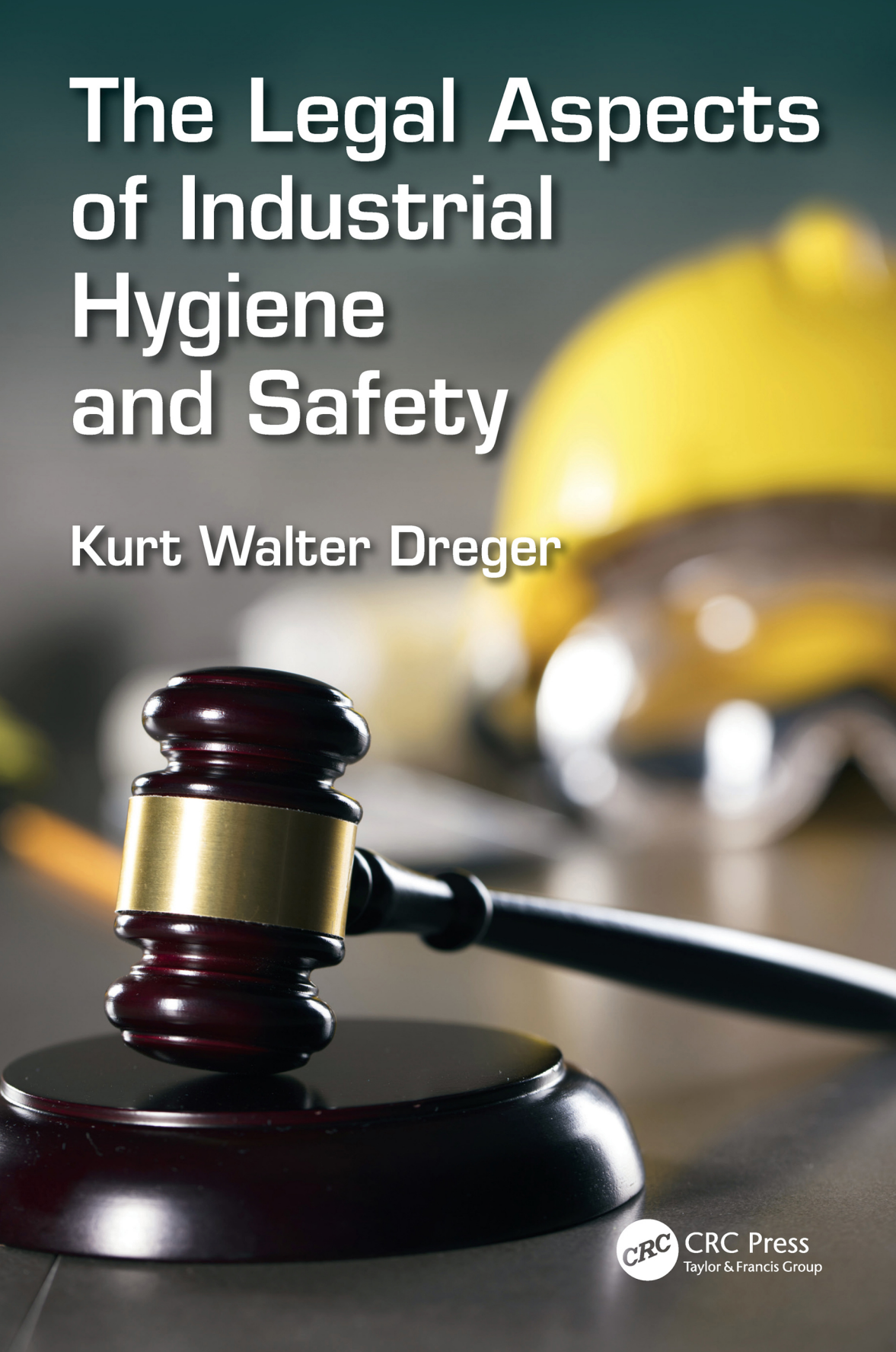
The Legal Aspects of Industrial Hygiene and Safety

Kurt Walter Dreger



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The Legal Aspects of Industrial Hygiene and Safety

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To Stephen Franaszek and Anthony Sperber

The former for inspiring me to be an industrial hygienist,
the latter for teaching me employment law.

Contents

Introduction

The implementation of an effective Industrial Hygiene and Safety (hereinafter "IH/S" in this book) program or practice for any organization usually presents leadership, management, resource, and technical challenges, regardless of the size of the organization or the type of business conducted. Those managing such programs typically start their careers with a strong technical basis, such as a bachelor's degree in engineering, or the physical or applied sciences, and then rise through the ranks as they acquire the leadership and management experience necessary to do a good job. As they continue to grow in the profession, they learn how to develop and implement sound IH/S policy, make decisions, budget resources, and supervise personnel. These necessary management and leadership skills are sometimes acquired through training (e.g., through a formal organizational leadership development program), but most often are gained from experience, conducting research, or simply by conferring with colleagues, direct reports, or consultants. Thus, by the time a successful IH/S manager reaches mid-career, he or she has likely demonstrated an ability to develop, resource, and sustain effective IH/S programs for their organizations.

Of course, along the way there are always bumps in the road. Some of the "bumps" as it were, which form the subject of this book, are the legal issues and challenges that every IH/S manager will undoubtedly face at some point in their careers. Legal issues are usually complex, and IH/S managers are often not equipped to handle them. Legal aspects of IH/S are not typically presented in the curriculum or mentioned in leadership development programs.

Interestingly, whenever I have introduced myself to IH/S managers new to my organization, or at a conference, and I mention I am an attorney, I always get the same reaction. They invariably have a story to share, and it's usually a bad or frustrating experience about how they were caught off-guard by a wrongful termination lawsuit or lost an administrative challenge during an enforcement action. In most cases, managers related how they felt lost about the legal entanglements they encountered and how they wished they knew more about legal processes. Most lamented that the outcome was not favorable to their organizations.

The IH/S profession by nature lends itself to legal contention. First, the profession is centered around people, workers mainly, but often members of the public too, with the goal of ensuring people do not get hurt or exposed to dangerous chemicals or physical agents. When these unfortunate events happen, as they occasionally do, management's focus is typically on finding out how the event happened, and how it can be prevented from happening again. But what is often overlooked is the fact that injured people have legal rights that may need to be addressed, or should have been addressed before the injury, depending on the circumstances. People get upset when they feel their legal rights are infringed. If their concerns are not addressed, or were not planned for, they get even more upset. They hire lawyers and file claims to assert their rights. Suddenly, what was initially thought of as an unfortunate event has now mushroomed into a legal battle with compensatory and punitive damages at stake. This is something any organization, no matter how big or small, undoubtedly wants to avoid.

The other aspect of IH/S that makes it a field fraught with legal risk is the intense regulatory environment in which it operates. Operations at a typical organization may be subject to thousands of regulations and statutes, enforced by dozens of external agencies at the federal, state, regional, or local level. Each agency, or each individual inspector for that matter, may have his or her own interpretation of what the regulation means or how it should be enforced. Many jurisdictions have established unified agency enforcement schemes. That means you could be fined for a fire code violation when the agency is looking at your hazardous waste program.

When faced with a significant legal issue or concern, most managers are accustomed to turning to legal counsel for assistance. For the smaller organizations, the likelihood of having resources to support in-house counsel is remote, and smaller organizations only hire legal counsel to defend a claim. Indeed, rarely is counsel retained for legal risk mitigation, especially in the area of IH/S. Larger organizations have in-house counsel, but the in-house attorneys are usually involved with larger organizational issues such as intellectual property or product liability. It is not likely in-house counsel, even at the very large firms, will have expertise in IH/S or fully understand the legal risks prevalent in the profession. Thus, it is important to arm IH/S managers with sufficient knowledge to be able to assess the legal risks of their organization's operations. If for nothing else, knowledge of the legal aspects of IH/S would help managers communicate better, particularly in writing, with their senior leaders or attorneys when issues arise.

This book advocates for providing IH/S managers with a basic understanding of the particular legal aspects arising in their profession. The idea is to incorporate *legal risk analysis* into the standard risk assessment process – something IH/S managers conduct daily. An understanding of legal principles and the various legal processes, as they relate to the IH/S field, will undoubtedly help IH/S managers make better, more informed decisions while addressing legal risk.

Before we delve into introductory material or some of the substantive law areas, I would like to take a few moments to discuss the approach that some chapters in the book take. In law school textbooks (case books), topics are first presented and then explored through case study. This book takes a similar approach. I have selected a handful of actual case briefs that illustrate the points. I have also created hypothetical cases where I feel the lessons are more easily presented. In such cases, I clearly denote the case is hypothetical. All cases in the book, whether hypothetical or from publicly available court opinions, follow a similar layout. The cases begin with the facts and are so labeled. Facts indicate what happened between the litigants, and often contain a procedural history. After the facts, there is often a section labeled "analysis," which shows either how the judges reviewed the facts in light of the law or how I would analyze the facts in the hypothetical case. Last, there will be a holding. The holding is the opinion of the majority of the court deciding the case. In essence, under the common law system, the holding becomes the law for the set of facts in question. In many of the cases, I offer my comments about the key points at the end (i.e., the take home message).

One of the things that often takes getting used to as a first-year law student is that the cases in the textbooks seem to come out of nowhere, at least at first. However, after going through a few law courses, the student learns that each case is presented

for a reason; to expand on the lesson of the chapter or section, showing how the law works from a real case. You even get to a point in the second or third year where you can almost anticipate the case holding. No one expects you to do that here. I have made every attempt not to surprise you in this text. You will know by the headings that you are entering into a case or hypothetical based on the section title. Cases, either hypothetical or actual, will be denoted in the traditional format: Plaintiff name v. Defendant name (and sometimes there will be a case cite too).

As the cases come up in the book, just take a breath and read them casually. Pay most attention to the facts and the rules of law being explored. After doing this several times, you will get more comfortable with the process of case review and will soon see how legal results are developed through appellate litigation.

I believe reading the cases, even if they do not always relate specifically to IH/S issues, will help prepare you for the material in the last chapter, where I give you tips and tricks and examples of better persuasive and objective writing for your IH/S professional life. The purpose here is to help you influence IH/S policy by improving communication to your organization's senior leaders or in-house counsel.

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INTRODUCTION

If knowledge is power … legal knowledge is a superpower

We have all heard the old proverb, "a man who is his own lawyer has a fool for a client," and probably wondered whether it was just a way for lawyers to express their importance to prospective clients. And with the advent of online legal services, and so-called do-it-yourself lawyering, many organizations, especially the smaller ones, might find it attractive to go it alone when faced with the threat of legal action. Perhaps you have someone in your organization particularly skilled at dealing with external regulators, or who just likes to argue a point. You might think such a person would be great representing you at an OSHRC hearing, or against the workers' compensation authority in your state. You probably will want to rethink that decision. Although you might save money initially, going it alone without representation for a legal issue likely ends in disaster.

Many of us enjoying a career in IH/S undoubtedly think we know the pertinent regulations and are confident interacting with external regulators on behalf of our organization, especially as we reach mid-career. However, what we are not prepared

to handle is the procedural aspects of legal proceedings, and these are things that can trip up even the most seasoned IH/S expert (and occasionally even a seasoned attorney). A late filing or failure to timely disclose an expert could, for example, lead to a dismissal even on facts and evidence fully in support of your organization's defense. In any legal dispute, there is no substitution for having a well-trained and experienced attorney representing your interests.

Even though legal representation is key when facing a potential legal threat, there certainly is something to be said about arming oneself with legal knowledge, especially as it pertains to IH/S practice. This will help in a number of ways and is the basic tenet of this book. First, understanding the legal aspects of IH/S will help practitioners manage risk more confidently. For example, suppose your team is responsible for evaluating a contractor's health and safety program. As a host employer you are rightfully concerned whether the contractor's safety policies and practices are in line with those of your own organization. It is relatively easy to build such rules (e.g., follow 29 CFR 1910) into a written contract, but it may be quite another matter to deal with the things you did not plan for. What happens if a contract worker is injured? Who was supposed to put the controls in place? Are your employees allowed to stop work for any reason? Do contract workers have the same right? Including the right to stop *your* work if they perceive a hazardous situation?

Many IH/S practitioners believe one can contract around all possible issues that may arise during work, even for unforeseeable events. However, in many jurisdictions, multi-employer work site regulations govern the legal relationships organizations have with subcontractors. The rules are complex, and legal liability for accidents and injuries can shift depending on the factual circumstances. Arming yourself with knowledge of the legal implications of multi-employer work site regulation will help you deal with subcontractor liability issues more effectively. Chapter 2 goes into much more detail on multi-employer work site issues.

Another benefit of arming yourself with a basic foundation in legal principles impacting IH/S practice is it will help you communicate with your attorneys more effectively. For those organizations fortunate enough to have in-house counsel, real benefits to the IH/S program are realized when you can partner with the in-house counsel. As seen in Figure I.1 below, the practice of worker safety and health law is not included in the law school curriculum and is only discussed briefly in employment law practice guides. The truth is that most in-house counsel have absolutely no idea about health and safety regulation or practice. They might have a general sense that the organization has to follow OSHA regulations,* but they lack a practical or technical understanding of factual situations that give rise to legal issues in this very niched area of law.

An example of this comes to mind from recent regulatory changes in California. For many years, California labor law has mandated meal breaks for most non-exempt employees. The law requires unpaid meal breaks be offered to employees and limits the circumstances under which such offers can be waived. Lawsuits, often class actions, have arisen where employees complain they did not receive a meal break offer. The law also provides a penalty for employers who do not make the

* Or other federal authority or state program as the case may be.

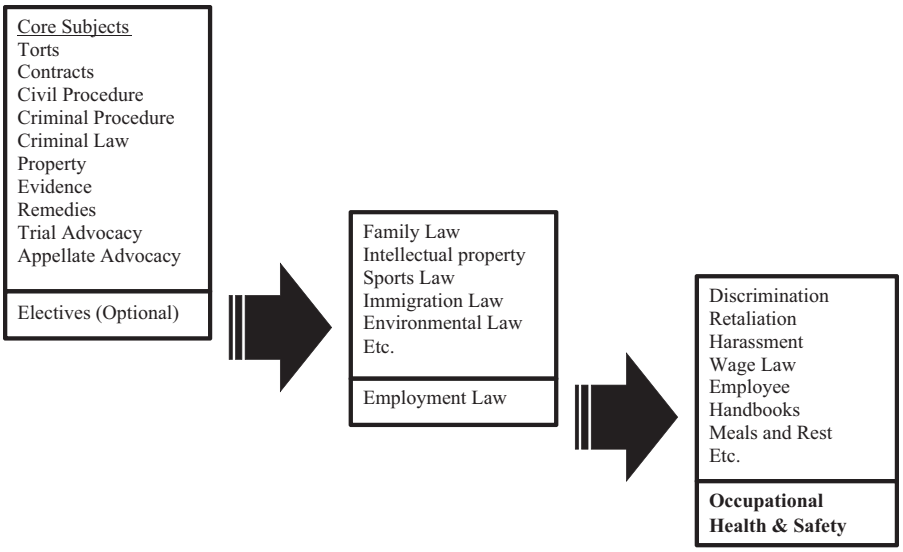

FIGURE I.1 Typical law school curriculum.

offer. So many companies developed meal break offer recording systems to protect against such litigation. These types of record keeping systems work well to knock out a claim early in litigation.

In 2014, the California Division of Occupational Safety and Health (Cal-OSHA), promulgated new regulations for heat stress prevention. This scheme included a provision similar to the California meal break law. Workers are required to be offered rest breaks on hot days. Failure of the employer to offer the rest break can result in Cal-OSHA fines, but also creates a right to sue for the employee who was not offered a break. Groups of aggrieved employees can also band together in a class action lawsuit.

When the new heat stress regulations came out, many in-house counsel were rightfully concerned about whether the new regulations would create liability if their organization could not show it made rest break offers (similar to meal break offers; i.e., using an electronic recording system in the timecards). And for that matter, what constitutes a "hot day" and how does one prove the offer was made on such hot days? These are questions posed by attorneys who have little knowledge of how important worker safety and health issues, such as heat stress prevention should be managed.

Imagine that your in-house counsel consulted with you on the company's plan to develop a process similar to meal breaks where "hot weather break" offers are recorded on time cards. Using your experience as an industrial hygienist (and not as an attorney), you could probably convince the attorney that such a process would be extremely burdensome and impossible to manage because as good as we all are, we really cannot predict the weather. With just a little understanding of the legal world, you might be able to explain, as is likely the case, that the organization already has mechanisms in place to deal with heat stress and to inform employees about work-rest regime requirements in its EH&S program. Such terms are very familiar to a

practicing IH/S but are a complete mystery to an attorney. Thus, understanding the basic legal issues arising out of the ES&H arena, coupled with your ES&H management experience, can only help your organization.

The Duty of Care Runs to All Stakeholders of the Organization

One of the principal tenets of Western law systems is duty. We will talk more about duty in Chapter 4 on torts, but for now, think of duty as that which gives rise to a legal obligation or liability. A parent has a legal duty to care for his child, spouses have legal duties to each other, and employers have statutorily prescribed duties to employees. The duties associated with employment are the ones IH/S professionals are most familiar with in the work setting.

The issue that frequently comes up in the work place for an organization is to whom does it owe a duty of care? The first answer to that question is always to the employees working at the facility. The organization has a duty to establish and maintain a safe and healthy work environment, to provide medical attention to injured workers, and to compensate injured workers (i.e., via the workers' compensation system). But what about other people present at the work site? At any given time, there may be independent contractors, vendors, members of the public, or even government officials. Does the organization owe these people a duty of care?

The answer is one given to first-year law students all the time – "it depends." The duty to provide a safe and healthy workplace to non-employees entering your sites depends on several factors, including the purpose of the visit, and often, statutory requirements. We will go into far greater detail on this in Chapter 2, but for now it is important to realize that generally, the organization owes a duty of care to all stakeholders. This general rule is something you should always consider when establishing safety policies and developing safety programs. In most cases, your policies must be protective of not just your employees but also those who could be harmed by your activities. This radically increases the breath of responsibility for a company safety program, and frankly is what can keep in-house counsel awake at night.

IH/S is an Evidence-generating Venture

Another thing to keep in mind as you read this book is that IH/S and attorney work are remarkably similar. Each is ultimately concerned with discovering the key facts that lead a reasonable person to realize the truth about a situation. For lawyers, evidence takes the form of testimony, out-of-court statements (known as hearsay), documents and records, and sometimes, physical objects (e.g., "the murder weapon"). For the IH/S professional, evidence takes the form of air sampling reports, things heard and seen during inspections or accident investigations, reference materials and government standards, and yes even physical objects (e.g., a respirator with significant deterioration).

The IH/S professional, like the lawyer, uses this evidence to make a conclusion about whether or not a person was overexposed to toxic chemicals, or whether a regulation was violated. Thus, the ultimate goal of both a lawyer and an IH/S professional is to find and preserve facts and evidence that support a position. In the

case of the lawyer, the evidence supports a favorable legal outcome (i.e., the client's innocence or defendant's liability). For the IH/S professional, the evidence supports an understanding of the hazards in the workplace, and how to prevent workers from being exposed to such hazards now and in the future. Understanding this will give the IH/S professional a better appreciation of the value of his work to the organization, and a want to better protect health and safety records and information. Much more of this is explored in Chapter 9.

Confidentiality and Privilege

Another concept to get straight right off the bat is confidentiality and privilege. Much of legal practice deals with maintaining the confidentiality of client information and asserting privilege grounds whenever necessary. Lawyers are bound to keep their client's (including prospective and former client's) information confidential. The assurance of confidentiality serves the purpose of encouraging clients to speak frankly about their cases. If it were any other way, clients might not want to divulge all the facts surrounding their legal issue, and the attorney would not be in the best position possible to provide a zealous representation.

A somewhat amusing example of the extent to which a lawyer's client information must be kept confidential comes from early family law. In a small town, there might only be handful of lawyers. A crafty soon to be ex-spouse (one opposed to a divorce) might discuss his case with all the lawyers in town. Even if the husband has no intentions of hiring any of these lawyers, any information divulged cannot be repeated. So when the wife visits these same attorneys seeking representation in a divorce settlement, they will be foreclosed from representing her because doing so would require them to divulge confidential information, or at least create an unfair advantage for the wife because of the information already in the attorney's head. Of course, this example is not likely to occur today as there are millions of lawyers in the world, and no one person could speak to them all, but it does a nice job of illustrating the point of confidentiality.

Privilege, although narrower than the duty of confidentiality, provides additional protections to a client. The most common privileges an IH/S professional may encounter are the Attorney–Client privilege and the Attorney Work Product privilege. In a nutshell, the Attorney–Client privilege where properly asserted, prevents disclosure of any communications between an attorney and her client. Only in rare circumstances may this privilege be broken. The work product privilege is similar. It protects virtually any of the notes, theories, ideas, and thoughts a lawyer might have during representation of a client. Without this privilege, a lawyer would not be able to thoroughly evaluate the legal issues facing her client.

The IH/S practitioner will come across issues of confidentiality and privilege from time to time. Information obtained during an injury investigation might be pertinent to a defense. Any information shared with the company attorney about an accident or injury may be held as privileged information during litigation around the incident. Likewise, confidential information, such as an employee's personally identifying information, or medical information will need to be protected from disclosure. For the most part, these are obligations of the attorney working the case, but

as a client it is important to understand which evidence is protected, and the ways your company employs to protect it.

Thus, similar to the practice of IH/S, the law can be complicated and ultimately might encompass many of the IH/S programs and processes in which you may be involved. Understanding how to work with your legal department when issues arise is important. And equally important is the need to educate your legal department about worker health and safety issues. A healthy partnership can minimize legal risk and enhance worker safety, which, of course is, the ultimate goal.

Author

Kurt W. Dreger began his career in the late 1980s as a field chemist, working for a small hazardous waste disposal-consulting firm in the San Francisco Bay Area. It was a tumultuous time in the hazardous waste business, as the regulations were relatively new and disposal options limited. Treatment and disposal facilities policies seemed to change on a weekly basis, and a big part of the job was negotiating waste acceptance with treatment facilities and local regulators. Kurt learned early on the skills required for negotiation, problem resolution, and settlement.

Kurt traversed the state of California ensuring that hazardous waste was packaged properly and that the workers who handled the waste were safe. He then went on to leadership positions in ES&H management at public universities and the private sector. These experiences drew him to become a Certified Industrial Hygienist (CIH), a certification he has proudly held since 1998.

Over the years, currently more than 30, Kurt has helped public and private employers meet their environment and worker safety and health regulatory obligations, both as an employee and a consultant. Along the way, Kurt went to law school and became a licensed California attorney. He currently is principal attorney at Dreger Law PC, a San Francisco Bay Area based law practice focusing on employment law on the plaintiff side, with an emphasis on disability discrimination and occupational safety and health law.

Kurt holds a BA degree in Chemistry from the University of California, Berkeley and MBA from San Francisco State University. He obtained his Juris Doctor (JD) from The John F. Kennedy University, College of Law.

1 The Employment Relationship

1.1 INTRODUCTION – ORIGINS OF EMPLOYMENT LAW

Before delving into the law and the ways an IH/S professional may come into contact with the law, it is helpful to discuss the origins of employment law, and some of its key aspects. The vast majority of American workers are in some kind of employment relationship. The employer–employee relationship is one rooted in tradition and history and if healthy involves shared goals and expectations of both the employer and his employee. An employer, who wishes to earn profits by selling goods or performing services for customers, will quickly realize that he cannot sustain the volume of business needed to earn a profit without the aid of someone working on his behalf. He hires a person to help him carry out his business. So long as the employee is helping the employer create more income than the cost of the employee's salary, the relationship, at least from the employer's perspective, should flourish.

On the most fundamental level, the employee desires to earn a salary for his work to pay for food, shelter, and other life necessities. The employee is also motivated to work for benefits, such as health insurance, paid time off to focus on personal or family matters, paid sick leave, or retirement savings. Other motivating factors for an employee are career advancement, building a reputation in a career, or simply a feeling of self-worth for being a valued member of a profession. Compensation for work is very important, but it is often these other "soft factors" that lead to a feeling of job satisfaction.

1.2 HISTORY OF EMPLOYMENT LAW

Unfortunately, the above depiction of the employment relationship, where the employer is happily earning a profit and the employee experiences job satisfaction and employment stability, is not always the case. Conflicts between employers and employees can arise over a multitude of issues relating to denial of compensation or benefits, unsafe working conditions, discrimination, retaliation, performance issues, economic downturn, and a host of other things that can go wrong. Termination of employment is the ultimate end point to conflict between employers and employees. When termination is deemed unlawful, there might be legal action.

The body of law known as employment and labor law arose out of conflicts with the employment relationship. Before the advent of employment regulation, working conditions were often poor in the United States. Long hours, low wages, and unsafe working conditions ultimately lead to the passing of the National Labor Relations Act of 1935 (NLRA) and the Labor Management Relations Act of 1947 (LMRA), which govern the rights of workers in the private sector to create unions and engage in collective bargaining. Union employment rose steadily after the Great Depression and World

War II. Union employment was highly organized and flourished in the blue-collar sector of the economy, including manufacturing, mining, and transportation.

In the last several decades, union employment in the United States has declined. There are many theories for why this is the case, including a negative public perception of the value of unions and the fact that labor-saving technologies continue to change blue-collar-type jobs. Nevertheless, union employment remains active in a certain sector of the economy. Musicians, actors, and professional athletes are highly unionized, as are college faculty members, engineers, physicians, and nurses.

Of interest to IH/S professionals is the collective bargaining process for health and safety controls. Often, the demand for greater worker health and safety protection is hotly contested in collective bargaining. In a particular accident investigation, the IH/S professional may find herself interacting not only with the supervisor and management, and the injured employee and any witnesses, but also with union representatives concerned with enforcing collective bargaining agreements.

1.3 STATUTORY EMPLOYMENT REGULATION

If it is true that union employment is on the decline, the opposite may be said about Federal and state regulation of employment matters. Perhaps the most sweeping changes affecting the private employment relationship were the passage of Title VII of the Civil Rights Act of 1964. This Federal law, which was amended by Congress in 1972 as the Equal Employment Opportunity Act, made it unlawful for an employer to discriminate based on race, color, religion, sex, or national origin. As is often the case, states followed suit and created even more restrictive laws and regulations, protecting employees from not only adverse employment actions based on protected statuses as all of the above, but also public policy issues such as sexual orientation, genetic factors, or pregnancy.

Title VII, and the state laws that followed it, radically modified the traditional common law concept of "at-will" employment. At-will employment, the default employment relationship in virtually every state, provides that the employment relationship may be terminated by either party (i.e., the employer or the employee) for "any reason, or for no reason at all." These federal and state laws transformed the traditional at-will employment relationship to one where an employee could be fired for any reason or no reason at all, but not for an unlawful reason, such as those that offend the public policy.

Since the passage of Title VII and the various pro-employee protections offered by the states, other protections relating to public policy considerations have emerged. Laws have been passed to protect employees from harassment and hostile work environments. When one thinks of harassment in the workplace, one usually considers sexual harassment, but laws are in place to protect employees from racial and national origin harassment too. Harassment claims not only involve employer liability, but they can also be brought against offending managers as an individual defendant. The legal standard for proving a prima facie case of harassment is fairly easy to meet, and employer liability is established by failure to respond to an employee's complaint. Many companies have responded to the swell of harassment claims by providing required harassment training to management staff.

Following several high-profile cases involving shootings in the workplace in the 1990s, many states responded by passing workplace violence regulations. In

California, workplace violence is treated like other hazards; employers must evaluate the potential for workplace violence, implement controls, and train employees.

Public policy has also driven legislative protections from disability discrimination and retaliation. These protections stem from the public position that no one should be fired because they suffered an injury (on or off the job) or have a medical condition that makes it challenging (but not impossible) to work or for doing the right thing by reporting unsafe conditions or illegal activities at work. Disability discrimination and retaliation have elements that come up frequently in IH/S practice. These concepts will be explored in much greater detail in Chapter 7.

1.4 PUBLIC V. PRIVATE EMPLOYMENT

Working for a government agency can be much different than working for a private company, at least in the employment law context. One major difference is that public employment is generally not "at will."* In fact, public employment is often deemed a protected property interest by contract, implied practice, or statute. University professors, for example, often achieve tenure by operation of state law, or in the case of a private university by contract terms or collective bargaining agreements. No matter how a public job becomes a protected property interest, one thing is clear that a public employee has due process rights to her job.

Due process rights, as provided by the 5th amendment to the Constitution, and incumbent on state government by the 14th amendment, require a person to not lose his life, liberty, or property without a fair hearing. In the case of public employment, this usually means that termination may only occur after the employee has a fair chance to challenge the adverse employment action. The hearing must be impartial and fair. Thus, in the public sector, an employee intentionally committing an unsafe act can only be fired after a hearing and presentation of evidence.

Private employment is not a protected property right in all jurisdictions. Thus, the default employment arrangement in the private sector is "at will." However, several states have created exceptions to "at-will" employment in their legislative schemes. These include the public policy, the implied contract, and covenant of good faith and fair dealing exceptions.

