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# OSHA REFORM: AN EXAMINATION OF THIRD PARTY AUDITS

ANNE T. NICHTING\*

## INTRODUCTION

Legislative proposals to amend the Occupational Safety and Health Act of 1970 (the "OSH Act") have been introduced in Congress each of the last six years, but with no success. The OSH Act is one of the most controversial pieces of legislation ever enacted by Congress not only because of the sharply conflicting political and economic interests at stake, but also because of disagreement as to the precise method for administering and enforcing the legislation. Efforts at amending the OSH Act have also resulted in vigorous disagreement between labor and industry. Despite the controversy, some future amendment is likely because a large number of workplace illnesses and injuries are experienced every year by American workers.

Third party audits of American businesses and a federal statutory privilege for third party audits are among the major changes to the existing legislative program proposed in Congress. These changes represent a remedy that is aimed at attacking the problem of occupational safety and health injury in small businesses. Generally, small businesses have not seen a reduction in occupational injury and illness rates. The lack of a reduction in those rates can be viewed as a public health and policy failure, particularly in light of the fact that small businesses are the fastest growing sector in the U.S. economy.

To address this failure, some have suggested that Congress increase the number of federal inspectors or the amount of penalties for workplace violations. However, these suggestions do not recognize the fundamental change that has occurred with respect to the role of the federal government in our society. Specifically, growth in the small business sector now makes it less likely that the limited number of government inspectors will perform a workplace

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inspection.

The third party audit method is consistent with the current paradigm of the federal government's role in workplace inspection because third party audits would rely on the private sector, not the federal government, for workplace inspections. In addition, the federal statutory privilege for third party audits encourages businesses to conduct inspections in order to identify potential hazards.

In theory, existing federal government auditing policies encourage companies to inspect their workplaces. However, because no federal statute provides for a privilege for this information, the federal government can discover the information and use it as the basis for citations, fines, or other legal action.

Third party audits are considered a viable concept for stand-alone legislation and represent a major change to the existing OSH Act. This article maintains that third party audits, accompanied by a federal statutory privilege for third party audits, are necessary if the Occupational Safety and Health Administration's ("OSHA") goal of protecting American workers from occupational injury and illness is to be achieved. Part I discusses the need for reform of the OSH Act and summarizes the current Senate version of OSHA reform. Part II provides background information on occupational safety and health audits, provides guidelines for the conduct of audits, and identifies the present federal government policies for conducting audits. In addition, Part II delineates the legal methods or common law privileges that protect audit information from discovery. This section also discusses a union's right to health and safety information and examines how this ostensible conflict could be resolved with a federal statutory privilege for audit information. Finally, Part III explores the federal statutory privilege for third party audit information as formulated by the current Senate version of OSHA reform.

## I. OSHA REFORM

### A. *Legislative Efforts for OSHA Reform in the 1990s*

#### 1. General Reform Efforts

April 1996 marked the twenty-fifth anniversary of the OSH Act's

enforcement.<sup>1</sup> Reform legislation has been introduced in every session of Congress since OSHA's twentieth anniversary in 1991 and legislation is currently pending in Congress.<sup>2</sup> At least two OSHA reform bills have unsuccessfully been introduced each year since 1993. The reform legislation has proposed major philosophic and structural changes to the existing legislative program. These changes include exempting certain operations from routine inspections, codifying several employer defenses, and reducing or eliminating fines under certain circumstances. Similar to the OSH Act of 1970, the reform legislation has been the subject of vigorous disagreement between labor and industry. This paper will focus on third party audits because OSHA's goal of protecting American workers from occupational injury and illness is simply not met without effective enforcement. The only hope for achieving OSHA's goal is an effective inspection mechanism like the third party audit.

## 2. The Third Party Audit Provisions of S. 1237

The major focus of the current Senate version of OSHA reform has been third party audits.<sup>3</sup> Vice President Gore advocated the concept of third party audits in his *Reinventing Government* report.<sup>4</sup> Third party audits rely on private inspection companies or non-management employees to ensure that all workplaces would be regularly inspected.<sup>5</sup> The goal of third party audits is for every employer to have a competent health and safety professional assess their facilities so that the employer can identify and correct health and safety standards.<sup>6</sup> A third party audit consultation, as envisioned by the current Senate version of OSHA reform, would consist of a qualified third party auditor evaluating a workplace to determine compliance within the requirements of the OSH Act.<sup>7</sup> No later than ten business days after an auditor provides a consultation service, the auditor must provide the employer with a written report that identifies any occupational safety and health violations.<sup>8</sup> The written

1. See *OSHA Hits Quarter-Century Mark*, West's Legal News, May 6, 1996, available in 1996 WL 260658.

2. See generally H.R. 2579, 105th Cong. (1997); See S. 1237, 105th Cong. (1997).

3. See Deborah Williams, *The SAFE Act: The Right Combination for OSHA Reform?*, THE SYNERGIST, February 15, 1998, at 23, 24.

4. See *id.*

5. See *id.*

6. See S. 1237 § 5(a)(1).

7. See *id.*

8. See *id.* § 5(d)(2).

report must also contain recommendations that identify the corrective measures that the employer needs to carry out in order to be in compliance with the OSH Act.<sup>9</sup> No later than thirty days after receiving the written report, the auditor must also re-inspect the employer's workplace to verify that any hazards have been abated.<sup>10</sup> If the corrective measures have been completed, the auditor would then provide the employer with a declaration of compliance.<sup>11</sup>

The current Senate version of OSHA reform also creates a federal statutory privilege for the third party audits.<sup>12</sup> Any records relating to a third party audit would not be admissible in a court of law or administrative proceeding except to show fraud or malfeasance of a certified auditor.<sup>13</sup>

Although it is not explicitly stated in the current Senate version of OSH Act reform, OSHA would presumably be responsible for designing model health and safety programs that a third party auditor would use to assess specific workplaces. However, an independent, nonpartisan advisory committee would be charged with making recommendations to the Secretary of Labor with respect to the third party audits.<sup>14</sup> Additionally, OSHA would approve or certify third party auditors as competent based on specific criteria.<sup>15</sup>

Individuals qualified to become certified as third party auditors would be required to be either: (1) licensed by a state authority as a physician, industrial hygienist, professional engineer, safety engineer, safety professional, or occupational nurse; (2) an individual who had been a state or federal occupational safety and health inspector for a period greater than five years; or (3) an individual certified in an occupational health or safety field by an organization whose certification program had been accredited by a nationally recognized private accreditation organization or by the Secretary of Labor.<sup>16</sup> In addition, the Secretary of Labor would have the authority to extend eligibility as a third party auditor to "other individuals determined to be qualified by the Secretary."<sup>17</sup> If it was determined that the auditor

9. *See id.*

10. *See id.* § 5(d)(3).

11. *See id.*

12. *See id.* § 5(e).

13. *See id.* § 5(f)(2).

14. *See id.* § 4.

15. *See id.* § 5(a)(2)(A)-(D).

16. *See id.*

17. *Id.* § 5(a)(2)(D).

had failed to meet the requirements of the accreditation program, the Secretary would be empowered to revoke the auditor's privilege to participate in the third party audit program.<sup>18</sup>

To promote the use of third party audits, a two-year exemption from regular inspections has been proposed.<sup>19</sup> Specifically, employers who utilized the services of certified safety and health professionals under the third party audit program would be exempt for a period of two years from any civil penalty prescribed under the OSH Act.<sup>20</sup> This exemption would not apply if the employer had not made a good faith effort to remain in compliance as prescribed by the declaration of compliance, or if there had been a fundamental change in the hazards at the workplace.<sup>21</sup> Additionally, under the current Senate version of OSHA reform there is no benefit to the employer unless the company pays for the review and then implements the recommended corrective measures.<sup>22</sup> Even though comprehensive OSHA reform legislation faces a difficult time and a remote chance of passage, the third party audit concept is viewed as a viable concept for stand-alone legislation.<sup>23</sup>

### B. *The Need for OSHA Reform*

One of the main criticisms of OSHA has been its perceived failure to reduce occupational safety and health injury and illness in small businesses, one of the fastest growing sectors in the United States. Another seemingly intractable problem faced by OSHA is the small probability that any given workplace will be subject to an OSHA inspection.

