

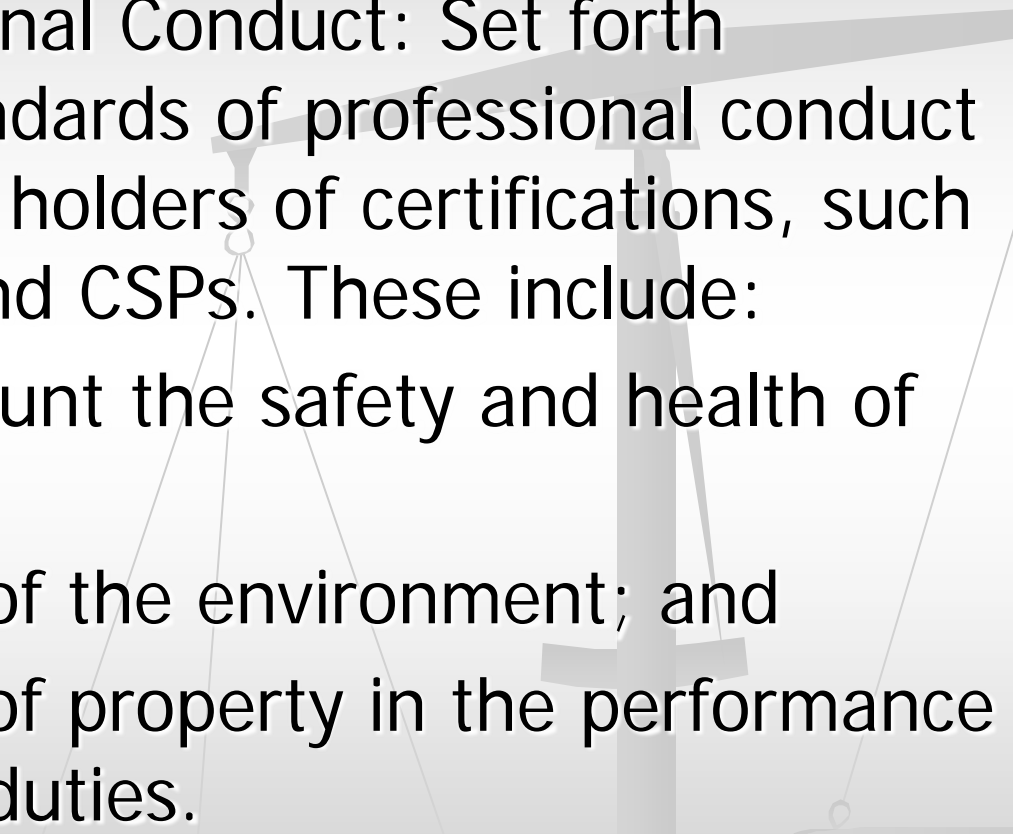


Legal & Ethical Considerations for the EHS Professional

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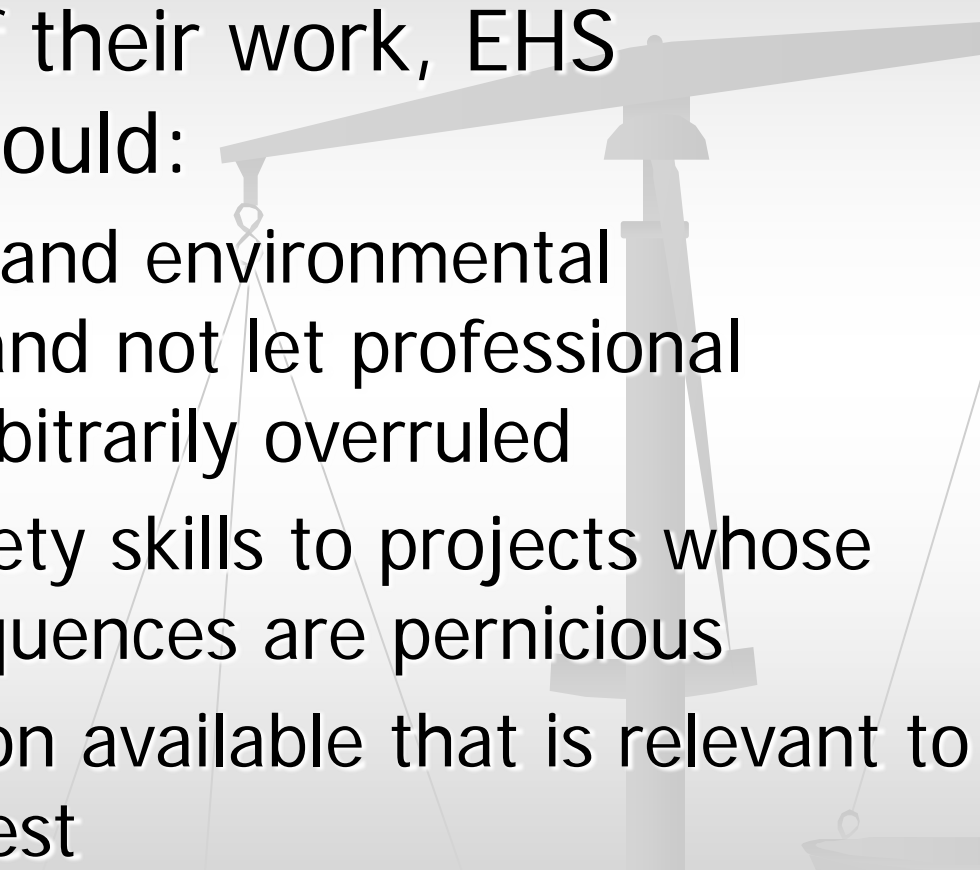
Codes of Professional Conduct

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

- 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

- MSHA Audit Policy: None. Under strict liability and no SOL, any documentation of hazards can lead to citations.
- 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)
 - 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

Audit Issues

- **MSHA** can write as “S&S/non-S&S” even if corrected, but can write as 104(d) if not fixed
- **OSHA:** Failure to correct hazards documented in self-audits may result in the issuance of “Willful” citations when the Employer:
 - Blatantly ignores identified hazards
 - Refuses to correct hazards likely to result in serious injury or death.
 - Knowledge of in-house CMSP/CSP/CIH can be imputed to employer
 - Documents produced by insurance company re: audits can be used against employer
 - OSHA reserves right to use self-audits as evidence to prosecute employer or individuals civilly or criminally

Investigations & Inspections

- EHS inspection and investigative notes are normally not privileged
 - Some FMSHRC ALJs require production by mine operator of such notes and deny privilege under most circumstances)
 - OSHA can access non-privileged notes via subpoena
- Inspection, accident and “near miss” reports may require EHS pros to testify against employer
- Documented knowledge of violative conditions can lead to personal criminal liability under OSH Act and environmental statutes
 - Providing knowingly false statements, representations or certifications (i.e. falsifying records)

Privileges and Pitfalls

- There is no “Consultant-Client” privilege unless consultant expressly prepares reports for counsel (attorney work product) unless testifying expert
- Some documents may be protected as “Attorney-Client” communications
- Documents must be labeled as privileged to avoid inadvertent disclosure
- Privilege can be waived by distribution of, or access to, documents by unauthorized persons (including on unprotected server or via an e-mail CC)

Subpoena Issues

- MSHA has limited subpoena power – must convene a public hearing
- 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 hired by employer or working for insurance co)
 - Documents and testimony can also be obtained from non-attorneys handling OSHA/MSHA matters as their correspondence with clients is not privileged
 - 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