We have already discussed the public policy exception in the context of discrimination and retaliation (see Chapter 7 for a more detail on these concepts). Under the public policy exception, one cannot be fired for reasons that offend the public policy,† such as:

- Refusing to commit an illegal act at the request of the employer
- Filing a worker's compensation claim following an injury
- Calling the state occupational health and safety regulatory body to report an unsafe working condition

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* The higher the level of management, the more "at-will" employment becomes in the public sector. Public managers who serve by appointment by the executive branch can be fired anytime and for no reason at all.

† It is not so much that an employee cannot be fired as people are fired everyday over issues that offend the public policy. Rather, such an employee has a cause of action to seek damages when fired for reasons contrary to public policy.

The implied contract exception involves basic concepts of contract law, which we will discuss in more detail in Chapter 3. Many employers publish employee handbooks or other documents that partially describe the terms and conditions of each job at the company. If such documentation mentions that employees have rights to appeal a termination or should be fired only for "just cause," then courts will hold the employer to such statements even where the employment contract itself says the job is "at will."

The final exception to "at-will" employment is the broadest and most protective of employees. It is recognized in a handful of states and is based on a fundamental legal principal that makes its way into all contracts – the terms of the contract must be fair and made in good faith to benefit both parties. The exception in essence says that when an employer and employee enter into an employment arrangement, the employee should always enjoy the right to be treated fairly. At the time of this writing, 11 states impute a good faith and fair dealing clause into every employment agreement, written or oral. This is not to say that private sector employees in these jurisdictions are entitled to a hearing or other due process before being fired, but rather the employer is obligated under the law to show just cause in every adverse employment situation. In essence, the bar to bring a wrongful termination lawsuit in these jurisdictions is low. As seen in Figure 1.1, "at-will" employment dominates in the United States, but powerful exceptions apply.

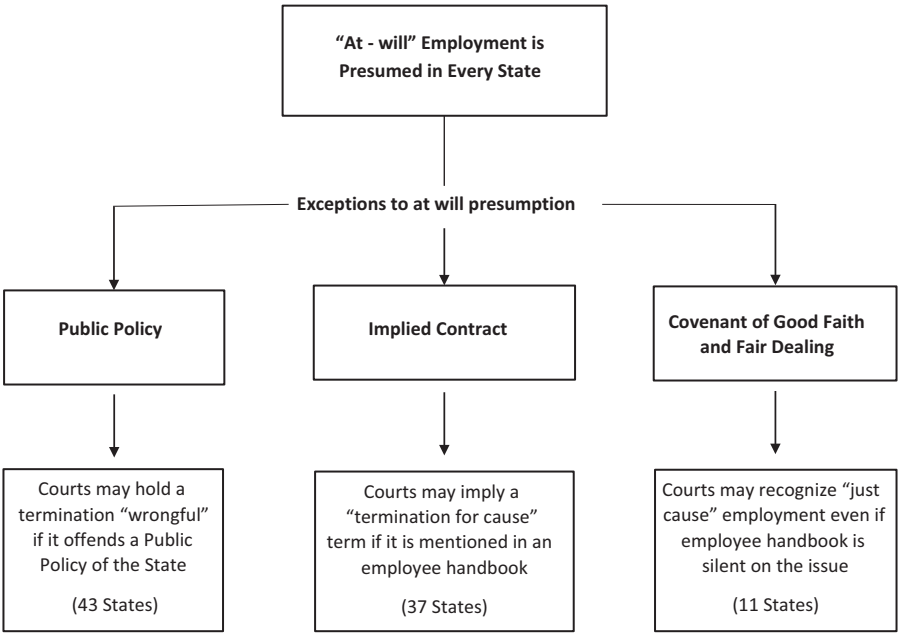

FIGURE 1.1 Legally recognized exceptions to "at-will" employment.

1.5 AGENCY LAW

Employment law is rooted in agency law. Agency law arose out of two societal needs following the industrial revolution. First, as hinted at in the opening paragraphs of this chapter, business owners needed others (i.e., employees or agents) to help them carry out the business. Without such help, a business owner would be compelled to carry out all functions of the business, which is obviously not feasible in an expanding industrial enterprise. Second, as a business grows, it interfaces with customers, regulators, and members of the public. Sometimes, mistakes are made and customers can be harmed by the wrongdoings of the business. If a harmed individual were limited to suing only the person who actually caused the harm (e.g., an employee), then she would be denied a recovery from the true beneficiary of the business – its owner or principal.

Agency law was devised, in part, by the courts to set the ground rules for when an employer is liable for harms (financial or physical or emotional injury) caused by his employees, and when it is not. It also regulates the circumstances under which an employer (i.e., principal) grants authority to his employee (i.e., agent) to carry out the objectives of the business. Authority vested in an employee is typically express, but often is implied through past conduct of the principal. Apparent authority (e.g., neither expressed nor implied) to act on behalf of the principal may be found where circumstances suggest a third party reasonably relied on assurances of the principal's agent.

The following case illustrates these points, particularly the authority that is created in an employment relationship, and in the context of workplace injury. This case may ring a lot of bells for IH/S practitioners, especially ones experienced in workers' compensation determinations.

1.6 *MILL STREET CHURCH OF CHRIST V. HOGAN* (785 S.W.2D 263 KY. (1990))

1.6.1 Facts

Mill Street Church of Christ and State Automobile Mutual Insurance Company petitioned for review of a decision of the New Workers' Compensation Board [hereinafter "New Board"], which had reversed an earlier decision by the Old Workers' Compensation Board [hereinafter "Old Board"]. The Old Board had ruled that Samuel J. Hogan was not an employee of the Mill Street Church of Christ and was not entitled to any workers' compensation benefits. The new Board reversed and ruled that Samuel Hogan was an employee of the church.

In 1986, the Elders of the Mill Street Church of Christ decided to hire church member, Bill Hogan, to paint the church building. The Elders decided that another church member, Gary Petty, would be hired to assist if any assistance was needed. In the past, the church had hired Bill Hogan for similar jobs, and he had been allowed to hire his brother, Sam Hogan, the respondent, as a helper. Sam Hogan had earlier been a member of the church, but was no longer a member.

Dr. David Waggoner, an Elder of the church, soon contacted Bill Hogan, and he accepted the job and began work. Apparently, Waggoner made no mention to Bill

Hogan of hiring a helper at that time. Bill Hogan painted the church by himself until he reached the baptistery portion of the church. This was a very high, difficult portion of the church to paint, and he decided that he needed help. After Bill Hogan had reached this point in his work, he discussed the matter of a helper with Dr. Waggoner at his office. According to both Dr. Waggoner and Hogan, they discussed the possibility of hiring Gary Petty to help Hogan. None of the evidence indicates that Hogan was told that he had to hire Petty. In fact, Dr. Waggoner apparently told Hogan that Petty was difficult to reach. That was basically all the discussion that these two individuals had concerning hiring a helper. None of the other Elders discussed the matter with Bill Hogan.

On December 14, 1986, Bill Hogan approached his brother, Sam, about helping him complete the job. Bill Hogan told Sam the details of the job, including the pay, and Sam accepted the job. On December 15, 1986, Sam began working. A half hour after he began, he climbed the ladder to paint a ceiling corner, and a leg of the ladder broke. Sam fell on the floor and broke his left arm. Sam was taken to the Grayson County Hospital Emergency Room, where he was treated. He later was under the care of Dr. James Klinert, a surgeon in Louisville. The church Elders did not know that Bill Hogan had approached Sam Hogan to work as a helper until after the accident occurred.

After the accident, Bill Hogan reported the accident and resulting injury to Charles Payne, a church Elder and treasurer. Payne stated in a deposition that he told Bill Hogan that the church had insurance. At this time, Bill Hogan told Payne the total number of hours worked, which included a half hour that Sam Hogan had worked prior to the accident. Payne issued Bill Hogan a check for all of these hours. Further, Bill Hogan did not have to use his own tools and materials in the project. The church supplied the tools, materials, and supplies necessary to complete the project. Bill purchased the other needed items from Dunn's Hardware Store and charged them to the church's account.

1.6.2 Analysis

It is undisputed in this case that Mill Street Church of Christ is an insured employer under the Workers' Compensation Act. Sam Hogan filed a claim under the Workers' Compensation Act.

As part of their argument, petitioners argue the New Board also erred in finding that Bill Hogan possessed implied authority as an agent to hire Sam Hogan. Petitioners contend there was neither implied nor apparent authority in the case at bar.

It is important to distinguish implied and apparent authority before proceeding further. Implied authority is actual authority circumstantially proven that the principal actually intended the agent to possess and include such powers as are practically necessary to carry out the duties actually delegated. Apparent authority, on the other hand, is not actual authority but is the authority the agent is held out by the principal as possessing. It is a matter of appearances on which third parties come to rely.

Petitioners attack the New Board's findings concerning implied authority. In examining whether implied authority exists, it is important to focus on the agent's

understanding of his authority. It must be determined whether the agent reasonably believes because of present or past conduct of the principal that the principal wishes him to act in a certain way or to have certain authority. The nature of the task of job may be another factor to consider. Implied authority may be necessary in order to implement the express authority. The existence of prior similar practices is one of the most important factors. Specific conduct by the principal in the past permitting the agent to exercise similar powers is crucial.

The person alleging agency and resulting authority has the burden of proving that it exists. Agency cannot be proven by a mere statement, but it can be established by circumstantial evidence including the acts and conduct of the parties such as the continuous course of conduct of the parties covering a number of successive transactions.

In considering the above factors in the case at bar, Bill Hogan had implied authority to hire Sam Hogan as his helper. First, in the past the church had allowed Bill Hogan to hire his brother or other persons whenever he needed assistance on a project. Even though the Board of Elders discussed a different arrangement this time, no mention of this discussion was ever made to Bill or Sam Hogan. In fact, the discussion between Bill Hogan and Church Elder Dr. Waggoner indicated that Gary Petty would be difficult to reach and Bill Hogan could hire whomever he was pleased with. Further, Bill Hogan needed to hire an assistant to complete the job for which he had been hired. The interior of the church simply could not be painted by one person. Maintaining a safe and attractive place of worship clearly is part of the church's function, and one for which it would designate an agent to ensure that the building is properly painted and maintained.

Finally, in this case, Sam Hogan believed that Bill Hogan had the authority to hire him as had been the practice in the past. To now claim that Bill Hogan could not hire Sam Hogan as an assistant, especially when Bill Hogan had never been told this fact, would be very unfair to Sam Hogan. Sam Hogan relied on Bill Hogan's representation. The church treasurer, in this case, even paid Bill Hogan for the half hour of work that Sam Hogan had completed prior to the accident. Considering the above facts, we find that Sam Hogan was within the employment of the Mill Street church of Christ at the time he was injured.

1.6.3 Holding

The decision of the New Workers' Compensation Board is affirmed.

1.7 INDEPENDENT CONTRACTOR V. EMPLOYEE STATUS

The Hogan case presented above points out another area of employment law that comes up frequently in IH/S practice: when is a worker an employee and when is he an independent contractor? In the Hogan case, might the court have held that Bill Hogan was an independent contractor to the church, and Sam, his brother, an employee of Bill's rather than of the church? That certainly could have been the case if the facts supporting implied and apparent authority (from Sam's prospective) were not in front of the court.

The determination of whether an employment arrangement is a classic employer–employee relationship, or one more characterized, as independent contracting is an important legal matter and often litigated. The consequences of this determination are serious, as the traditional employment relationship enjoys far greater legal and regulatory protection benefits than does an independent contractor. On the other hand, independent contractors have some freedoms that employees do not have, like being able to market their services to a variety of customers or firms and to negotiate the terms and conditions of their work. In a sense, employees have "all their eggs in one basket," whereas an independent contractor to some extent at least enjoys the benefits (and economic safety) of diversification.

The area of interest to IH/S practitioners is the delegation of safety requirements to an independent contractor. It is clear that employment brings all activities under the fold of Occupational Safety and Health Act (OSH Act) (or the state plan equivalent) regulation. And independent contractors are usually subject to the same regulations for their own employees. But what happens when employed workers and independent contractors work side-by-side potentially exposed to the same work place hazards? Do these two groups have to follow the same safety controls? Who sets those controls? Who enforces them? These questions are more fully explored in Chapters 2 and 3.

1.8 NON-EXEMPT V. EXEMPT EMPLOYMENT

Many states have different employment regulation schemes for different types of jobs. Generally, those paid by the hour are considered non-exempt employees, and their employers must follow rigid labor laws, especially in the area of compensation. For example, non-exempt employees are entitled to overtime pay when their work day exceeds a certain number of hours defined by statute (typically exceeding eight hours of paid work in a work day). In some jurisdictions, non-exempt employees must be offered an unpaid meal break after working a set number of hours. Employers failing to offer the required meal breaks could be subject to individual and class action lawsuits that include provisions for statutory penalties and attorney's fees.

Exempt status is not determined solely by whether a person earns a salary rather than being paid by the hour. The main factor in determining whether an employee is exempt is the extent to which she exercises discretion and independent judgment in her work. IH/S disciplines are typically exempt, whereas technicians are often non-exempt.

As far as worker safety and health laws and regulations are concerned, there is no real difference between exempt and non-exempt employment. If an employee is injured, he is still subject to the same workers' compensation process, whether he is exempt or non-exempt. Likewise, OSHA regulations apply equally to non-exempt and exempt employees.

2 Multi-employer Worksite Regulations

2.1 INTRODUCTION – THE IMPETUS OF MULTI-EMPLOYER WORKSITE REGULATIONS

The Federal Occupational Safety and Health Act (OSH Act) of 1970 has the clear focus to protect American workers from injury or illness caused by hazards in the workplace. In passing the OSH Act, Congress made a choice to base protection to workers on a true employment relationship, making it largely an employer obligation to protect its workers. Other types of workers, such as persons self-employed or working under contract to an organization, did not fall under the OSH Act (at least via the employer–employee relationship). State worker protection plans followed the same idea that employers are responsible for the health and welfare of their employees while at work. Thus, the basic rule of worker protection was fairly simple – employers were responsible to a worker's health and safety only if they were in an employment relationship.

The Federal Occupational Safety and Health Administration (OSHA) recognized early on that work places are often complex. A typical construction project, for example, might have many workers who work side-by-side, but all report to a different employer. The general contractor will have a handful of employees, typically project managers and technical specialists, on site to oversee all the work. There could then be dozens of subcontractors, each bringing their own employees to the project site at various times. The owner of the property might have some in-house project coordinators or even its own in-house safety personnel assigned to the project. Finally, at any given time, there might be government inspectors, who are employees of a public agency, or other workers, such as food and beverage vendors, or even third-party environment, health, and safety contractors.

As early as 1971, OSHA promulgated its multi-employer citation policy (MECP). The MECP defined different types of employers, such as creating, exposing, correcting, and controlling, and granted authority to OSHA inspectors to cite any or all of the different employers on a job site. This policy made it more difficult for an employer found in violation of a safety standard to hide behind the "not my employee defense." However, the MECP at its onset was mere guidance, and implementation of its provisions varied among the field offices. It would take litigation to give the policy teeth.

As the complexity of workplaces continued to grow following passage of the OSH Act, so did OSHA enforcement challenges. If, for example, a subcontractor employee was exposed to a hazard generated by the general contractor, there might not be any liability to the general contractor because the exposed employee was not an employee of the general contractor. This led to great frustration on the part of OSHA (and state plan) inspectors as under this scenario they were powerless to cite anyone if they could not link the hazard to the actual employer of the exposed employee.

In 1994, OSHA attempted to address this situation by updating its Field Inspection Reference Manual (FIRM). This change, which essentially gave the MECP new teeth, officially gave OSHA inspectors the authority to issue citations on multi-employee worksites. However, it did not give clear or detailed guidance, and OSHA inspectors had difficulty implementing it consistently across different regions. It was also subject to numerous legal challenges where employers prevailed on vagueness grounds.

However, over the years, the enforcement policy has matured (primarily through litigation) and OSHA has a much easier time assigning liability to various employers in a multi-employer setting. The fundamental takeaway is that OSHA has the power to issue citations under the policy regardless of the contractual relationships that might exist between different employers on the same project.

Federal OSHA regulations only, of course, apply to non-plan states. Thus, multi-employer worksite regulations did not affect employment in many states until legislatures acted. Some states, including California, have specific multi-employer worksite regulations.

Before we see how all this works with a case study, it is instructive to review the different types of employers defined under the MECP and to discuss the different scenarios that give rise to OSHA liability for violations. Figure 2.1 outlines OSHA's Multi-Employer Worksite Scheme.

2.2 THE CONTROLLING EMPLOYER

The first type of employer under the MECP is the "controlling" employer. The controlling employer is an employer who has general supervisory authority over the

Exposing Employer	**Controlling Employer**
Employer whose own employees are exposed to the hazard Duty to request mitigation of hazard and mitigate itself if controlling employer fails to mitigate	Employer who has general supervisory authority, including the power to correct violations itself or to direct others to do so Typically the general contractor, but can be any employer that exercises control in practice.
Correcting Employer	**Creating Employer**
Employer engaged in common under taking as exposing employer ad is responsible for correcting a hazard Must exercise reasonable care in preventing and discovering violations and meeting its obligations (usually contract) to correct hazards.	Employer that caused a hazardous condition Liable even if its own employees are not exposed.

FIGURE 2.1 OSHA's multi-employer worksite scheme.

worksite, including the power to correct safety and health violations itself or require others to correct them. As per OSHA, a controlling employer must exercise reasonable care to prevent and detect violations on the site.

The main way a controlling employer gets its power to demand correction of safety and health hazards is through contract. Often, the controlling employer will have a contractual obligation to control safety at the worksite. Controlling employers are usually the business owner, or a general contractor. The key is they have the authority and duty (by contractual means) to take affirmative steps to control or prevent a violation (or to compel another employer to do so.)

2.3 THE CORRECTING EMPLOYER

An employer who is engaged in a common undertaking, on the same worksite, and is responsible for correcting a hazard is known as a "correcting employer." An employer typically becomes a correcting employer when he is given the responsibility of installing or maintaining particular safety and health equipment or controls.

Even though a correcting employer has a duty to control and prevent work place hazards, his role is narrower than the controlling employer. It is limited to taking steps to correcting and preventing violations for only the hazards it is assigned (via contract). For example, a contractor might be hired on a multi-story construction project to install, inspect, maintain, and repair, as necessary, all the guardrails throughout the project. If a section of guardrail is damaged by another employer or member of the public, but not reported, the guardrails will likely remain in disrepair until they are discovered during inspection. If in the meantime workers are exposed to the uncorrected hazard, there will be a violation.

The guardrail contractor will not be liable as the exposing employer because its employees never worked in a location with deficient fall protection. However, the guardrail contractor could be liable as the correcting employer because it had a legal duty to correct the broken guardrails. The correcting employer might have a defense that it had no knowledge of the hazard, but it will have to prove that the damage occurred in between inspection cycles and it had no reasonable notice of the condition. Generally, the correcting employer will be liable if it actually knew or "should have known" about a deficiency or violative condition.

2.4 THE EXPOSING EMPLOYER

The "exposing" employer is perhaps one we are most familiar. This is the employer whose own employees are exposed to the hazard. If the exposing employer did not create the hazard it will generally not be liable. The exposing employer will be citable for a hazard created by another employer if it (1) knew about the hazardous condition or failed to exercise reasonable diligence to discover it; and (2) failed to take steps (within the limits of its authority) to protect its employees from the hazard.

Consider the previous example involving the guardrail contractor on the multi-story construction project. Suppose a masonry contractor was working on the scaffolding adjacent to the damaged guardrail. As the work crew advanced down the line, one of its workers sets up right by the damaged area but does not notice it. This

would be a citable condition for the masonry contractor as the exposing employer. But suppose that a foreman or another worker for the masonry contractor comes along and notices the condition. The masonry contractor can avoid liability for a citation if it promptly calls a safety pause, removes its employees from the hazard and notifies the guardrail contractor of the condition. So long as the guardrail contractor (the correcting employer) investigates the situation and repairs it timely, there likely would be no citations issued.

The key here is the action of the foreman. Immediately upon recognizing a hazard existed to one of his employees, he took decisive action to prevent injury to his employee, and made immediate notification to the employer responsible to correct the hazardous condition.

2.5 THE CREATING EMPLOYER

The last type of employer under the multi-employer worksite scheme is the "creating employer," which is defined under OSHA as the employer that caused a hazardous condition that violates an OSHA standard.

Liability for OSHA citations for the creating employer flows from the general premise that employers must not create violations. An employer that does so is citable even if the only employees exposed are those of other employers at the site. As an example, suppose Company 1 owns and operates a factory making widgets. The making of the widgets generates waste solvents that are stored in drums until they can be picked up by a vendor and sent to a solvent reclamation facility. Company 1 contracts with Subcontractor A to repair the widget packaging machines. This work occurs from time to time when the machines go down or need maintenance. Subcontractor A workers hate going to the Company 1 site because they complain they are exposed to strong chemical odors as Company 1 often fails to cover the solvent waste drums, which are stored near the machines Subcontractor A employees work on. Company 1 fails to cover the solvent waste drums despite repeated requests that it do so by Subcontractor A workers and managers. This results in airborne levels of the various solvents that exceed the Permissible Exposure Limit (PEL).

In this scenario, Company 1 is a creating employer because it caused employees of Subcontractor A to be exposed to the air contaminant above the PEL. Company 1 failed to implement measures to prevent the accumulation of the air contaminant. It could have met its OSHA obligation by implementing the simple engineering control of covering the drums. Having failed to implement a feasible engineering control to meet the PEL, Company 1 is citable for the hazard, even though there is no evidence that its own employees were exposed to the hazard.

2.6 *MARTINEZ MELGOZA & ASSOCIATES, INC. V. DEPARTMENT OF LABOR & INDUSTRIES*

2.6.1 Facts

In 1999, Host Marriott, an airport concessions company, began remodeling concession areas in portions of SeaTac Airport. The project required interior demolition

and asbestos abatement, so the Port of Seattle, which owned the airport, contracted with several companies to coordinate the asbestos removal.

After the project began, Host Marriott significantly increased the scope of work and shortened the completion schedule. This required the Port to hire five additional asbestos subcontracting firms, including the Defendant, Martinez Mendoza & Associates, Inc. (MMA). Under three separate contracts, MMA provided asbestos consulting services to the Port. MMA's contractual obligations included the provision of professional and technical assistance and to "work through the Asbestos Program Manager to ensure a quality project within regulatory compliance, time and cost guidelines." This work included facility surveys, bulk-sampling, air sampling, project inspection and coordination, project monitoring, cost estimates, emergency response, compliance guidance, and analysis services. The contracts granted ultimate responsibility for all decision-making to the Port's Asbestos Program Manager and Project Engineer.

When Host Marriott drastically reduced the time to complete the project, the asbestos abatement crews had to work double and triple shifts. MMA monitored work on all shifts, and MMA employees had to be present 24–7. Because the project was so rushed, MMA allegedly reduced the frequency and thoroughness of its inspections, authorized the abatement contractors to stop work before all the asbestos was removed, and instructed the contractors to work without proper safeguards.

In April 1999, a project employee filed a complaint with the Washington Department of Labor & Industries (L&I) alleging unsafe asbestos work practices and conditions at the airport. L&I inspected all project sites at the airport, and in October 1999 issued several violations of the Washington Industrial Safety & Health Act (WISHA), including (1) allowing, and even directing, the employees to perform asbestos-related work without required safeguards; (2) directing abatement workers to leave asbestos materials in wall cavities; (3) failing to fully inspect all areas; (4) failing to ensure that all areas were adequately encapsulated; (5) failing to demonstrate that clearance samples were taken as required; and (6) failing to institute the necessary quality assurance programs. L&I categorized these violations as willful and imposed a $63,000 fine against MMA. L&I did not cite any other employers or contractors on the project. MMA appealed to the Washington Board of Industrial Insurance Appeals (BIIA), which affirmed the citations but reduced three of the violations from willful to serious and imposed a total penalty of $38,700. MMA appealed the BIIA decision, which was upheld by the King County Superior Court. It was then sent to the Court of Appeals of Washington.

2.6.2 Issue

Whether MMA exercised sufficient control to be liable for these violations despite the fact that contract language ascribed ultimate responsibility to the Port's Asbestos Program Manager.

2.6.3 Analysis

WISHA multi-employer worksite regulations closely adhere to OSHA holding that under the doctrine, an employer who controls or creates a worksite safety hazard

may be liable even if the employees threatened by the hazard are solely employees of another employer. Moreover, sole liability under the multi-employer worksite doctrine may be imposed if the violating employer was a creating, exposing, correcting, or controlling employer.

Here, substantial evidence demonstrates that MMA exercised sufficient control over the worksite. An employer may be categorized as controlling employer if a contract establishes control over the worksite or if the employer actually has control without explicit contractual authority. Similarly, in Washington, liability may arise if the subcontractor contractually assumes responsibility for safety precautions at the worksite or is shown to have been in control of the method of performing the work.

MMA argues that it is not an employer under WISHA because it was merely a consultant with limited duties. This argument fails because there is substantial evidence that MMA exercised a great deal of control over the worksite and may therefore be liable under the multi-employer worksite doctrine.

Despite MMA's contention that it had no contractual duty to mitigate hazards at the worksite, the court need not decide whether such contracts were sufficient to grant MMA the right to control the worksite, because as BIIA found, MMA exercised a great deal of control over the worksite in actual practice. The testimony of several of the project's employees supports this finding.

2.6.4 Holding

Substantial evidence demonstrated Defendant MMA exercised sufficient control over the worksite to make it liable, under the multi-employer worksite doctrine, for unsafe asbestos work practices and conditions. Citations upheld.

2.6.5 Author's Comments on the Case

The MMA case is typical of how the courts come down on the issue of who's liable under multi-employer worksite doctrines. Note two important aspects of how the court made its decision in the MMA case: (1) substantial evidence and (2) actual control.

In this context, "substantial evidence" is evidence in sufficient amount to persuade a fair-minded, rational person of the truth of a declared premise. This is the standard by which the truth of the facts is to be judged. A substantial evidence standard means that this case was a factual evaluation, not a legal one. In other words, the court is tasked with determining what actually happened rather than what the law means and whether a lower court interpreted the law correctly.

MMA tried to argue that its contract with the Port shielded it from liability. But the court will not bite on that argument because there was substantial evidence (i.e., factual findings) that MMA did exercise total control. In fact, MMA was in control of everything that went on in the abatement project, from project planning and design, to air monitoring, to conducting inspections, to correcting known hazards. It did not matter to the Court that the hazards needing correction did not impact MMA employees per se. In essence, the court found MMA to be the employer for anyone subjected to the hazards it failed to control (and in many situations, may have created).

The other aspect of the multi-employer doctrine showcased in the MMA decision, is the actual practice standard. This touches on contract law, which you will learn more about in Chapter 3. MMA argued it had no liability because its contract said it did not. The Court held that despite the clear contract language purportedly shielding MMA from liability, it made no difference because MMA actually controlled the worksite. Contract law might protect MMA from liability to the Port, but it is no help for liability for unsafe work practices that it not only created but had the actual power to correct.

It is important for IH/S professionals who work in the multi-employer arena to stick to their ethics at all times. The doctrine gives OSHA and Courts power to find liability where it makes the most sense, and it will abandon the idea that only actual employers are responsible for safety.

But by sticking to one's ethics and code of conduct, the IH/S professional can manage the liability for the organization. If you are in a position to stop work when you see something unsafe then by all means do so. Stop work policies should be broadly written so that anyone has the authority to stop work when things do not seem right.

3 Contract Law

3.1 INTRODUCTION – CONTRACT FORMATION

Contract law is rooted in the ancient premise that people should keep their promises to one another. After all, if a person promises to do something for someone else and the other person is relying on it, should not the promisor be compelled to keep his promise? A broken promise is one of society's most hated things, and as a result, an ancient body of law exists to remedy the broken promise.

As sad as it may sound, promises are made and broken everyday yet we rarely find ourselves in court over such things. In the simplest of terms, a contract is a set of promises the law will enforce. I might promise to pick up the check at dinner before ordering and then at the last minute tell you I left my wallet at home. That might be a despicable act (certainly if it's not true I left my wallet at home) and I would certainly deserve to lose your friendship but it's not something the court is going to enforce. The court will only review and enforce sets of promises that meet the legal elements of a contract.

In order for an agreement or set of promises to have some legal teeth is must have "mutual assent" and "valuable consideration." Mutual assent is the human aspect of contracting. There has to be an exchange or communication (i.e., a bargain) between the parties that is objectively clear as to what each party wants or expects out of the other. This almost always takes the form of offer and acceptance. The exchange so critical to contract formation is often referred to as "an arm's length negotiation." The parties do not have to literally be at arm's length, but they must interact with each other directly or in a represented capacity, either in writing or verbally.

