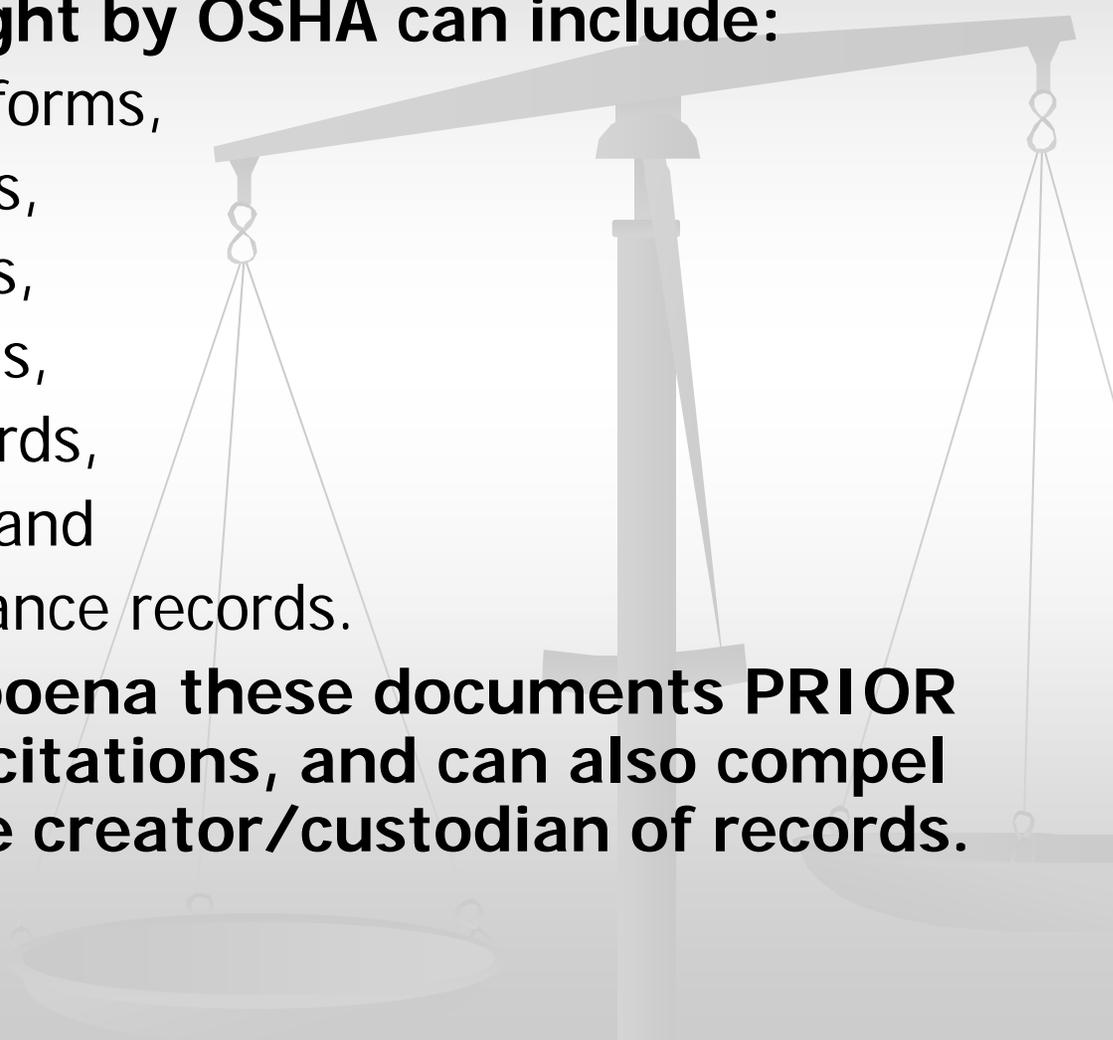
- There is no “Safety Consultant-Client” privilege BUT
 - Some documents may be protected as “Attorney-Client” communications
 - Attorney work products are protected where document preparation is directed by counsel. May include consultants hired by attorney who produce documents for attorney’s use.
 - Documents must be labeled as privileged to avoid inadvertent disclosure.
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Subpoena Issues