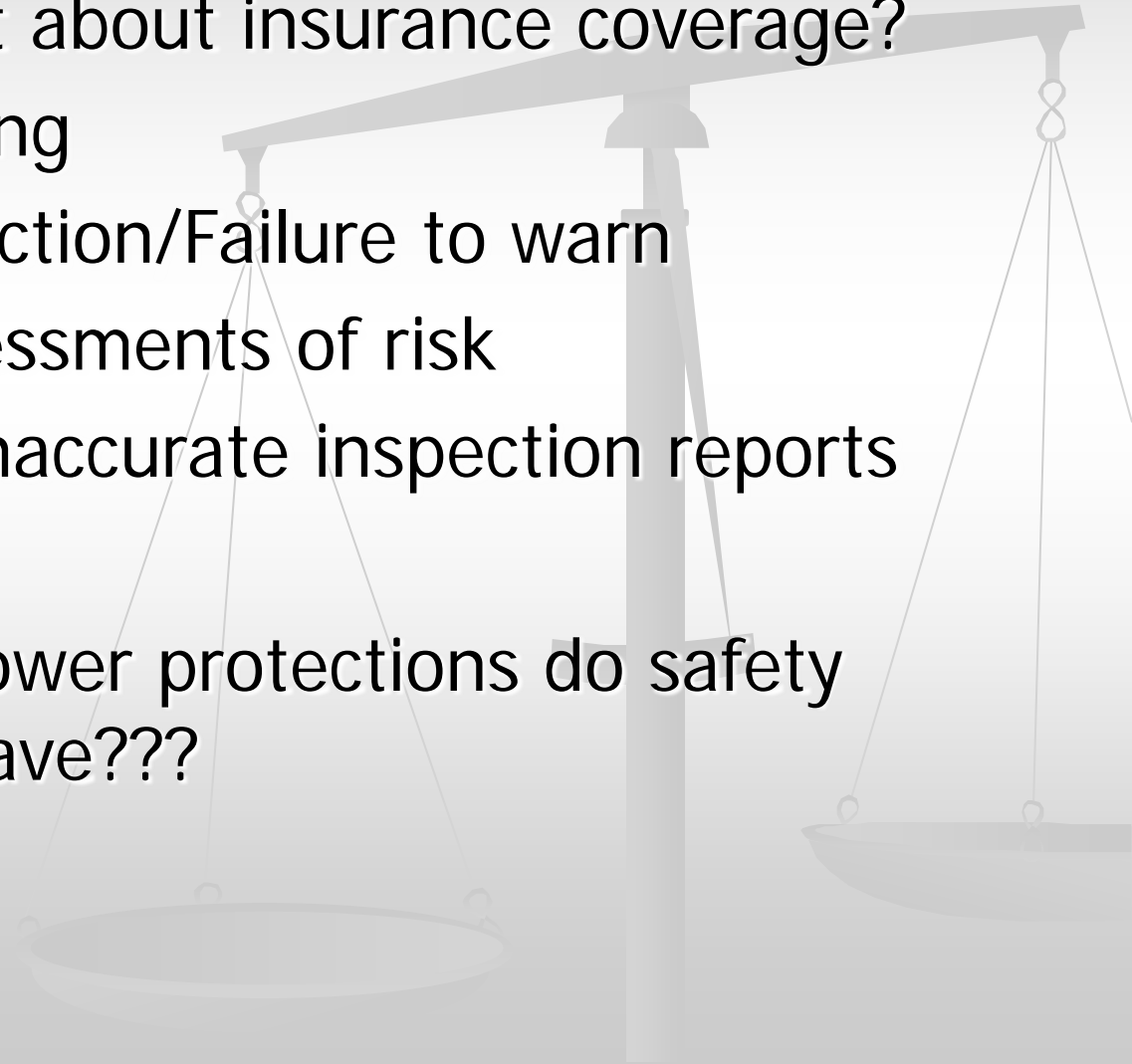
- Worksites should have document retention/destruction policies
- S&H professionals must abide by these (avoid “packrat” tendencies) and inform these (know mandatory retention periods for OSHA specified docs such as medical surveillance, training)
- Even if statutory limits are exceeded, the policy should 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 (but be wary of MSHA claims of “impeding” investigation under Sec. 103A)
- 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.