3.2 OFFER AND ACCEPTANCE

An offer is a present manifestation of willingness to enter into a bargain so made as to give the person receiving it the power to bind it. That is quite a mouthful but yet an elegant description of exactly what is needed to give an offer legal significance. Breaking down the definition, we see that an offer first requires a "present willingness." This means the offer must express one's present intention to bind himself to the other person in the future. An offer cannot be that someday I will agree to do x but rather I am willing right now to do x for you in the future.

An offer must also be made in an objective way, meaning a reasonable person hearing or reading the terms of the offer would know what the offer is. In other words, any subjective thoughts not expressed at the time the offer is made are not valid and not enforceable. If you and I are negotiating the sale of my house to you and I write the price of $500,000 on a cocktail napkin and slide it over to you then I have made an objective offer because a reasonably minded person in your shoes would understand I am willing to sell you the house for $500K. If I secretly meant to sell it to you for $600K the law will not allow me to change the price. You accepted

my offer to sell it to you for $500K. My subjective and unexpressed desire to get more for the house will not be tolerated by the court.

The last thing about offers is they have to give the person the offer is directed to the power to close it. Thus, the offer has to be directed to the offeree and the offeree must know that she has the ability to accept it (and more importantly how to accept it).

Contract acceptance is the manifestation of the offeree's assent to be bound by the contract. Acceptance can be the nod of a head, a "yes", and any other manner that gives the objective indication that mutual assent to be bound by the contract has occurred. Typically, an offer will not only grant the power to accept it but also dictate how the offer can be accepted. For example, an offer to sell real estate may state that the offeree must accept the offer in writing by signing it before a designated deadline. The following case is famous (among law students at least) for exploring the boundaries of offer and acceptance, in this case as a unilateral contract.

3.3 *CARLILL V. CARBOLIC SMOKE BALL CO.* (1 Q.B. 256 COURT OF APPEAL (1892))

3.3.1 Facts

This case arises out of the following advertisement placed in a London newspaper: "£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. £1000 is deposited with the Alliance Bank, Regent Street showing our sincerity in the matter …."

On the faith of this advertisement, Carlill used one of the balls as directed. When she contracted influenza, she sued the Company and was awarded £100 in damages. The Company now appeals the award by the lower court.

3.3.2 Analysis

As explained by L. J. Lindley (the presiding judge in the trial court), the advertisement and subject of this case was not "a mere puff," but an offer under which "the reward is offered to any person who contracts the epidemic or other disease within a reasonable time after having used the smoke ball." The fact that plaintiff had not notified the Company of her acceptance was not fatal to her claim. One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself, if he thinks it desirable to do so … and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification …. In

many cases you look to the offer itself. In many cases you extract from the character of the transaction that notification is not required, and in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition notification is dispensed with. It seems to be that from the point of view of common sense no other idea could be entertained.

3.3.3 Holding

The award to plaintiff by the lower court is upheld.

3.3.4 Author's Comments on the Case

Thus, an offer invites an acceptance, and an acceptance, either by notification or action, closes the contract. Once offer and acceptance is in place, the contract is on its way to formation. Carlill got to keep the money because she accepted the company's offer by taking the medicine as directed and still contracted the flu. The contract was formed by her performance consistent with the terms of the offer.

3.4 CONSIDERATION

Mutual assent (offer and acceptance) as discussed above is only half the story. A valuable consideration must be the subject of an enforceable contract. Consideration, in the contract law sense, means "bargained for legal detriment." We have already dealt with the bargained for aspect of this under offer and acceptance and the arm's length negotiation process. So what is legal detriment? It simply means the parties through their promises are changing their legal positions because of the contract. Typically, one party is legally obligated to perform an act and the other party is legally obligated to perform another act. The "exchange of acts" as it were is consideration.

Perhaps an example is in order. If I promise to sell you my car for $5000, and you promise to buy my car for $5000 then the car and the money is the consideration. Once you tender me the $5000 I am promising to give you legal title to the car. Thus, you have a legal detriment to possession to the $5000 and I have legal detriment in that I no longer have legal title or possession of the car.

The law developed the concept of consideration as an issue of legal standing. In other words, the court is not going to entertain (and rule on) a dispute if there are no issues about legal rights. This is the reason that a gift promise fails for lack of consideration. I might promise to give you $5000 to help you with college expenses, but if I change my mind and do not give you the money, you are not going to be able to sue me for it. Why? Because, in the absence of other facts, my promise of money did not result in you incurring any legal detriment; you did not change your position based on my promise, and you did not promise me something in return. If on the other hand, I am old and sick and I promise to will my house to you upon my death on your promise to take care of me for the rest of my life, then we have exchanged promises and incurred legal detriment. The Court will likely find consideration.

3.5 PRE-EXISTING LEGAL DUTY AND INTERNAL AGREEMENTS

If one party to an agreement has an already existing legal duty to perform an act for the other party, then the duty cannot be consideration. The reason for this is it fails the "bargained for" requirement of consideration. This is the exception to consideration that arises most often in the employment context.

Many organizations have developed so-called "safety contracts" to manage safety expectations and objectives. The idea is an executive level manager might enter into a "contract" with the CEO, promising to conduct a certain number of safety walk-throughs or "safety interactions" with workers. This is a good idea because it puts into writing senior management's commitment to safety. But as we've discussed, an internal agreement between employees and management is not a legal contract because both parties already have a duty to each other. If the executive fails to complete the required number of safety walk-throughs, for instance, the company is not going to have a breach of contract case on its hands. The organization may have a performance issue to deal with and possibly grounds for termination, but contract law issues will provide no remedy. This is the reason that in-house counsel will not be terribly interested in internal safety contracts because they have no legal effect or consequence.

Another way organizations often create internal agreements is through a Memorandum of Understanding (MOU). MOUs are often created between different divisions within a larger organization. This could take the form of one department making an agreement with another department to share resources or embark on a mutual research venture. The ES&H Department might agree to provide respirator fit testing services or High Efficiency Particulate Air (HEPA) filter certification services to an offsite organization. The offsite facility might not have the resources to do its own HEPA filter testing and the ES&H organization has an interest in making sure that the work at the offsite facility meets design safety requirements. The MOU is put in place to show each party's intention to help one another in a particular program area.

Even though the MOU is essentially a set of promises it is not a contract. In our example above, if the ES&H Department misses a critical deadline for HEPA testing by mistake, the offsite facility cannot go to court to enforce the agreement. The MOU is the modern day version of a "gentlemen's agreement." The two "parties" to the agreement are merely stating their intentions to work with one another toward a mutual goal or outcome. If things change, such as budgets are cut, new regulations surface, etc., the parties to the MOU can simply walk away and often do. They are not legally bound to each other and there will be no breach of contract lawsuit.

3.6 MANAGING SAFETY IN CONSTRUCTION AND LABOR CONTRACTS

The most likely interface between IH/S practice and contract law arises in construction or supplemental labor contracts. And if you work for a large company, you have probably wondered why in-house counsel or the procurement department is usually very interested in the construction or labor contracts into which your organization might be entering.

Many organizations, the government in particular, includes in its workforce supplemental laborers. Often times, supplemental laborers work alongside the company's

employees, but in reality, they are employees of the supplemental labor firm. Why does this matter to the IH/S professional? The answer lies in the company's desire, and duty, to prevent worker injury at all levels. As a separate employer, a supplemental labor contractor is generally the one on the hook for its workers' health and safety. But as we learned in Chapter 2, workplaces with multiple employers have a lot of overlap in operations, and hazards created by one activity may affect co-located work. For this reason, it is in your organization's best interest to make sure your contracts are watertight when it comes to setting controls. The worst-case scenario is where one group of supplemental labor workers are working side by side with company workers and they are wearing different kinds of personal protective equipment (PPE). I have seen this in my career – asbestos workers dressed in full Tyvek and PAPR P100 respirators in the hot zone alongside a supervisor from a general contractor dressed in street clothes. This is a scene we obviously want to prevent, and the only way to stop it might be in the contract terms.

Construction contracts require a good understanding of where the boundaries are with the work. It is often desirable for an owner to contract for a turnkey operation. Build a fence around the construction site and treat it like it's a foreign country. This is relatively easy by including terms in the contract such as "contractor is solely responsible for the health and safety of its workers and compliance with OSHA regulations." But reality says this will not work in the long run. Most of the time, construction contracts require a careful integration with co-located work of the company. Utility tie-ins, material delivery, and access to already built facilities are just a few of the many things that might bring construction crews alongside company workers. As we will see in Chapter 4, a company will not likely be able to "contract around" duties owed to all workers, visitors, and even the public.

3.7 FLOWING DOWN SAFETY REQUIREMENTS

I have personally witnessed in-house counsel take a very distance-like approach when it comes to managing supplemental workers on-site. Much advice is given to management to "keep things separate" and "do not provide them with respirators" or things like that. The advice is given under the hope that not getting involved will limit liability (i.e., if we never give them the respirator than we cannot be liable if they misuse it). Although I understand the thinking behind this approach, I do not believe it's valid and probably creates a greater liability for the organization.

There are always competing concerns when it comes to safety and supplemental labor. On one hand, the organization is paying for the contractor's services, presumably because it makes sense from an economic standpoint to do so. Outsourcing is often an efficient way to achieve goals that would be too costly to perform in-house. Why should the organization worry how the job gets done as long as it's done? On the other hand, the organization does not want workers to get hurt either and many times a large organization with an established health and safety program might be in a better position to provide the necessary controls to all workers. If respirators are required for the work, and the company has an on-site fit testing program, including medical, doesn't it make sense to fold the supplemental labor workers into the company respiratory protection program?

I believe there is less liability on the company who takes an active role in promoting health and safety to all workers on-site, not just the organization's own

employees. That way, the company stands a greater chance that the right controls will be implemented and the risk of injury is managed and probably mitigated. Of course, things can go wrong and someone might get hurt but it's a better position to show that the organization took reasonable steps to assure the worker's safety than it is to argue from a position where you "looked the other way."

Nevertheless, it is still important to make sure the supplemental labor contractor retains overall responsibility for the safety and health of its workers. How do you ensure the contractor is responsible yet follows the controls you believe are necessary for the work? Fortunately, this can be done relatively easily by flowing down all the organization's health and safety requirements into the contract. This is where an IH/S professional can be extremely helpful to procurement or in-house counsel. Specifics are key in good contracts. If the organization expects the same controls it would require of its own workers, then they should be specifically listed in the contract. Not only does this make it clear to everyone what is required for safety, it makes it very easy for the company to inspect or audit the contractor's performance, and if issues are discovered, they can be easily corrected simply by referring to the contract.

The best way I have seen to do this is like this. Prepare a brief statement of work and detailed specifications about the work. In the specifications, include exactly which documents must be produced (e.g., a written confined space program, an injury and illness prevention program, etc.) and detail each element of the document. Then ask the contractor to prepare and submit for review a job hazards analysis (JHA). The JHA should be very specific to the work to be performed. It should list the major tasks of the work and all hazards that will be encountered with those tasks. Ask the contractor then to propose the controls for each hazard.

The proposed JHA and supplemental documents and safety plans should then be routed to all ES&H disciplines relevant to the work. For example, if the work involves asbestos removal, the Industrial Hygienist needs to review the documents. Train each discipline to review the JHA and supporting safety documents as if the work was for in-house workers. Here is where a little back and forth can have a tremendous impact. Disciplines should review the documents and provide comments, feedback, and suggestions. This is particularly important where the contractor is a small organization that may not have its own ES&H staff, or does not have a lot of experience with Occupational Safety and Health Administration (OSHA) regulations.

When both parties mutually agree on the contents of the JHA and safety documents for the work, then these should be integrated into the contract. In other words, they become binding obligations of the contractor. You should also make sure that safety requirements are also flowed down to lower-tiered subcontractors. This way, all organizations are working literally from the same page and there are fewer surprises. Of course, care must be exercised to prevent creating a "paper tiger" safety program. If you ask a contractor to prepare a robust JHA, be sure to enforce it in practice.

3.8 *PRESCOTT HOUSING GROUP, INC. V. DO-RIGHT ASBESTOS CORPORATION*

Consider this hypothetical case of how inadequate flow down of safety requirements can end up a breach of contract lawsuit or a costly change order.

3.8.1 Facts and Analysis

Plaintiff Prescott Housing Group, Inc. owns senior living apartment complexes all over the city of San Francisco. The company prides itself in being able to offer multiple living options for seniors living on fixed incomes in a city known for its very high cost of living.

Prescott acquired most of its properties through foreclosures in the 1970s. Many of the buildings were built in the 1950s and 1960s and have gone through only minor renovations since. Because of the age of the buildings, many of the building materials contain asbestos, including the ceiling texture known as "popcorn" ceilings. The popcorn ceilings look old and ugly, but the company contends as long as they are not physically damaged they present no health hazard to the residents.

Over the years, there has been some damage to the popcorn ceilings in several of the Prescott buildings. Because of this, the company has employed a three-person maintenance crew who is trained in asbestos abatement. The crew responds to resident complaints about damage to the ceilings and the dust it generates. In any given week, the crew makes repairs to two or three ceilings. This work is conducted using glove bags and wet methods. The crew conducts personal air monitoring and wears Tyvek suits and gloves. All work is conducted using Powered Air Purifying Respirators (PAPR) equipped with P100 filters. The lead supervisor of the asbestos crew testified in deposition that using PAPRs is a bit of overkill, but "my guys feel more comfortable wearing them [as opposed to the negative pressure respirators]."

In the spring of 2017, the SF bay area, after a three-year drought, experienced unprecedented rain. One of Prescott's facilities in the mission district, an older five-story apartment complex with 20 apartments per floor, suffered serious roof damage during a particularly violent rain and wind storm. Water leaked through the roof into most of the 20 apartments on the 5th floor. The ceilings were heavily damaged. Large chunks of asbestos-laden ceiling texture fell down in almost every apartment. The residents of the 5th floor had to be relocated.

The company decided that the full abatement of the entire 5th floor ceilings was necessary. This would be about 8,000 square feet of popcorn ceiling material to be removed. Realizing that the three-person maintenance crew could not perform the job by itself, the company issued a request for proposal (RFP). Rushed for time, Prescott's RFP was brief without a lot of detail. Among the requirements were that the successful bidder must be a licensed asbestos contractor, must remove any damaged asbestos-containing ceiling material, and "must comply with Cal-OSHA regulations pertaining to asbestos removal." The RFP did not require the bidder to submit any safety documentation or JHA for the work.

Three companies bid on the job, including Defendant Do-Right Asbestos Corporation (DRAC). DRAC won the job because it came in with the lowest bid and committed to completing the job in three weeks.

On April 1, 2017, the DRAC foreman attended an owner/contractor meeting to kick off the job. The foreman explained to Prescott representatives that he planned to remove the damaged ceiling material using mini-containments in each apartment rather than construct full-blown negative air enclosures. DRAC was confident that this approach would save time and money while fully complying with Cal-OSHA

regulations. DRAC also stated that it would be using its standard set of PPE for this type of work, which was Tyvek suits, safety glasses, nitrile gloves, and half-mask tight fitting negative pressure air purifying respirators. Finally, the DRAC foreman said it was going to conduct its own personal air monitoring.

When the Prescott representatives heard the plan they were alarmed because they were under the impression that full containments needed to be built and that the workers should be using PAPRs "just like our guys do." They also expected DRAC to subcontract out the air monitoring to a third party IH firm. Their concerns stemmed from the fact that there were a lot of eyes on this project due to the sensitivity of the public toward senior housing issues. The company did not want its regulators or family members of the residents thinking it was cutting corners and putting the residents' health at risk. The President at DRAC assured Prescott that its approach was sound. He later testified in deposition "if [Prescott] wanted a Cadillac why did they ask for a Chevy?" Despite his compelling arguments, Prescott refused to issue a change order to cover the additional costs of more rigorous controls.

Prescott sued DRAC for specific performance.* A provision in the RFP requiring the parties to seek arbitration was stipulated by the parties in court. The parties commenced discovery and each submitted briefs to the court appointed arbitrator.

On August 1, 2017, the arbitrator heard arguments from both parties. The thrust of Prescott's argument was that a valid contract had formed by its acceptance of DRAC's bid and that DRAC was under an obligation to comply with all Cal-OSHA regulations and bore the risk of misinterpreting what those regulations required for the type of abatement job involved. DRAC defended on grounds that Prescott's unexpressed expectations to have "more controls than are required" cannot support a claim of breach of contract.

The arbitrator found in favor of DRAC, stating that the risk of vague terms are borne by the drafter of the contract. "Prescott's unexpressed desire to have greater controls than those required of law does not in itself create a binding term of the agreement. If Prescott desired specific controls to be part of the agreement, it was under obligation to express them and form a contract around them such that both parties were clear on exactly what was bargained for."

This case is a good justification for working with contractors upfront to ensure that a safety plan with all desired controls is established. If Prescott had required DRAC to submit a safety plan that detailed the controls, this could have been caught in the negotiation process rather than after the fact forcing the parties into litigation. And keep in mind that the dates of this case are exaggerated greatly on the short end. In reality, the case probably couldn't have been heard for at least 18 months after the initial meeting when communications broke down. Meanwhile, the job is not getting done and residents are displaced. More upfront work by the building owner and actually partnering with the bidder before the contract is formed could have saved time and money. An on the ball IH/S professional could have been very useful in helping the organization craft contract documents and requirements that would have prevented this fiasco.

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* Specific performance is an equitable remedy, where one party to a contract asks the court to force the other party to perform.

4 Tort Law

4.1 INTRODUCTION TO TORTS

A tort is a wrongful act, not including a breach of contract or trust, that results in injury to another's person, property, reputation, or the like, and for which the injured party is entitled to compensation. Similar to contracts, tort law takes the view that when a person suffers harm at the hands of someone else they are entitled to be made whole. Of course, there are some harms in which the injured person will never be the same (i.e., amputation, emotional harm, or death), and so tort damages are based on money. The money is intended to take the place of the harm suffered. Thus, money not only replaces damaged property or compensates for medical bills, but it might also compensate for pain and suffering or emotional trauma.

In some cases where the offender's actions are particularly despicable, punitive damages can be awarded. Punitive damages, which are often awarded by a jury, is the legal system's way of saying "don't do that again, and to make sure you don't do that again and to punish you, we are going to give the Plaintiff a lot of extra money."

Tort law falls into three main categories – intentional torts, negligence, and strict liability. Intentional torts are just what they sound like – the person, or "tortfeasor," intended to cause the other person harm. For example, battery is the intentional hitting or offensive touching of another. Assault is intentionally causing the apprehension in another of being harmed. False imprisonment occurs when a person intentionally restricts another's movement within any area without justification or consent. In all three examples, the offender would be liable if the plaintiff proves he or she intended to cause harm.

Many of these age-old common law intentional torts were established by the courts to prevent violence. The theory is that people will avoid harming another person if they could face legal liability for doing so. So too are torts against property such as conversion or trespass to chattel. Taking one's property used to be a justification for committing violence in retaliation. The courts were trying to avoid the inevitable violence that results from theft so they created a system of rules at common law to compensate the victim in a very public way.

A question that many employees have is whether the organization can be held liable for the intentional torts of its employees. For the most part, the answer is a qualified yes. Thus, in general, if an employee commits a battery against a customer or another employee, the lawsuit most likely will be against both the employer and the offending employee. The theory of law at work here is respondeat superior, or "the master shall answer." Respondeat superior is rooted in agency law, a common law system whereby an agent acts on behalf of his principal (i.e., employer). Since the benefits of the agent's work accrue to the principal, so do the risks and liabilities of the agent's wrongdoing. We discussed Agency Law in Chapter 1.

Of course, there are exceptions to this rule. An employer may not be liable if the wrongdoing occurs at a time and place not linked to the work, or if the employee's actions substantially departs from his or her job duties for purely personal reasons. In other words, the tortious act must occur during and within the scope of employment. The following California case is illustrative.

4.2 *LISA M. V. HENRY MAYO NEWHALL MEMORIAL HOSPITAL* (1995)

4.2.1 Facts

On July 9, 1989, Plaintiff, a 19-year-old pregnant woman, was injured in a fall and went to an emergency room at Defendant's hospital for treatment. The examining physicians directed a technician to perform obstetrical and upper-right quadrant ultrasound exams. The technician completed the initial exam correctly and then left the examination room to "check on something."

When the technician returned he asked Plaintiff whether she wanted to know the sex of the baby. She responded that she did. The technician falsely told the Plaintiff that to determine the sex of the baby, he would have to conduct "a much more involved examination." She agreed to the more involved examination, which in her mind would not involve vaginal penetration. The technician sexually molested the young woman under the guise of examination.

The patient sued both the technician and the hospital. The trial court granted summary judgment in favor of the hospital and the court of appeals reversed.

4.2.2 Rule

The rule of respondeat superior is familiar and simply stated: an employer is vicariously liable for the torts of its employees committed within the scope of the employment. Equally well established, if somewhat surprising on first encounter, is the principle that an employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts. What, then, is the connection required between an employee's intentional tort and his or her work so that the employer may be held vicariously liable?

It is clear that California no longer follows the traditional rule that an employee's actions are within the scope of employment only if motivated, in whole or part, by a desire to serve the employer's interests.

4.2.3 Analysis

Although the technician conducted the initial and "more involved" examination on behalf of the hospital and during a time he was fulfilling the scope of his job duties, we cannot find the hospital vicariously liable for Plaintiff's damages. The technician's actions were so far outside of acceptable behavior and purely his own desires and not that of any hospital objective or expectation. Nor is there any evidence the hospital ratified his behavior.

However, the trial court never reached a decision of the claim for the hospital's negligence. That matter is remanded to the trial court for further proceedings consistent with this opinion.

4.2.4 Holding

The issue on appeal is whether the ultrasound technician's tortious actions fell within the scope of his employment, thus making the hospital liable. We hold the answer to that question is no.

4.2.5 Author's Comments on the Case

Thus, in this case the Court of Appeals reversed, holding the hospital was not liable for an intentional tort, but punted back to the trial court to determine if it was negligent.

Negligence, which we will get to later in this chapter, is one typical way organizations are found liable for an employee's intentional tort. For example, if a company is aware its employee has a history of violence or failed to address complaints about past aggressive behavior, then the employer may be liable under respondeat superior but by way of negligent hiring or supervision. For example, suppose you own a bar and have a need for a bouncer. It is foreseeable that a bouncer will encounter problems with intoxicated customers. If you hire a person with a history of violence, putting them in the position of "bouncing" out drunk people, and they get into an altercation that did not reasonably necessitate physical manhandling, then you will likely be liable because you were perhaps negligent in hiring him and putting him in a position where he had to interact with customers often during contentious times.

4.3 VIOLENCE IN THE WORKPLACE

In light of many high-profile workplace shootings and other violent acts across the country, The Occupational Safety and Health Administration (OSHA) has become concerned with workplace violence. In fact, OSHA views this emerging reality in the workplace as a hazard to workers, which, like any other hazard, must be recognized and controlled.

There are currently no specific OSHA standards to control workplace violence. However, under the General Duty Clause (Section 5(a)(1) of the OSH Act of 1970), employers are required to provide their employees with a place of employment that "is free from recognizable hazards that are causing or likely to cause death or serious harm to employees." Federal courts have interpreted the general duty clause to mean that an employer has a legal obligation to provide a workplace free of conditions or activities that either the employer or industry recognizes as hazardous and that cause, or are likely to cause, death or serious physical harm to employees when there is a feasible method to abate the hazard.

The legal duty for an employer to abate workplace violence hazards is based, in part, on notice. An employer that has experienced acts of workplace violence, or becomes aware of threats, intimidation, or other indicators showing the potential for

violence in the workplace is considered on notice of the risk of workplace violence and should implement a workplace violence prevention program combined with engineering controls, administrative controls, and training. Thus, depending on the circumstances, an employer can be cited for not implementing a workplace violence policy or prevention program.

One problem with the OSHA enforcement scheme is the fact that there is a "cart-before-the-horse" argument to be made (i.e., how does the employer know to prevent workplace violence if it has never experienced it or the threat of it?). If the employer truly has no notice of the potential for workplace violence then it should not be held liable for failure to have a prevention program. However, employers, especially the larger ones, are most likely going to be held to the standard "it should have known" about the possibility of workplace violence and should make an effort to address this potential hazard.

Preventing workplace violence follows the hierarchy of controls like any other hazard. Engineering controls are preferred. This often takes the form of security guards, locks and keys, security cameras, etc. Prohibitions of bringing firearms or other weapons to work are common. Administrative controls are used too. Employee training is critical from the OSHA perspective. A popular training video which has been developed for Federal workers called "Hide. Run. Fight," trains workers on what do to if there is an active shooter in the workplace. Employee Assistance Programs (EAP) are very popular and can be used to help people going through personal issues, such as divorce, death in the family, teenager issues, addiction, etc. cope with these problems through on-site counseling. The idea is to get people the help they need before their frustrations reach a level conducive to violence. Ombudsmen programs are also a good way for employees to resolve conflict in a controlled and respectable manner.

Some state occupational health and safety programs have already created specific regulations for workplace violence prevention that carry a lot more teeth than the general duty clause. In California, new regulation section 3342 in the General Industry Safety Orders (GISO) provides for workplace violence prevention in health care. The new regulation applies to all health care settings and is comprehensive in its coverage and requirements. Health care employers are required to develop written violence prevention plans, conduct extensive training, and implement numerous other provisions for safety in the facilities and surrounding locations like parking lots, and for dealing with hostile patients and family members, and other employees. It is expected that if the new anti-violence in health care regulations are deemed a success, California will push for more specific regulations in all workplaces.

A crossover issue worth mentioning occurs in the area of workplace violence and discrimination/retaliation (discussed in great detail in Chapter 7). The victims of domestic violence or stalking are specifically protected in many states by statute. Suppose, for example, one of your employees has an abusive spouse who has on occasion shown up in the workplace demanding to see your employee, acting with hostility, etc. As discussed earlier, the company, on notice for a potential workplace violence situation, would have a duty to protect all employees from the abusive spouse. The company might be tempted to terminate the employee to avoid any further disruptions. It might go something like this: "I'm sorry Pat, you're a great

worker but we just can't take the risk that your spouse might come by and hurt you or the other employees." In many states such a termination would be unlawful under statutes enacted to prevent victims from paying the price of the harms made against them. Not only is the victim of domestic violence protected against termination, he or she must also be afforded unpaid time off to deal with the legal issues of domestic violence (i.e., going to court for a restraining order, or to testify against the abuser in a criminal proceeding). Thus, we can see that workplace violence prevention is a key area in the public policy arena. I have no doubt that state legislators will enact additional protections in the future.

4.4 NEGLIGENCE – DUTY AND BREACH

As mentioned in the beginning of this chapter, there are three main kinds of torts: intentional torts, negligence, and strict liability. Negligence is by far the biggest of the three. Companies spend millions and millions of dollars every year attempting to prevent negligence or compensating others for their negligence (and paying attorney's fees too). A big part of the IH/S professional's efforts should be to counteract the error precursors and latent organizational weaknesses that give rise to negligence. Accidents do not just happen. People get injured in one of three ways: self-inflicted, the intentional conduct of someone else, or because he or she or another person was negligent.

Torts in negligence take many forms but they all share the same four elements: duty, breach, causation, and damages. To prevail in a suit for negligence, the Plaintiff must show by a preponderance of the evidence that all four elements existed when the defendant's action (or inaction) caused him harm.

4.4.1 Duty

A duty is a legal obligation a person* owes another to act or not act in certain situations. Unlike the other three elements of negligence (i.e., breach, causation, and damages), duty is a matter of law. In other words, whether or not a person owes another a duty is decided by the courts under common law, or by statue or regulation. Juries do not determine duty, and so duty is not a fact-based inquiry.

The most prevalent duty is the duty of reasonable care. To some extent, everyone in society owes a duty of care to others to conduct themselves in a reasonable manner that does not create a foreseeable risk of injuring others. The famous case, *Palsgraf v. Long Island Railroad, Co.*, a 1924 case which is still good law today, explored the boundaries of duty. In that case, Judge Benjamin Cordozo in his majority opinion held that the duty of care extends only to foreseeable plaintiffs. In other words, a person will not be held to owe a duty to someone he could not reasonably foresee his actions affecting.

The *Palsgraf* case had some rather bizarre facts. A young mother was attempting to board one of defendant's trains when two men, one of which was carrying a package containing explosives pushed ahead and tried to board the train ahead of the

* "Person" means in the legal context not solely an individual, but also company, non-profit organization, corporation, partnership, etc.

plaintiff. The train's employee negligently caused the parcel to fall and it exploded, causing a nearby scale to break apart. A piece of the scale hit the plaintiff injuring her. Cardozo reasoned that in helping the two men board the train it was not foreseeable they would have explosives ultimately setting up a chain reaction injuring the plaintiff. This is the majority view in the United States and it places limitations on the duty we have to one another. A duty to protect would only arise if the results of the act were foreseeable.

Palsgraf also had a dissenting opinion held by Judge William Andrews. The so-called Andrews view of duty is that reasonable care extends to everyone in the world. Judge Andrews reasoned, "driving down Broadway at high speeds is negligent whether or not someone is hurt." The Andrews view is adopted by a minority of states. It does not mean that a negligent person is responsible for every single thing that happens as a result of his negligence (i.e., the butterfly effect), but it stands for the belief that our duty of reasonable care extends to everyone, and to defend yourself from liability you have to be able to show your actions were not the cause of the plaintiff's injury (more on causation later).