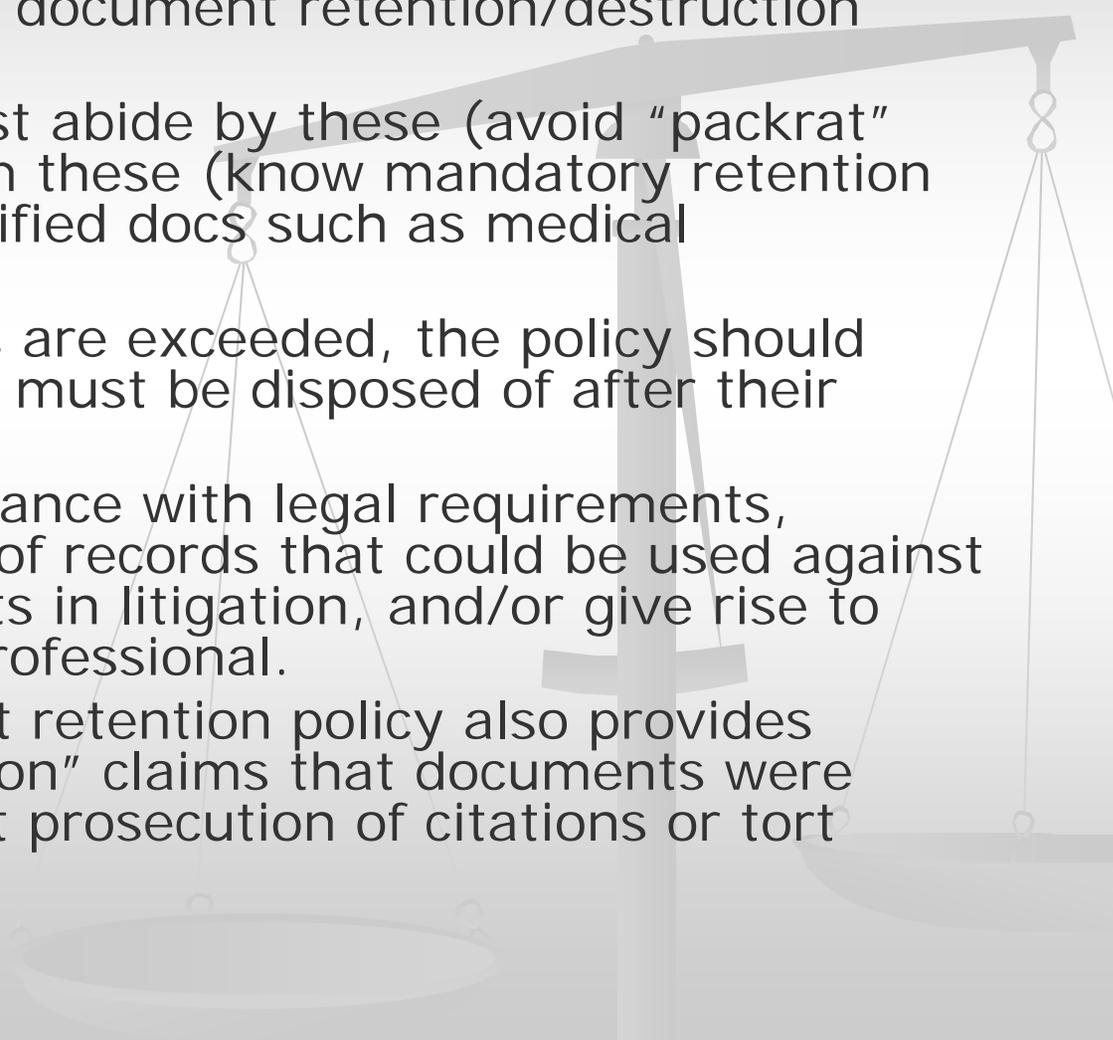
- OSHA may issue subpoenas (for testimony or document production - "*duces tecum*") to the following:
 - Employer
 - 3rd party consultants (I.e. industrial hygienists and safety professionals)
 - Insurance company safety professionals who audit workplaces
 - Contractors and sub-contractors