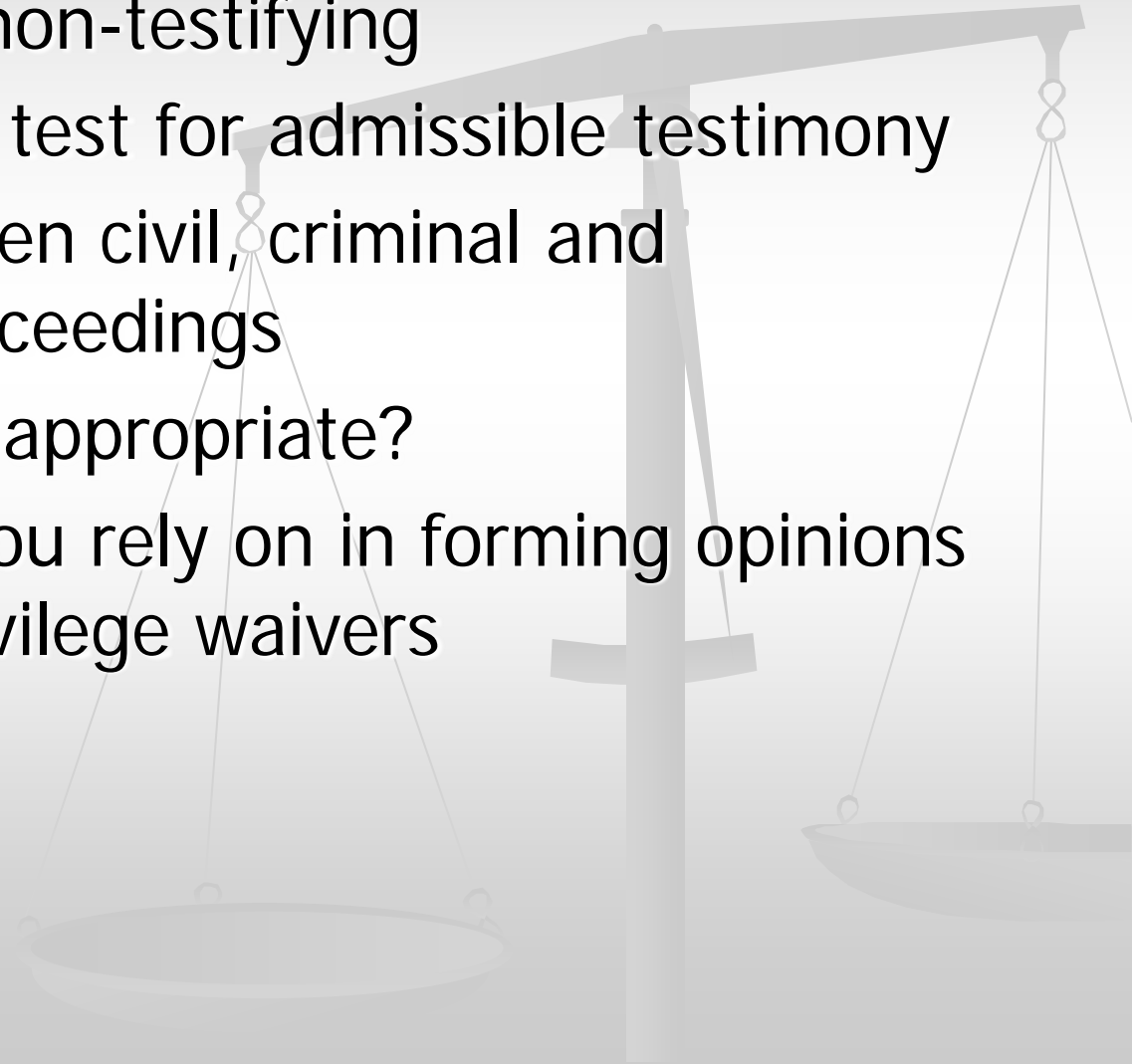
Malpractice Issues

- Tort liability: What about insurance coverage?
 - Negligent training
 - Negligent inspection/Failure to warn
 - Inaccurate assessments of risk
 - Fraudulent or inaccurate inspection reports
- Ethical violations
 - What whistleblower protections do safety professionals have???