Whether we take the Cardozo or Anderson views of duty, one thing is true, reasonable care is the standard to which we must live our lives. But duty does not end with simple reasonable care. There are other more heightened duties that have been created over time by the courts and legislatures for specific public policy purposes. For example, common carriers such as the airlines or commuter trains must go far beyond reason care and provide its customers with the "upmost care." IH/S professionals working in the transportation sector tasked with passenger safety know this all too well.

Other special duties that exist in law are the duty of a parent to protect her child, duties owed to business invitees by landowners, and duties owned by professionals. In most jurisdictions, a person owes no duty to rescue a person in peril; however, if one's actions are the cause of another person's peril, then a duty to rescue arises. Many states have Good Samaritan laws, which provide immunity to rescuers who wind up injuring the person they are trying to save. This serves competing public policies of no general duty to rescue and the desire for people to at least attempt to rescue others in peril.

Perhaps the most relevant duty for IH/S professionals is the duty of employer to employee. There actually is no special duty per se for employers to employees so the general reasonable care standard applies. However, through the application of administrative law and regulations an employer is held to have a duty to provide a workplace free of recognized hazards. This is expressly established by the OSHA General Duty Clause, and is certainly implied by the multitude of state regulations in worker safety and health. In any work setting, it is usually very easy to establish that the employer owes a duty to protect her employees. And under multi-employer worksite regulations (see Chapter 2), such duties can logically be extended to subcontractors.

4.4.2 Breach

The second element of simple negligence is breach. Breach is failure to act in accordance with the applicable standard of care, which as we have seen is usually to provide reasonable care. Unlike duty, breach is a factual question, meaning the jury or

judge evaluates the facts and determines whether the defendant failed to live up to the applicable standard of care.

In the IH/S world, breach is usually not in contention. Most organizations have written procedures, which reflect either company policy or laws and regulations. In other words, there are rules to be followed in certain situations and it is usually fairly easy to determine whether or not rules have been followed. However, unless it is a case of intentional misconduct or sabotage, it is not common practice to blame an individual employee for an injury or incident and we rarely find ourselves saying "he breached his duty to be more careful." The more common scenario is when the organization's procedures are deficient and the employee is set up to fail. Then, it could be said the organization breached its duty to provide a safe and healthy workplace. So, breach is usually ascribed to the organization and is typically easy to establish (or refute) in a legal proceeding.

4.5 NEGLIGENCE – CAUSATION

Causation is by far the most important element of negligence for the practicing IH/S. In a sense, a large part of our job is to determine how an injury or unwanted event occurred. Indeed, we live to prevent bad things from happening again and we can't do that if we don't know what caused the bad event to happen.

The legal theory behind causation is that a person should not liable for an injury he did not cause. As with the other elements of negligence, the plaintiff has the burden to prove causation. Thus, an injured person may easily show the defendant breached a duty, but then must meet the burden of proving the harm was caused by the breach. This is not always easy to do especially when evidence is lacking.

4.6 *SINE QUA NON* CAUSATION

There are two causation tests that both must be satisfied to prove the element. First is the *sine qua non*, which is a Latin legal term, translated literally, as "without which it could not be." Modernly, this test is called the "cause in fact" test or more commonly, the "but for" test. "But for" defendant's conduct, plaintiff would not have been harmed. Putting this into IH/S parlance, "but for the company's failure to construct a negative pressure enclosure, Plaintiff Paul would not have been exposed to asbestos and would not have developed asbestosis."

The "but for" test is simple and elegant, but has drawbacks and is often ineffective in the modern context. The main drawback, which is often the case, is where there are two or more concurrent causes of a harmful event. For example, suppose a construction company doing roadwork fails to barricade an open trench, and a careless driver swerves into a bicycle rider forcing the rider off the road into the trench. Falling into the trench causes serious harm to the rider. Who then is the cause of the harm? But for the careless driver, the bicycle would not have been forced off the road into the trench where he was injured. And, but for the construction company's negligent act, the rider would not have fallen into the trench. Both satisfy the test, even though the test is designed to provide the court with the *one person* responsible for the harm.

Courts have tried to solve this problem by holding both negligent parties liable for the harm when the but for test is satisfied by more than one person's conduct. The problem with this is where the harm could only have been caused by one person's action, but it is not possible to identify the culpable person.

4.7 *SUMMERS V. TICE* (33 CAL.2D 80)

4.7.1 Facts

Plaintiff sued two defendants for an injury to his right eye and face as the result of being struck by birdshot discharged from a shotgun. On November 20, 1945, plaintiff and the two defendants were hunting quail on the open range. Each of the defendants was armed with a 12-gauge shot gun loaded with shells containing 7½ size shot. Prior to going hunting plaintiff discussed the hunting procedure with defendants, indicating they were to exercise care when shooting and to "keep in line." In the course of hunting plaintiff proceeded up a hill, thus placing the hunters at the points of a triangle. The view of defendants with reference to plaintiff was unobstructed and they knew his location. Defendant Tice flushed a quail which rose in flight to 10-foot elevation and flew between plaintiff and defendants. Both defendants shot at the quail, shooting in plaintiff's direction. At that time defendants were 75 yards from plaintiff. One shot struck plaintiff in his eye and another in his upper lip. The lower court found that both defendants were equally liable.

4.7.2 Issue

Which of the two defendants is the legal cause of plaintiff's injury?

4.7.3 Holding

The judgment of the lower court is affirmed. Each defendant failed to meet his burden of proving who was responsible for plaintiff's injury; therefore, because each acted negligently, each was responsible to plaintiff for damages from the injuries.

4.7.4 Author's Comments on the Case

In *Summers v. Tice*, the court of appeal recognized that strict adherence to the but for test would leave the plaintiff without a remedy for his harm. If one defendant satisfied the test (i.e., but for the first hunter's firing the shot plaintiff would not have been struck) then the other hunter would be exonerated. But as is often the case it is not possible to know which gun fired the injury causing shot. So, the court created a new rule shifting the burden to the defendants to each prove their shot did not cause the harm. This is a radical departure from the notion that plaintiff must prove all four elements of a tort to prevail. In this case, both hunters were negligent, so both shared the liability unless one could show their shot did not cause the harm. In a sense, *Summers v. Tice* pitted the defendants against each other so that the plaintiff could have a remedy. If a *Summers v. Tice* situation occurred today, you can bet

each defendant would hire ballistics and forensic experts to prove the birdshot that harmed the plaintiff came from the other guy's gun.

This happens all the time today in the modern world of IH/S. The plaintiff may be a worker suffering from lung cancer as a result of working many asbestos jobs for several employers, installing or removing asbestos made by several manufacturers. From plaintiff's perspective, he has lung cancer and somebody caused it. Who that somebody is up to the others to prove by showing they did not expose the plaintiff to their asbestos.

4.8 PROXIMATE CAUSE

The *sine qua non* or "but for" test is an elegant logical test but often fails to assign legal culpability. For example, one might conclude but for the rain, the car would not have skid out of control hitting the plaintiff's car. The rain in this example is the actual cause of the accident, but rain cannot be legally or morally responsible; only a person can fill that role. To address this, and the other limitations of the "but for" test, courts developed the concept of proximate cause. Proximate cause, often-called legal cause looks at foreseeability and intervening behaviors or actions that get to the true negligent actor in a case. IH/S professionals often consider intervening actions in conducting root cause analysis, or human performance improvement factors, so proximate cause may be a familiar concept.

Proximate cause occurs where the defendant sets in motion a foreseeable chain of events between his actions and plaintiff's harm. Thus, foreseeability is a major component of proximate cause and it is a measure for how predictable the harm was from the negligent conduct.

Suppose we are college roommates and I throw a football at you inside the room, wanting to see your reaction. But I do not know my own strength and the football sails comfortably over your head. Unfortunately, you keep your Industrial Hygiene textbooks on a shelf in the room and the football hits them and a large volume lands on your head causing a concussion. In this scenario, I am not liable for assault or battery because I never intended to harm you. My conduct is negligent, but did my conduct (throwing a football at you indoors) cause your injury? If the court simply follows the "but for" test I might get off scot-free. But for my throwing the football (i.e., my negligent conduct) you were not injured. In fact, I might argue that you are the cause of your injury because but for your failure to secure your textbooks properly one would not have fallen on your head. However, it is certainly foreseeable that throwing a football at you in the house where there are other things around on shelves could cause a chain of events that led to injury. After all, footballs are meant to be thrown outside in the open field. Thus, I am going to be liable to you under the proximate cause test because a reasonable person should have no trouble foreseeing that throwing a football in the house could cause the type of injury you endured.

4.9 INTERVENING AND SUPER INTERVENING EVENTS

As the definition above implies, in addition to foreseeability, proximate cause relates to chains of events. The law recognizes that things can happen after negligent conduct that contributes to a cause. So-called intervening causes are part of a chain of

events that lead to injury, but they do not sever the legal liability. Under the "but for" test, an intervening cause might sever the chain of events leaving a deserving plaintiff without redress.

The classic example of intervening events that contribute to cause but do not sever causation is the ambulance accident. In this scenario, a defendant acts negligently causing harm to a plaintiff requiring emergency medical attention; let's say the harm is a broken leg. An ambulance is summoned rushing plaintiff to the hospital for treatment. Along the way, another car runs a red light and collides with the ambulance. The ambulance rolls over several times and catches on fire. Unfortunately, the plaintiff is badly burned from the fire.

Under the theory of proximate cause defendant is not only liable for the broken leg but also the burn injuries. Why is this the case? The defendant could not have possibly caused the accident. The reason is that the ambulance accident is a foreseeable consequence along the chain of events that defendant put in motion by his negligent conduct. It is foreseeable that when a person breaks a leg, they will need to go to the hospital, and it is foreseeable that any vehicle can get into an accident along the way. The intervening act of the ambulance accident is the "but for" cause of the burn injury, but because such an event is foreseeable, the proximate cause remains with the defendant who put the whole thing in motion.

For the same ambulance accident scenario, suppose plaintiff makes his way safely to the hospital and undergoes treatment. The leg is badly broken and requires an open reduction by inserting pins. The surgery lasts two hours and the plaintiff is in recovery, but unfortunately soon after he gets a very severe staph infection. The doctors have no choice but to amputate the leg. Is defendant now liable for an amputated leg? The answer is yes. Staph infections are foreseeable following surgery. Even if defendant can prove the recovery room nurses were negligent in their treatment of the surgical wound, the proximate cause is not severed. Simple negligence is foreseeable in a hospital. In this scenario, the hospital might share in some liability but defendant is still on the hook for setting things in motion.

Now consider this wrinkle, same scenario as above where the plaintiff experiences a life-threatening staph infection. He is rushed in for emergency leg amputation surgery to save his life. Unfortunately, the surgeon amputates the wrong leg – the healthy one – and then, after realizing the mistake, amputates the other infected leg. Is defendant liable for the loss of both legs? In this scenario probably not. Amputating the wrong leg has been held to be gross negligence, and gross negligence is not foreseeable in the chain of events. This would be a super-intervening event that severs the chain of causation in proximate cause analysis. Thus, in this case, the hospital's negligence would be the proximate cause of plaintiff's loss of a healthy leg.

4.10 DAMAGES

The final element of negligence is damages. A plaintiff must prove he suffered harm as a result of defendant's negligent conduct. Damages are specific and general in nature. Specific damages would be out of pocket expenses, such as medical bills, lost

wages (back and front pay) from not being able to work, and even attorney's fees in some situations. General damages in tort are for pain and suffering. General damages are determined by the jury and can vary widely by jurisdiction and the make-up of the jury. Pain and suffering is hard to translate into dollars but must be done in every case. Usually, attorneys will argue that in such and such case, plaintiff was awarded x dollars for a broken leg, or x dollars for developing cancer, and on and on. A seriously injured person is never actually made whole. They just now have money to compensate for the pain they endured.

The other type of damages in negligence cases is punitive. Punitive damages are awarded to the plaintiff but they are not intended as compensation. Their purpose is to punish the defendant, in theory to prevent him from doing the same wrong again. Since all trials are public record, the hope is that other people and companies get the message that whatever behavior caused the injury will not be tolerated.

4.11 STRICT LIABILITY TORTS

There is one more tort theory worth discussing, especially in the context of IH/S practice. Strict liability holds a defendant liable for certain harms even when he is not at fault (i.e., he has not acted negligently) but is responsible for the activities that result in injury. Strict liability is usually associated with inherently dangerous activities, such as wild animal handling or use of explosives. It is also one of several legal doctrines invoked in product liability cases.

Under strict liability, a person engaged in certain inherently dangerous activities must take every precaution necessary to avoid injuring someone. Even if all precautions are taken, the defendant is still liable. The only defense to a strict liability tort is showing "absence of fault," which means the defendant is able to prove the plaintiff's conduct was the sole reason the event occurred and the cause of injury. Consider this famous occurrence from the news:

4.12 *IN RE: SAN FRANCISCO ZOO*

4.12.1 Facts

On Christmas Day, 2007, Tatiana, a female tiger, escaped from her open-air enclosure at the San Francisco Zoo and attacked three visitors shortly after closing time. After escaping from the tiger enclosure, the tiger killed one patron, Carlos Eduardo Sousa Jr., who was 17 years old at the time of his death, and injured two brothers, Amritpal "Paul" Dhaliwal, aged 19 years, and Kulbir Dhaliwal, aged 23.

After being attacked, the brothers fled to the zoo cafe approximately 300 yards away and, according to initial reports, left a trail of blood that the tiger followed. Paul Dhaliwal began screaming outside the locked Terrace Cafe, prompting an employee to call 911.

Carlos Sousa was found near the tiger enclosure by a zoo employee who remained with him until rescue crews arrived. After police officers and fire department paramedics arrived, they reached Carlos Sousa's body and found his throat slashed or punctured. His autopsy later revealed that he had blunt force injuries of the head and

neck, many punctures and scratches to his head, neck, and chest, skull and spinal fractures, and a cut to his jugular vein.

The Dhaliwal brothers received deep bites and claw wounds on their heads, necks, arms, and hands. Their injuries were not life-threatening, and they were released from the hospital on December 29, 2007. The police shot and killed Tatiana.

It was not immediately apparent how Tatiana had escaped, but police said that Tatiana may have "leaped" or "climbed" the walls of her enclosure. Police undertook an investigation to determine whether one of the victims climbed over a waist-high fence and then dangled a leg or other body part over the edge of a moat that kept the big cat away from the public.

Two days after the attack, on December 27, 2007, the zoo reported that while the moat, at 33 feet wide, was sufficient by national standards, its claim that the enclosure's moat wall was 18 feet tall was incorrect. Officials measured it at 12.5 feet tall, substantially lower than their initial report, and substantially lower than recommendation for such enclosures. Tatiana's rear paws were found to carry a significant amount of concrete in them, suggesting that she had pushed against the moat wall during her escape.

In the days immediately following the attack, the director of the zoo stated that Tatiana was probably provoked. He said, "Somebody created a situation that really agitated her and gave her some sort of a method to break out."

According to news sources, the Dhaliwal brothers had slingshots on them at the time of the attack. In later reports, the police denied that slingshots were found in the victims' car or at the zoo. Zoo visitor Jennifer Miller and her family allegedly saw the group of men, including an unidentified fourth person, taunting lions less than an hour before the tiger attack. She later identified Carlos Sousa as being part of the group but said Sousa did not join in the taunting.

Toxicology reports disclosed in mid-January 2008 indicated a blood alcohol level of 0.16 for 19-year-old Amritpal Dhaliwal, twice the legal limit for operating a motor vehicle, and that alcohol was also present but under legal limits for Kulbir Dhaliwal, aged 23 years, and for Carlos Sousa, aged 17, and that evidence of cannibis use was present for all three. Reporters also noted that "police found a small amount of marijuana in Kulbir Dhaliwal's 2002 BMW, which the victims drove to the zoo, as well as a partially filled bottle of vodka, according to court documents."

4.12.2 Author's Comments on the Case

This case never went to trial. It settled out of court for an undisclosed figure in favor of the Plaintiffs. This is typical in cases like this, and as a result, the public will never know all the facts and circumstances. But one can easily see from the facts reported above what is important to both sides.

The Plaintiff's would be expected to plead the zoo is liable under strict liability. Under this theory, as we have learned, keeping a tiger is an inherently dangerous activity, and no matter how careful the zoo was, it could still be liable for any damage caused by Tatiana. But you can see that the Plaintiffs want to hedge their bets a bit by introducing evidence of negligence. Perhaps the walls of the tiger's pen were not tall enough, below standards established by zoo keepers' associations or even

statutes. Of course, the most compelling evidence is the fact the tiger was seen by the police outside her enclosure and near the body of one plaintiff. All plaintiffs had evidence of physical trauma caused by a wild animal. Seems like case closed right?

Not so fast. Despite the seemingly conclusiveness of the term "strict liability" there is the defense of "absence of fault." This explains the zoo's defense strategy of investigating evidence the Plaintiff's taunted the tiger and were perhaps intoxicated. All of this evidence is circumstantial and is introduced in attempt to show the zoo had no fault, and the harm caused by the tiger is solely the fault of the Plaintiffs. This is a difficult defense to put on but you can bet had this gone to trial, the defendant would have pulled out all the stops, including the use of character evidence. Even if the Plaintiffs left their slingshots in the car, what kind of person brings a sling shot to a zoo?

4.13 TOXIC TORTS

Toxic torts have particular applicability to industrial hygiene. Whether an intentional tort such as battery, or negligence, the idea here is there could be liability for exposing workers to toxic chemicals. One question always asked by IH/S professionals and employers is whether the company can be liable for battery for intentionally exposing a worker to toxic chemicals. The answer is yes and no. The employer might certainly be liable to the worker for such an exposure, but liability will generally only extend to the limitation of workers' compensation. Consider this case:

4.14 *GUNNELL V. METROCOLOR LABORATORIES, INC.*

4.14.1 Facts

Gunnell, Walters, and Cohen were unskilled laborers who belonged to Local 724 of the Studio Utility Employees Union. The union supplied laborers to film studios in the Los Angeles area. Union laborers customarily performed work assisting carpenters as they built sets, dismantling sets after filming was completed, performing maintenance (such as gardening and moving furniture), moving lumber, tools, and construction materials, and cleaning.

In 1989, Gunnell, Walters, and Cohen worked for four and one-half months at Metrocolor Laboratories, Inc., which owned a facility to process and develop television and movie film. The laborers' assignment was to clean walls, pipes, and other parts of the interior of the film lab. Gerald House, the Safety and Engineer Project Coordinator and Program Manager of Metrocolor's Hazard Communication Program, generally supervised the cleaning of the Metrocolor film lab, the project on which Gunnell, Walters, and Cohen worked.

Metrocolor directed Gunnell, Walters, and Cohen to clean the interior of the film lab with a blue-green substance they then believed to be cleaning soap. They filled mop buckets and sprayers with the blue-green solution from 55-gallon barrels. Metrocolor provided no hazard training, posted no signs about chemical hazards, and never told the laborers what the 55-gallon barrels contained. None of the barrels of blue-green solution had labels warning of a chemical hazard or identifying the contents of the barrels.

During delivery of the 55-gallon barrels of blue-green solution, Gunnell observed his supervisor, Carrasco, removing labels from each barrel before offloading them from a truck for use by Gunnell and his co-workers in cleaning the facility. The barrels provided to the workers had no labels by the time the workers used them. At that time, Gunnell believed the blue-green substance was harmless. Charles Bracey, who supervised Gunnell's work crew, testified that the blue-green substance in the barrels was referred to at Metrocolor as "green or blue strong soap."

Cleaning the interior walls and ceiling of the Metrocolor film lab exposed Gunnell, Walters, and Cohen to the blue-green cleaning substance. Gunnell transferred undiluted blue-green liquid from the barrels to buckets and sprayers. The workers sometimes did not dilute the substance before using it. Gunnell sprayed the ceiling with the blue-green solution, causing dirt to bead. He then used a mop to remove the cleaner and dirt from the ceiling, usually repeating the procedure several times to clean each area.

After cleaning the ceiling, he cleaned the walls, and finally cleaned floors and pipes. As he worked on the ceiling, the blue-green cleaning liquid "rained" down on him, making contact with his skin, running down his back and chest, and getting inside his gloves. Pressing the mop against the ceiling and walls caused liquid to squeeze out of the mop and run down the handle into his sleeves, down his arms, and into his shirt. Gunnell used several gallons of solution every day. After a day's work, the blue-green solution soaked his clothing and feet. He remained wet until he arrived home. He worked in street clothes.

Metrocolor provided no protective gear except for rubber gloves, which disintegrated after about 30 minutes of use, and a paper suit that did not protect Gunnell from being soaked.

While working at Metrocolor, Gunnell did not recall ever being told what the blue-green cleaning substance was inside the barrels. No one told him about or required him to attend a safety program or a "right to know" program. No one trained him on how to handle chemicals.

Gunnell testified that on one occasion when he was working in clothing soaked with the blue-green substance, he saw House, Carrasco, and Fuhrmann (Director of Facilities at Metrocolor) observe as he cleaned a room. Gunnell asked if the blue-green substance was safe. House responded, "Yes, sir. Yes, it is safe." Walters's foreman told him several times the cleaner was safe.

After finishing his work at Metrocolor, Gunnell learned that the blue-green substance provided for cleaning the film-processing lab was Absorb, an organic solvent/degreaser. Absorb contains sodium hydroxide and 2-butoxyethanol, known as 2BE. Sodium hydroxide and 2BE appear on the OSHA Director's list of hazardous substances. 2BE is one of a class of chemicals known to cause brain and nervous system damage. 2BE absorbs readily through the skin and into the bloodstream. Diluting 2BE causes it to absorb through skin more readily. Once in the bloodstream, 2BE targets the liver, kidneys, respiratory tract, and central nervous system. Its effects on the central nervous system include headaches, nausea, dizziness, confusion, loss of consciousness, and possible death. Breathing vapor, combined with skin exposure, significantly increases exposure. Workers using 2BE should avoid skin contact and wear chemical-resistant gloves and possibly a respirator.

During four and one-half months of using Absorb, Gunnell sustained injuries, which included a slowing of brain function; anxiety and panic attacks; concentration difficulties; loss of cognitive functioning; personality changes; mood and temper problems; respiratory problems; and numbness. Gunnell was classified as disabled from working as a laborer. Plaintiffs' toxicology and neuropsychology experts testified that exposure to 2BE at the Metrocolor film lab, to a reasonable degree of medical probability, caused Gunnell's injuries.

4.14.2 Issue

The question is whether Gunnell's injuries, caused by chemicals Metrocolor supplied for the work he was hired to perform, resulted from injurious employer misconduct that remains inside, or falls outside, workers' compensation. In other words, can the plaintiffs sue in tort or are their damages limited to workers' compensation.

4.14.3 Analysis

Gunnell claims that Metrocolor committed a criminal battery on the plaintiffs, and therefore argues, pursuant to *Fermino v. Fedco, Inc.* that workers' compensation does not bar his independent civil suit for damages.

Certain types of "injurious employer misconduct" remain outside the compensation bargain and thus beyond the coverage of the Workers' Compensation Act (WCA) (see *Fermino v. Fedco, Inc.*). In some instances, even though an injury arises in the course of employment, an employer engaging in misconduct steps out of its proper role or engages in conduct of questionable relationship to the employment. *Fermino* addressed the relationship between such intentional employer torts and workers' compensation. Unlike many other states, in California, workers' compensation provides the exclusive remedy for at least some intentional torts committed by an employer.

Fermino described a "tripartite system" for classifying injuries arising in the course of employment. First, there are injuries caused by employer negligence or without employer fault that are compensated at the normal rate under the workers' compensation system. Second, there are injuries caused by ordinary employer conduct that intentionally, knowingly or recklessly harms an employee, for which the employee may be entitled to extra compensation under Cal. Labor Code section 4553. Third, there are certain types of intentional employer conduct which bring the employer beyond the boundaries of the compensation bargain, for which a "civil action may be brought."

Gunnell argues that a criminal battery fits within the third *Fermino* category of intentional employer misconduct and that Metrocolor's ongoing "chemical-type-battery" therefore falls outside the compensation bargain.

Fermino held that the plaintiff stated a cause of action for false imprisonment, and that false imprisonment committed by an employer against an employee was always outside the scope of the compensation bargain.

Because the intentional tort of false imprisonment involves criminal conduct against the employee's person, it is not a normal part of the employment relationship and lies outside the compensation bargain.

Fermino qualifies this statement, however, by saying that regulatory crimes, such as violations of health and safety standards or special orders, remain within the normal course of employment and worker's compensation.

In *Fermino*, the plaintiff worked as a sales clerk in the jewelry department of defendant's department store. The store's personnel manager summoned the plaintiff to a windowless room and interrogated her concerning her alleged theft of the proceeds of a $4.95 sale to a customer. Two security agents and the store's loss prevention manager joined the personnel manager. The interrogation lasted more than one hour, during which defendants denied the plaintiff's repeated requests to leave the room to call her mother and "physically compelled" plaintiff to remain in the room. When the plaintiff tried to leave and walked toward the door, a security guard "slid in front of the door, threw up a hand and gestured her to stop."

In language relied on by Gunnell, this part of the *Fermino* opinion continues: "What we hold today, rather, is that those classes of intentional employer crimes against the employee's person by means of violence and coercion, such as those crimes numerated in parts of the Penal Code, violate the employee's reasonable expectations and transgress the limits of the compensation bargain."

In the present case, Metrocolor's conduct was clearly intentional and harmful, but it did not rise to the level of a crime against the plaintiffs, inflicted with violence or coercion. The facts of this case do not meet the third instance laid out in the *Fermino* case to justify ordering a remedy beyond workers' compensation.

4.14.4 Holding

Metrocolor Laboratories is not liable for criminal battery.

4.14.5 Author's Comments on the Case

Thus, we learn from *Gunnel* and other similar cases that even intentional harm by an employer will not automatically take the case outside of workers' compensation. This may seem ludicrous to the practicing IH/S as Metrocolor's actions were despicable and go so far beyond what we would expect an employer to do it kind of "shocks the conscience." Nevertheless, as you can see, legal standards are different than IH/S practice, and in this case, the plaintiff is limited to workers' compensation damages, which are often not satisfying and have no punitive element, because the defendant's conduct did not rise to a crime characterized by violence or coercion. We will learn more about the reasons for the compensation bargain in Chapter 8.

5 Administrative Law

> The history of American freedom is, in no small measure, the history of procedure.
>
> *Malinski v. New York, 324 U.S. 401, 414 (1945) (Assoc. Justice Frankfurter, concurring opinion)*

5.1 INTRODUCTION – CIVIL PROCEDURE OF LITIGATION

Thus far in the chapters on contracts and torts we explored the substantive law in these areas but not the basic civil litigation process. Litigation between private parties, or a private party and the government, with the power to do so derived from the U.S. Constitution, is generally initiated through the filing of a Complaint. The Complaint, which is a pleading and filed by a Plaintiff, and must be served on the Defendant through a Summons, outlines the basic facts of the case (at least as the Plaintiff believes them to be at this early part of litigation) and the various causes of action Plaintiff thinks are available to him. The Complaint is filed directly with the state trial court (which is often a "Superior Court" but will have different names in different jurisdictions), or in a federal case in a U.S. District Court.

Defendants must answer the Complaint within certain prescribed times. If the defendant believes the Complaint is not valid, it can file a Motion to Demurrer (some states have different terminology), which basically means the defendant is saying to the judge the facts plead in the complaint do not give rise to a legitimate cause of action. This is the "ok … so what?" response. If the Motion to Demurrer is denied the cause will go forward into the discovery phase, which is usually the longest phase of litigation. Discovery is the process by which both sides to a dispute share or discover evidence from each other. This includes requests for production of documents, requests for admissions, deposition of witnesses and parties, form and special interrogatories, etc. The idea of discovery is to keep last-minute surprises out of the courtroom, and to help each side paint a realistic picture of their chances of prevailing given the evidence available to all. Indeed, most cases settle because each party is able to predict the outcome of the case and to assign a value to it ahead of trial.

Sometime before the end of discovery, one party may decide to file a Motion for Summary Judgment (MSJ). This is akin to asking the court to decide on the case without a trial. The standard for MSJ is that there are no genuine issues of material fact (i.e., no disputed facts that are material to the case) and the moving party is entitled to a judgment as a matter of law (i.e., by the judge, not a jury). If the MSJ is denied in whole, all stated causes of action can go to trial. If the MSJ is denied as to some causes of action, the sustained causes of action only can go to trial.

If a defendant moves for summary judgment and the motion is granted in full, the case is over. But in practice, the case is likely to be over even when a defendant's

motion is denied because at this phase in the litigation there will be substantial pressure to settle the case and avoid the expenses of a trial.