In the United States, while the small business sector continues to grow, the actual size of each small business is getting smaller.<sup>24</sup> In 1992, the National Institute for Occupational Safety and Health found that forty percent of the U.S. workforce, or over ninety percent of the actual physical work sites in the United States are comprised of

18. *See id.* § 5(c)(1)(A)-(B).

19. *See id.* § 5(f)(1).

20. *See id.*

21. *See id.* § 5(f)(2)(A).

22. *See id.* § 5(f)(1).

23. *See* Letter from American Industrial Hygiene Association to its members, *Happenings from the Hill 2* (Feb. 2, 1998) (on file with the author).

24. *See Small Business Regulatory Assistance Act of 1997: Hearings on H.R. 96 Before the Subcomm. on Regulatory Reform and Paperwork Reduction of the House Committee on Small Business*, 105th Cong. 3 (1997) (statement of D. Jeff Burton, President, American Industrial Hygiene Association).

businesses of fifty or fewer employees.<sup>25</sup> These businesses have no occupational health and safety expertise on staff, are not regularly inspected by OSHA, and have little information about occupational health and safety.<sup>26</sup>

Under Section 7(c)(1) of the OSH Act, OSHA has taken steps to provide small business assistance efforts. Under this section, federal matching funds are provided to states for on-site consultation. The on-site consultation program involves evaluating the physical hazards, the work methods, employee practices, and current safety and health practices in the workplace. A comprehensive program for compliance is developed on the basis of the evaluation. However, it is difficult for a business entity to receive an OSHA consultation service because of the length of time required before an OSHA consultant can respond to the request.<sup>27</sup> Additionally, many employers are not comfortable calling OSHA for assistance because of their concern about being placed on an inspection list.<sup>28</sup>

There are more than six million workplaces that are under the jurisdiction of OSHA and there are approximately 2,400 compliance officers in the federal and state programs. Based on these numbers, it is unlikely for any workplace to be inspected on average more than once every fifty to eighty years.<sup>29</sup> Therefore, other strategies such as third party audits have been recommended.

## II. OSHA AUDITS

### A. *The Audit Concept*

#### 1. General Ideas

Environmental auditing emerged in the late 1970s and early 1980s as a separate and distinct management compliance tool.<sup>30</sup> This tool was stimulated principally by the Securities and Exchange Commission's (the "SEC") actions against three large industrial companies.<sup>31</sup> The SEC believed that each company was understating

25. *See id.* at 3-4.

26. *See id.*

27. *See id.* at 3.

28. *See id.*

29. *See id.*

30. *See* LAWRENCE B. CAHILL, ENVIRONMENTAL AUDITS, I-9 to I-12 (6th ed. 1989).

31. *See id.* at I-11.

its liabilities in its annual report to shareholders.<sup>32</sup> As a result, the SEC required each of the companies to undertake a corporate-wide audit to determine accurately the extent of environmental liabilities they faced.<sup>33</sup>

The SEC's actions were followed closely by a burgeoning of federal environmental, safety, and health regulations.<sup>34</sup> Many companies developed audit programs to respond better to these regulations because of their comprehensiveness, complexity, and the potential cost of noncompliance.<sup>35</sup> Because many businesses think that good management and business requires complying with federal regulations, auditing has become an acknowledged part of professional business planning.<sup>36</sup>

Nevertheless, the effectiveness of workplace occupational health and safety programs is not measured by an audit. This difference represents an important distinction because a program evaluation actually requires measuring performance. An audit merely provides an indication of activity in a given area. An audit:

is a process by which persons with relevant health and safety expertise external or internal to the organizations determine the presence or absence of [occupational safety and health program elements] and compare them to those currently required by law, or those established by professional groups or by the [company] itself. An audit is not a program evaluation because it does not focus on the degree to which the program's elements attain stated objectives, *i.e.* prevention of injury or illness, the presence of [a program] element in an audit implies that it is capable of moving the [company] towards a preventive goal [or regulatory requirement], but this is an assumption.<sup>37</sup>

Critics may argue that, because audits do not assess the effectiveness of an employer's occupational health and safety program, audits should not replace OSHA compliance inspections. Nevertheless, auditing will continue to be an important tool to assess an employer's occupational safety and health programs and, as discussed below, efforts are underway to improve audits through the development of valid and reliable assessment instruments.

32. *See id.*

33. *See id.*

34. *See id.*

35. *See id.*

36. *See* Lynn L. Bergeson, *Compliance Audits Are the Key to Staying Out of Court, the Writing Is on the Wall*, CORP. LEGAL TIMES, Nov. 1992, at 17, 17.

37. Morton Corn & Peter S.J. Lees, *The Industrial Hygiene Audit: Purposes and Implementation*, 44 AM. IND. HYGIENE ASS'N. J. 135, 136 (1983).



## 2. Auditing Guidelines

Currently, there is no standard auditing format, nor are there specific regulatory requirements that an audit must meet. However, OSHA has encouraged employers to prevent employee accidents and illnesses through voluntary self-audits.<sup>38</sup> Although no comprehensive OSHA standard for general industry employers to conduct audits exists, there are many audit requirements in certain types of industries.<sup>39</sup> For example, employers in the construction industry are subject to a comprehensive audit requirement.<sup>40</sup>

The Environmental Protection Agency (the "EPA") has issued its own audit policy and statement defining auditing.<sup>41</sup> The EPA defines auditing as a "systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."<sup>42</sup> The EPA Auditing Policy also suggests seven elements for "an effective environmental auditing system."<sup>43</sup> Several North American groups have also established guidelines for conducting environmental, health and safety audits. For example, the American Industrial Hygiene Association (the "AIHA") has issued a publication that addresses auditing occupational health programs.<sup>44</sup> The Environmental Auditing Roundtable (the "EAR"), another professional organization, finalized a set of environmental auditing guidelines in 1993.<sup>45</sup> Many of these guidelines provide criteria for conducting the audit itself and include standards for auditor proficiency, objectives, plans and procedures, field work, quality control, documentation and clear report writing.

The EPA definition of an audit and the current existing guidelines will likely provide a starting point for future dialogue and

38. See Stephen C. Yohay, *OSHA Compels Disclosure of Safety and Health Audits: Smart Enforcement or Misguided Policy?*, 18 EMPLOYEE REL. L.J. 663, 663 (1993).

39. See, e.g., 29 C.F.R. § 1910.146 (1997) (confined space standard); 29 C.F.R. § 1910.147(c) (1997) (lockout/tagout standard); 29 C.F.R. § 1910.119 (1997) (process safety management standard); 29 C.F.R. § 1910.120 (1997) (hazardous waste standard).

40. See, e.g., 29 C.F.R. 1926.20(b) (1997) (requiring frequent and regular inspections of job sites by competent persons to assure compliance with the OSHA construction standards).

41. See Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004 (1986).

42. *Id.* at 25,006.

43. *Id.* at 25,009.

44. See generally AMERICAN INDUS. HYGIENE ASS'N MANAGEMENT COMM., INDUSTRIAL HYGIENE AUDITING A MANUAL FOR PRACTICE (1994) [hereinafter AIHA Auditing Manual].

45. See generally *Environmental Auditing Standards Update*, BUSINESS & ENVIRONMENT CUTTER INFORMATION CORPORATION, July 1, 1993, available in 1993 WL 2736153.

debate on what a third party audit under OSHA reform should entail. Additionally, the AIHA has established guidelines for occupational safety and health management systems,<sup>46</sup> and OSHA has proposed a draft for an occupational safety and health program standard.<sup>47</sup> These guidelines are likely to be assessed during the discussion on what a third party audit should entail.