Subpoena Issues



- **Documents sought by OSHA can include:**
 - self-inspection forms,
 - sampling results,
 - purchase orders,
 - consultants' logs,
 - calibration records,
 - training syllabi and
 - training attendance records.
- **OSHA can subpoena these documents PRIOR to the issuance of citations, and can also compel testimony from the creator/custodian of records.**

Document Retention

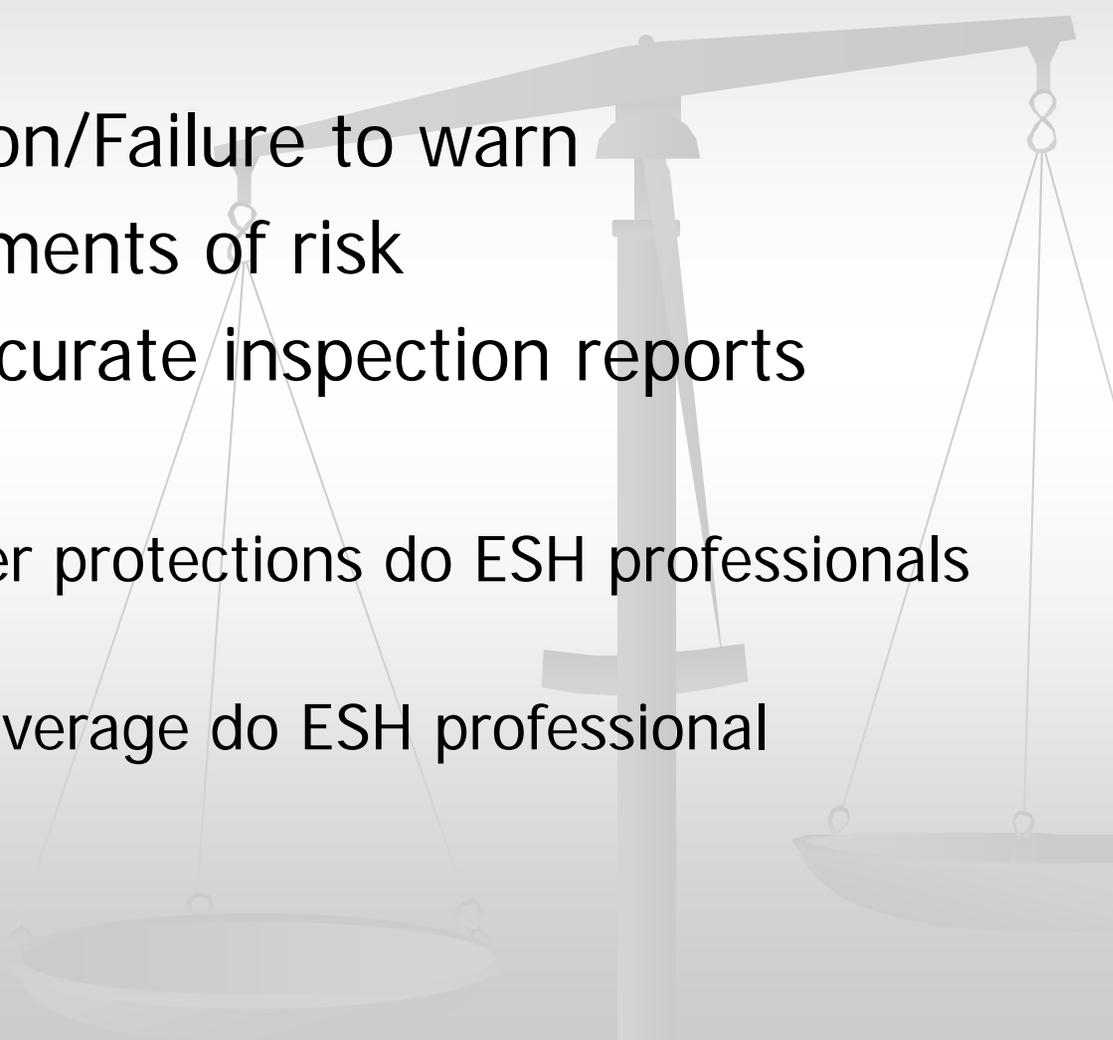


- Worksites should have document retention/destruction policies
- S&H professionals must abide by these (avoid “packrat” tendencies) and inform these (know mandatory retention periods for OSHA specified docs such as medical surveillance, training)
- Even if statutory limits are exceeded, the policy should 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 S&H professional.
 - Following document retention policy also provides defense to “spoliation” claims that documents were destroyed to thwart prosecution of citations or tort claims

Other Document Issues

- 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/MSHA 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.