5.2 THE ADMINISTRATIVE LAW PROCESS

The civil litigation process described above might be described as "elegant" by some legal scholars, but it certainly is cumbersome and slow to most people. Being so cumbersome, would it make sense that a regulatory agency such as the Federal Occupational Safety and Health Administration (OSHA) should have to follow this same laborious process just to issue a citation? If it takes two years for OSHA's proposed citation to be upheld, does that not have an impact, ultimately, on worker safety and health?

When OSHA issues a citation and proposes a penalty to an organization, it is essentially initiating litigation with that organization. The citation is basically a Complaint that the organization committed a wrong against the public, and the particular workers involved, by violating a health and safety standard. It is essential for everyone involved that process move along reasonably quick. If OSHA had to file a Complaint with the trial court, pre-trial motions and motions for summary judgment, engage in extensive discovery, etc., just to issue a citation for a minor violation of the Hazard Communication Standard, for example, such a simple matter could take years to resolve. This would tie-up OSHA attorneys on mundane things and they might not be available for more serious regulatory offenses. Company attorneys or outside counsel would also be tied up unnecessarily and attorney's fees would likely far exceed the penalties involved. Wouldn't it be better if there was an administrative process whereby citations could be appealed quickly? That is why administrative law processes have been put in place for most matters involving civil penalties from regulatory violations, including matters initiated by OSHA enforcement actions.

We will explore OSHA's administrative law process shortly but first, I want to digress a little and discuss a Constitutional matter that provides the basis for administrative law systems. Also know that state plan jurisdictions will have their own administrative law systems in place. These are usually very similar to the Federal system with a few small differences in nomenclature and procedural details. In California, for example, a citation has to be posted in plain view for the workers to see.

5.3 SEPARATION OF POWERS AND THE INTELLIGIBLE PRINCIPLE

Most of us learned in school about the concepts of *Separation of Powers* and "checks and balances" in the government. These are notions that no one of the three branches of government should have all the power, or better put, more power than the others. The legislature is supposed to make the laws, the executive branch is supposed to enforce the laws, and the judicial branch is supposed to interpret the laws, right? Would you be surprised though to know that the phrase Separation of Powers does not even appear in the U.S. Constitution? Most people are not aware of it but it's true.

The idea that Separation of Powers, a phrase learned in grammar school by American children, exists by implication was upheld time and time again in U.S. Supreme Court cases reviewing actions by one branch of government over the

complaint of another branch. It is clearly implied the Framers of the Constitution envisioned separate powers with checks and balances so that one branch could not dominate the others; otherwise, they would have granted more power to one branch at the expense of the other two.

So then, given that an implied separation of powers exists, and that Congress has the exclusive power to create law, granted under Article I of the Constitution, how can a member of the executive branch, such as OSHA, be involved in the law-making function? After all, is not an OSHA regulation a law passed via a rulemaking process? Can an organization or person (we will cover criminal law in Chapter 6) be punished by violating an OSHA regulation? Of course it can, as we will see in this chapter and the next. So how can an OSHA regulation, created by the executive branch, get around the separation of powers doctrine?

The answer to that question is one-part practicality and one-part legality. If Congress was responsible for making all rules involving every function and detail of the government's regulation of human and organizational activity, it would surely become even more bogged down than it already is. Some may find the notion of government getting bogged down the normal state of affairs, but in reality, things could come to a grinding halt if Congress regulated everything, in theory at least. This is the practical side of it.

The legal side of this issue involves action by the U.S. Supreme Court. A tangent to the Separation of Powers doctrine is the Non-Delegation Doctrine, which holds the principle in administrative law that Congress cannot delegate its legislative powers to agencies. The idea is that if the powers of Congress are clearly separate than the other branches then there shall be no delegation of such powers. But Congress does nevertheless leave some rulemaking to the executive branch agencies. Both OSHA and the Environmental Protection Agency (EPA), for example, promulgate regulations every year that have the same impacts on society as does a public law. How can Congress do this without offending the Non-Delegation Doctrine?

The answer to that lies in another legal doctrine created by the Supreme Court – The Intelligible Principal Doctrine. In 1928, the U.S. Supreme Court held in the case *J.W. Hampton, Jr. & Co. v. United States* that "congressional delegation of legislative authority is an implied power of Congress that is constitutional so long as Congress provides an 'intelligible principle' to guide the executive branch: in determining what Congress may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination." The holding went on to state, "so long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power."

Thus, the intelligible principle doctrine acknowledges that Congress will not only create the foundation or basis of new law but is also allowed to grant power to executive agencies to work out the details of administering the laws in accordance with the articulated foundation. Under this concept, Congress enacted the Occupational Safety and Health Act (OSH Act) in 1970, which included provisions (clearly explained as intelligible principles) for OSHA to promulgate and enforce worker safety and health regulations. Included in this power, is the power to adjudicate citations and appeals

of violations of the regulations. For this reason, OSHA set up an adjudication system rooted in administrative law principles.

5.4 THE FEDERAL OSHA ADJUDICATION SYSTEM

The beginning of OSHA adjudication lies in its enforcement efforts. For jurisdictions under Federal OSHA, workplace organizations will be subject to inspections from time to time. An inspection is typically not random and usually follows some kind of trigger event. A serious injury or fatality often triggers an OSHA inspection, as does its notification that an imminent danger exists. Another trigger for a workplace inspection is a complaint lodged by a worker. Worker complaints about safety are very compelling to OSHA inspectors because they naturally are focused on the workers' points of view.

OSHA sometimes also inspects facilities under a "Targeted Enforcement" initiative also called National Emphasis Programs (NEPs). Some of the more recent NEPs have included hazardous machinery, hexavalent chromium, and lead. The idea here is that OSHA has concerns about safety in targeted industries and chooses to invest in special inspections of such facilities absent a triggering event such as a fatality.

Technically speaking, an OSHA inspector needs a warrant to enter the premises. Warrants are typically easy to get and an employer always has to weigh the situation of demanding a warrant versus the perception it may leave with an OSHA inspector that you "might have something to hide." Most lawyers I have talked to advise clients to skip demanding a warrant.

The inspection usually begins with an opening conference and presentation of credentials. In the conference the inspector should explain why the workplace was selected for inspection (i.e., whether it was from a triggering event or a targeted enforcement strategy). OSHA inspectors are allowed to demand documents, such as a written safety program, training records, or even air monitoring records. They might even take air samples of their own.

An OSHA inspection includes employee interviews. A private location with no management presence must be provided for these interviews. The actual inspection will almost always be a walk around. In theory, the inspector should stick to areas of the workplace that are reasonably related to the purpose of the visit. But know that inspectors are free to roam the plant. As an aside, organizations should be sure to enforce safety control requirements on the OSHA inspector. If hearing protection or other personal protective equipment (PPE) is required to enter a space, make sure the inspector is so equipped.

During the walk-around, review of documents, and employee interviews, the OSHA inspector is basically gathering facts from what they see, read, touch, hear, or smell. Such facts will be compared to volume 29 of the Code of Federal Regulations and perhaps other standards. If violations of such standards are encountered, the OSHA inspector might issue citations, which can range from de minimus to less-than-serious to serious to willful. Proposed penalties increase as the seriousness of the citation increases based on a regulatory framework. Even more severe penalties can be issued if the citation is a repeat occurrence or the organization failed to abate a hazard associated with a previous citation. Citations and proposed penalties

will generally be shared at a closing conference, but the actual "legal" citation might not be issued until after the on-site inspection.

If a citation is issued the employer has a legal right to appeal. Similar to the civil litigation process, much effort will be applied to see if a settlement can be reached without a more formal process. OSHA will likely propose a settlement conference where the employer will sit down with a branch manager and see if things can be worked out. Usually, proposed penalties can be reduced. One thing that is not negotiable is an order to abate a hazard. If the employer successfully demonstrates abatement, OSHA is more apt to reduce penalties especially when the employer is cooperative and proactive in addressing the problem.

Nevertheless, some companies prefer to appeal OSHA citations, and there are attorneys who specialize in OSHA appeal representation. The employer must formally request an appeal within 15 working days of the citation's issuance. The appeal is made directly to the Occupational Safety and Health Review Commission (OSHRC), which is a government agency completely separate from OSHA. OSHRC appeals follow a two-phased process. The first phase consists of a hearing before an Administrative Law Judge (ALJ). The ALJ will hear evidence presented by both the OSHA attorney and the employer or its hired counsel. Notification to employees of the company charged a citation is also made, and such employees have the right to attend the hearing and give testimony. This is the equivalent to a trial in a civil case, but it is brief. Some of the requirements in civil litigation such as the ban on hearsay evidence (see Chapter 9) are relaxed and the whole process is streamlined. The ALJ will review the evidence and determine whether the citation stands or is vacated. The ALJ also has the authority to lower or increase the penalties based on case law precedents.

If the employee is not satisfied with the ALJ's ruling, it can appeal to the second phase of OSHRC hearings and the case will be heard before a three-member panel of judges, located in Washington D.C., Atlanta, or Denver. Similar to civil procedure principles in the courts, the three-judge panel will review the decision of the ALJ to determine if any legal error has been made. If so, the panel can vacate the citation. Of course, it can also uphold the citation and like the ALJ, can make adjustments to the penalties. The following OSHRC case is illustrative of the process.

5.5 *SECRETARY OF LABOR V. MISSOURI BASIN WELL SERVICE, INC.* (OSHRC, MARCH 1, 2018)

5.5.1 Facts

Missouri Basin Well Service, Inc. (MBI) is an oil and gas well-servicing company based in Belfield, North Dakota. On April 2, 2013, MBI was servicing an oil well owned by Abraxas Petroleum Corporation when a fire occurred. Specifically, MBI was "circulating the well," a process which involved pumping large amounts of water into the well and back out to remove debris, such as leftover drilling mud and sand.

MBI's supervisor on the project was Mike Fifer. The day before the incident giving rise to an OSHA citation discussed *supra*, Fifer had his crew set up a 500-barrel, enclosed tank to serve as the water "supply tank," a 120-barrel, open-top "discharge

tank" to receive the water discharged from the well, and a diesel-powered "mud pump" to circulate the water from the tank into the well and out again (by drawing water out of the supply tank, pushing it down the well, and out into the discharge tank). Fifer testified that he followed his usual practice and separated the discharge tank approximately 75 feet from the mud pump in order to address his concern that combustible fumes or vapors might emanate from the discharge tank and migrate to the mud pump, which is a potential ignition source. Fifer selected an open-top tank to hold the discharge water to encourage the dissipation of any combustible vapors. The supply tank, discharge tank, and mud pump were each placed at least 100 feet from the wellhead.

The next day, an Abraxas official instructed Fifer to move the mud pump closer to the discharge tank – from approximately 75 feet away to less than 30 feet away – and also to use a 500-barrel, enclosed discharge tank, known as a "frac tank," instead of the 120-barrel, open-top tank. Fifer testified that he was concerned about moving the mud pump closer to the discharge tank. He agreed to do so, however, thinking that it "would be good enough" so long as the enclosed tank's "top hatch" remained closed, forcing any vapors to be released through a 3-inch vent opening on the back of the 50-foot long discharge tank so that any gas would emanate from the tank at about 80 feet from the mud pump. Fifer testified that he instructed all members of his crew to keep the hatch on the discharge tank closed.

With this new set-up in place, the crew began "circulating the well." After they had been doing so for one to two hours, a fire broke out near the pump, which engulfed an MBI employee who sustained second-degree burns to his face. The fire then migrated from the mud pump to the hatch of the discharge tank, which was now open, and continued to burn through the open hatch for 15 to 20 minutes until it was extinguished by the fire department.

Following the fire Occupational Safety and Health Act (OSHA) conducted an inspection. OSHA issued MBI a citation alleging a violation of the general duty clause of the OSHA (29 U.S.C. § 654(a)(1)), for exposing its employees to fire and explosion hazards. MBI appealed. At the first phase of appeal, Administrative Law Judge Brian Duncan vacated the citation, finding that the Secretary failed to prove two elements of the alleged general duty clause violation: recognition of the hazard and the existence of a feasible and effective means to abate the hazard.

5.5.2 Discussion

To prove a violation of the general duty clause, the Secretary (of Labor) must establish the following: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard (see *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93–0628, 2004)). Here, the judge found that the Secretary established the presence of the alleged hazard at the worksite, but he failed to establish the hazard recognition and abatement elements of the violation.

As to the recognition element, the judge framed the issue as a question of whether MBI or its industry recognized that the Secretary's proposed abatement measures were required and concluded that the Secretary had not made this showing.

As to the abatement element, the judge found that MBI already had adequate safety measures in place to address the risk of a fire at the worksite and that there was insufficient evidence to show the Secretary's proposed abatement measures would have materially reduced the hazard. Each of these issues is addressed in the following sections.

5.5.3 Hazard Element

In a general duty clause case, "the hazard must be defined in a way that apprises the employer of its obligations and identifies conditions and practices over which the employer can reasonably be expected to exercise control." The hazard must be defined "in terms of the physical agents that could injure employees rather than the means of abatement." In his amended complaint, the Secretary describes the allegedly hazardous condition as an unsafe distance between the mud pump and discharges of oil and gas from the discharge tank. On review, MBI challenges the Secretary's definition, arguing the Secretary inappropriately defined the hazard in terms of an abatement method.

This argument lacks merit. MBI is correct that the alleged hazard and the Secretary's main proposed abatement method overlap to some extent in that both implicate the spacing between the discharge tank and the mud pump. The hazard allegation itself does not specify an abatement method, and it only references an *insufficient* amount of spacing. Thus, the Secretary has not, as MBI contends, defined the hazard in terms of the distance or space that must be maintained to *abate* the hazard. Moreover, the Secretary's definition is consistent with the Commission's requirement that it identify "the physical agents that could injure employees" – the tank (a source of hydrocarbon vapors) and the mud pump (an ignition source).

The evidence also establishes that this hazard was present at the worksite. There is no dispute that the mud pump was an ignition source and that it was less than 30 feet from the discharge tank. In addition, four MBI employees identified the open hatch of the discharge tank as the source of the combustible vapors that were ignited, and Fifer testified that he saw flames coming through the open hatch. In a post-accident investigation, MBI's vice-president of health, safety, and environment, Tim Brown, determined that the discharge tank emitted flammable vapors. MBI's expert witness, Ron Britton, agreed that the fire resulted from flammable vapors that escaped from the discharge tank and were ignited. Although the source of the flammable vapors was never determined, there was near unanimity among the witnesses, including Britton, that the source was either the water or the discharge tank provided by Abraxas. Thus, the record shows that discharges of flammable vapors were released from the discharge tank at an unsafe distance from the mud pump, posing a fire hazard.

5.5.4 Hazard Recognition

To establish hazard recognition, the Secretary must show that MBI or its industry recognized that locating the mud pump – an undisputed ignition source – an unsafe distance (less than 30 feet) from discharges of gas from a tank presented a fire or explosion hazard.

Based on Fifer's testimony, it is clear MBI recognized that allowing discharges of gas vapors to emanate from a tank located less than 30 feet away from a pump presented a fire hazard. Fifer, who had worked in the oil and gas industry for 45 years, testified that he understood there was a risk the pump would ignite flammable vapors emanating from the tank, and for this reason, he decided to use an open-top tank to better disperse such vapors and placed the tank at least 75 feet away from the pump:

Q: Your practice is to try to keep the discharge tank 75 feet – at least 75 feet from the engine of the mud pumping unit?
A: Yes.
Q: … And you did that because you know that vapors could come from the discharge tank?
A: Yes.
Q: Combustible vapors? You did that because of combustible vapors?
A: Yes.
Q: And you … prefer [open-top tanks] because open tanks disperse whatever combustible vapors might be in the tank better …?
A: Well, there's always a possibility that it can, yes.
Q: But that's the purpose …?
A: Yes.

Although Fifer consented when Abraxas directed him to move the mud pump to a location less than 30 feet from the tank, he testified that he "still really didn't like it." As a supervisor, Fifer's recognition that the distance between the pump and the discharges of gas vapors from the tank posed a fire hazard is imputed to MBI.

Although the judge acknowledged Fifer's attempt to maintain a 75-foot distance between the tank and the pump, he found this only reflected Fifer's "personal practice and preference" and did not show MBI recognized that such spacing was required under the Act. Fifer made clear, however, that this practice was not just his personal preference. Indeed, he had been taught the 75-foot rule by two of the oil and gas servicing companies for whom he had previously worked and carried that practice with him to MBI.

MBI's vice-president Brown testified that MBI "trusts [its supervisory] personnel" to make these types of judgments. The judge's requirement that the Secretary show that MBI recognized that the 75-foot abatement method was required by the Act is erroneous.

The judge also cited to Commission precedent noting a reluctance to rely solely on an employer's safety precaution to find hazard recognition. Here, however, Fifer clearly understood that the conditions at the worksite posed a fire risk. He "didn't like" Abraxas' decision to move the pump to within 30 feet of the tank and discussed his reasons for keeping the two pieces of equipment farther apart. "We talked about it and decided that it would work if – if that hatch was closed, it would vent out the back of the tank if there was any gas coming off of it." Fifer testified that ultimately "I went along with his thinking … thinking that that would be good enough, you know, if you would vent out the back." Accordingly, the record establishes that MBI recognized the condition posed a fire hazard.

5.5.5 Feasibility of Abatement

To establish the feasibility of a proposed abatement measure, the Secretary must "demonstrate both that the measure is capable of being put into effect and that [it] would be effective in materially reducing the incidence of the hazard." The Secretary need only show that the abatement method would materially reduce the hazard, not that it would eliminate the hazard.

Here, the judge found that MBI had already instituted a number of safety precautions to address the risk of a fire or explosion at the worksite and the Secretary failed to establish that these measures were inadequate. Specifically, the judge cited evidence that MBI, among other things, used a diesel pump with spark arresters and a kill switch, required employees to wear fire-resistant clothing that protect the body (but not the face), prohibited smoking and cell phone use, banned open flames on location, made fire extinguishers readily available, and trained employees on fire prevention and control. While these general fire-related safety measures are commendable, they fell short of abating the specific fire hazard at issue here. As demonstrated by the facts of this case, spark arresters and the prohibition of cell phone use, smoking, and open flames are insufficient to prevent the ignition of the flammable vapors. As for the other measures cited by the judge, they can only reduce the extent of a fire and/or its consequent injuries after it has occurred – these measures would not prevent the ignition of such flammable vapors in the first place.

The judge correctly found, however, that the Secretary failed to prove his proposed abatement measure would materially reduce the risk of a fire. The Secretary's method involves ensuring that "discharges of oil and gas to the atmosphere" are "to a safe area, preferably on the downwind side of the well and a minimum of 100 feet (30.5 m) from the wellhead, open flame, or other sources of ignition," as "described in Section 12 of the American Petroleum Institute Recommended Practice 54, 'Occupational Safety for Oil and Gas Well Drilling and Servicing Operations.'" In support of this measure, the Secretary relies heavily on testimony from the OSHA compliance officer who inspected the worksite. The compliance officer testified that, in his opinion, maintaining a 100-foot distance between the tank and the pump would materially reduce the likelihood of a vapor cloud migrating to the pump.

Whether increasing the spacing between the pump and tank from 30 feet to 100 feet would materially reduce the chances of a fire occurring is a technical/scientific question that requires expertise to answer. As the compliance officer was never proffered as an expert with the qualifications necessary to opine on this question under Federal Rule of Evidence 702.* His opinion on this question is given no weight.

The Secretary also contends that testimony from MBI's expert witness, Britton, supports the efficacy of the proposed measure. According to the Secretary, Britton's opinion is that the accident would not have occurred if the vapors had discharged 75 feet from the pump. This ignores, however, that Britton's testimony on this point was predicated on the tank being completely sealed, with no fumes escaping it. As Fifer

* Note that in California AB 2774 was passed making sweeping changes to the Cal-OSHA citation adjudication process, including a provision that Cal-OSHA compliance officers are automatically deemed expert witnesses for appeal hearings. This means such officers do not need to be qualified as experts and can give opinion on cases for which they have no percipient knowledge.

testified, the tank used here had a vent line at the back, and the Secretary's proposed abatement measure does not mention ensuring that no vapors escape the tank. In addition, Britton denied that a 100-foot separation would eliminate or substantially reduce the hazard. Further, while the Secretary argues that generally increasing the distance decreases the risk of explosion, he makes no attempt to quantify the rate at which the risk decreases as the amount of distance increases.

Finally, the Secretary cites the American Petroleum Institute (API) safety recommendation, on which the wording of his proposed abatement measure is based, as evidence that a 100-foot separation would be effective. The API standard, however, does not appear to have been intended to address the circumstances at issue here. The standard's 100-foot provision is located within a section titled "Special Services," which is defined as "those operations utilizing specialized equipment and personnel to perform work processes to support well drilling and servicing operations." Both Britton and the compliance officer testified that MBI's well circulation did not involve any specialized equipment or personnel. The API standard contains a separate section titled, "Fire Prevention and Protection," which does not have a similar scope limitation. Since the 100-foot provision is located within the "Special Services" section, rather than the generally applicable "Fire Prevention and Protection" section, the standard's structure shows that the provision was intended to apply only to the activities specifically defined as "Special Services." Moreover, the 100-foot spacing recommendation contained in this API standard is in reference to spacing equipment from the wellhead, spacing with which MBI complied; it does not state that equipment should be placed 100 feet from a mud pump. In sum, the API recommendation is insufficient to establish that the Secretary's proposed abatement measure would be effective.

5.5.6 Decision

As the Secretary has thus failed to prove that materially effective means existed to abate the hazard, he has failed to establish a general duty clause violation. Accordingly, the citation is vacated.

5.5.7 Author's Comments on the Case

This case shows us a couple interesting points. In the end, the OSHRC three-judge panel upheld the ALJ's decision to vacate the citation. On appeal from the first phase, the review panel basically sided with the ALJ, but only as to the element of abatement (i.e., whether materially effective means existed to abate the hazard).

Note that just like a civil case, the Secretary of Labor, which is the Plaintiff here, has the burden of proof for each element of the offense. Thus, as the General Duty Clause has four elements (hazard, recognition of the hazard, likely to cause death or serious physical harm, and existence of a feasible abatement method), the Secretary must prove all four by a preponderance of the evidence. If the Secretary is unable to prove just one element using the available evidence, as was the case here, the entire citation will be vacated.

Although the opinion is fairly laborious to read, this entire process took far less time to litigate than would it had been brought before a civil court.

6 Criminal Law

> Even a dog knows the difference between being kicked and being stumbled over.
>
> *Oliver Wendell Holmes*

6.1 INTRODUCTION TO CRIMINAL LAW

This quote by Justice Holmes eloquently describes the fundamental premise of criminal law across the nation and in many parts of the world. Criminal laws, and the punishments that come with violating them, are rooted in intention. A person who intends harm to another is far more blameworthy and punishable than a person who accidently causes harm. This just speaks to our fundamental morals and beliefs about appropriate human behavior.

Criminal law was born in the common law. Cases were tried and judges or juries made the law what it is by their decisions. Modernly, criminal law is largely statutory. Legislative bodies define the elements of a crime and the punishments via sentencing statutes. Nevertheless, it is important to first look at the common law principles of criminal law before delving into how criminal law has been "statute-ized" for serious injury cases resulting at work.

6.2 *ACTUS REUS*

The term, *actus reus*, is Latin meaning "guilty act." It forms the objective element of a crime, answering the question, what did the person do, or as is often the case in IH/S practice, not do? All but a few crimes both in common law and under modern statutes have an element rooted in the ancient idea that a person must actually commit an act to be guilty of a crime. Merely thinking about hurting someone or wishing ill on someone is not enough to constitute a crime. A famous U.S. Supreme Court case illustrates importance of *actus reus* in crime quite well:

6.3 *UNITED STATES V. ROBINSON*

6.3.1 Facts

Robinson was stopped by a police officer who had observed "tracks" on Robinson's arms. The officer claimed Robinson admitted to him that he occasionally injected narcotics into his arms. Robinson denied saying this to the officer and denied he was an addict. The officer arrested him under a California law making it a misdemeanor to "be addicted to the use of narcotics." Robinson was tried and convicted in the Municipal Court and sentenced to 90 days in jail. His conviction was upheld on appeal

in the Appellate Department of the County Superior Court. Robinson then appealed the U.S. Supreme Court, contending the California law was unconstitutional under the Eighth Amendment, which prohibits cruel and unusual punishment.

6.3.2 Issue

At the time of Robinson's arrest, state law provided, "no person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administrated by or under the direction of a person licensed by the State to prescribe and administer narcotics" (California Health and Safety Code § 11721). The issue before the U.S. Supreme Court is whether this California statute violates the Eighth Amendment to the U.S. Constitution.

6.3.3 Analysis & Holding

A fragmented Supreme Court reversed Robinson's conviction. The main opinion in the case recognized that drug addiction is a disease, and that it is unconstitutional to impose punishment for having a disease. As Justice Stewart noted in the opinion, "even one day in prison for the 'crime' of having a common cold," would be cruel and unusual. Further, the court held it unconstitutional to criminalize behavior in the absence of a guilty action, or actus reus.

6.3.4 Author's Comments on the Case

Thus, California's attempt to curb drug use by criminalizing addiction, rather than by use, possession, or sale of illegal drugs, were thwarted. The "act" of being addicted to narcotics will never rise to the level of a "guilty act" required of all crime. This case shows the prime division between crime and innocent behavior. Punishing someone who had no guilty act offends the U.S. Constitution.

There are three crimes that seem to not rely on an actus reus element but in fact do when one looks closer. These are the so-called incomplete or inchoate crimes. They are solicitation, conspiracy, and attempt. Solicitation is compelling someone else to commit a crime. Conspiracy is making an agreement with others to carry out a crime. Attempt is taking the steps to commit a crime (e.g., actus reus) but the intended outcome is not realized (e.g., attempted murder does not result in a killing).

Of the three so-called incomplete crimes, conspiracy is the one that seems to challenge the requirement of actus reus the most; after all, can a person be guilty of just thinking about a crime rather than actually committing it? In the purest sense, the answer is no, but conspiracy does require some action other than mere thought, or better put, some guilty action. The guilty action of conspiracy is the forging of the criminal agreement, acting together to conceive an evil plot. This may seem a little wishy-washy, so many jurisdictions address the uneasiness of conspiracy by requiring an "overt act" be taken toward commission of the crime. Thus, in such jurisdictions, agreeing to commit the crime and sitting around and talking about how you would commit it will not be enough to convict the enterprise without some

evidence that something more overt occurred, such as acquiring the get-a-way vehicle for a planned robbery.

6.4 MENS REA

As actus reus is the objective element of crime, mens rea is the subjective side of crime. Also a Latin term, mens rea can be translated as "guilty mind." This is the intentional aspect of the crime; in other words, what was in the mind of the bad actor and what were his intentions when he acted so badly?

Mens rea is what gives modern criminal statutes different degrees of severity and corresponding stiffer punishments. Murder, for example, was at common law "the killing of a human being with malice aforethought." Malice aforethought, an ancient term, is the subjective state of mind in the killer as he takes another life. The mental state for murder can be stated in different ways, such as he "intended to kill," "intended to cause serious bodily harm," "or he acted with a 'depraved heart,'" in other words, so recklessly and without regard to a human life, that he can be said to have the requisite intent to commit murder.

Modernly, mens rea is at the core of determining criminal severity. The difference between a felony and misdemeanor is in the actor's intent. Did he intend to hurt someone by driving recklessly or was he just in a hurry but did not mean to swerve into oncoming traffic? Let's take a look at this U.S. Supreme Court case decided in 1951.

6.5 *MORISSETTE V. UNITED STATES*

6.5.1 Facts

On a large track of uninhabited and untilled land in a wooded and sparsely populated area of Michigan, the Government created a practice bombing range over which the Air Force dropped simulated bombs at ground targets. The "bombs" consisted of a metal cylinder about 4 inches long and eight inches across, filled with sand and a small amount of black powder to cause a smoke puff that could then be located. The site had many signs that read "Danger – Keep Out – Bombing Range," but was known as good deer country, and was extensively hunted despite the signs.

Spent bomb casings were cleared from the targets and thrown into piles. They were not sacked or piled in any order, but were dumped in heaps, some of which had been accumulating for four years or more. They were exposed to harsh weather and rusting away.

In December 1948, Morissette went hunting in this area but did not get a deer. He thought to meet expenses of the trip by salvaging some of the bomb casings. He loaded three tons of casings on his truck and took them to a nearby farm, where he flattened them driving over them with a tractor. He was able to sell the metal as scrap for $84.

The loading, crushing, and transporting of the casings were conducted in broad daylight, in full view of passers-by, without the slightest effort at concealment. When investigation was started, Morissette voluntarily, promptly, and candidly told the

whole story to the authorities, saying that he had no intention of stealing, but the property was abandoned, unwanted, and considered of no value to the Government. He was indicted, however, on the charge that he "did unlawfully, willfully and knowingly steal and convert" property of the United States of the value of $84, in violation of 18 U.S.C § 641, which provides that "whoever embezzles, steals, purloins, or knowingly converts" government property is punishable by fine or imprisonment. Morissette was convicted and sentenced to imprisonment for two months or a fine of $200. The Court of Appeals affirmed, contending that this particular offense does not require an element of criminal intent. The Court based its opinion on established law that had held, if Congress had intended to make criminal intent an element of the offense, it would have done so in its construction of the statute.