### *B. Present Federal Audit Policies*

As mentioned above, both the EPA and OSHA have announced policies that encourage companies to voluntarily perform compliance audits.<sup>48</sup> Additionally, both agencies have taken the position that they have the authority to compel disclosure of audit information. OSHA has also taken the position that the information in the audit might be used to determine if an OSHA violation had occurred and to determine both the severity of the violation and the penalty.<sup>49</sup> OSHA's ability to compel disclosure of audit information has been upheld in at least one federal court.<sup>50</sup>

OSHA does have other means to gain access to audit information. First, workers or union representatives in unionized workplaces can and do provide information to OSHA concerning OSHA violations.<sup>51</sup> Also, OSHA has authority to gather other documents from the employer, to interview employees and other witnesses, and to take sworn statements as part of an investigation.<sup>52</sup>

OSHA's statement supporting conducting audits was announced in a July 1991 letter from the Secretary of Labor to the chief executive officers of the Fortune 500 companies.<sup>53</sup> This letter is not as detailed as the EPA's policy. More importantly, OSHA did not announce in the July 1991 letter that it might seek to compel discovery of audit information during inspections.<sup>54</sup> Alternatively, the EPA did

46. See generally AMERICAN INDUS. HYGIENE ASS'N, OCCUPATIONAL HEALTH AND SAFETY MANAGEMENT SYSTEM: AN AIHA GUIDANCE DOCUMENT (1996).

47. See Safety and Health Programs (For General Industry and Shipyards), 63 Fed. Reg. 22,260 (1998) (to be codified at 29 C.F.R. pts. 1910, 1915) (proposed April 27, 1998).

48. See Environmental Auditing Policy Statement, *supra* note 41; see also AIHA Auditing Manual, *supra* note 44.

49. See AIHA Auditing Manual, *supra* note 44, at 663.

50. See *id.* at 664-65 (citing *Martin v. Hammermill Paper Div. of Int'l Paper Co.*, 796 F. Supp. 1474 (S.D. Ala. 1992)).

51. See Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1600.

52. See Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1599.

53. See AIHA Auditing Manual, *supra* note 44, at 663.

54. See *id.*

announce in the text of its policy statement that it might compel disclosure of audit information. The key aspect of both agencies' auditing policies follows.

First, as already mentioned, both agencies encourage companies to audit their environmental, safety, and health programs for compliance. The EPA encourages the use of environmental auditing to "help ensure the adequacy of internal systems to achieve, maintain and monitor compliance."<sup>55</sup> OSHA's July 1991 policy letter encouraged auditing "with as much management support, precision, and care as critical financial audits."<sup>56</sup>

Second, "as a matter of policy, [the] EPA [does] *not* routinely request environmental audit reports."<sup>57</sup> Yet, the EPA's authority to obtain audit information depends on a "case-by-case basis where the Agency determines [that the information] is needed to accomplish [its] statutory mission, or where the Government deems [the information] to be material to a criminal investigation."<sup>58</sup> OSHA has not provided a policy statement on this issue but is seeking some form of a compromise.<sup>59</sup> OSHA's *Field Inspection Reference Manual* (the "FIRM"), the manual that provides guidance to OSHA compliance officers that conduct inspections, does not direct the compliance officer to request audit information on a routine basis.<sup>60</sup> However, the FIRM leaves it to the compliance officer's discretion whether to request such information.

The EPA has stated that it would not change its enforcement program in response to the existence of an environmental auditing program at a regulated facility.<sup>61</sup> Specifically, the EPA stated that it would not "promise to forgo inspections, reduce enforcement responses, or offer other such incentives in exchange for implementation of environmental auditing or other sound environmental management practices."<sup>62</sup> There is no indication or report that OSHA has a contrary policy even though no written

55. Environmental Auditing Policy Statement, *supra* note 41, at 25,006.

56. AIHA Auditing Manual, *supra* note 44, at 663.

57. Environmental Auditing Policy Statement, *supra* note 41, at 25,007 (emphasis in original).

58. *Id.*

59. See Cynthia Omberg, *OSHA Seeking Compromise on Employer, Agency Use of Safety Audit Data, Panel Told*, OCCUPATIONAL SAFETY & HEALTH, Aug. 5, 1998, at 263.

60. See *OSHA Field Inspection Reference Manual CPL 2.103* (visited Apr. 8, 1999) <[http://www.osha-slc.gov/Firm\\_osha\\_toc\\_by\\_sect.html](http://www.osha-slc.gov/Firm_osha_toc_by_sect.html)>.

61. See Environmental Auditing Policy Statement, *supra* note 41, at 25,007.

62. *Id.*

document from OSHA addresses this issue. More recently, OSHA has indicated that lower penalties would be considered for an employer that voluntarily conducts an audit and implements a reasonable plan to correct the identified deficiencies.<sup>63</sup>

The EPA did recognize in its written policy the inhibiting effect that not providing protection from enforcement actions was likely to have on companies performing a compliance audit. From a public policy and public health viewpoint, both agencies' decision to use their authority to compel disclosure of audit information is unwise because of the inhibiting effect that such a policy has on voluntary audits. In today's environment of smaller government and shrinking federal budgets, perhaps the only realistic means of meeting the OSH Act's purpose of protecting the nation's workers is to encourage companies to look at and review their workplace. OSHA's policy of not providing protection for voluntary auditing works against OSHA's efforts to prevent injury and disease. For example, some employers likely do not engage in voluntary auditing because of the potential risks of receiving increased penalties after voluntary disclosure. Alternatively, other employers might not document their auditing efforts and thereby reduce the possibility of taking corrective measures. In addition, some employees might not be as forthright during an audit interview knowing that the information they provide could support an OSHA citation against their employer. Finally, the effectiveness of an audit may decrease if an employer carefully words its audits so as to avoid the risks associated with the audit.

The overriding public policy question is whether the risk of not having employers conduct voluntary audits is worth the benefits of gaining access to the information contained in audits. As mentioned earlier, because of OSHA's limited resources, the number of inspections and the likelihood of an employer being inspected is small. As a result, the number of voluntary audits that OSHA will actually obtain is also small. In contrast, there are a large number of employers who are likely to not conduct audits because of the aforementioned risks. This result has a negative impact on the nation's workforce because employers are not assessing their workplaces for occupational health and safety hazards and thereby preventing injury and illness. These arguments strongly suggest that

63. See generally Joseph Dear, *Voluntary Safety and Health Audits under the Occupational Safety and Health Act* (visited Sept. 18, 1998) <[http://www.osha-slc.gov/OshDoc?Interp\\_data/I19960911.html](http://www.osha-slc.gov/OshDoc?Interp_data/I19960911.html)>.

it is doubtful that OSHA or the public will benefit from compelled disclosure of audit information. Rather, there is public harm in the form of injury and illness in those workplaces that OSHA will never inspect and an employer will not audit.

### *C. Proposed OSHA Third Party Audit Program*

The major provisions of the current Senate version of OSHA reform were presented earlier in Part II.A.2 of this article. Critics have raised several arguments against third party audits. These arguments have tended to focus on the federal statutory privilege for third party audits. Critics complain that the audit results would be secret because OSHA could not review them during an inspection. If OSHA were able to review audit results during an inspection, the information could serve as a basis for a more serious citation and higher civil penalty.

Additionally, critics complain that there is no provision that grants workers or unions access to the audits. However, as discussed later, if a union represents employees, employer information about workplace safety and health must be disclosed upon request to the union. This obligation arises in connection with the employer's duty to bargain in good faith about safety and health issues.<sup>64</sup> Moreover, a long-standing tenet of occupational safety and health professionals has been that in order to protect oneself from injury or illness, the individual employee needs information about workplace hazards. Critics would argue that audit results might contain information useful to the employee for preventive purposes. The fallacy of this argument is demonstrated by the fact that employers will not keep relevant audit information from their employees because various OSHA standards require an employer to inform and train workers about workplace hazards.<sup>65</sup>

64. See *NLRB v. American Nat'l Can Co., Foster-Forbes Glass Div.*, 924 F.2d 518, 524 (4th Cir. 1991) (granting union access to heat measurements at company's glass manufacturing plant).