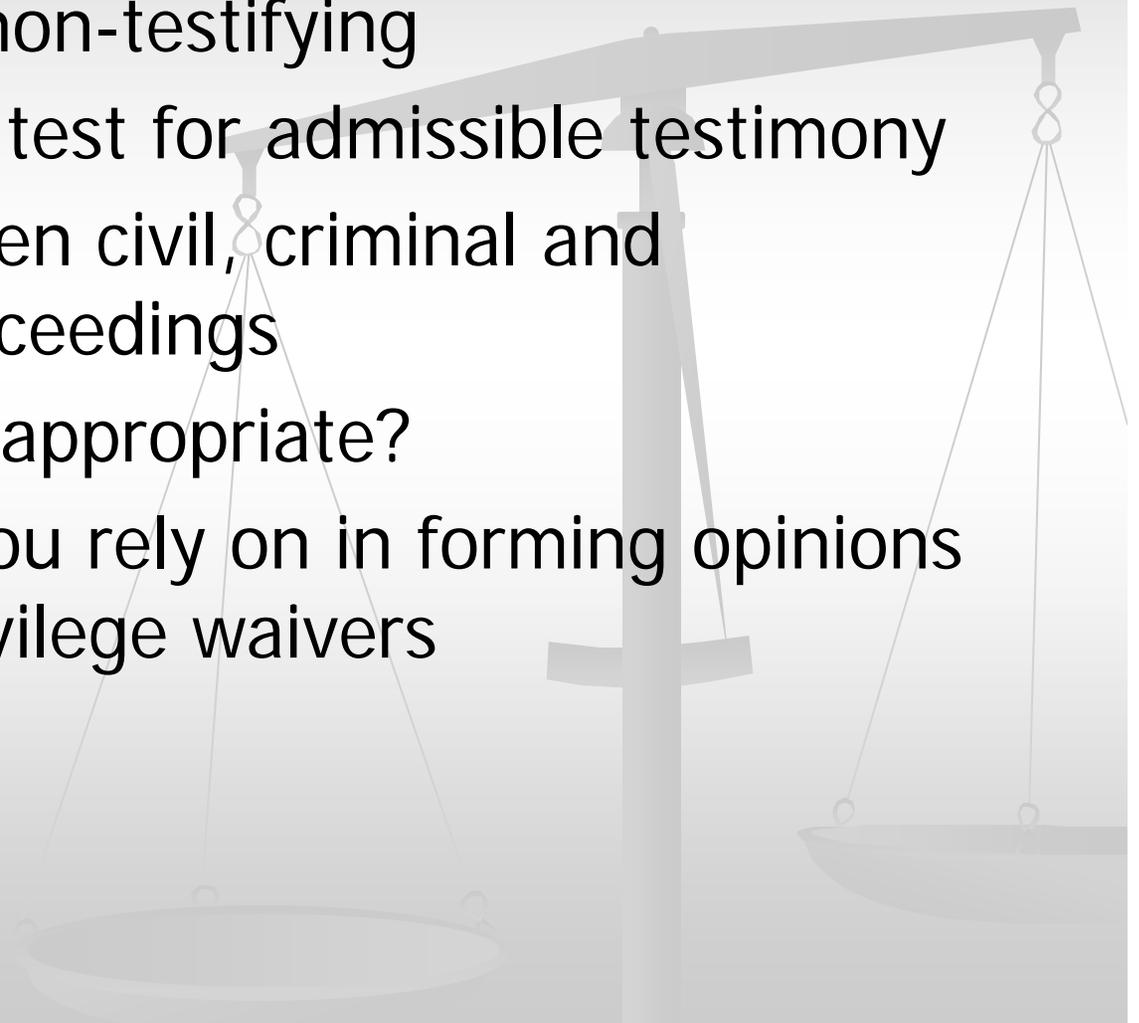
Malpractice Issues



- Negligent training
- Negligent inspection/Failure to warn
- Inaccurate assessments of risk
- Fraudulent or inaccurate inspection reports
- Ethical violations
 - What whistleblower protections do ESH professionals have???
 - What insurance coverage do ESH professional have???