6.5.2 Analysis

In past cases, this Court has construed the mere omission from a criminal enactment of any mention of criminal intent as dispensing with it. If such cases be deemed precedents for principles of construction generally applicable to federal penal statutes, they authorize this conviction. Indeed, such adoption of the literal reasoning announced in those cases would do this and more – it would sweep out of all federal crimes, except when expressly preserved, the ancient requirement of a culpable state of mind.

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.

As the states codified the common law of crimes, even if their enactments were silent of the subject of criminal intent, their courts assumed that the omission did not signify disapproval of the principle, but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over the common law.

Where congress omits any mentioning of specific intent, specific intent is not to be eliminated as an element. Crimes in violation of plain regulatory law (as compared to common law crimes, which are more serious), like conversion, require mens rea as the commission of the crime itself. That is, the criminal defendant must have known he was violating the law.

6.5.3 Holding

Morissette's conviction is reversed. Defendant must have had knowledge that the property was abandoned in order for the prosecution to convict. He, therefore, must have had mens rea or guilty mind associated with the taking of the property. In this matter, he had no such guilty mind.

6.5.4 Author's Comments on the Case

Thus, the Morissette case made clear that as legislatures codified common law crimes, the element of mens rea or guilty mind is always an essential element that carried forward even if the law maker omitted in the text of the law the word intentional. This is not true for all crimes, as lesser crimes, such as running a stop sign carry strict liability – "but officer I did not mean to run the stop sign" is no defense to a moving violation. Nevertheless, mens rea is a cornerstone element of most crimes that continues to be upheld even as criminal behavior becomes more complex with technological and social change.

How then do jurisdictions deal with companies and managers who do not intend harm to their employees, but act so negligently to warrant a criminal punishment? And can an organization be subject to criminal punishment when only its employees carried out criminal behavior? These are difficult questions that have faced state legislatures for years. The answers were achieved by legal schemes applying criminal prosecution to some violations of worker safety and health regulatory requirements.

6.6 WHEN IS VIOLATING AN OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION REGULATION A CRIME?

Thus far in this chapter, we have explored the ancient elements that make up crime. But in Chapter 5, we see that workplace health and safety regulation is primarily based on administrative law, where regulatory violations of the Occupational Safety and Health Act (OSH Act) are heard in administrative law divisions and involve company civil liability rather than individual liability. Companies that violate Occupational Safety and Health Administration (OSHA) regulations can be fined no doubt, but can their managers go to jail? And under what circumstances?

If we just look at the ancient elements of crime, which as we have seen is rooted in intentional acts coupled with a guilty mind, how can we put someone in jail for violating an OSHA regulation? Has anyone ever had the intent to harm one of his employees and chose to do so by ignoring an OSHA regulation? How do we meet the mens rea requirement for crime when the only intentional act in the death of a worker was a blatant disregard for known health and safety requirements? The old answer is we just ignore it and let the existing legal remedies such as workers' compensation take care of things. If an employee intentionally killed a co-worker on the job, then this would be a matter for the District Attorney and the offender would likely be prosecuted for murder, but the company would not be to blame. But what if the company willfully violated a known standard and an employee died as a result? Can't this be punished with jail time for management?

On the Federal level historically, violations of OSHA standards that are the root cause of a worker death, were rarely prosecuted as crimes. This is due to the fact that such acts were usually only misdemeanors with a maximum six months sentence, and overburdened U.S. attorneys do not want to take on such cases, as they are costly and do not produce significant jail time for offenders.

Very recently, however, there has been a significant change in the arena of OSHA criminal prosecution. In 2015, OSHA and Department of Justice (DOJ) issued a joint

memorandum of understanding (MOU) that gives new teeth to the idea of pursuing criminal prosecutions for regulatory violations committed by employers. The MOU moves some statutes, such as the OSH Act and the Mine Safety and Health Act, into the DOJ's Environmental Crimes Section. Thus, U.S. Attorneys' offices can now start working with OSHA and the Mine Safety and Health Administration (MSHA), and a few other agencies, to investigate and prosecute worker safety violations. Before this new arrangement, OSHA attorneys would have to bring cases before the Federal criminal courts to get action, and as already stated, U.S. Attorneys' offices were reluctant to take such cases, and so OSHA attorneys focused on just the civil penalties associated with regulatory noncompliance. The DOJ's criminal prosecution powers are extensive and managers in companies that violate OSHA standards resulting in worker death can do prison time if convicted.

At the time of this writing, I am aware of at least two cases that showcase the changes. In the first, the Chairman and CEO of the Massey Energy Company, D. Blankenship, was found guilty by a federal jury of a misdemeanor charge of conspiring to willfully violate safety and health standards under the MSHA of 1977. These charges resulted from a coal dust explosion at a Massey Energy mining site that occurred in April 2010, in which 29 of 31 miners on-site were killed. MSHA inspectors cited "multiple examples of systematic, intentional, and aggressive efforts by … Massey to avoid compliance with safety and health standards, and to thwart detection of that non-compliance by federal and state regulators." For these crimes, the CEO faced a maximum of just one-year in prison. [D. Blankenship was also charged with felony counts of securities fraud and making false statements to the U.S. Securities and Exchange Commission. Although acquitted of these charges, by contrast, he would have faced a 30-year prison sentence if convicted.]

The second case, in which the facts occurred more recently than the first shows some impact this agreement might have on criminal prosecution of individuals in the workplace safety arena. In this case, the DOJ brought charges against the owner of a roofing company, James J. McCullagh following a workplace fatality. One of McCullagh's employee fell to his death from a scaffold and McCullagh allegedly attempted to cover up the fact that he failed to provide his employees with fall protection equipment, including safety harnesses. In December 2015, McCullagh pled guilty to four counts of making false statements to an OSHA Compliance Officer, one count of obstruction of justice, and one count of willfully violating an OSHA regulation causing death to an employee. Before trial, it was reported by the prosecution team that if convicted, McCullagh faced a maximum sentence of 25 years in prison, three years of supervised release, $1.5 million in fines, and a $510 special assessment.

These harsher proposed maximum penalties were based no doubt on the racketeering aspects of the crime, in other words, cover up, lying to federal officials, a felony, and directing other employees to do the same, obstruction of justice, etc. In the end, however, McCullagh received only ten months in prison and two years of probation. Pleading guilty to the felony charge of lying to a federal official helped to reduce his sentence, and the fact he had an avalanche of mitigating circumstances, such as strong character evidence, support of the community, etc. Despite the seemly light sentence, this case does show the intent of OSHA to criminalize workplace

safety regulation violations that result in worker death, and that the Federal courts are in favor of pursing these prosecutions.

Ironically, it must be noted that the Environmental Protection Agency's (EPA) criminal investigation and prosecutions wing puts far more people in jail every year that OSHA does. This might be an indication that as a society we care more about the environment than workers' lives but it's probably more about the amount of resources available to the EPA than to OSHA.

6.7 "BE A MANAGER GO TO JAIL" STATUTES

We saw in the previous section that an increased emphasis on criminal prosecutions for OSHA regulatory violations has arisen through agreements between DOJ and other federal agencies. What about state prosecutions? It turns out that in California, at least, state prosecution of willful violations resulting in death is quite mature in the legal system.

California enacted the Corporate Criminal Liability Act (CCLA) in 1990 to address the problem of workplace deaths in the state. Known to many as the "be a manager go to jail law," the statute provides sweeping requirements for corporations and managers to warn exposed individuals about concealed hazards in the workplace and products (the law has a substantial product liability aspect that applies beyond the workplace). Thus, as California is a state plan state, the CCLA provides a powerful legal mechanism to lock up managers who willfully violate health and safety regulations and serious harm or a death results.

Be a Manager go to Jail applies to a "manager with actual knowledge of a serious concealed danger." A manager under the law means a person having both management authority in or as a business entity, and significant responsibility for any aspect of a business which includes actual authority for the safety of a product or business practice, or for the conduct of research or testing in connection with a product or business practice. Thus, one does not need to have the word manager in his title to fall under the law. But prosecutors do need to prove the charged person had both authority and responsibility for a major aspect of the business. This typically includes the power (and responsibility) to set policy, enforce policy, and many of the other aspects of being an employer or lead person, such as hiring and firing, speaking on behalf of the organization, etc.

Liability is realized through actual knowledge of a serious concealed danger, which means the business practice creates a substantial probability of death, great bodily harm, or serious exposure to an individual, and the danger is not readily apparent to an individual who is likely to be exposed. Thus, unlike the prosecutions in the federal system, death is not a requirement.

The law mandates that managers in possession of actual knowledge of a concealed danger take steps to abate the hazard or warn those likely to be exposed to the hazard. Included is the requirement to notify Cal-OSHA about the danger and the efforts taken to abate or warn others.

The punishments for violating the CCLA are on par with the federal system and can be quite hefty. For individuals, imprisonment in county jail for up to one year and/or a fine not exceeding $10,000 is the minimum. Sentences for individuals can

also be imprisonment for 16 months, 2 years, or 3 years and/or a fine not exceeding $25,000. The judge has leeway on the sentencing within these guidelines and based ultimately on the degree of culpability. For corporations or limited liability companies (LLCs), which obviously cannot be put behind bars, fines can be as high as $1 million.

The CCLA does not limit the number of culpable managers who can be charged. So, if one manager sends an email showing concern about a hazard, and no one makes the required notifications, then all recipients of the email can be personally charged. This places liability on anyone who knows about a problem, including the person who first raises it, which as we all know could be an IH/S manager. Thus, the classic "CYA" defense may not apply in such cases. If as an IH/S manager you feel you need to "cover yourself" by writing a memo about a hazard, you should be prepared to report it if no one else takes action.

6.8 INVESTIGATION AND PROSECUTION AT THE STATE LEVEL

Statutes like California's CCLA as discussed above focus on managers who are in a position to abate or report concealed hazards. Failure to abate or warn can result in criminal liability to both the individual manager and the corporation. In California, there is statutory authority via the labor code for Cal-OSHA (the California equivalent to OSHA as a state plan) to investigate serious work place injuries and fatalities for evidence of crime. Cal-OSHA maintains a Bureau of Investigations that acts independently of regular Cal-OSHA inspectors. If the investigator feels there is enough evidence to charge a person with a crime, he will refer the case to the local District Attorney's office. The DA will then decide to prosecute an individual or organization, or both, for criminal behavior, just as it may for any matter for which evidence has been provided. In a sense, this is no different than the police submitting evidence of crime to the DA. Thus, although the only example I am able to give comes from California, it is possible that other plan states have or will develop similar "criminal-OSHA" procedures and statutes. The following case did not go to trial but shows the complexity and aggressiveness that criminal prosecutions can be in the OSHA arena.

6.9 *PEOPLE V. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, PATRICK HARRAN*

6.9.1 Facts

On December 29, 2008, Ms. Sheharbano Sangji was employed by the Defendants in the Department of Chemistry and Biochemistry at the UCLA campus. Ms. Sangji was working as a research associate in the organic chemistry laboratory of Dr. Patrick Harran. She was in the process of transferring t-butyl-lithium, a highly flammable chemical with pyrophoric properties.

A quantity of t-butyl-lithium unexpectedly ejected from the syringe Ms. Sangji was using on to her hands, arms, and torso, and immediately ignited. Ms. Sangji was not wearing a lab coat and was severely burned on her hands, arms, and torso. She died on January 16, 2009, as a direct result of the severe burns.

6.9.2 Investigation and Prosecution

Following Ms. Sangji's death, a Cal-OSHA administrative investigation began. Cal-OSHA issued four citations, three of which were serious citations to the Regents with total proposed penalties of $31,874. The Regents paid the total monetary penalty without appeal.

The Cal-OSHA citations were based on the fact that the Regents had not adequately trained Ms. Sangji on the hazards and handling requirements of t-butyl-lithium, and further found that the Regents did not require her to wear appropriate personal protective equipment. A citation also stated the Regents failed to establish standard operating procedures for transferring t-butyl-lithium or other pyrophoric agents.

On December 27, 2011, after reviewing the evidence collected by the Bureau of Investigations within Cal-OSHA, the Los Angeles District Attorney's Office (LADA) filed a complaint alleging three felony violations of California Labor Code section 6425(a), "the willful violation of an Occupational Safety and Health standard causing the death of an employee," against the Regents. The three charged counts allege the Regents' willful: (1) failure to train, supervise, or instruct Ms. Sangji in the proper handling and operating procedures for working with chemicals in her work area; (2) failure to implement and maintain an effective Injury and Illness Prevention Program that includes methods or work procedures; and (3) failure to require appropriate clothing be worn for the work being done.

In the same complaint, the LADA office filed four felony charges against Dr. Harran as an individually named defendant. The felony charges brought against Dr. Harran and the Regents were based on a 95-page investigation report, completed by Cal-OSHA investigators that showed overwhelming evidence of negligence, concluding that "UCLA … wholly neglected its legal obligations to provide a safe working environment for laboratory personnel."

6.9.3 Settlement

This was the first case in U.S. history in which a professor was criminally charged after a laboratory accident. In July 2012, the Regents entered into a settlement agreement with the LADA office. The agreement was comprised of several promises and obligations of the Regents, including that the Regents accepted responsibility for the events, that the Regents could and would not deny publicly its responsibility for the events, an agreement to establish the Sheharbano Sangji Scholarship at the UC Berkeley, Boalt Law school, with an endowment amount of $500,000, and a promise to pay all Cal-OSHA investigation costs.

The settlement agreement also included, among other things, a requirement that all UC campuses implement safe laboratory practices and procedures compliant with Title 8 regulations. This had to be certified by each of the campus' ES&H Departments. In exchange for this, and many other things, the LADA office agreed to dismiss its case against the Regents with prejudice.

The settlement agreement was between the Regents and the LADA office. Dr. Harran was not indemnified by the Regents and had to provide his own defense

to the charges. If convicted of all felony counts, Dr. Harran was facing 4.5 years in prison and a loss of federal and state grant money for research.

In 2014, Dr. Harran reached a settlement agreement of his own with the LADA office. In exchange for dropping the charges, Dr. Harran had to complete 800 hours of community service and make a $10,000 donation to a local burn center.

In the five years this case took to settle, the University of California spent over $4.5 Million in legal fees. This far exceeded the money paid into an endowment or to improve laboratory safety at the UC campuses.

6.9.4 Author's Comments on the Case

The UCLA case was unprecedented in many ways. It is clear that Dr. Harran, or anyone else at the University had no intent to harm Ms. Sanjgi. With no intent to harm her how could Dr. Harran be guilty of a felony? Public opinion varied greatly on this question. Some people felt Dr. Harran and the Regents got off too lightly. Others felt that Ms. Sanjgi was a well-trained chemist who did not wear the correct personal protective equipment (PPE) even though it was available. After all, does not a research chemist have some autonomy due to the sophisticated nature of the work, or should the professor hover over her at all times?

No matter what side one falls on in the debate, there is no doubt it was one of the most tragic and politically charged events in the academic laboratory environment. Because the case settled, the law in this area is still as unclear as it was in 2008. We know that legislatures have the clear goal to punish those who carelessly put workers in grave danger – that's why we have "be a manager go to jail" laws, and OSHA criminal enforcement efforts. Yet as a society we struggle with the fact that it just does not seem right to throw the book at someone (i.e., to take away their liberty) who does not possess a guilty mind. It is troubling to think that it will take another tragic event, such as this one, to explore the boundaries of the criminal law in the worker safety and health context.

7 Workplace Discrimination and Retaliation

7.1 INTRODUCTION – THE BOUNDARIES OF ACCOMMODATION

Although the legal limitations imposed on the traditional "at-will" employment rule mainly concerned broad social issues and public policy, lawmakers have expanded protections in many key areas. Of particular interest to the practice of IH/S are two areas of employment regulation: disability discrimination and whistleblower retaliation.

In 1990, Congress passed the Americans with Disabilities Act (ADA). This legislation provided sweeping reforms in both public accommodation law and employment law. In the employment law arena, the ADA made it unlawful to discriminate (or take an adverse employment action against) a person with a qualifying disability. The stated purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Under the ADA, a qualifying disability is one that "substantially limits a major life function," which has been held by the courts to include the ability to perform work among other things.

After passage of the ADA, states began to expand on disability protections, especially in the employment arena. Several jurisdictions, most notably California, already had disability protections in place as early as the 1970s. However, some state legislatures reexamined their disability in employment laws after the ADA and amended the protections in favor of employees. A common change was to liberalize the qualifying disability definition requiring only that a disability "limit a major life activity" instead of "substantially limit" one. Many state courts viewed this seemingly subtle change of wording (i.e., dropping "substantially") as a powerful legislative precedent to bring just about any disability and often medical condition into protection. In California, courts have held (under Fair Housing and Employment Act [FEHA]) that a temporary back injury can be a qualifying disability.

Many employment protection laws, including the ADA have provisions relating to the size of the organization. The ADA, for example, only applies in the employment context if the organization has fifteen or more private employees. The ADA does apply to all state and local government employment situations regardless of the number of employees in the organization. Thus, a small private office employer with fewer than 15 employees does not need to accommodate an employee's bona fide disability. State programs, of course, have liberalized the number of employee threshold requirements. In California, under the FEHA, the law kicks in at five employees. It is

important for IH/S professionals to work with in house counsel to determine which disability programs apply and how to manage situations where employees present with disabilities or request accommodations.

A worker struggling with a qualifying disability is granted several job protections under the ADA or state laws. First, an employer is obligated to provide a reasonable accommodation to an employee with a disability. A reasonable accommodation must be provided to assist the employee in performing the essential functions of the job. It is very important to make sure that all jobs have documented essential functions. For the most part, reasonableness comes down to whether or not an accommodation would cause an undue burden to the employer. "Reasonableness" often varies depending on the size of the firm; providing an ergonomic workstation to every employee is probably not going to be ruled unduly burdensome, especially given the high cost of medical treatments for ergonomic injury. On the other hand, an accommodation costing a small firm hundreds of thousands of dollars might be viewed as unreasonable, especially if it causes undue financial hardship to the business. However, it is becoming more and more difficult for employers to demonstrate that undue financial hardship would result from the accommodation and the burden of proof is always on the employer.

Reasonableness also varies by job. The core rule is the employee is entitled to the job if he or she can perform the essential functions of the job with or without reasonable accommodation. The following case explores the State of Wisconsin's interpretation of reasonable accommodation.

7.2 *VANDE ZANDE V. STATE OF WISCONSIN, DEPARTMENT OF ADMINISTRATION*

7.2.1 Facts

Plaintiff Lori L. Vande Zande is a paraplegic and uses a wheelchair. From February of 1990 until January 22, 1993, she was employed by the Wisconsin Department of Administration, Division of Housing. Defendants are the Wisconsin Department of Administration; the Department's secretary, James R. Klauser; the administrator of the Division of Housing, Lee Martinson; and the director of the Bureau of Community Services, Gerard J. Deschane. Defendant Deschane was plaintiff's immediate supervisor.

Plaintiff's job included the following tasks: compiling fact sheets and informational brochures from material that was provided to her (30%), acting as an administrative assistant to the director (25%), planning and coordinating events and meetings (15%), coordinating task forces and councils for the Division of Housing (10%), miscellaneous duties (10%), working on the affirmative action committee and later on the Governor's Council on Disability Issues (5%). In practice, the actual time plaintiff spent on specific duties varied. Defendants were flexible in assigning work to plaintiff based on work availability.

After the Division of Housing was formed in October of 1989, it occupied a small office in a state building known as GEF II in Madison, Wisconsin. In the spring of 1990, the division moved its offices to a building on Doty Street in Madison. Prior to

the division's move Deschane asked Jean Rogers, the Administrator of the Division of Administrative Services, to determine whether there was a wheelchair-accessible women's bathroom in the new offices. Upon viewing the Doty Street offices, plaintiff recognized that the women's bathroom would not be accessible to her. Deschane made arrangements for modifications in the bathroom that were made before the division moved into the offices. Additionally, defendants installed a ramp with a grab bar over a step in the office.

Once the division moved into the Doty Street offices, plaintiff was assigned an office with a door to provide her privacy when she needed to call her physician. No other clerical employees were provided with this kind of office. Also, the division purchased for plaintiff's office approximately $1500 worth of customized furniture, selected by plaintiff.

During 1991 and 1992, the state planned to build a new building to house the Department of Administration (DOA). Michael Stark, a facilities designer in the Division of Buildings and Police Services of DOA, was put in charge of the layout and design of the building. Stark consulted with the plaintiff 10 to 15 times and spent approximately 60 hours discussing, researching, and taking action on plaintiff's concerns regarding the design of the new building. One of plaintiff's concerns was the accessibility of the women's locker room. In response to plaintiff's concerns, the locker room was redesigned: its location was switched with that of the men's locker room and the location of sinks, water closets, and mirrors was changed. Additionally, grab bars were installed and the layout was redesigned to accommodate plaintiff's cot and two wheelchair-accessible sinks.

Cindy Torstveit, another facilities designer, consulted with plaintiff approximately 15 times regarding the furniture to be placed in plaintiff's new office. Plaintiff requested that the adjustable furniture the division had purchased for her be transferred to the new building because the new "systems" furniture that other employees would receive would not be suitable for her needs. Torstveit helped plaintiff design a plan for placing plaintiff's adjustable furniture in her new office.

Each floor of the new building contains a small kitchenette with a sink, microwave, refrigerator, coffee machine, and counter space. Each counter is 36 inches high. In April 1992, plaintiff advised Stark that she would not be able to reach the sink handles and soap in the kitchenette because of their height. Plaintiff requested that the kitchenette counter and sink be lowered to a 34-inch height.

The DOA moved into the new building on September 15, 1992. On the day of the move, the locker room lacked paper towels, toilet paper and soap. Plaintiff complained to defendant Deschane about the lack of supplies in the locker room and Deschane asked plaintiff to "cut us some slack," given that it was the first day in the building. After September 15, 1992, the locker room was always stocked with the appropriate supplies.

On October 5, 1992, at defendant Deschane's request, plaintiff summarized all of her concerns about the new building in a "reasonable accommodations request." DOA attempted to accommodate almost all of plaintiff's additional requests. DOA agreed to (1) replace the table in the conference room with a smaller one so that plaintiff could move around more easily; (2) install a full-length mirror in the bathroom so that plaintiff could see her whole body; (3) install paddle handles on one

sink; (4) install a grab bar on plaintiff's cot; (5) look into an automatic door opener for the parking garage; (6) redesign plaintiff's work space with new furniture; and (7) place a coffee warming plate on the lower movable counter across from the kitchenette, so plaintiff did not have to pour the coffee over her lap.

When plaintiff's furniture was moved from her old office, it did not fit well into the new office space and did not allow a wide enough aisle for plaintiff to turn. To remedy this difficulty plaintiff tried to use the new "systems" furniture in a vacant office and determined the furniture would work. Therefore, plaintiff requested that she be provided the new "systems" furniture. Torstveit spent numerous hours making arrangements for the systems furniture to be installed in plaintiff's office. Torstveit also redesigned the entry space to plaintiff's office to provide more room for plaintiff's wheelchair.

Twice during plaintiff's employment, she developed pressure ulcers (open sores) that require relief of pressure to heal. These ulcers commonly develop in people with paralysis. The first-time plaintiff developed the ulcers, plaintiff's doctor recommended that she stay home with the ulcers open to the air for four to six weeks. Plaintiff asked to work at home during this time.

Deschane consulted with defendant Martinson and the DOA's personnel director about allowing plaintiff to work at home. Deschane understood that he could allow plaintiff to work at home if she had projects to do that were within her normal job description and that could be done at home as long as Deschane could monitor the progress. Because plaintiff had been working on a project preparing a directory of housing services that required reading, typing, proofing, and some telephone work, plaintiff was allowed to work at home until she recovered.

In October of 1992, plaintiff attended a conference on the ADA in San Francisco, California. At the conference plaintiff again developed pressure ulcers on various parts of her body, including an ulcer on her left heel.

On October 26, 1992, plaintiff saw her physician about her pressure ulcers. She was told to keep her heel elevated and open to the air and to avoid pressure points on her wheelchair and shoes. Plaintiff's doctor advised her to speak with her employer about working at home.

After her doctor's appointment, plaintiff spoke with Deschane about her condition and the fact that she might have to work full-time at home for a period of about six weeks. Defendant Deschane did not believe that he would have enough work for plaintiff to work at home full-time.

On October 27, 1993, plaintiff bumped one of the sores on her foot and it began to bleed. Plaintiff stopped the bleeding and went to call her doctor and Deschane. After consultation with Martinson, Deschane told plaintiff that since she had a number of small projects that she was working on she could do them at home for the rest of the week, but he thought that he would not have similar work for the following week.

On October 29, 1993, plaintiff had an appointment with her doctor. The doctor provided plaintiff with a note stating that she needed to stay at home for six to eight weeks in order to allow her ulcers to heal.

On October 30, 1993, plaintiff called Deschane and told him that she would have to work at home for six more weeks. Deschane told plaintiff that she would have to pursue her request through appropriate channels, but he could not foresee having

the type of work available that she could perform at home. When plaintiff requested that Deschane give her an answer whether there would be work available, Deschane stated that if an immediate answer was necessary he would have to say that he did not have sufficient work for her to do at home. On the same day, plaintiff prepared a reasonable accommodation request asking to be allowed to work at home. DOA staff attorney Mark Sauders, Martinson, and Deschane decided after consultation with plaintiff's attorney Lawrence Bensky that while the DOA was considering plaintiff's request she would be paid for full-time work at home.

On November 17, 1993, the DOA issued a response to plaintiff's request, signed by Deschane, that stated that plaintiff would "be able to perform those essential functions of her job duties which can reasonably be performed at home" and that the DOA would provide her those tasks "appropriate" to be done at home. The response also stated that it estimated that 15 to 20 hours of work per week could be provided at home. Plaintiff ordinarily worked a standard 40 hour week.

At some point, plaintiff gave Deschane a list of potential projects and tasks that she could perform at home. These tasks included: gathering facts and writing reports, producing and revising fact sheets and brochures, working on a newsletter, assisting with the state housing plan, working on the Governor's Council on Disabilities, assisting with the HOME program, answering phones, working on ADA matters, setting up Housing Advisory Council meetings, making arrangements for the Regulatory Task Force, editing and proofing, updating a county-by-county directory of homeless people, arranging conferences, and working on fair housing issues and housing documents. Deschane evaluated the tasks plaintiff suggested, concluding that some of the tasks were appropriate for plaintiff to perform at home and that others were either not within plaintiff's normal duties or were not practical to perform at home.

In late December 1992 or early January 1993, plaintiff informed Deschane that she had accepted a position at the Wisconsin Department of Social Services. Deschane then told defendant to consider herself on full-time status and to "tie up loose ends" when she was not working on projects.

Plaintiff worked at home until January 4, 1993, when she was hospitalized for an infection. Plaintiff returned to work on January 7, 1993. Her last day of work with the division was January 22, 1993.

Deschane estimates that during the period of plaintiff's employment with the Division of Housing, he spent five hours a week dealing with issues relating to plaintiff's needs, including accommodations, space problems, adjusting other staff members' schedules, and interceding on plaintiff's behalf with other employees. Plaintiff sued for disability discrimination in violation of the ADA.

7.2.2 Analysis

Plaintiff contends that defendants violated both the ADA and the Rehabilitation Act (predecessor to the ADA) through their failure to accommodate her disability. Subchapter I of the ADA prohibits discrimination against "a qualified individual with a disability" in any of the "terms, conditions, [or] privileges of employment." The ADA's definition of discrimination encompasses an employer's failure to make

"reasonable accommodations" for a disabled employee without demonstrating that such an accommodation would impose an "undue burden" on the employer.

The ADA defines reasonable accommodations as including:

A. making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
B. job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Although the ADA requires an employer to provide reasonable accommodations, an employer need not accommodate an employee in the manner that an employee requests or provide the employee with the "best" possible accommodation. The principle that an employee is entitled only to a reasonable accommodation and not to preferred accommodation is rooted in case law.

Plaintiff contends that defendants failed to reasonably accommodate her request in October 1992 to be allowed to work at home full-time while her pressure ulcers healed. Plaintiff argues that because pressure ulcers are such a common diction among people with paralysis, they are covered by the ADA's requirements obligating defendants to accommodate her disability by providing her with full-time work at home. The State of Wisconsin suggests that since the pressure ulcers will heal and will not cause long-term effects, they are similar to a broken bone or a sprain and therefore do not qualify as a disability under the ADA. Although this response does not completely reconcile the regulations governing temporary conditions, the close nexus between the ulcers and the underlying disability suggests that the ulcers should be considered to be part of plaintiff's disability.