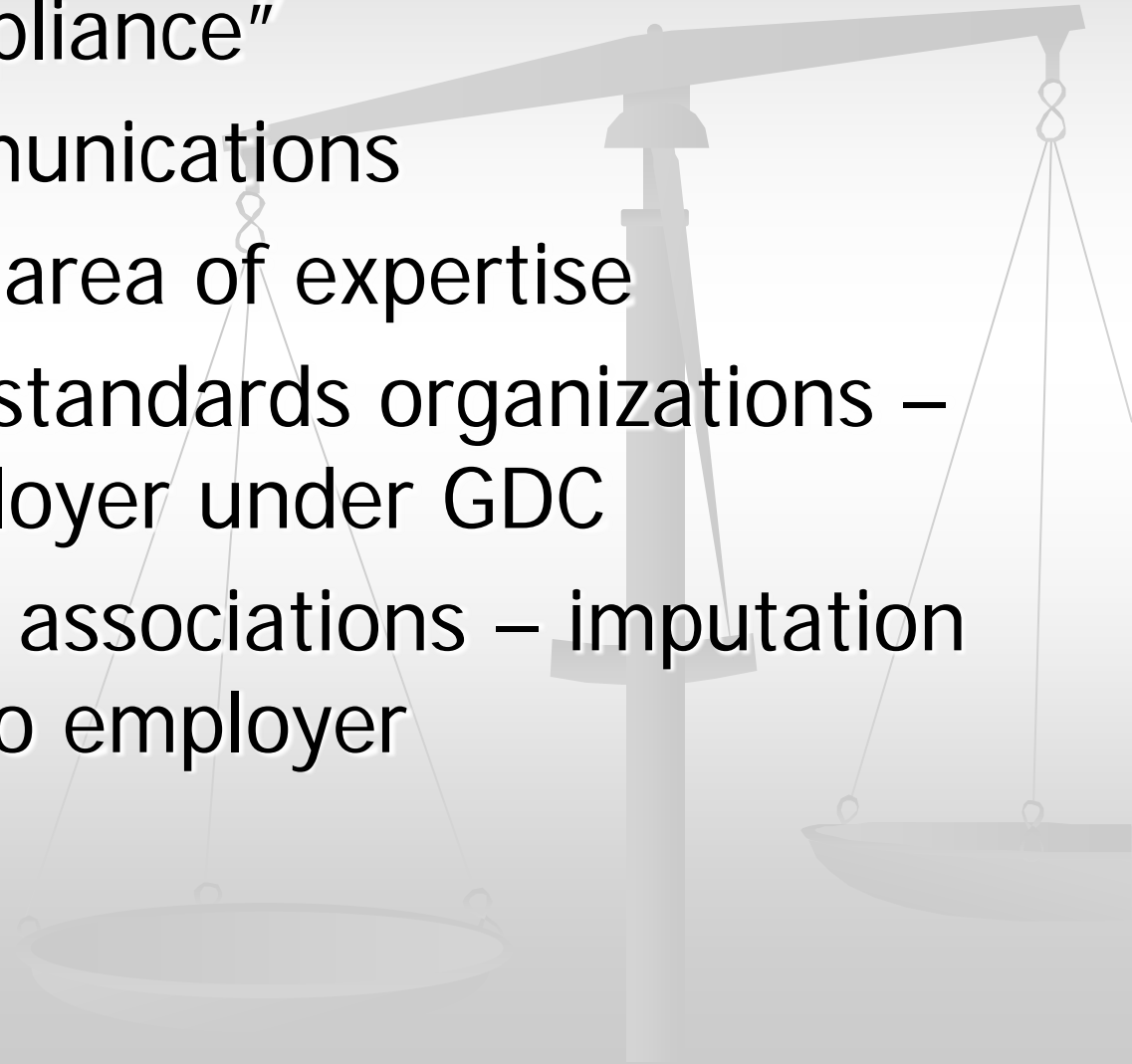
Expert Witness Issues

- 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



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 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.
- **Mine Act:** Section 110 (linked to violations, false statements & advance notice) even if no injury or accident
- **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.