65. See, e.g., OSHA's Hazard Communication Standard, 29 C.F.R. § 1910.1200 (1998).

## D. Issues Related to Third Party Audits

### 1. The Application of Common Law Privileges

#### a. Background

The rules of privilege serve a purpose opposite to the rules controlling discovery. The rules controlling discovery are designed primarily to promote the presentation of objective and reliable evidence at trial.<sup>66</sup> In contrast, the rules of privilege are inhibitive rules. In other words, they are meant to benefit the public good by encouraging the free flow of information within relationships whose utility is dependent upon frank communication.<sup>67</sup> When determining whether communication should be privileged, courts have historically balanced the public's interest in the need for disclosure of the information at trial against the need to keep communications within certain relationships private.<sup>68</sup>

This balancing test is embodied in the Federal Rules of Evidence, the body of rules that federal courts must look to for guidance when developing and applying discovery privileges in civil proceedings.<sup>69</sup> The Federal Rules of Civil Procedure expressly make the Federal Rules of Evidence the appropriate source to find guidance on the application of privileged communications.<sup>70</sup> Federal Rule of Evidence 501 governs the development of privileges in federal courts and empowers the courts to apply the common law with respect to privileges.<sup>71</sup> Because the public's interest is a valid justification for applying a privilege at common law, the public's interest is a relevant factor when determining the applicability and

66. See MCCORMICK ON EVIDENCE § 72, at 268-69 (John W. Strong ed., 4th ed. 1992).

67. See *id.* at 270.

68. See Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1084 (1983).

69. See *id.*

70. See FED. R. EVID. 1101(c) ("The rule with respect to privileges applies at all stages of all actions, cases, and proceedings."); see also Note, *supra* note 68, at 1084.

71. Federal Rule of Evidence 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

scope of privileges.<sup>72</sup> Thus, Rule 501 “embodies a congressional intent that [the] privilege doctrine be fluid rather than static.”<sup>73</sup>

However, courts have been hesitant to create new privileges despite the congressional intent that the privilege doctrine be fluid rather than static.<sup>74</sup> Courts may be hesitant to create new privileges because of the Federal Rules of Civil Procedure bias in favor of discovery. Federal Rule of Civil Procedure 26(b)(1) allows discovery of all unprivileged information relevant to the subject matter involved in the pending action.<sup>75</sup> Additionally, the information sought need not be admissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.<sup>76</sup> The burden imposed by the “reasonably calculated” standard in Rule 26(b)(1) is so low that some have argued there is no limit on discovery.<sup>77</sup> In *Upjohn Co. v. United States*, the Supreme Court did not follow the bias in favor of discovery and expanded the scope of the attorney-client privilege to include not only corporate officers, but also to include employees.<sup>78</sup> In *Upjohn*, the Supreme Court held that certain communications between Upjohn employees and Upjohn’s counsel was privileged.<sup>79</sup> That communication comprised of information relating to Upjohn’s internal investigation of suspected illegal payments to foreign government officials.<sup>80</sup> The Court reasoned that the communications were consistent with the public policy underlying the attorney-client privilege, namely to encourage open and frank communication between attorneys and their clients.

One of the primary purposes of the OSH Act is to reduce occupational injury and illness.<sup>81</sup> If third party auditing will

72. See Note, *supra* note 68, at 1084-85 & n.9.

73. *Id.* at 1084.

74. See *United States v. Arthur Young & Co.*, 465 U.S. 805, 806 (1984) (refusing to create a new common law accountant-client privilege).

75. See FED. R. CIV. P. 26(a)(1)(B) (requiring parties to provide copies or descriptions of the type and location of all information, documents, data or tangible things in control of the party that are relevant to the disputed facts alleged without waiting for a discovery request).

76. See *id.* 26(b)(1).

77. See generally David R. DeMuro, *Colorado’s Approach To Discovery and Pretrial Reform in Civil Cases*, 16 REV. LITIG. 271 (1997); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1997)

78. 449 U.S. 383, 396 (1981) (application of privilege is on a case-by-case basis and should not be so narrow as to frustrate the very purpose of the privilege by discouraging the communication of relevant information).

79. *Id.*

80. See *id.* at 395.

81. See 29 U.S.C. § 651(b)(1) (1984).

encourage compliance with OSHA's standards and further assist in the identification of occupational hazards, then the third party audit advances a compelling public interest. The countervailing interest in the disclosure of facts at trial is not as weighty because information contained in an audit could be obtained through other means. Congress should, therefore, encourage auditing by removing the possible liability that is associated with discovery and providing for a federal statutory privilege to audit information.

The remainder of this section will deal with the attorney-client privilege, the work product doctrine, and the self-evaluative privilege. In addition, this section will also examine the various issues that may arise when a company asserts one of the above privileges. Absent a federal statutory privilege for audit information (such as the one found in the current Senate amendment to the OSH Act), these are the privileges that a company would have to rely on in order to protect voluntary audit information from disclosure.

#### b. Attorney-Client Privilege for Third Party Audits

The attorney-client privilege is designed to protect communications between a lawyer and his or her client from disclosure under certain circumstances. The purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."<sup>82</sup> The attorney-client privilege "rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation [if the] professional mission [is to be] carried out."<sup>83</sup> In addition to the Supreme Court, the legal profession has also recognized how essential the attorney-client privilege is to our legal system.<sup>84</sup>

The attorney-client privilege only applies if: (1) the person

82. *Upjohn Co.*, 449 U.S. at 389.

83. *Trammel v. United States*, 445 U.S. 40, 51 (1980) (apart from confidential communications, a witness spouse alone has the privilege to refuse to testify adversely and may be neither compelled to testify nor foreclosed from testifying).

84. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 reads in part: A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. . . . [To] hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1995).



claiming the privilege is, or sought to become, a client; (2) the person receiving the communication is (a) a member of the bar, or his subordinate, and (b) acting as an attorney in connection with the communication; (3) the communication is related to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the primary purpose of securing either (i) legal advice, (ii) legal services or (iii) assistance in some legal proceeding; (4) the communication is not made for the purpose of committing a crime or tort; and (5) the privilege is (a) claimed and (b) not waived by the client.<sup>85</sup> Because no showing of need can compel discovery, the attorney-client privilege is considered absolute once the person asserting the privilege satisfies the above five elements.<sup>86</sup>

Four issues may arise when a company attempts to assert the attorney-client privilege in order to protect third party audit information. As noted, the company must establish that there was an attorney-client relationship. In a company setting, the first issue will likely be whether low level management employees or non-management employees are considered the attorney's clients.

In *Upjohn Co.*, the Supreme Court unanimously ruled that limiting the attorney-client privilege to those who control or take a substantial part in corporate decisions restricted the privilege too severely.<sup>87</sup> In 1976, auditors alerted Upjohn to the possibility that certain of its subsidiaries were making improper payments to foreign government officials. Based on this information, Upjohn's general counsel launched an internal investigation.<sup>88</sup> Corporate counsel sent out confidential questionnaires and conducted interviews with mid-level managers.<sup>89</sup> When the company voluntarily disclosed certain questionable payments to the SEC, the Internal Revenue Service issued a summons for the production of all documents gathered during Upjohn's internal investigation.<sup>90</sup>

In holding that the questionnaires were privileged material, the Court reasoned that "middle-level—and indeed lower level—employees can . . . have the relevant information needed by corporate

85. See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 601-02 (8th Cir. 1977) (holding that interviews of corporate employers by a law firm, retained by the corporation to investigate and report on charges of corporate wrongdoing, were confidential communications of the corporate client and entitled to the attorney-client privilege).

86. See *id.*

87. 449 U.S. at 392-93.