In the final analysis, what is missing from plaintiff's claim is any indication that the defendants acted unreasonably. Plaintiff's goal was to work full-time at home for eight weeks without the loss of pay or benefits. Defendants provided a way for plaintiff to accomplish this goal, thereby satisfying the purposes of the ADA. The court holds that defendant's found numerous ways to accommodate plaintiff's disability and maintaining full-time work at the state office building. Compelling defendants to allow plaintiff to work from home where defendants have no management control is unreasonable given the substantial efforts the state has made to already accommodate plaintiff's disability.

7.2.3 Holding

Defendant's Motion for Summary Judgment is affirmed.

7.2.4 Author's Comments on the Case

The Vande Zande case took place in Wisconsin but it was a question of Federal law. The main point here is that accommodations under the ADA do not need to be

perfect but reasonable. States that have their own disability discrimination statutes may differ in litigation holdings as to what is reasonable, but in all cases, reasonableness is the standard.

7.3 THE IH/S PROFESSIONAL'S ROLE IN REASONABLE ACCOMMODATIONS

The IH/S professional can be of great assistance to Human Resources or in-house counsel in establishing creative ways to accommodate workers who have been injured or suffer from disability. Ergonomics and chemical evaluation for pregnant workers are areas where the IH/S professional can be very effective in this area of law. Most of the time, practical solutions can be reached without having to spend a lot of money or resources on new construction or equipment.

In law practice, I have rarely seen a situation where a disabled worker cannot be somehow accommodated, so they can continue their work. Obviously, the larger the organization the easier it is to establish accommodations, often creative ones, to make it possible for an injured employee to perform their essential duties while they recuperate from an injury or temporary disability. But even the smaller organizations can usually come up with a reasonable way a worker can continue to work.

Keep in mind that there will be times when unpaid leave exceeding statutory limits will be considered a reasonable accommodation. Courts have consistently held that cancer and the effects of its treatment such as chemotherapy are a disability (or medical condition rather) in the ADA context. When an employee develops cancer and needs to be off for treatment they typically cover the time with sick leave/paid time off (PTO), or through the Family Medical Leave Act (FMLA) coverage (or state equivalent). But what happens when sick leave runs out or the 12 weeks of job protection are up and the employee is still experiencing fatigue from chemotherapy? The answer is not that they are fired. They still have a disability in the eyes of the law and time off to rest has been held to be a reasonable accommodation. The obvious question then is how long can this go on? What if the employee has recurring bouts of cancer for many years and always uses up his 12 weeks of FMLA coverage each year. The answer is that it cannot go on forever but only for a reasonable period of time, which can vary depending on the financial strength of the organization and whether or not the company can somehow accommodate and still get the essential functions of the job completed. This is a fuzzy area of the law where there are no absolutes as to what is reasonable. When faced with such a situation, good companies attempt to be as accommodating as they can to help the cancer patient recover from this devastating illness.

7.4 THE GOOD FAITH INTERACTIVE PROCESS

When the lawmakers in Congress conceived of the ADA and the impact of disability discrimination in general, they were concerned that some employers, when faced with a situation involving a disabled employee, might quickly conclude there is no reasonable accommodation that can be made without giving it much thought.

Accordingly, a separate but equally powerful claim can be made against an employer who fails to engage the employee in an interactive process. The idea is that the disabled employee should be afforded an opportunity to discuss the situation with the employer in a non-coercive and constructive (i.e., interactive) manner. Even if it is later determined through expert testimony in a lawsuit that there were no reasonable accommodations that a defendant could have made, the plaintiff may still prevail if the employer dismissed the employee without discussion.

The interactive process must be initiated (by either party) upon the employers' notice of the disability or medical condition. Constructive notice has been held to occur when the employer "reasonably should have been aware" of the disability through some kind of ostensible characteristic, such as walking with a cane or coming into work in a wheelchair. In other words, the employee does not need to declare she has a disability (although that is usually the case) but just reasonably appear to the employer to have one. It's kind of a difficult area of the law for employers because on one hand it must protect the privacy rights of employees and on the other ensure it addresses any reasonable accommodation issues that arise. Consider the following hypothetical case as illustrative of some of the legal aspects of the interactive process:

7.5 *BLACK V. EL PASEO STEEL COMPANY*

7.5.1 Facts

In June 2017, plaintiff Jeff Black was hired by the El Paseo Steel Company as a steel-treating assistant. Without any previous experience in the steel-treating field, Mr. Black received a substantial amount of training and was considered a probationary employee for his first three months, consistent with written company policy. Black worked very hard at his new craft and enjoyed working for El Paseo. He was excited to be on a new career path and believed he had a bright future.

After three months of work, Black "made probation" and was considered a permanent employee[*] of the company. His performance appraisals were fair to good in most categories and by all accounts he seemed to be learning this new trade at a pace acceptable to the company.

One morning in September 2017, Mr. Black accidently stepped in a pot-hole in a public street while walking to work. The sudden change in elevation without notice caused Black to twist his back sharply in attempt to brace for an inevitable fall. Black heard a "pop" in his back and immediately felt severe pain. Not wanting to be late to work, he hobbled in and punched in the time clock. His work tasks that morning included prepping various steel parts for the treating process. This work required him to manually lift 5–20 lb parts from a sorting table and place them into sizing bins. Normally, this work would not have given him any trouble, and he was careful to not twist as he loaded the materials, but the great pain he was in from the injury made the work unbearable. After "sweating through the pain" for about an hour,

[*] Black was at-will but he had passed probation meaning he received a raise and health benefits.

Mr. Black informed his supervisor, Rico Smith that he had hurt his back on the way into work and that he wanted to leave to see a doctor. Smith told him it was okay to leave to go to the hospital and clocked him out as sick time.

Mr. Black promptly reported to a nearby urgent care facility. The attending physician Dr. Warren diagnosed him with a "severely bulged disc" in his back and prescribed immediate bed rest and pain medication. Dr. Warren advised him to use a cane until the pain subsided and prepared a letter to El Paseo. The letter stated that Mr. Black could perform no work and required bed rest for one week, and after that he would see Mr. Black again and determine if additional time-off or a work restriction was necessary.

Immediately after being seen by Dr. Warren, Mr. Black called in to work to report his status. A receptionist made a note indicating Mr. Black said he had severely injured his back and that he would be out for a week, and would report back to work the following Monday. Mr. Black also told the receptionist he had a doctor's note verifying his inability to work the following week. Consistent with company policy, the receptionist routed the message to Smith and other members of the El Paseo management team.

During the week of bed rest, Mr. Black called into work at least two additional times to report his status. He reiterated that he would be in on Monday and that he was willing to fax the doctor's note in any time. The receptionist told him "don't worry about it."

On the Monday ten days after the injury, at 7 AM, Mr. Black promptly reported back into work. He was using a cane and had the doctor's note in hand. The receptionist greeted him and told him to remain in the front office while she paged Smith. Smith came into the office about ten minutes later. He told Mr. Black that company policy was that he could not work unless he was "100% back to normal." Mr. Black offered him the doctor's note but Smith refused it telling Mr. Black to go home until he was "100 percent back to normal." He also said, "we don't want you to hurt yourself again."

The next morning Mr. Black received a phone call from the El Paseo Human Resources Manager, Ms. Thomas. Thomas fired Mr. Black over the phone telling him "it's just not working out."

7.5.2 Litigation Commences

After the defendant rebuked a good faith attempt to suggest private settlement via a demand letter, plaintiff's attorneys filed a lawsuit in the County Superior Court alleging Disability Discrimination in Violation of the California FEHA, Failure to Engage in the Interactive Process in Violation of FEHA, Wrongful Termination in Violation of Public Policy, and other relevant claims.

Defendant answered the complaint denying any liability. Defendant contended Mr. Black was fired not for his back injury and inability to work but for non-discriminatory legitimate reasons, including his poor attendance, and that he had been involved in a hostile exchange with another employee some several months before his termination.

7.5.3 Discovery Begins

Plaintiff's attorneys promptly deposed Thomas and issued Requests for Production of Documents, Form and Special Interrogatories, and Requests for Admissions. These discovery methods led to the following evidence to make plaintiff's case:

- An email from the President of El Paseo to Smith and Thomas sent while Mr. Black was at urgent care stating he was authorizing Mr. Black's termination because "he got injured and is out again" and "he had become a problem."
- Several leave authorization slips showing Mr. Black adhered to company policy when calling in sick, and that one time he would be out because he was caring for his fiancé who had suffered a miscarriage the night earlier. [This evidence showed Mr. Black missed five workdays over the course of the three months at El Paseo – two were vacation days pre-arranged during his interview; one for the miscarriage, and the remaining two when Mr. Black had the flu and was told to stay home. During deposition, plaintiff's attorneys asked Thomas whether she felt Mr. Black's five absences over a three-month period were excessive. She stated she did not think so personally, but "the company frowns on employees who get sick a lot."]
- Deposition testimony confirming that "unless it is a workers' compensation injury, company policy is that no one works unless they are 100% recovered from an illness or injury." [This statement was "qualified" with the admission that the company does not want to "further injure an employee who is not 100% fit for their job."]

7.5.4 Mediation and Settlement

In separate case management statements, both parties agreed to court supervised mediation. This was unproductive as the parties were orders of magnitude apart in the amount of damages. After this first mediation failed, the defendant fired and replaced its attorney. Supplemental discovery requests were pending, and plaintiff's attorneys issued deposition notices for several more El Paseo management employees, including the President of the company. The new attorney for defendant was very amenable to private mediation. A local mediator was selected by the parties. Further discovery was put on hold pending the mediation.

The mediator successfully guided the parties (which included defendant's insurer) to a fair settlement amount. The most important evidence was the email from the President. This showed that the decision to fire Mr. Black was made immediately upon hearing he had been injured and would be off-work for one week. There was no effort at all to discuss Mr. Black's injury with him (i.e., engage in an interactive process), and the statements about "100% recovered" would likely be construed by a jury to violate the reasonable accommodation requirement. The mediator stated that a temporary back injury could go either way as to whether it would be considered a "qualified disability" under the ADA or California FEHA, but the company

absolutely owed Mr. Black a discussion about his condition and how it might reasonably accommodate him during his recovery.

7.5.5 Author's Comments on the Case

First, statements such as "we don't offer light duty" are signs of unlawfulness and will likely persuade a jury to side with a plaintiff. In addition, the Black case provides a good foundation of how an IH/S professional might help Human Resources, management, or in-house counsel deal with injured employees in a lawful manner. The take home message is there are no such absolutes as "we don't have light duty" or "come back when you are 100% recovered." The challenge for IH/S professionals then comes down to how will the company accommodate the disabled employee without aggravating or re-injuring him? In the Black case, what should come to mind immediately is lifting training, work restrictions, or the use of lifting equipment. Or perhaps an ergonomic evaluation of the work area to determine ways he can perform the essential functions of the job without twisting or lifting excessively.

Employers often make the mistake of only focusing on work-related injuries. The reason for this is employers usually understand that under workers' compensation laws, they are strictly liable for work-related injuries and they have insurance for this. I have heard employers say "your client wasn't injured at work so it's not our problem." But as we have discussed above it often is the employer's problem.

7.6 WORKPLACE RETALIATION

Retaliation in the workplace is not a modern concept. If you think about it for minute, every unwanted termination of employment is a retaliatory move of some sort – "Bill, you failed to meet your quarterly sales goals, so the company has to let you go." I have never come across a case where someone was fired for no reason at all. But when the motivation to terminate employment stems from an action or statement the employee has the legal right to make, or where the employee reasonably believes following his supervisor's orders would be illegal or unsafe, retaliation is unlawful.

Most states have laws on the books to address workplace retaliation, most often in the form of whistleblower protection. Although state laws differ in terms of applicability and coverage (e.g., some whistleblower protection laws cover only public employees, others cover all employees), they all stem from a fundamental public policy that people should not lose their jobs for doing the right thing (or refusing to do the wrong thing).

Termination of employment is the most common form of retaliation but there are others. Unlawful retaliatory moves can include demotion, suspension, failure to hire, failure to promote, or reduction in pay. Most lawsuits, however, are filed by terminated ex-employees, as most people do not like the idea of suing their current employer. Keep in mind, though, that retaliation lawsuits can arise from job applicants or from former employees too. Not hiring someone because they filed a harassment suit against a former employer can be considered unlawful retaliation; and putting a former employee on a black list to prevent them from being hired by someone else can also be retaliation, and depending on the circumstances, defamation too.

The most compelling overlap of IH/S practice and the law is the retaliation against an employee who complains about unsafe working conditions. California has a very broad whistleblower protection statute that has implications for IH/S practice, particularly in injury and illness prevention plans and policy. Other states have comparable laws making it clear that raising safety and health concerns is protected activity.

In California, labor code section 1102.5 provides general protection to whistleblowers. Employees who report information to a government or law enforcement agency, a person with authority over the employee (i.e., supervisor or other manager), or another employee who has a duty to investigate a complaint such as a person in human resources, are protected under the statute. Specifically, employers are prohibited from retaliating against an employee who exercises her rights to complain about unsafe conditions or unlawful conduct.

Whistleblower laws also extend protection to employees who refuse to perform a task they reasonably believe to be unsafe or unlawful. A reasonable belief that later turns out to be unfounded is still protected. Public policy in most jurisdictions favors the reporting of concerns that later turn out to be unfounded rather than not reporting a true issue that results in injury. In other words, false positives are better than false negatives.

Consider the following hypothetical case illustrating retaliation laws in the IH/S context:

7.7 *PEDERSON V. DUBLIN STATE UNIVERSITY*

7.7.1 Facts

Mr. Dale Pederson is a plumber with 30 plus years of experience. For many years, Pederson owned and operated his own plumbing business in the Dublin area. By the early 2000s, Pederson had built his family-owned business into a thriving operation with five employees that provided plumbing service to small business customers.

In 2005, Pederson felt he was missing out on the residential market. He raised capital primarily by borrowing from family, and was able to purchase additional equipment, lease a larger office and shop space, and hire an additional five employees. Pederson anticipated that residential customers would likely need service capabilities 24/7, so he invested in advertising and telecommunications equipment to offer such a service to the community.

The real estate meltdown in this state in 2008 was devastating to Pederson's business and his plumbing service literally dried up in a matter of months. Pederson was forced to close the business and filed for bankruptcy.

Still needing to work as he had college age children, Pederson applied for an open plumber position at Dublin State University (DSU). Pederson was a great fit because of his years of experience in the plumbing trade and the fact DSU had been one of his customers in the early years of his business. Pederson did very well at DSU, receiving two very positive performance reviews during his first year. He quickly built a reputation as a hard worker who knew everything about plumbing.

The University has an aging central plant and power distribution system. The steam, natural gas, and water services are delivered to campus buildings through a

network of underground pipe systems. Access to water and gas valves was provided by manholes (gas and water lines and valves are generally co-located in the manholes). The utility valves had not been maintained or inspected in several years due to a deferred maintenance policy put in place after severe budget cuts. Gas leaks were rare (1–2 a year) and were fixed as they occurred. The University knew there were water leaks in many valves but chose to ignore this until funding became available.

After two years of working for DSU, Pederson learned that the university was going to address the deferred maintenance problem. Pederson's supervisor, Daniel Dean, directed him to come up with a plan and budget for inspecting all underground water and gas valves, conduct maintenance (i.e., valve turning), and to make repairs to any valves that were leaking or were frozen.

Realizing the project would involve entry into the manholes, Pederson was concerned that he would need to budget and plan for confined space work. He called DSU's Environment, Health and Safety Director, Ivan Henderson, who told Pederson he would be more than happy to help. Pederson met Henderson the next day along with an Industrial Hygienist from the Industrial Hygiene Services Department, Chris Aerosmith. Henderson and Aerosmith explained to Pederson the University had evaluated all utility manholes on-site and categorized them as permit-required confined spaces. Accordingly, he would have to have a permit to enter the spaces, conduct air monitoring, use non-entry rescue equipment, and implement other controls. Workers would need to be trained too.

Pederson submitted his plan and budget to Dean. The plan included a breakdown of the cost to acquire non-entry rescue equipment. Dean asked Pederson why the University needed to purchase the equipment and told Pederson he was concerned the training would take too much time as he was under pressure from his boss to get started on the project. Pederson explained that the controls and training were necessary to comply with OSHA regulations, and that he could not enter the manholes without a permit and the necessary controls. Dean told him "we used to enter these manholes all the time; we've never needed these things before; no one ever got hurt." The two men argued for several minutes and Pederson said, "I will not violate the OSHA requirements, and will not let anyone on my crew do so either." Dean replied, "then we might have to find someone else to do this project. I will discuss it with the Director of Plant Operations, but I don't think she's going to like this one bit."

A few weeks went by without any further discussion between Pederson and Dean. Pederson figured Dean was working out the details with senior management.

On May 6, Pederson had finished up a re-piping job in the Science Building and was on his way back to the shop. He saw one of his colleagues climbing out of a manhole with a clip board in his hand. Pederson asked the worker about it and he told him he had been ordered by Dean to check on valves in several of the manholes. Pederson noted there were no confined space controls and he was concerned about his co-worker's safety. He immediately went into Dean's office to report this. Dean would not see him, so Pederson called the 800 number for the state occupational health and safety agency to report a serious hazard.

The next day Pederson reported to work. Colleagues told him that a state inspector had visited the campus and was in discussion with Dean and other managers. Pederson learned that the state inspector issued the University a "willful citation."

At the end of the day, Dean paged Pederson to report this to his office. Waiting for him was his final paycheck. Dean told him he was fired. Pederson asked why, and Dean replied, "it's just not working out."

7.7.2 Disposition

After several good faith attempts to settle privately with DSU, Pederson's attorney filed a claim for retaliation and wrongful termination in the Superior Court, seeking damages of $275,000 plus attorney's fees. As discovery was coming to a close, DSU filed a motion for summary judgment. The judge heard arguments and held that Pederson had shown there was a genuine issue of material fact and the case could proceed to trial. At that point DSU offered to pay all costs of a private mediator. Pederson accepted the offer. Mediation was scheduled for six weeks after the summary judgment motion was heard. The parties met for eight hours and were able to reach settlement in the mid six figures, inclusive of attorney fees.

7.7.3 Author's Comments on the Case

In my opinion, the Pederson case, as presented with these facts, would be an easy plaintiff victory. The law is very clear that retaliation for expressing legal rights, reporting unlawful acts, or refusing to conduct unlawful activities will not be tolerated.

7.8 ESTABLISHING A SAFETY CULTURE FREE OF THE FEAR OF RETRIBUTION

In order to be favorable with the law, worker safety and health programs should emphasize transparency and the prompt reporting of errors without fear of retribution. This should be policy and integrated into the safety culture of the organization. The first place to start is the have a written "Stop Work" policy. Everyone in the organization, including subcontractors, should have the power to stop work if they feel continuing work is unsafe. This not only should be policy, but it should also be encouraged. And like the law, there must be no penalty if the reported situation turns about to be a false alarm. It is better to have several false alarms about safety then to miss a real event that causes an injury to workers or the public.

There will always be a certain percentage of every work force that does not believe (no matter what management says) they will not be retaliated against for reporting errors. For these people, it's a good idea to set up an anonymous reporting system. Some organizations have set up special email addresses and telephone extensions for this purpose. The trick is that confidentiality must be maintained to prevent the chilling effect of being identified when anonymity was desired.

A lot of good managers with all the good intentions in the world break the promise of confidentiality. In one case I am aware, two workers were involved in an electrical accident involving an arc flash. Management wanted to produce a lessons learned video on the incident not because they wanted to expose the injured workers but

because they truly cared about their workers and wanted the word to get out about how to avoid a similar accident in the future. Nevertheless, compelling these workers to participate in the video had a chilling effect on the work force (i.e., unintended consequences). The safety culture of the organization dropped a few notches after this event because some workers feared that if they reported an injury management might ask them to talk about it and they did not want to be paraded about in that fashion. It's ultimately the best approach to encourage openness and transparency of reporting while maintaining the anonymity of the injured worker if they so choose to remain anonymous.

8 Workers' Compensation

8.1 INTRODUCTION – THE COMPENSATION BARGAIN

Thinking back to Chapter 4 on Torts for a moment, what would happen if a person, let's say Polly, a customer at a mall, slipped on a greasy floor at the mall, fell down some stairs, and as a result broke her leg? If the mall owner had control over the floor, which he likely does, and failed to mitigate the slip hazard when he should have, Polly would have a suit for negligence. She might be entitled to general and economic damages, medical expenses, and maybe even lost wages. Polly would have to file suit and prove that the mall owner was negligent and caused her damages. Polly would likely have to hire a lawyer for this to go up against the mall's insurance company. All of this could take years and be quite costly.

Now suppose the same facts, but this time Polly is a security guard at the same mall – she is an employee of the mall. Polly, while pursuing a suspected shop lifter, slips on the same puddle of grease ultimately breaking her leg and suffering damages. Would the security guard version of Polly have to prove negligence in court? The answer is no. Because Polly is an employee, injured on the job while conducting her job duties, Polly's injuries would be covered by her state's workers' compensation program. She doesn't have to prove a thing because the employer is strictly liable for her injury.

All jurisdictions in the United States have some form of workers' compensation scheme. These laws, which ultimately protect employers and employees, are based on the compensation bargain. A bargain in the legal sense is a negotiated contract, but here it has a specific meaning. Each party to the bargain, the employer and the employee is giving up something. By entering into an employment situation, the employee is giving up certain legal rights she would have under other relationships. If injured on the job, she cannot sue her employer in tort and recover all the things (i.e., damages) we discussed in Chapter 4. She will only be entitled to the benefits prescribed in her state's workers' compensation statutes; usually, medical expenses, and compensation for lost wages as she recovers. She will not be entitled to general damages, such as pain and suffering, and in the case of fatality, her family generally can only recover a statutorily provided workers' compensation death benefit.

Lost wages and medical expenses are limited to statutory limits. Injured employees who get permanently disabled might only be entitled to a percentage of lost income based on the percentage of their disability. States have complicated formulas and procedures for determining percent disability, and only qualified medical examiners can make such a determination. The system is complex and often political.

So, what does the injured employee receive in exchange for her bargain of giving up her legal rights? The answer to that question is the whole point of workers' compensation statutes. The injured employee does not have to prove negligence or fault;

the employer is strictly liable for her injuries, even if it did nothing wrong, which is often the case. And except for a few situations described later, the employer is totally on the hook for an injury even where the employee caused it.

Workers' compensation laws require employers to have insurance. Like torts, in a workers' compensation case, it is the insurer that defends the employer and ultimately settles with the injured worker. In exchange, the employer pays the premiums for the insurance, which can be costly because there are so many injuries on the job and the employer is just about always liable. Workers' compensation insurance premiums go up when a company has a lot of injuries, just the same as car insurance premiums rise with a lot of accidents. This is one reason companies employ IH/S professionals. It's always cheaper to prevent injury than to pay out on an injury.

Perhaps the most significant benefit to society created by workers' compensation laws is the cost savings from avoidance of lawsuits. Despite our best efforts, injuries occur every day at work in the United States. Imagine if every injured worker had to sue his employer to recover lost wages and medical costs. The courts would be clogged up with thousands of cases, and litigants would likely never get their day in court. Imagine the costs. Remember that for each case, the injured employee as plaintiff would have to prove by a preponderance of the evidence that the employer was negligent or acted with evil intention. Both sides would have to gather and present evidence, call witnesses, and cross-examine the other side's evidence and witnesses. This could take days or weeks depending on the circumstances. All of this would have to be done during work hours. So, would the employer have to pay for time off for the worker to sue? Would the employee have to use vacation time? What if the employer doesn't offer vacation? We haven't even talked about attorney's fees. What if the employee can't afford an attorney? The questions go on forever. It is just far less a burden to resolve work injury matters outside of court with a set of legislated rules.

As seen in Figure 8.1, U.S. workplace nonfatal injuries and illnesses are trending downward, but it is still a very large number of cases. If there were no workers' compensation systems, all of these cases in the chart would result in lawsuits and the costs would be astronomical. Like it or not, workers' compensation in lieu of civil litigation is here to stay.

8.2 WORKERS' COMPENSATION LITIGATION

The workers' compensation scheme sounds like a trouble-free system, right? The employer pays premiums. The insurance company pays the injured worker. And the worker is always taken care of, not having to hire a lawyer or go to court. What could be better?

Not so fast. The reality is that worker injury cases can be fraught with legal issues. Most if not all states have special workers' compensation administrative boards that hear cases and attempt to resolve them. Going before the workers' compensation board usually requires an attorney to help the injured employee navigate the process. Although perhaps simpler than a full-blown civil action, compensation board proceedings can be daunting. Attorneys representing clients in these matters are typically provided statutory-based attorney's fees, typically 15%. Such fees might come out of the settlement not out of pocket.

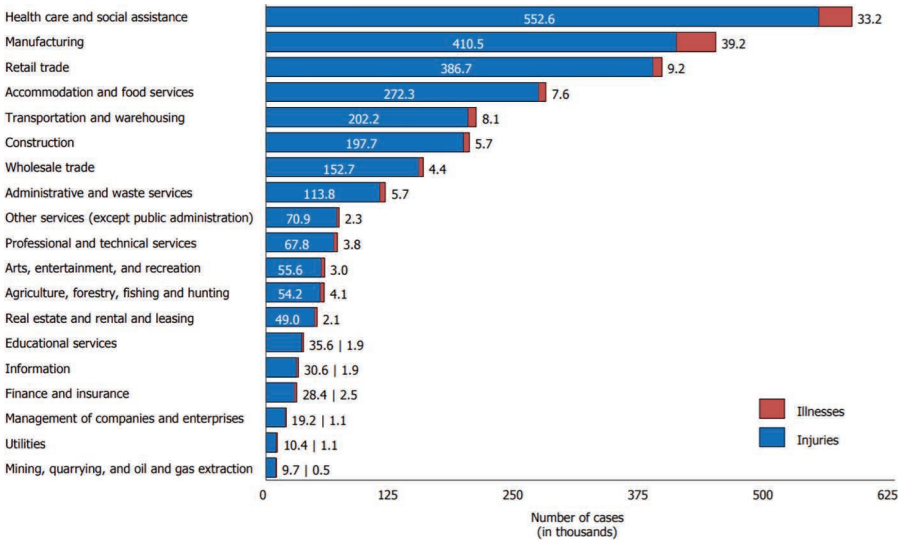

FIGURE 8.1 Distribution of nonfatal occupational injuries and illnesses, private industry sector (2016).

Source: **U.S. Bureau of Labor Statistics, U.S. Department of Labor, November 2017.**

An often-litigated matter in workers' compensation claims is whether the employee is temporarily disabled or permanently disabled as a result of a workplace injury. If the latter, the employee might qualify for a lifetime pension. Disability questions are handled by qualified medical examiners (some states might have different terms for these specially qualified physicians). The qualified medical examiner determines whether the injured worker's medical condition has stabilized and been fixed. In other words, permanent disability requires the qualified medical examiner to determine there are no more curative treatments available to the worker.

Some states have thresholds for determining permanent disability. In California, an injured worker is permanently disabled if the qualified medical examiner determines she is 70% disabled. This is often litigated. If the worker disagrees with the qualified medical examination about the percentage of her disability she can and often will appeal.

The lifetime pension is only available for permanent disability. Until that time, the injured worker will receive workers' compensation benefits (i.e., medical payments and compensation) until she is able to return to work.

Most employers have return to work programs. This is where an IH/S professional can be invaluable. Often, there is a reasonable way to accommodate a worker who is not at 100% and as we saw in Chapter 7, the law requires employers to make a reasonable accommodation for any employee with a qualified disability either temporary or permanent. The IH/S professional can help his employer by reviewing the work tasks and helping to determine which controls can be implemented to allow an injured worker to safely perform the essential duties of the position. Some employers get into legal trouble when they think an employee, previously injured must be "100%

back to normal" in order to return to work. This is not the case, and employers should work hand in hand with the injured employee and the IH/S professional to help the employee come back to work in a safe manner.

8.3 WORKERS' COMPENSATION DEFENSES – WORK RELATEDNESS

Just like any other civil action, the employer has several defenses to paying out on a workers' compensation claim. These defenses will first be raised by the insurance carrier and after investigation; the claim often denied if evidence shows a defense is warranted. At this point, the injured worker will appeal to the workers' compensation board and a hearing held to determine if benefits are available.

The first defense to workers' compensation is the most prevalent and often most debated. For strict liable to kick in when an employee is injured, the injury must have been work related. The standard used to determine work-relatedness is found in other areas of the law, such as in torts and contracts: the injury must arise out of and during the course of employment. Thus, the injury must result from tasks the benefits to which accrue to the employer.

If the injury occurs on-site it is generally easy to show the requisite work relatedness. Even if the worker is injured while pursuing a mostly personal matter, such as eating lunch, the case will likely be construed work related if on-site. So, if an employee trips over a curb in a parking lot while heading to the on-site cafeteria for lunch, it will be work related. Things like meal breaks, going to the restroom, and even conducting personal transactions on the internet, subject to a clearly stated incidental use policy, will likely be deemed work related (I think of an ergonomic injury).