Expert Witness Issues

- 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

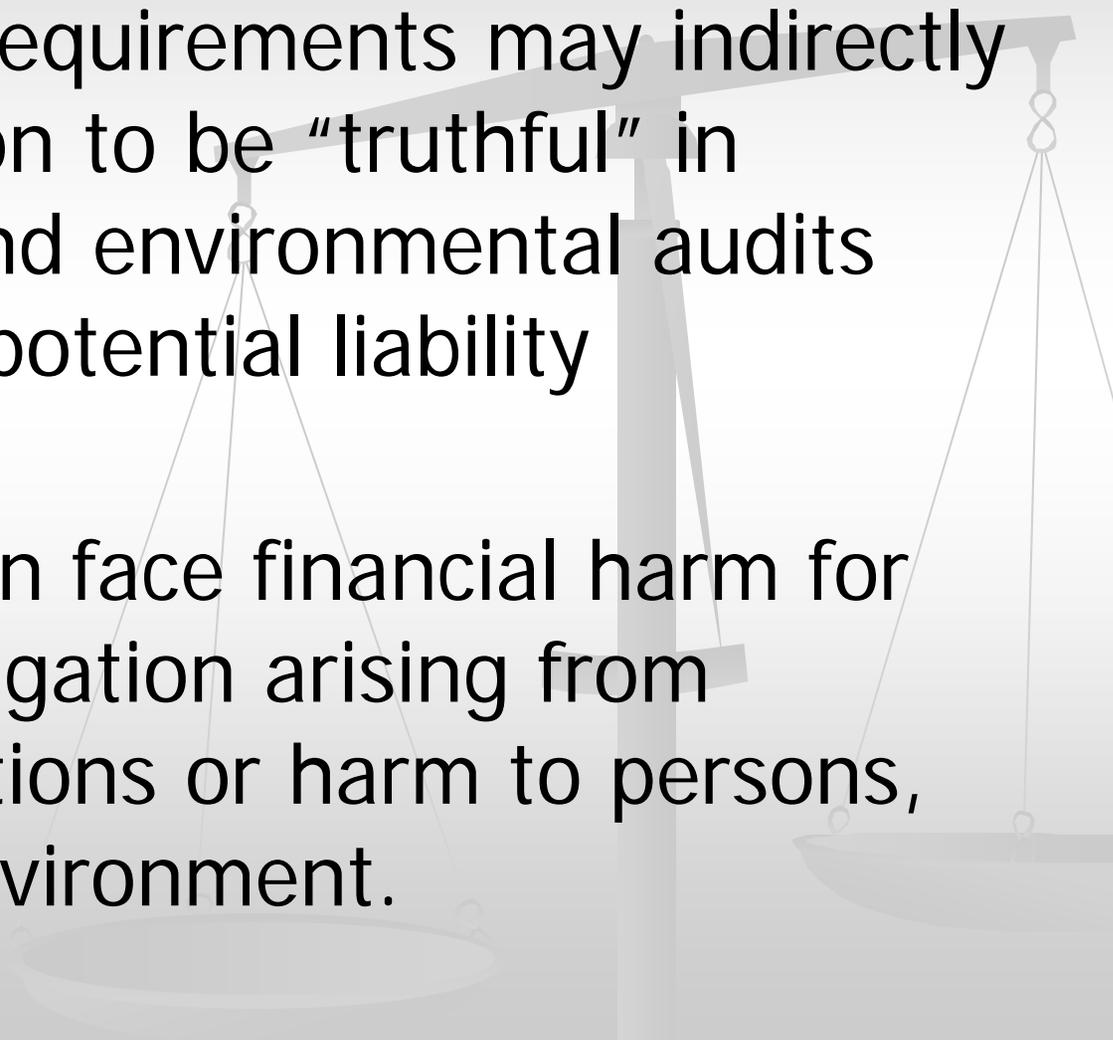


Legal/Ethical Issues

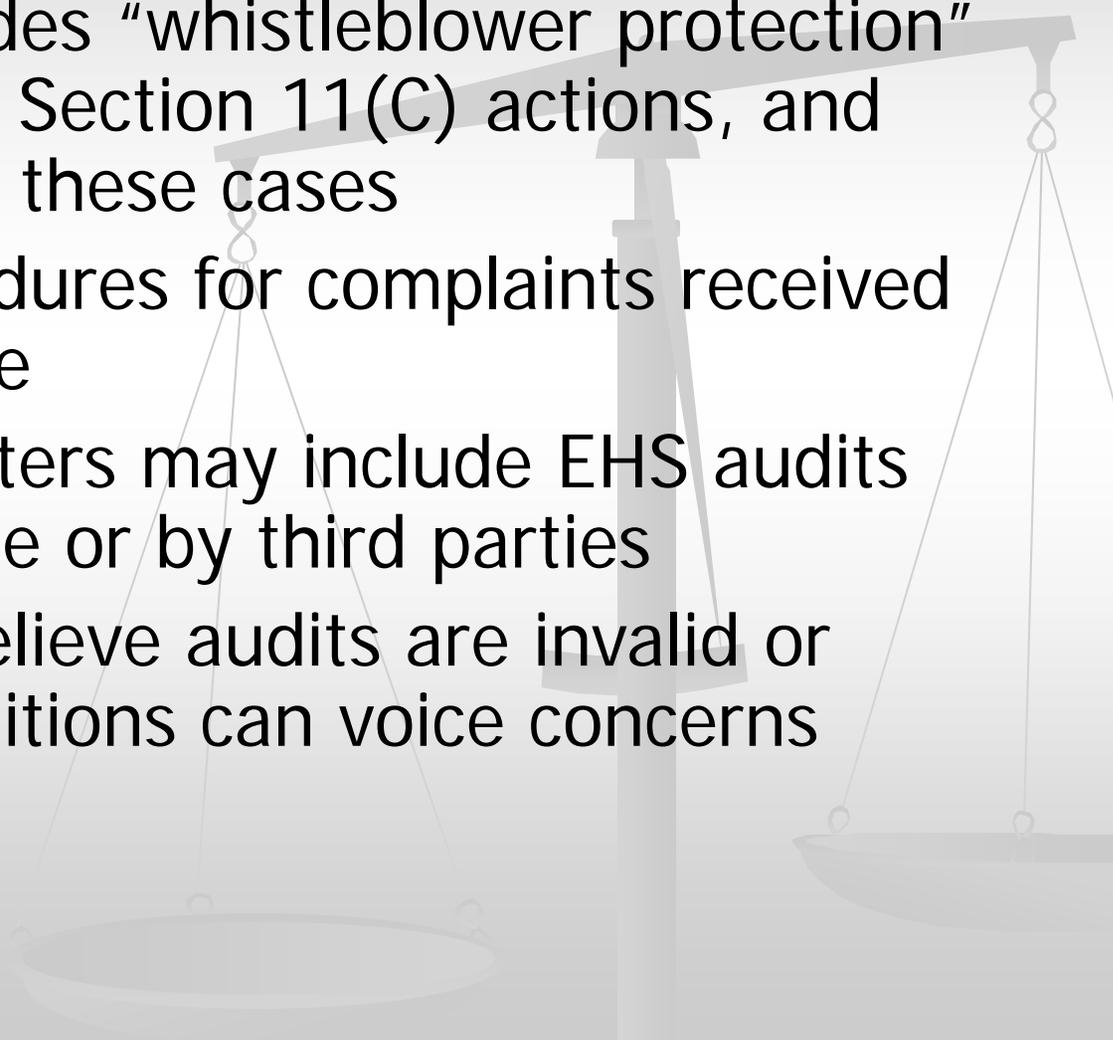


- Certifying “compliance”
- Electronic communications
- Getting outside area of expertise
- Participation in standards organizations –
Impact for employer under GDC
- Activity in trade associations – imputation
of information to employer