88. See *id.* at 386.

89. See *id.* at 387.

90. See *id.*

counsel if he is adequately to advise the client with respect to such actual or potential [legal] difficulties.”<sup>91</sup> Without the vital facts possessed by middle-level and lower level employees, the corporation would be deprived of effective legal advice concerning “the vast and complicated array of regulatory legislation confronting [it].”<sup>92</sup> Without the protection of the attorney-client privilege, corporate counsel would be faced with the choice of either interviewing middle-level and lower level employees without the protection of the attorney-client privilege or not interviewing such employees and thereby giving advice with only a partial understanding of the facts.<sup>93</sup>

There is no material difference between the type of internal investigation conducted in *Upjohn* and a third party audit. An occupational safety and health audit may involve questionnaires or interviews with middle-level and lower level employees.<sup>94</sup> For example, in order to assess a plant’s compliance with OSHA’s Hazard Communication Standard, assembly line workers who handle hazardous materials may be interviewed to ascertain whether they are aware of the risks involved with handling the particular hazardous material.<sup>95</sup> Legal counsel cannot effectively counsel a corporation without the ability to make an accurate compliance assessment of a regulated plant. Accordingly, information obtained during a third party audit from employees should fall within the attorney-client privilege.<sup>96</sup>

A second issue that arises when a company attempts to assert the attorney-client privilege is whether the recipient of the information is an attorney. This issue arises because the information collected during a third party audit may be technical and will likely require an occupational health and safety professional to act as an interpreter of the information for the legal counsel. Some courts have found the attorney-client privilege to exist in such circumstances if the non-attorney is not conducting an independent investigation.<sup>97</sup>

Courts should construe the attorney-client privilege to include

91. *Id.* at 391.

92. *Id.* at 392.

93. *See id.* at 391-92.

94. *See generally* AIHA Auditing Manual, *supra* note 44.

95. *See* OSHA’s Hazard Communication Standard, 29 C.F.R. § 1910.1200(a)(1) (1998).

96. Many of these issues are similar in an environmental auditing context. For a thorough discussion of audits in that context, see Heather L. Cook & Robert R. Hearn, *Putting Together the Pieces: A Comprehensive Examination of the Legal and Policy Issues of Environmental Auditing*, 7 TUL. ENVTL. L.J. 545, 566-73 (1994).

97. *See id.* at 569.

third party audits completed with the assistance of non-attorneys. Doing otherwise may result in an attorney acting on technically incorrect information in order to maintain confidentiality. Such a situation could potentially result in incorrect findings and conclusions, thereby defeating the purpose of the audit.

The third issue involves whether the company was actually seeking legal advice. Some courts have held that the involvement of an attorney in an audit does not indicate that the company was seeking legal advice by performing the audit.<sup>98</sup> Other courts have presumed that any attorney-client communication is evidence that legal counsel is sought and therefore is protected by the attorney-client privilege.<sup>99</sup>

Courts should presume that third party audits are performed for the purpose of obtaining legal counsel for several reasons. First, this presumption is warranted because an audit is generally performed to determine whether a company is meeting its legal duties under the OSH Act. Second, compliance with the numerous and complex OSHA standards and the OSH Act's general duty clause does not result from the application of common sense. For example, some hazardous material regulated by OSHA standards have very complex and proscriptive standards. Alternatively, a large majority of the hazardous material regulated by OSHA standards only has limits that address the maximum amount of the material that can be airborne.<sup>100</sup> Arguably, a company could use common sense to comply with one of OSHA's proscriptive standards. However, a company may find it difficult to comply with standards that are not proscriptive or with OSHA's general duty clause. Compliance with non-proscriptive OSHA standards or with OSHA's general duty clause would likely involve the application of technical knowledge and knowledge of other OSHA standards such as the OSHA standard for respiratory protection. Finally, assuming that the attorney-client privilege protects third party audit information, the privilege promotes the purpose of the attorney-client privilege, that is the free flow of information between an attorney and her corporate client.

When a company attempts to assert the attorney-client privilege in order to protect third party audit information, a fourth issue

98. *See id.*

99. *See id.*

100. *See* C.F.R. §§ 1910.1000 to .1025 (1998) (OSHA Z table standards to the OSHA standard for lead or asbestos).

involving confidentiality of the communication is implicated. There are various ways to waive an attorney-client privilege. For instance, if either the attorney or the company conveys the substance of the confidential information to a non-privileged third party, the confidential status of the communication may be lost.<sup>101</sup> Additionally, voluntary disclosure of material containing confidential information to a third party waives the attorney-client privilege.<sup>102</sup> The attorney-client privilege is also waived for the entire communication once any part of the privileged communication is disclosed to a third party.<sup>103</sup> Also, a company may implicitly waive the attorney-client privilege if it discloses information to the government during an investigation or enforcement action.<sup>104</sup> However, some courts have held that the disclosure of internal reports to a regulatory agency does not amount to a waiver of the attorney-client privilege.<sup>105</sup>

Courts should not allow the disclosure of third party audits to a regulatory agency to waive the attorney-client privilege. A finding of no privilege in such instances would have a chilling effect on OSHA's relationship with companies, a relationship that is already viewed by most companies as adversarial. However, other parties could likely obtain the same information from non-privileged sources. A finding of privilege in such instances would prevent the company's efforts from being used freely by its adversaries. For example, a finding of no privilege might allow a company's adversary to obtain information about its noncompliance through a Freedom of Information Act request and use that information to put the company in a bad public light.<sup>106</sup>

### c. The Work Product Doctrine Applied to Third Party Audits

The work product doctrine embodied in the Federal Rules of Civil Procedure prevents material prepared in anticipation of litigation from being discovered.<sup>107</sup> Under the work product doctrine,

101. See Cook & Hearn, *supra* note 96, at 571.

102. See *id.* at 572

103. See *id.*

104. See *id.*

105. See *id.*

106. See *Chrysler v. Brown*, 441 U.S. 281, 282 (1979) (striking down reverse Freedom of Information Act suits).

107. FED. R. CIV. P. 26(b)(3) reads in part:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's

information prepared in anticipation of litigation may be confidential even for information requested by unions.<sup>108</sup> There are four different types of work product and each has a different degree of protection from discovery.<sup>109</sup> The four types of work product are: facts, ordinary work product, opinion work product, and legal theories. Facts contained within a document classified as work product are not protected by Federal Rule of Civil Procedure 26(b)(3) and therefore may be discovered by deposition or interrogatory.<sup>110</sup> Legal theories found within work product may also be discoverable through interrogatories or requests for admissions.<sup>111</sup>

Federal Rule of Civil Procedure 26(b)(3) implicitly distinguishes between ordinary and opinion work product. Ordinary work product is considered material that does not contain the mental impressions of the attorney.<sup>112</sup> Conversely, opinion work product is material that contains the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."<sup>113</sup> Opinion work product receives a higher degree of protection compared to ordinary work product.<sup>114</sup>

A company must meet the following three elements in order for third party audit material to receive protection from discovery under the work product doctrine: (1) the material must consist of documents or tangible things; (2) the material must be prepared in anticipation of litigation or for trial; and (3) the material must be prepared by or for another party.<sup>115</sup> To determine whether the work product doctrine is applicable, a court must first decide what category of work product applies to the audit information. Categorizing the third party audit information as opinion work product would be advantageous because that category receives the highest degree of protection from

representative only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

FED. R. CIV. P. 26(b)(3).

108. See *General Dynamics Corp., Quincy Shipbuilding Div.*, 28 NLRB 1432, 1433 (1984) (study bearing on union's subcontracting grievances and pending litigation).

109. See Jeff A. Anderson et al., *Special Project: The Work Product Doctrine*, 68 CORNELL L. REV. 760, 788 (1983).

110. See FED. R. CIV. P. 26(b)(3).

111. See FED. R. CIV. P. 33(b), 36(a).

112. See Anderson et al., *supra* note 109, at 793.

113. FED. R. CIV. P. 26(b)(3).

114. See Anderson et al., *supra* note 109, at 789; see also FED. R. CIV. P. 26(b)(3); Cook & Hearn, *supra* note 96, at 574.

115. See Anderson et al., *supra* note 109, at 792.

discovery.

The provision in Rule 26(b)(3) of the Federal Rules of Civil Procedure strongly suggests that a court will likely categorize third party audit information as opinion work product. This is because determination of whether a company has violated a legal duty under the OSH Act requires an attorney to state a legal opinion or come to a conclusion based on applying the OSH Act or an OSHA standard to the facts contained in the third party audit. For example, if an attorney receives factual information during a third party audit concerning a potential violation of the OSH Act or an OSHA standard, the attorney will likely determine whether there is an affirmative defense available. This analysis requires the attorney to apply complex law to the facts and reach a conclusion.<sup>116</sup> Accordingly, such reports should be classified as opinion work product.