Criminal Prosecution: 18 USC

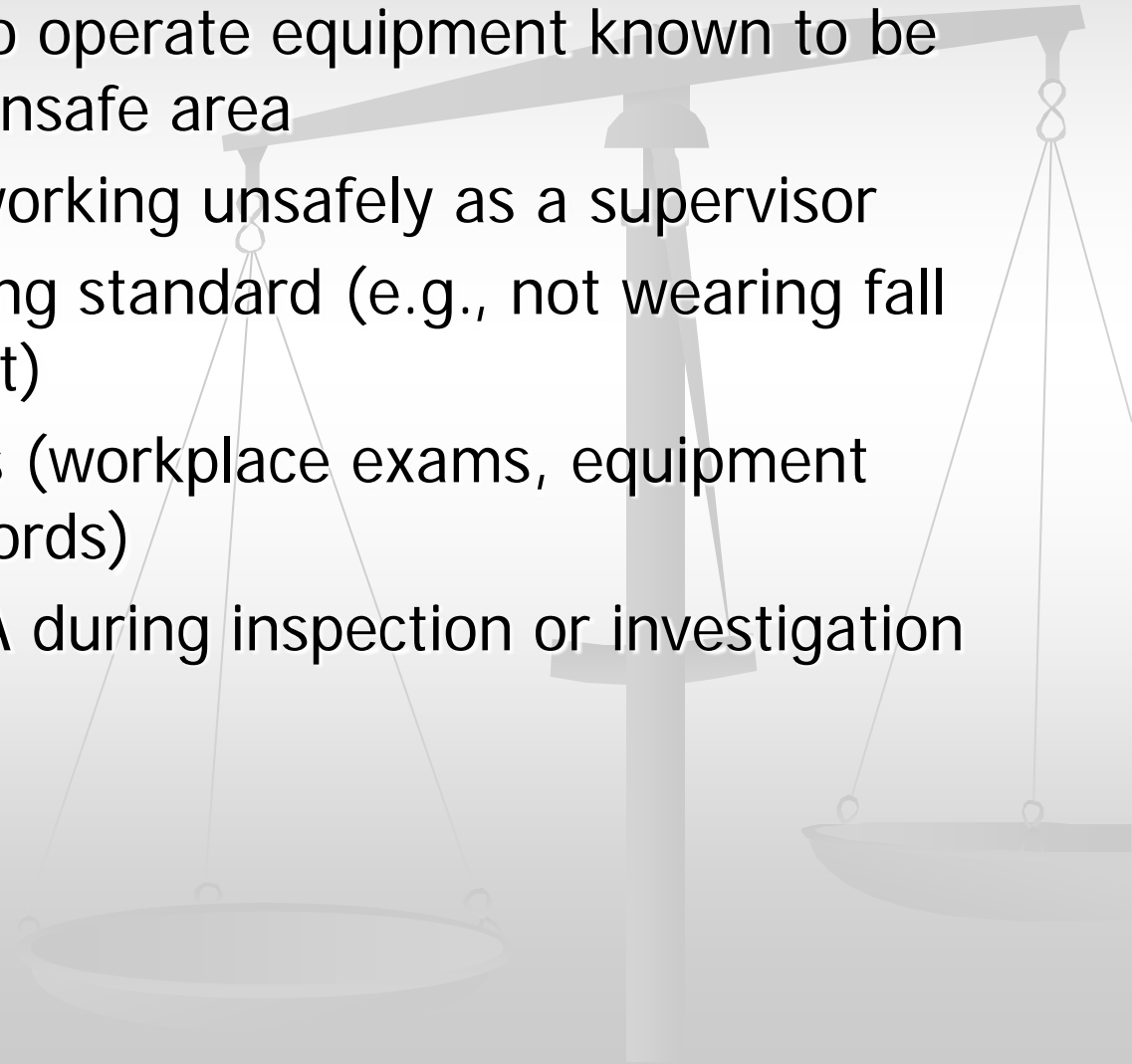
- 18 USC 3331-4120 also can be triggered in obstruction/conspiracy cases
 - Increases fines against individuals to \$250,000 per violation
 - Additional corporate fines of up to \$500,000 per violation.
- These penalties do not impact terms of imprisonment under OSH Act or Mine Act/MINER Act
 - MSHA has personal “agent” civil penalties of up to \$72K per violation under Sec. 110(c)

State Agency Prosecutions

- In the 22 OSHA “state plan states,” or states with mine safety agencies, 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

Examples of Criminal Acts

- Directing someone to operate equipment known to be unsafe, or to enter unsafe area
- Observing persons working unsafely as a supervisor
- Agent himself violating standard (e.g., not wearing fall protection or seatbelt)
- Falsifying documents (workplace exams, equipment preshift, training records)
- Lying to OSHA/MSHA during inspection or investigation