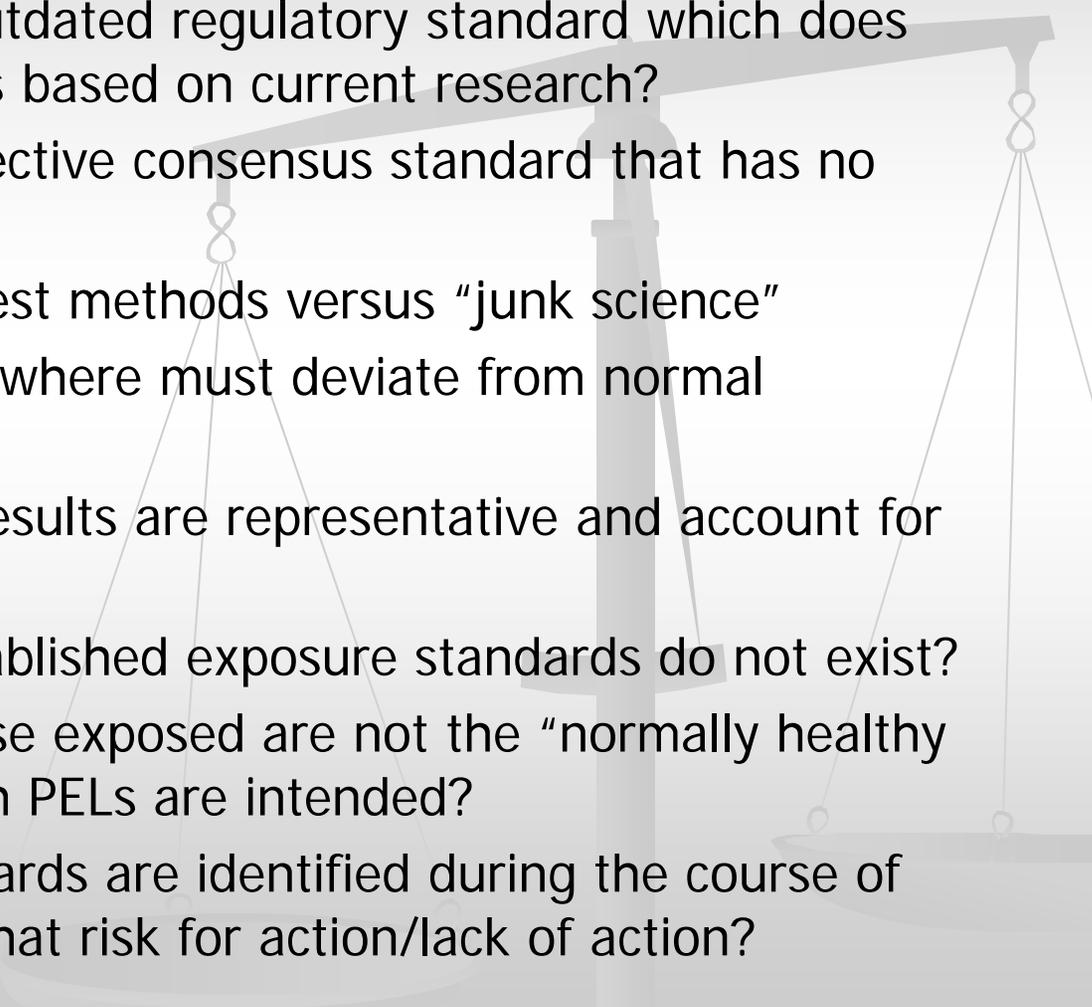
Sarbanes-Oxley Act

- Financial audit requirements may indirectly include obligation to be “truthful” in safety, health and environmental audits because of the potential liability exposures.
 - Shareholders can face financial harm for losses due to litigation arising from regulatory violations or harm to persons, property and environment.
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Sarbanes-Oxley Act