A second work product issue involves whether the work product doctrine is applicable when the third party audit material was prepared in anticipation of litigation. Most courts employ a fact-specific inquiry to determine whether documents were prepared in anticipation of litigation.<sup>117</sup> A company asserting work product immunity for third party audit information has the burden of showing that the document was prepared in anticipation of litigation. Some courts have protected environmental auditing material from discovery under the work product doctrine when the material was prepared prior to the inception of litigation.<sup>118</sup> However, other courts have not protected environmental auditing material from discovery under the work product doctrine when the material was prepared following an official warning of violation issued by a government inspector.<sup>119</sup> Additionally, courts apply the "in anticipation of litigation" standard differently.<sup>120</sup>

Application of the work product doctrine to third party auditing material is likely limited by the requirement that the material be prepared in anticipation of litigation for several reasons. Many would argue that a company conducting a third party audit is exercising a form of management. Additionally, the facts contained in a third party audit would be discoverable, as discussed above, and OSHA

116. See generally MARK A ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW (West's Handbook Series, 3rd ed. 1990).

117. See Cook & Hearn, *supra* note 96, at 576 & n.197.

118. See *id.* at 577 & n.200.

119. See *id.* at 578 & n.205.

120. See *id.* at 577 & n.198.

would most likely be interested in the facts contained in a third party audit because of the implications for finding a more serious violation.

Despite the limitation imposed by the “in anticipation of litigation” requirement, courts should extend immunity from discovery to final reports prepared following a third party audit. The underlying facts of a third party audit would remain available through discovery. The goal of the third party audit is that a company with no previous compliance assessment should obtain such an assessment from a qualified professional. A company in such a position could plausibly argue that the third party audit is likely to uncover violations and therefore the third party audit is also performed in anticipation of regulatory action.

#### d. The Self-Evaluation Privilege Applied to Third Party Audits

A privilege of self-critical analysis has developed in several contexts to shield self-evaluations from discovery.<sup>121</sup> Several aspects of the privilege are worth noting before discussing the elements of the privilege and its application to third party audits. Unlike the privileges discussed above, the privilege of self-critical analysis has been the subject of state legislation.<sup>122</sup> Also, the common law governing the privilege of self-critical analysis varies among the states.<sup>123</sup> Finally, the privilege is likely to be applied inconsistently because it has been formulated almost exclusively at the trial court level.<sup>124</sup> Trial court decisions are not reported and therefore there is no opportunity to understand how a trial court judge applies the privilege. Thus, different trial judges will likely apply the privilege differently.

There are three types of documents to which the privilege of self-critical analysis has been applied: minutes of hospital committee meetings, reports of internal disciplinary investigations, and Title VII compliance documents.<sup>125</sup> However, the privilege should be applicable to any document that meets the elements discussed below.

There are three elements that must be met in order to have a self-critical analysis shielded from discovery.<sup>126</sup> First, the information

121. See Note, *supra* note 68 for an in-depth review of the privilege of self-critical analysis.

122. See *id.* at 1084 & n.11.

123. See *id.* at 1085-86 & n.13.

124. See *id.* at 1085 & n.12.

125. See *id.* at 1083.

126. See *id.* at 1086.

must result from a critical self-analysis undertaken by the party seeking protection. Second, the public must have a strong interest in preserving the free flow of the information that is sought in discovery. Finally, the information must be of such a nature that its development would be limited or stopped if discovery of the information were allowed. However, some courts have not recognized the privilege when the government has sought discovery.<sup>127</sup> This limitation has particular relevance to third party audit information should OSHA request discovery of the information during a subsequent investigation. This limitation defeated the privilege in the only environmental auditing case to date.<sup>128</sup> However, not applying the self-evaluation privilege to third party audits would defeat the self-policing purpose of a third party audit. “[T]he question is not whether the self-evaluative privilege impedes the government’s enforcement ability; it is whether an overriding public interest in keeping certain information confidential justifies that imposition.”<sup>129</sup>

The statement of the self-critical analysis privilege was put forth in *Bredice v. Doctors Hospital, Inc.*<sup>130</sup> The *Bredice* court acknowledged the self-defeating nature of allowing discovery of audit information. Many courts have approved the *Bredice* court’s rationale.<sup>131</sup> Courts should apply the principles articulated in *Bredice* to third party audits. Companies who undertake audits are using a critical self-analysis process and are seeking to improve the safety and health of their workplace. There is a strong public interest in preserving the free flow of information during an audit, namely preventing injury and illness. As discussed earlier, some employers may stop performing audits because of the risks involved when discovery of the information is allowed.

The extent of the public interest in self-critical analyses and the type of information the privilege protects has not been fully delineated because the privilege is at an early stage of development.<sup>132</sup> Despite the uncertainty these factors provide in the application of the

127. See Cook & Hearn, *supra* note 96, at 579 & n.217 (citing Federal Trade Comm’n v. TRW, Inc., 479 F. Supp. 160, 162-63 (D. D.C. 1979) (holding with no explanation that the privilege is not enforceable against the government)).

128. See Cook & Hearn, *supra* note 96, at 580 (citing United States v. Dexter, 132 F.R.D. 8 (D. Conn. 1990) (discovery of environmental auditing materials in a Clean Water Act civil enforcement action upheld pursuant to the Federal Rules of Civil Procedure)).

129. Cook & Hearn, *supra* note 96, at 581.

130. 50 F.R.D. 249 (D.D.C. 1970).

131. See Note, *supra* note 68, at 1087 & n.18.

132. See *id.*



self-evaluation privilege, the privilege has applicability to third party audits because third party audits are performed for self-evaluation purposes and the OSH Act is couched in terms of a public health benefit.

One of the principles articulated by courts as a rationale for the privilege is the chilling effect of disclosure on self-critical analyses.<sup>133</sup> This effect operates to discourage a company from conducting a third party audit at all, or from conducting a thorough audit. Fear of lawsuits or regulatory action is a primary cause for a company to hesitate or refrain from conducting an audit. Additionally, there are disincentives for an employee to be frank with information that may be disclosed. Coming forward with information may subject the employee to disciplinary action, the wrath of co-workers, and may concern the employee that she is exposing her employer to liability.

A second principle that should be considered by courts as a rationale for the privilege is the effect of verifiability and replicability on a company's decision to perform a third party audit. "An unreplicable damning report that is verifiable is not likely to be produced if it can be discovered, because production will provide the only means possible for [others] to obtain and analyze the information that would go into such a report."<sup>134</sup> Similarly, a company is not likely to conduct a third party audit if OSHA is able to discover such information and OSHA is not able to obtain the information otherwise.

Courts should not hesitate to apply the self-evaluation privilege to third party audits when the three criteria discussed above are met. Only through such a development will the goals of a third party audit, improved safety and health in our nation's workplaces, be met and the purpose of the privilege be achieved.

## 2. The Unionized Workplace and the Right to Audit Information

When a union represents employees, employer information about workplace safety and health must be disclosed upon request to the union.<sup>135</sup> Without this requirement the union would be unable to perform its statutory duties as bargaining agent for the employees—

133. *See id.* at 1091.

134. *See id.* at 1095.

135. *See* NLRB v. American Nat'l Can Co., Foster-Forbes Glass Div., 924 F.2d 518, 524 (4th Cir. 1991).

these duties include securing a safe and healthy workplace.<sup>136</sup> The National Labor Relations Board (the “NLRB”) and courts have adopted a liberal discovery-type standard, which requires that the information be directly related to the union’s function as bargaining representative, and that it appears reasonably necessary for the performance of that function.<sup>137</sup>

One consideration in determining relevancy and necessity is the union’s need for the information.<sup>138</sup> When a request has become moot because of subsequent events, the employer does not have a statutory obligation to furnish the requested information because the request does not have relevancy.<sup>139</sup> Thus, employers who promptly correct deficiencies identified by an audit may not have a duty to disclose the audit information. In addition, an employer can attach conditions to providing third party audit information, provided that the conditions are reasonably related to the employer’s interest in preventing disclosure to others.<sup>140</sup> Moreover, the NLRB has taken the position that an employer is entitled to bargain with a union to resolve confidentiality concerns. An employer is “entitled to discuss confidentiality concerns regarding the information request with the [u]nion so as to try to develop mutually agreeable protective conditions for its disclosure to the [u]nion” when the employer has legitimate concerns regarding the confidentiality of the information sought by the union.<sup>141</sup>

The parties must bargain in good faith to reach an accommodation of interests. If the parties cannot resolve the matter through bargaining, the NLRB will balance the parties’ competing interests.<sup>142</sup> The employer who asserts confidentiality has the burden

136. See generally *Minnesota Mining and Mfg. Co.*, 261 NLRB 27 (1982), *enforced sub nom. Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983).