Whistleblower Prosecutions for EHS Professionals

- Protects workers from retaliation for engaging in protected activity if complaint filed within 30 days with OSHA (federal or state agency) or 60 days (MSHA) – as well as DOT and EPA statutes' whistleblower provisions
- Protected activity
 - Speaking privately to OSHA or MSHA
 - Reporting injury/illness to employer or agency
 - Testifying against employer in case
 - Making internal safety complaints
 - Making formal complaint to OSHA or MSHA

Whistleblower Protections

- Growing enforcement area – OSHA Advisory Cmte guidelines, new MSHA “interference” theory
- Interface with OSHA e-Recordkeeping rule – effective 12/1/16
- Remedies include: reinstatement, back pay, awarding of retroactive seniority, benefits
- MSHA Sec. 105C allows temporary reinstatement & private right of action
- OSH Act has no TR or private right of action
 - Some states allow wrongful discharge suits because of this under “public policy” exception)
 - OSHA obtained \$200K+ in recent cases for compensatory damages

Sarbanes-Oxley Act

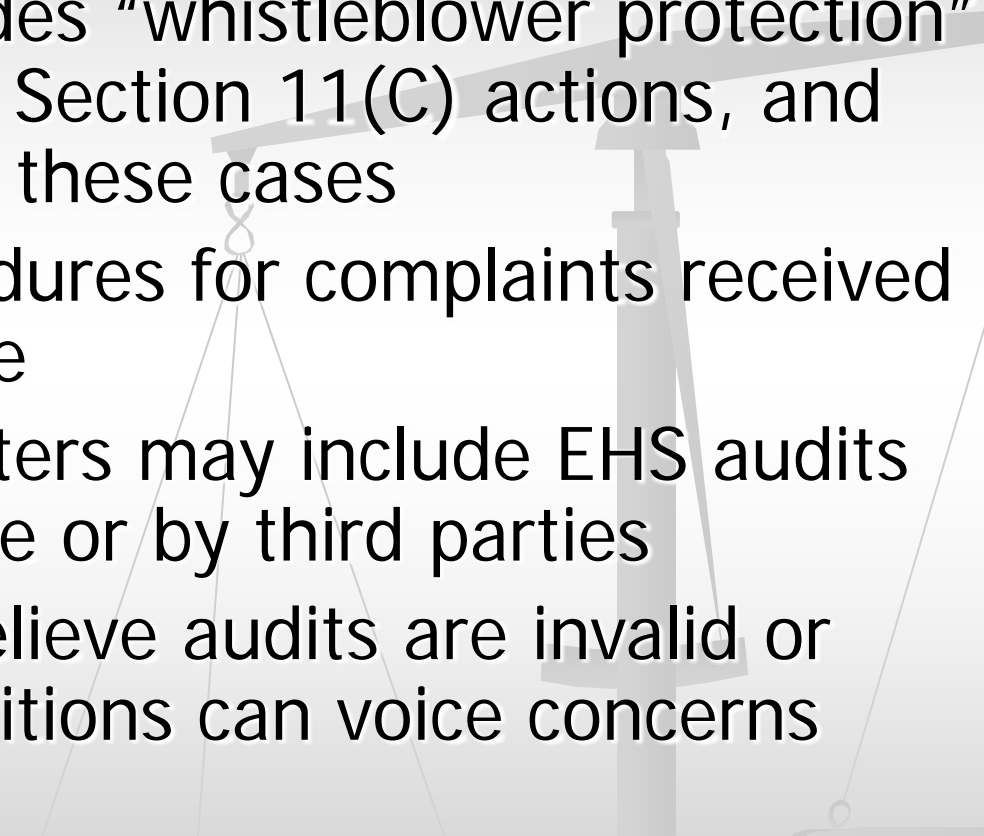
- Financial audit requirements may indirectly include obligation to be “truthful” in safety, health and environmental audits because of the potential liability exposures.
- Shareholders can face financial harm for losses due to litigation arising from regulatory violations or harm to persons, property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

Sarbanes-Oxley Act

- Title IV, Section 404 (Management Assessment of Internal Controls) requires annual report by covered firms under the Securities & Exchange Act of 1934.
 - Must state responsibility of management for establishing and maintaining adequate internal control structure and procedures for reporting
 - Must include assessment of effectiveness of internal control structure

“Internal control structures” could include systems mandated under OSHA’s process safety management standard (29 CFR 1910.119)

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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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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