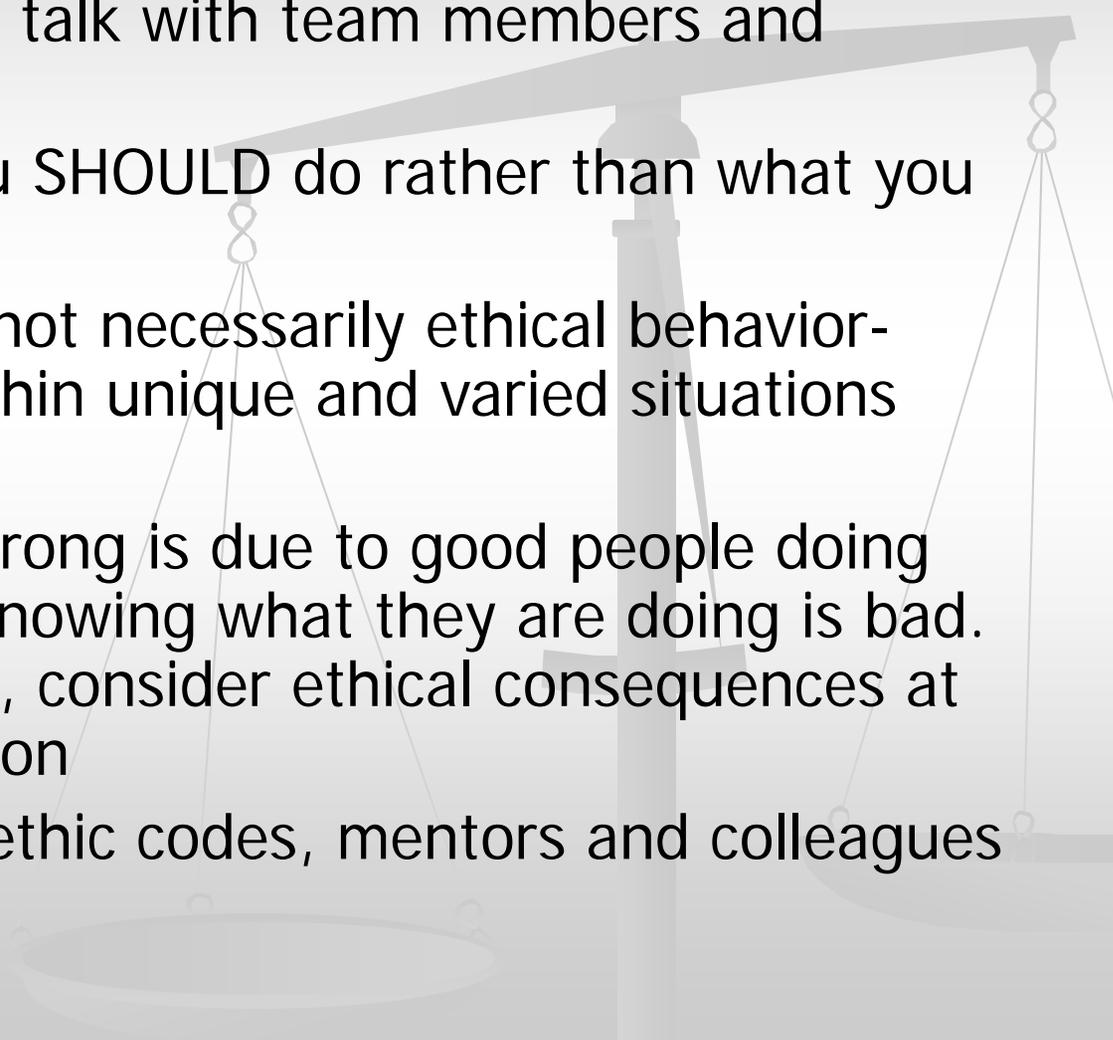
- The S-O Act provides “whistleblower protection” similar to OSH Act Section 11(C) actions, and OSHA investigates these cases
 - S-O Act has procedures for complaints received by audit committee
 - Such auditing matters may include EHS audits conducted in-house or by third parties
 - Employees who believe audits are invalid or misrepresent conditions can voice concerns through S-O Act.
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Additional Due Diligence Issues



- Ramifications for use of outdated regulatory standard which does not protect workers/clients based on current research?
- Duty to shift to more protective consensus standard that has no force of law?
- Use of scientifically valid test methods versus “junk science”
- How to address situations where must deviate from normal procedures?
- How to ensure exposure results are representative and account for variations?
- How to proceed when established exposure standards do not exist?
- How to proceed when those exposed are not the “normally healthy adult population” for which PELs are intended?
- How to proceed when hazards are identified during the course of different investigation – what risk for action/lack of action?

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



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QUESTIONS????

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