137. See generally *J.I. Case Co. v. NLRB*, 253 F.2d 149 (7th Cir. 1958); *NLRB v. Item Co.*, 220 F.2d 956 (5th Cir. 1955).

138. See generally *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956) (holding that when both the union and the company treat a claim by either party as highly relevant to reaching an agreement, the claim must be substantiated to support a finding of bargaining in good faith).

139. See generally *Glazers Wholesale Drug Co.*, 211 NLRB 1063 (1974) (company’s refusal to supply union with names of replacement workers became moot when strikers returned to work).

140. See generally *Fruit & Vegetable Packers and Warehousemen Local 760 v. NLRB (Yakima Frozen Foods)*, 316 F.2d 389 (D.C. Cir. 1963) (an employer may attach conditions to the furnishing of financial information that are reasonably related to its own business interest); *United Paperworkers Int’l Union v. NLRB*, 981 F.2d 861 (6th Cir. 1992) (an employer may condition disclosure of financial data on the union’s willingness to keep the data confidential).

141. *Silver Brothers Co. Inc.*, 312 NLRB 1060, 1062 (1993).

142. See *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 309-11 (1979).

of proof<sup>143</sup> and “has a duty to seek an accommodation.”<sup>144</sup> “[T]he employer must bargain toward an accommodation between the union’s information needs and the employer’s justified interests.”<sup>145</sup>

Recently, the NLRB required an employer to provide a complete copy of the environmental audit of its facilities.<sup>146</sup> The NLRB rejected the employer’s confidentiality claim because the employer had failed to timely raise the issue, the audit was not prepared in anticipation of litigation, and the audit was not an internal, self-critical report.<sup>147</sup> The NLRB found the audit was not confidential because it did not contain speculative material or criticisms of persons or events.<sup>148</sup> This decision demonstrates that the NLRB did not balance the union’s need for the information against any legitimate and substantial confidentiality interests of the employer. Instead, the NLRB contrasted the facts of the case—a routine, annual audit made without union participation—with a previous case where an investigation was conducted with union participation following a serious accident.<sup>149</sup> In distinguishing the two cases, the NLRB gave importance to two criteria: (1) whether the union participated in the audit or investigation and (2) whether the audit was prepared following a serious accident and in anticipation of litigation.

The dissent in *Detroit Newspaper Agency* had a more rationale approach. Specifically, the dissent would have required the employer to (1) turn over to the union portions of the audit relating to workplace conditions, except for judgments of management’s performance and other similar statements and (2) bargain with the union over a procedure for protecting the confidentiality of judgment statements and recommendations in an audit.<sup>150</sup>

Accordingly, an employer whose employees are represented by a union could take advantage of a federal statutory privilege for a third party audits and not run afoul of its duties under the National Labor Relations Act (the “NLRA”) if certain steps are taken. Specifically, the employer should bargain with the union and agree to a procedure concerning obtaining the audit. In addition, the employer and the

143. See generally *United States Postal Service (Main Post Office)*, 289 NLRB 942 (1988).

144. *Pennsylvania Power and Light Co.*, 301 NLRB 1104, 1105 (1991).

145. *Id.* at 1106.

146. See generally *Detroit Newspaper Agency*, 317 NLRB 1071 (1995).

147. See *id.* at 1073.

148. See *id.* at 1074.

149. See *id.*

150. See *id.* at 1074-75.

union should agree to provisions for confidentiality of the employer's judgments, statements, and recommendations. An employer should not only invite the union to participate in an audit, but also make the records reviewed for the audit available to the union. When actually drafting the audit report, the employer must ensure that it has control over the tone and substance of the document. Finally, whether the audit was routine or prepared following an accident should be a moot point with respect to liability under the NLRA if the union and employer have agreed beforehand about the procedures for an audit.

### III. THE CREATION OF A FEDERAL STATUTORY PRIVILEGE FOR THIRD PARTY AUDITS

The current Senate version of the OSH Act provides a federal statutory privilege for third party audits.<sup>151</sup> Any records relating to a third party audit would not be admissible in a court of law or administrative proceeding, except to show fraud or malfeasance of a certified auditor.<sup>152</sup> Several aspects of the proposed federal statutory privilege are worth noting. First, the proposed federal statutory privilege would not require the involvement of an attorney to provide the protection of the privilege. Second, the privilege would not protect records required to be collected under the OSH Act. Third, the privilege is worded so as to provide protection for third party audits or "records, reports, or other information prepared in connection with safety and health inspections, audits, or reviews conducted by . . . an employer."<sup>153</sup> This language appears to broaden the protection of the privilege to include not only third party audits, but also audits conducted by the employer. This aspect of the current Senate version has not been the subject of discussion in the occupational safety and health press and professional circles but will likely be discussed during congressional floor debate. Finally, the privilege would not protect material collected for fraudulent purposes or in instances of auditor malfeasance. Some states have passed a statutory privilege for environmental auditing material similar to the

151. See S. 1237 § 5(e).

152. See *id.* The provision reads:

Any records relating to [a third party audit] provided by an individual qualified under the program, or records, reports, or other information prepared in connection with safety and health inspections, audits, or reviews conducted by or for an employer and not required under this Act, shall not be admissible in a court of law or administrative proceeding against the employer except that such records may be used as evidence for purposes of a disciplinary action [against a certified auditor].

153. *Id.*

one proposed for OSHA reform.<sup>154</sup>

The proposed federal statutory privilege would have several positive effects. First, and most importantly, it would eliminate the uncertainty associated with the common law privilege. As a result, companies would be encouraged to perform audits because of a greater sense of predictability concerning the discoverability of audit information. Second, it would further OSHA's position of encouraging voluntary safety and health audits.<sup>155</sup> Third, conducting an audit to ascertain compliance with the OSH Act would be more economically attractive to employers because the legal services and resulting attorney's fees would not be required.

Despite the perceived advantages of a federal statutory privilege for occupational safety and health audits, several questions arise. What would be the procedural requirements for either asserting or contesting the privilege? Who would have the burden of proving that the audit was prepared for fraudulent purposes, as this information will likely reside with the employer? What must the federal government show when it is seeking to obtain audit information, probable cause or a lesser standard? In light of the large amount of debate surrounding the OSH Act, it is interesting to note that the above questions have not been raised or discussed.

In addition to these procedural questions, other questions arise concerning the standardization of auditing requirements and procedures. As mentioned previously, the current Senate version of the OSH Act provides that an independent, nonpartisan advisory committee would be charged with making recommendations to the Secretary of Labor with respect to the third party auditors and evaluations.<sup>156</sup> Although several groups have established guidelines for occupational safety and health audits, there is not a national consensus standard that addresses occupational safety and health audits.<sup>157</sup> The lack of a national consensus standard may make the task of setting a standard for third party audits difficult. For example, what elements will be necessary for the audit? Will a set of systematic plans that provide guidance in the preparation, fieldwork, and

154. See Cook & Hearn, *supra* note 96, at 582.

155. See Yohay, *supra* note 38, at 663.

156. See S. 1237 § 4.

157. See, e.g., AIHA Auditing Manual, *supra* note 44; ARTHUR D. LITTLE, ENVIRONMENTAL, HEALTH, AND SAFETY AUDITOR'S FIELD GUIDE: KEY TECHNIQUES FOR CONDUCTING AUDITS, (3rd ed. 1991); ENVIRONMENTAL AUDITING ROUNDTABLE, STANDARDS FOR PERFORMANCE OF ENVIRONMENTAL, HEALTH, AND SAFETY AUDITS (1993).

reporting be required? What, if any, quality checks will be required in order to assure accurate results? What documentation will be required? Similar to the questions concerning procedural matters, there has not been discussion about the need for standardization of audits or the means to assure standardization if standardization is required.

The suggestions that follow are an attempt to stimulate dialogue and debate on these questions. Occupational health and safety professionals must begin to anticipate and evaluate different suggestions to these questions because of the potential impact on their professions and the impact any change will have on occupational health and safety programs.

#### A. *Procedural Requirements for Asserting or Contesting the Privilege*

Under the current Senate version of OSHA reform, a third party audit would be privileged in civil, criminal, and administrative proceedings. Discovering parties could overcome the privilege only upon a showing that (1) the privilege is asserted for a fraudulent purpose; (2) the audit contains evidence relevant to show the malfeasance or gross negligence of a certified auditor; or (3) the audit contains evidence relevant to show the third party auditor does not meet the requirements of the program.<sup>158</sup> However, the current Senate version of OSHA reform does not provide language that details the procedural requirements for asserting or contesting the privilege. Because there are no guidelines and the bill has not been debated, the procedural requirements are left to presumption. The following discussion provides a suggestion for what the procedural requirements should be for a privilege for third party audits.

The procedural requirements for asserting or contesting the privilege would necessarily be somewhat complex. First, a party seeking disclosure of the audit should have the burden of proving that the audit was prepared for fraudulent purposes. In other words, the audit would be presumed to be non-fraudulent unless the party seeking disclosure could point to indicia of fraud. This presumption is consistent with the current Senate version of OSHA reform.<sup>159</sup> Additionally, absent this presumption, companies would be in the

158. See S. 1237 § 5.

159. See *id.* (stating that any records relating to a third party audit would not be admissible in a court of law or administrative proceeding except to show fraud or malfeasance of a certified auditor.)

same position they are in today without the privilege, (i.e., using complicated legal maneuvering to protect audit information from discovery). However, once the presumption is rebutted, the burden would fall on a company to show that the audit was conducted to assess its compliance under the OSH Act. Without a presumption that could be rebutted, a company could use the privilege for purposes other than assessing its compliance with the OSH Act. Also, the burden should be on the company because information showing that the audit was conducted to assess its compliance with the OSH Act is most likely to be in the company's possession.

If the audit is sought in a criminal proceeding, the government should be able to obtain the information under a criminal search warrant, by subpoena, or through regular discovery channels upon a showing of probable cause. Upon attaining the audit, the government should be required to place it under seal without review or disclosure of the contents. The employer responsible for the audit would be able to assert the privilege—within a limited time frame of the government obtaining the audit—by petitioning the court for an *in camera* hearing to determine the applicability of the statute.

This approach would increase efficiency in two distinct ways. First, instead of arguing whether an audit should be privileged, legal arguments would focus on whether the audit was fraudulent or performed to assist a company to assess its compliance with the OSH Act. Second, pretrial motion hearings would be replaced with a simple *in camera* review.

### B. *Standardization of Auditing Requirements and Procedures*

The current trend in auditing is assessing program effectiveness, not compliance auditing. Recently, there has been increased attention to the development of management systems for occupational health and safety programs.<sup>160</sup> Numerous governmental and non-governmental bodies throughout the world are either in the process of developing occupational health and safety management systems ("OHSMS") or are considering such development.<sup>161</sup> OSHA

160. See generally NEW FRONTIERS IN OCCUPATIONAL HEALTH AND SAFETY: A MANAGEMENT SYSTEM APPROACH AND THE ISO MODEL (Charles F. Redinger & Steven P. Levine eds., 1996).

161. See generally Charles F. Redinger & Steven P. Levine, *Development and Evaluation of the Michigan Occupational Health and Safety Management System Assessment Instrument: A Universal OHSMS Performance Measurement Tool*, AM. IND. HYGIENE ASSOC. J., Aug. 1998, at 573.

has initiated rulemaking for a comprehensive occupational health and safety program standard.<sup>162</sup> In addition, OSHA is field testing a Program Evaluation Profile (“PEP”) that analyzes employer programs based on fifteen factors.<sup>163</sup> Some of the fifteen factors include: comprehensive work-site survey and hazard analysis, regular site inspections, employee hazard reporting system and response, accident and “near-miss” investigations, and injury and illness data analysis. Other assessment instruments have proposed different measurement criteria.<sup>164</sup> Because of the trend towards development of OHSMS and the tools to assess them, it is more likely that an instrument such as the PEP would be developed for use by third party auditors.

As third party audits will apply to large or small workplaces and high-risk or low-risk workplaces, it will be imperative that the instrument developed be flexible. Also of paramount importance will be the need for the instrument to have a high degree of validity and reliability and a means of incorporating subjective differences between individual third party auditors. A valid and reliable instrument that measured program effectiveness would negate the criticism that a third party audit should not replace an OSHA inspection. The activities underway and described above will provide valuable empirical information for policy discussions by OSHA and its advisory committee should OSHA reform become a reality in the future.

### C. Auditor Qualifications

Finally, questions also arise concerning the qualifications and qualities of an auditor. As discussed previously, the current Senate version of OSHA reform spells out the minimum qualifications for a third party auditor.<sup>165</sup> These qualifications are based primarily on whether the individual has an appropriate professional background and is either licensed by a state or certified through a nationally

162. See generally Memorandum from the Deputy Assistant Secretary of Labor Occupational Safety and Health Administration to its Stakeholders (Nov. 15, 1996) (on file with author).

163. See generally Joseph Dear, *Voluntary Safety and Health Audits under the Occupational Safety and Health Act* (visited Sept. 18, 1998) <[http://www.osha-slc.gov/OshDoc?Interp\\_data/I19960911.html](http://www.osha-slc.gov/OshDoc?Interp_data/I19960911.html)>.

164. See, e.g., AIHA Auditing Manual, *supra* note 44.

165. See S. 1237 § 5.



recognized private accreditation organization.<sup>166</sup> However, state licensing and certification in an occupational safety or health field does not necessarily demonstrate proficiency for conducting audits. Critics may argue that the professional associations representing these professionals are lobbying for third party audits as a means of securing employment for their members and therefore additional regulation is required.<sup>167</sup> Others would counter that having the requisite professional background and the threat of liability for injuries resulting from negligent audits are sufficient means for maintaining auditing proficiency.<sup>168</sup> Additionally, any enhanced employment opportunities for selected professionals should not be a reason to defeat a program that could provide a public benefit in the form of increased awareness within companies of their occupational safety and health problems.

### CONCLUSION

In sum, a federal statutory privilege for occupational safety and health audits would have several advantages compared to common law privileges, primarily by providing more consistency than is provided through the common law. Moreover, such a privilege would also promote public health by encouraging companies to conduct audits. In so doing, businesses would become increasingly aware of the occupational safety and health problems in their workplaces. The current Senate version of OSHA reform raises several procedural questions about such a privilege in addition to questions concerning standardization of audits and auditor qualifications. These issues can be overcome by the suggestions made in this article. First, the audit should be presumed to be non-fraudulent unless the party seeking disclosure can point to some indication of fraud. The burden would then shift and fall on the employer to show the audit was conducted to assess its compliance with the OSH Act. Second, in a criminal proceeding the government should be able to obtain the audit information upon a showing of probable cause. However, the employer should be able to assert the privilege by petitioning the

166. *See id.*

167. *See, e.g.*, Letter from the American Association of Occupational Health Nurses, American College of Occupation and Environmental Medicine, American Industrial Hygiene Association, American Society of Safety Engineers, and the National Society of Professional Engineers to the Members of Congress (Feb. 23, 1996) (on file with author).

168. *See, e.g.*, MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 508 (3rd ed. 1990).

court for an *in camera* hearing to determine the applicability of the statute. Questions concerning standardization of audits will likely be answered by activities currently underway to develop valid and reliable audit instruments. Finally, concerns about auditors' qualifications are addressed by the requirement that auditors have certain professional qualifications and the ability to bring tort actions for a negligently conducted audit. Both of these factors assist securing third party audits that are conducted in a competent manner.



# STUDENT NOTES AND COMMENTS