Commuting to and from work is generally not work related. So, car accidents occurring during commuting is not a covered workers' compensation claim. However, business travel is generally work related. The rule that most jurisdictions follow is while traveling on business you are covered under workers' compensation from when you leave your home (i.e., to go to the airport) until you check into a hotel for the evening. Thus, if you are injured in transit, or by carrying your bags to your hotel room, you fall under workers' compensation. But if after checking in for the evening you trip over a tear in the carpet, you are not covered. Of course, you might then have a negligence claim against the hotel. On the other hand, if you order room service, paid for by your employer, and you choke on the food, that probably is work related. You can see it's a fact rich inquiry.

What happens if you deviate from your work tasks and are injured in the process? In torts and workers' compensation, departures from work tasks follow the common law rules of frolics and detours. A frolic is as it suggests, purely for the benefit of the employee. It is a significant departure from the tasks of the job, and often is a longer amount of time away from task. A detour on the other hand is still a departure from work for the benefit of the employee, but is often a lesser departure, shorter in time, and is more associated with a convenience to the employee than a personal benefit. Suppose a delivery truck driver realizes that the hospital his mother is at is between scheduled delivery stops and he decides to pay his mother a visit. If he accidently hits

a pedestrian while parking the truck at the hospital this would likely be considered a detour and his employer will be liable to the pedestrian if he can prove negligence. Likewise, if the driver trips over pavement in the hospital lot, his injury will have been caused during a detour and workers' compensation benefits will be available. Now suppose the same driver instead of visiting his mother drives to the ballpark and takes in a three-hour game. If he is injured at the ballpark, this will be considered a frolic, and workers' compensation will be denied.

8.4 WORKER'S COMPENSATION DEFENSES – DRUGS AND ALCOHOL

If drugs or alcohol played any part in a workplace injury, workers' compensation benefits will be denied. This universally recognized defense to a workers' compensation claim is straightforward.

Many companies have policies requiring employees who are injured on the job to submit to drug testing. This is usually legal provided the employee has reasonable notice that drug testing will occur. The best way to deal with this is to include a description of the practice in an employee handbook and then have the employees sign an acknowledgment form. And of course, drug testing following an injury must be conducted in accordance with all state or local laws.

8.5 WORKERS' COMPENSATION DEFENSES – HORSEPLAY AND THE INITIAL AGGRESSOR DEFENSE

Employers are not too sympathetic when their employee is injured while messing around at work. One difference between horseplay and the not work-related defense is horseplay is usually conducted during the course of work, so the questions that arise might be related to when the employee's behavior went from acceptable to horseplay, and *how much* horseplay was involved. As a result, whether or not behavior at work is horseplay often gets fuzzy.

If two employees are playing catch *for fun* with a bottle of acid and one gets burned when the acid bottle shatters that is definitely going to be horseplay. But what if it's not a game of catch and the workers are hurried, and one asks the other to give him a bottle of acid like this: "please toss me some acid." Is that horseplay? Maybe it is but it could also be construed as being in a hurry to try to get the job done and acting carelessly, but in furtherance of the work objectives and not as an amusement.

In the pure sense, horseplay is behavior at work that has no benefit accruing to the employer and is counter to the work task. Rather, the "benefit" accrues solely to the employee in the form of amusement, distraction from the mundane, and as is often the case, for the appeasement of "thrill seeking," curiosity, or even showmanship. "I bet you I can jump over and clear this trench with my eyes closed."

As a general rule in most states, a work injury resulting from horseplay is not covered under workers' compensation. The worker injured from playing catch with a bottle of acid is not covered and will not receive workers' compensation benefits. But many states have exceptions to this rule.

In some states, horseplay behavior resulting in injury might still be covered under workers' compensation if the employer is found to have condoned the horseplay. For example, suppose a manager organizes, and participates in a contest to see who can lift the most boxes without the aid of lifting equipment? In some jurisdictions, this will be viewed as ratification for the unsafe acts, and such an employer might be liable for the compensation claim if injuries arise, which they likely would in such a ridiculous contest.

Still other jurisdictions might define horseplay by the *degree* of horseplay. These states distinguish between horseplay that is momentary and insignificant and horseplay that is a significant deviation for the work tasks. For example, an employee who slips and falls while demonstrating to co-workers how his son kicked the game winning field goal might not be horseplay, but if the same employee performs elaborate tricks and displays of his agility during the weekend soccer match and is injured in the process, this will likely be horseplay. Thus, in this vein the law of horseplay in these jurisdictions is like torts and the work relatedness defense in that the dispositive question is whether the deviation in behavior was a frolic or detour from normal work duties.

Perhaps more common in the workplace than horseplay for amusement is employee altercations. As we saw in Chapter 4, companies invest a lot of resources in violence-in-the-workplace prevention and have to implement plans to address regulations in this area. Nevertheless, employees occasionally have heated arguments that sometimes erupt in physical blows. If an employee is injured in the course of a fight between another employee, will the injury be covered by workers' compensation? The rule of horseplay does not address this situation, as employee fights usually arise out of the course of work – most people do not find heated arguments and fist fights amusing, or a wanted distraction from the mundane. The prevailing rule in many jurisdictions is to determine whether the injured employee was the "initial physical aggressor." Let's see how this played out in this California case.

8.6 *MATHEWS V. WORKMEN'S COMP. APPEALS BD.* (CALIFORNIA SUPREME COURT, (1972))

8.6.1 Facts

The unfortunate facts which gave rise to this proceeding may quickly be summarized. Mathews was employed by Western Contractors, Inc., as a heavy-duty truck driver at the Castaic Dam site in Los Angeles County. On September 30, 1969, Mathews had just stopped his truck at the same site when he was approached by Marcus Cedillo, who was in charge of directing incoming trucks to appropriate places for unloading. Cedillo told Mathews that his truck was blocking traffic and would have to be moved. Mathews replied with an obscene remark and gesture; Cedillo responded similarly.

Mathews climbed down out of the cab of his truck and began walking toward Cedillo with his fists clenched at his sides. Cedillo, who was shorter and lighter than Mathews, picked up two rocks and began backing away. Both men hesitated,

and Cedillo drew a line in the dirt with his foot, warning Mathews not to cross it. This action apparently fueled Mathews' anger. He crossed the line and advanced toward Cedillo. Cedillo threw one rock past Mathews, who ducked, lost his hard hat, and lunged toward Cedillo to grab or strike him. Cedillo struck Mathews in the forehead with the second rock; Mathews fell and lay unconscious.

As a result of the injuries thus received, Mathews died two months later without ever having regained consciousness. His widow, Jessie Mathews (applicant), sought workmen's compensation death benefits.

After holding a hearing at which the foregoing evidence was adduced and legal argument was presented, the referee* determined that "the evidence leads to the inescapable conclusion that Mathews was involved in an altercation on September 30, 1969, in which he was the initial aggressor." Nevertheless, the referee awarded full death benefits, holding California labor code section 3600, subdivision (a)(7), unconstitutional because it denied "compensation on the basis of the fault of the injured employee." Upon reconsideration, the Workers' Compensation Review Board found the injury fell within the terms of section 3600, subdivision (a)(7). However, it held that the section was constitutional and ordered that "applicant take nothing." Jessie Mathews then petitioned to the California Supreme Court for writ of review annulling the Board's decision.

8.6.2 Analysis

California labor code section 3600, subsection (a)(7) bars recovery of workmen's compensation benefits only when two conditions are present. First, the injury for which benefits are sought must "arise out of an altercation." Second, the injured employee must be the "initial physical aggressor" in that altercation.

To "arise out of an altercation," an injury must result from an exchange between two or more persons characterized by an atmosphere of animosity and a willingness to inflect bodily harm. An altercation is distinguishable from "horseplay" or "skylarking," neither of which involves such animosity, although either may result in bodily harm.

In this case, the record contains ample evidence to support the Board's finding that Mathews' injuries arose out of an altercation. It clearly appears that Cedillo and Mathews were not engaged in a joint frolic. On the contrary, each obviously intended to inflict physical harm upon the other; Cedillo was successful. Mathews' death followed from the injury thus sustained.

The second condition of section 3600, subdivision (a)(7), presents more difficulty; it requires us to determine what type of conduct the Legislature intended to discourage when it denied compensation to an "initial physical aggressor." One of the practical difficulties in attempting to bar an aggressor from benefits is "the homely fact that, long after a quarrel is over, it is often almost impossible to determine who really started it."

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* At the time of this case, initial review of the decision was handled by a "referee," similar to the process of administrative law judge (ALJ) discussed in Chapter 5. Note that referee decisions could then appealed to the Workers' Compensation Review Board (WCRB) by either the employer or employee.

The Legislature's use of the work "physical" indicates that it was primarily concerned with the increased risk of injury which arises when a quarrel moves from an exchange of hostile words and nonviolent gestures to a trade of physical blows. Thus, one is not an "initial physical aggressor" so long as he confines his antagonism to arguments, epithets, obscenities, or insults. Instead, an "initial physical aggressor" is one who first engages in physical conduct which a reasonable man would perceive to be a "real, present and apparent threat of bodily harm."

Although the issue is not free from difficultly, nevertheless the record discloses substantial evidence in support of the Board's conclusion that Mathews was the initial physical aggressor. In the context of his altercation with Cedillo, Mathew's conduct in leaving his truck and advancing upon Cedillo with clenched fists held at his sides definitely appeared menacing. Since Mathews was several inches taller and 30 pounds heavier than Cedillo, a reasonable man in Cedillo's position might have considered Mathews' acts to be a real, present, and apparent threat of bodily harm.

Applicant argues that Mathews could not have been the "initial physical aggressor" because he did not "throw the first punch." However, the Board has properly held that "it is not necessary that there be a battery before one can be deemed a physical aggressor; bodily contact … is not the significant factor." He who by physical conduct first places his opponent in reasonable fear of bodily harm is the "initial physical aggressor." His act need not actually cause physical harm; throwing a punch or shooting a gun is not necessary. Under appropriate circumstances, clenching a fist or aiming a gun may be sufficient to convey a real, present, and apparent threat of physical injury.

8.6.3 Holding

Applicant's petition to annul the Board's decision is denied. Applicant receives no workers' compensation death benefits.

8.6.4 Author's Comments on the Case

Thus, the California Supreme Court in this case laid out the rule that a denial of benefits based on the initial physical aggressor defense is not triggered by actual physical contact, but merely by the real threat of such contact. Suppose that Mathews leapt out of his vehicle to talk to Cedillo, slipped on a rock and hit his head on a shovel that had been laid out. If he died two weeks later from head injuries received by hitting the shovel, would his widow be entitled to workers' compensation death benefits? Probably so. In that case, Cedillo would not have reasonably feared bodily harm by Mathew's conduct. Cedillo might have felt he was in for a fierce argument but he would not have reasonably feared for his life. In that case, the injury occurred through the course of conducting a work task (i.e., inquiring with another employee why he could not proceed to make a delivery). The initial physical aggressor would be inapplicable.

8.7 SERIOUS AND WILLFUL MISCONDUCT BY THE EMPLOYER

We saw in one of the cases presented in Chapter 4, Torts, that even egregious behavior on the part of an employer (in that case willfully exposing its employees to chemical

cleaners with no protection) will typically not amount to a battery. Is there a similar vein in the law of workers' compensation? In other words, is an injured worker's remedy restricted to the limits of the compensation bargain with no recovery for general damages even when the employer acted willfully or with malice?

The compensation bargain would say there is no special recovery for willfulness. After all, the employer is strictly liable for all workplace injuries, so the issue or negligence or intention should never arise. Nevertheless, a lot of jurisdictions recognize that strict adherence to the compensation bargain mentality does not punish the serious and willful misconduct on the part of the employer. For this reason, some jurisdictions provide a penalty for this undesirable behavior.

California labor code section 4553 provides "The amount of compensation otherwise recoverable shall be increased one-half… where the employee is injured by reason of the serious and willful misconduct… of the employer…." Section 4553 cases as they are known in California are heavily contested. One reason employers challenge serious and willful claims vigorously is the insurance code makes it unlawful to indemnify the employer in these cases, so the employer, if liable, will have to pay all the injured employee's benefits out of pocket and at the higher penalty rate.

8.8 *HORENBERGER V. JOHNS-MANVILLE SALES CORPORATION*

The line between simple and gross negligence and willfulness is a factual question that must be decided by the Board. This case provides a good example:

8.8.1 Facts

Horenberger, a truck driver employed by the Ruh Company as his general employer, and Johns-Manville Sales Corporation as his special employer, suffered a workplace injury in March 1976. Horenberger was working at night in a yard owned by Lompoc Truck Company, which leased the yard and a number of trucks to Johns-Manville. He tripped over a hose that had been left out in the unlit yard. In the resulting fall to the ground, Horenberger injured his left knee.

The legal working relationships in this case are somewhat complex. In a nutshell, Lompoc Truck owned the yard but leased it to Johns-Manville, which retained control of the yard's shop/office building in which the light switches for the yard were located. Ruh Company supplied truck drivers to Johns-Manville under written contract. A Ruh Company truck driver, such as Horenberger, when given an assignment by a dispatcher from Johns-Manville, would go to the yard, open the gate, obtain truck keys from a key box in the yard, and drive the truck to his assignment, usually the haul of a loaded truck from a Johns-Manville facility to its destination.

At a 1977 hearing on Horenberger's claim against Ruh Company for increased compensation for serious and willful misconduct Horenberger testified he was injured when he tripped over a hose in the dark; he had complained many times to the owner of the Ruh Company, Raymond Ruh, about the lack of adequate lighting in the yard; prior to the injury another employee had tripped in the yard as a result of inadequate lighting.

On behalf of the employer, Ruh testified he could not recall ever having received a complaint about the lighting; but if he had, he would have referred the complaint

to Johns-Manville, because he did not have a key to the shop/office in which the light switch was located. George Vance of Lompoc Truck testified he had leased the truck yard to Johns-Manville; he did not recall anyone complaining about the lack of lighting at night, but he acknowledged that the lighting was there for safety and other reasons. Johns-Manville had asked him to put a light over the key box and had paid for its installation. At this hearing, the workers' compensation judge, taking the view that Johns-Manville was a special employer which might be liable for serious and willful misconduct, suggested that Johns-Manville be brought in as an added party.

At a further hearing in 1978, Vance of Lompoc Truck testified that prior to Horenberger's injury the union had required lights at night, and he had told Bailey, the senior dispatcher for Johns-Manville, about the request. Vance "thought" he told Bailey that Lompoc Truck would not light the yard but that Johns-Manville could put up lights or put a light switch on the outside of the shop/office at its own expense. Bailey testified he had attended a safety meeting with the union at which the shop steward brought up the absence of lighting in the truck yard; a few days later he talked with a representative of Lompoc Truck, who assured him the lights would be turned on at night.

On this record the workers' compensation judge found Johns-Manville guilty of serious and willful misconduct and denied Johns-Manville credit for any portion of the settlement it had made with Horenberger in a civil tort action based on the same accident.

8.8.2 Analysis

This case presents the common question of the type of conduct that can amount to serious and willful misconduct under the labor code. While the weight of evidence in support of a claim of misconduct presents an issue of fact for resolution by the appeals board, determination of the minimum elements necessary to constitute serious and willful misconduct presents a question of law for the courts.

Under general state law willful misconduct has a well-established meaning which is clearly differentiated from negligence and gross negligence. Gross negligence involves a failure to act under circumstances that indicate a passive and indifferent attitude toward the welfare of others. Negative in nature, it implies an absence of care. Willful misconduct, on the other hand, requires an intentional act or an intentional failure to act, either with knowledge that serious injury is a probable result, or with a positive and active disregard for the consequences.

The supplemental award to an injured employee for the serious and willful misconduct of his employer is analogous to an award for punitive damages in tort actions. But punitive damages require both an intent to act and malice. The malice in the civil code is defined as intent to vex, injure, or annoy, or as criminal indifference toward an obligation owed another. Mere negligence or recklessness will not suffice.

These general principles have been followed by the courts in construing those provisions of the workers' compensation law that adjust compensation awards for serious and willful misconduct. Two leading Supreme Court opinions authoritatively define the meaning of the phrase serious and willful misconduct. In *Mercer-Fraser Co. v. Industrial Acc. Com.* (1953), a building collapsed during construction because

its temporary guy-wire backing was inadequate to withstand strong winds. The commission upheld employee claims for increased compensation on the theory that the employer had been guilty of serious and willful misconduct. The court in this case reversed, holding that the mere failure to perform a statutory duty is not, alone, willful misconduct. Much more is needed to show the behavior was the antithesis of negligence.

In the second case, *Hawaiian Pineapple Col. v. Ind. Acc. Com.* (1953), an award for serious and willful misconduct had been made by the commission for an employee injury that had resulted from an intersection collision in a cannery plant between a forklift truck and a switch engine. The employer had been warned of poor visibility at the intersection but had neglected to station a watchman on duty at the intersection during the slack season. The court reiterated the legal proposition that serious and willful misconduct denotes a greater degree of culpability than negligent or grossly negligent conduct. Willful misconduct said the court, involves the performance of an act with intent that the act be harmful or with a positive, active disregard for its consequences. The evidence in *Hawaiian Pineapple* does not show that the employer had the knowledge of the consequences of its act or omission necessary to make the performance of that act of omission a willful one. Thus, the court reversed the commission's findings.

Turning to the case at hand, the evidence shows we have nothing more than a classic instance of neglect, containing no element of malice, recklessness, or indifference to human safety. The fact of the matter is that effective corrective action was lost somewhere in the interstices of the tripartite arrangement for operation of the yard, and the Johns-Manville neglected to make certain that effective corrective action was accomplished. In the exercise of due care, Johns-Manville should have done more than it did to ensure that the yard was properly illuminated at night. But its failure to take effective action to remedy a routine defect does not amount to serious and willful misconduct. We conclude that failure to furnish sufficient lighting in the truck yard and thereby eliminate the known hazard of trip-and-fall, amounted to nothing more than simple negligence, and that the award against Johns-Manville for serious and willful misconduct must be annulled.

8.8.3 Author's Comments on the Case

Thus, the Johns-Manville case points out that courts set a high bar for extra damages for workplace injury. Knowledge of a hazardous condition and failure to mitigate it are not enough, even if the employer is aware that serious injury is likely. The court must see evidence that the employer knew the employer would be harmed and plainly disregarded it in a reckless manner or acted with malice. The high bar to get punitive-like workers' compensation damages reinforces the point that the legal system abhors litigation outside the compensation bargain mentality.

8.9 WORKERS COMPENSATION RETALIATION

As mentioned, workers' compensation premiums are directly tied to the number and severity of workplace injuries at a particular organization. Experience modifiers

can be used to increase premiums if injury rates are on the rise. For this reason, employers want injury rates to be low.

One can plainly see that an unscrupulous employer might not want an injured employer to file a workers' compensation claim but would rather take matters into its own hands, even offering to pay medical expenses and give paid leave.

Many jurisdictions recognize this and have incorporated workers' compensation claims into their whistleblowing schemes. Subjecting an employee to an adverse employment action for filing a workers' compensation claim is actionable at the administrative level. However, these types of retaliation cases are difficult to prove as an unscrupulous employer can often find some other reason to fire the injured employee like one of the defenses to workers' compensation, such as horseplay, or absent any other facts, invoke the at-will employment clause. Nevertheless, it's unwise for an employer to do so. Such defenses might ward off a workers' compensation claim, but it is not going to shield the employer from a retaliation action.

Often a workers' compensation retaliation claim can be tacked on to a disability discrimination claim (see Chapter 7). For example, consider the case where an employee is fired after being injured on the job because "they cannot return to work until they are 100% back to normal." As we saw in Chapter 7, this might be grounds for a disability discrimination lawsuit because they were denied a reasonable accommodation, or a good faith interactive process. That claim would get them into court under Americans with Disabilities Act (ADA) or the state's equivalent. If there is evidence, they were fired, in part, because they filed a workers' compensation claim then the court might hear the retaliation claim in conjunction with the disability claim.

9 Evidence Law Topics

> It is wrong always, everywhere, and for everyone, to believe anything upon insufficient evidence.
>
> *William James, American philosopher, psychologist, and physician*

9.1 INTRODUCTION – WHAT IS EVIDENCE?

Evidence is the link between what we sense and the truth. More precisely, it is the legal link between what we sense and what we, or perhaps a jury, believe is the truth. Evidence can be just about anything you can think of that logically makes this link. A picture, a recording, a physical object (e.g., the murder weapon), or a person's utterance is evidence of the existence (or non-existence) of some fact.

IH/S professionals are in essence factories of factual evidence. They are asked by their employers and clients every day to find out whether workers are exposed to certain substances or hazards, at what levels and to what extent, and whether the exposure is dangerous to health, or the cause of injury. In responding to these requests, they use instruments with read-outs, take air samples and submit them to a laboratory, snap pictures, interview workers, or simply write down the things they see, hear or smell. In all these scenarios valuable information is produced, usually recorded, and ultimately communicated to the client along with an interpretation of what the information means. It is not likely any client or employer would rely solely on oral communications of important IH/S results, so practitioners frequently find themselves writing about and recording the information they generate. Facts written down are evidence and quite possibly the evidence that determines the outcome of a legal dispute.

IH/S professionals work hard every day to get to the truth about workplace hazards and how they might be affecting the health of workers. However, if the jury never gets to see the evidence, it cannot factor into the outcome of a dispute. Thus, whether IH/S evidence is admissible is very important and IH/S professionals should make sure the evidence they generate and record is done so in a way that it is likely admissible.

9.2 THE REQUIREMENT OF RELEVANCY

The first test for the admissibility of evidence in a legal proceeding is relevancy. The courts do not have the time (or the patience) to entertain evidence that is not relevant to the issue at hand. Relevancy is an easy standard to meet – Evidence is relevant if it has any tendency to prove or disprove a fact of consequence in the matter. Thus, as long as there is *any* logical link between the evidence and the fact claimed, it will likely be deemed relevant.

However, despite the low threshold for relevancy, courts may still bar relevant evidence if its probative value is substantially outweighed by concerns of prejudice, confusion, or delay.* This is one way the legal system balances the competing interests of the parties and preserving valuable judicial resources.

For the most part, IH/S data is highly relevant in a workplace exposure dispute or the cause of injury. If the case has survived the numerous preliminary motions meant to avoid litigation (e.g., settlement, summary judgment, etc.), it is likely the IH/S information will be the key evidence at trial.† Nevertheless, the court is always concerned about cumulative evidence that wastes precious time. For this reason, it is best to produce IH/S information in as brief a format as possible without detracting from the overall message of the report. Reports that contain volumes of tangential, arguably irrelevant, information run the risk of being thrown out.

9.3 AUTHENTICITY

Before a jury can see offered evidence, the court must be convinced it is authentic. Surprisingly, the rules of authenticity are rather simple; to satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.‡ In a nutshell, if you want to authenticate any evidence you must produce some kind of additional evidence (e.g., foundational evidence) showing it is what you claim it to be. Once this foundation is provided and the item properly authenticated, it is up to the judge or jury to determine its weight (e.g., whether the evidence tends to prove or disprove the claim or defense).

The hit movie *My Cousin Vinny*, starring Joe Pesci and Marisa Tomei, provides a great example of authentication of evidence. In the film, defense counsel *Vinny Gambini* (played by Pesci) introduces a picture of the tire tracks made by the alleged getaway vehicle following a murder and robbery. *Vinny* asks *Mona Lisa Vito* (played by Tomei) to authenticate the photo. She is able to do this simply by stating she took the picture, and that the tire tracks in the picture reflect what she saw at the crime scene. *Vinny's* strategy is to show that the tire tracks made by the actual getaway vehicle are different than tracks made by defendant's vehicle. Once *Mona Lisa* lays the foundation for the photo, it is up to the jury to decide whether it represented the truth in the case.

Just as in *My Cousin Vinny*, evidence is typically authenticated by direct testimony. However, as we will discuss later, the goal is to create IH/S evidence that stands on its own. Federal and state rules of evidence provide many ways that evidence is "self-authenticating," but they are typically limited to certified public documents, not privately generated business records. Nevertheless, there are things an IH/S practitioner can do to ensure his data is easily authenticated without having to appear in court. First, IH/S information should be produced in as formal a manner

* Federal Rules of Evidence, Rule 403. Excluding Relevant Evidence for Prejudice, Confusing, Waste of Time, or Other Reasons.

† That is, the key evidence other than expert testimony.

‡ Federal Rules of Evidence, Rule 901 (a). Authenticating or Identifying Evidence.

possible. This means preparing reports in a uniform manner and under a clearly written formal procedure (more on this later).

The second rule is to establish and religiously follow a formal chain of custody process for sample collection, or damaged objects or equipment involved in an accident. Chain of custody is the key method prosecutors use to ensure there is no doubt that the murder weapon found at the scene of the crime is the same weapon now before the court during trial. IH/S practitioners should learn to think like the prosecutor. Without formal chain of custody, how does the court know that somebody along the way did not meddle with the results?

9.4 HEARSAY – AN ISSUE OF RELIABILITY

The courts are far more interested in whether a dog barked then whether even the most prominent person said something outside the courtroom. It is true. A dog has no motivation (or reasoning capability for that matter) to lie. Human beings on the other hand have a long history of lying (or at least embellishing the facts) to put them in a more favorable light. Tribunal systems have recognized this for thousands of years and have created and continually refined the complex rules of hearsay to counteract this human tendency.

Simply put, hearsay is an *out of court statement offered to prove the truth of the matter asserted*. In federal and all state jurisdictions, hearsay in its pure form is banned from the courtroom (at least during critical phases of trial). Let's breakdown hearsay to see why this is the case. First, the rule only concerns statements, and courts have interpreted statements to mean things said or intentionally asserted by human beings. Thus, a dog alerting to possible narcotics is not hearsay, but a person saying he saw the same dog barking at a point in time could be hearsay.

The second element of hearsay requires the statement be made "out of court." This means at any time or place other than giving direct testimony. So even if the statement was made in the courthouse men's room during recess, it's potentially hearsay.

The third element of hearsay is the trickiest to understand, the one that keeps law students up at night, and the one that lawyers are keen on exploiting. *The statement must be offered to prove the truth of the matter asserted*. To see how this might come into play in the IH/S world, suppose an industrial hygienist takes a noise level reading of defendant's machine using a sound level meter. After taking the reading he emails defendant's management employee, indicating the noise level of the machine is 75 dBA, well below the ACGIH TLV®. This happens frequently and usually without issue. But suppose a plaintiff who regularly is present when the machine is running claims the machine damaged his hearing and files a lawsuit,* contending the noise levels of the machine were much higher than measured. Suddenly, we have a key issue of whether plaintiff was actually exposed to noise above acceptable levels. How might the defendant prove plaintiff was not

* For purposes of this discussion ignore workers' compensation remedies; plaintiff could easily be an independent contractor or even a member of the public.

over-exposed? The email could be introduced for this purpose, but plaintiff's counsel would immediately make a hearsay objection.

Having made a proper objection over admitting the email into evidence, the judge must now consider an evidentiary issue – *is the email itself hearsay*? Look at the elements of hearsay to find the answer.

9.4.1 Is the Email a Statement?

The email is a statement because the IH, a human being made it. Note that statements do not have to be formal declarations; they can be grunts, a cough, a hand drawing of the machine on a post-it-note, showing its location in the room. Here, the statement is a sentence written in an email. It qualifies as a statement and the first element of hearsay is met.

9.4.2 Was It Made out of Court?

Indeed it was made out of court. The IH who wrote the email did so in his office, and the opposing party had no opportunity, obviously, to cross-examine the IH when it was made. The second element is met.

9.4.3 Was It Offered to Prove the Truth of the Matter Asserted?

The answer depends on what defendant is trying to prove. The statement (email) asserts that noise levels are 75 dBA, and are not a health hazard. If the defendant wants to use the email to prove the sound levels are lower than plaintiff contends then it is hearsay because the court has no way to tell whether or not the IH just made it up.[*] But suppose defendant offers the email to show that it knew about the machine and had notice that the sound levels produced were safe. This would be useful evidence because it tends to show that defendant had no reason to suspect there was a noise problem and acted prudently under the circumstances. Introducing the email for this purpose is a different story. We are no longer relying on the email to show what the levels actually were, but rather to show that defendant thought they were safe. Introduced in this manner, the email is not hearsay because it is offered only to show defendant's knowledge and notice.[†]

9.5 HEARSAY EXCEPTIONS GENERALLY

Notwithstanding the discussion above, IH/S information and data is usually introduced to prove either a worker was not exposed, or was over-exposed, to a hazardous agent (i.e., for the truth of the matter asserted), or to prove the cause of an accident

[*] Of course, the IH could give testimony at trial about the noise levels because he has personal knowledge, avoiding the hearsay issue altogether. But trial testimony is costly, subject to impeachment, etc., and the lesson to learn here is to have our IH/S information speak for itself.

[†] In Federal Rules of Evidence parlance, this is termed "offered to show its effect on the listener;" in other words, the email is offered to show defendant had notice that the machine was safe as a result of having read the email.

or injury.* Thus, in the example we've discussed, the noise level results transmitted by email to defendant's supervisor, is hearsay because it is offered to prove that the sound level was not a health hazard. *So now what should defendant do*? The information in the email is critical to its defense, but because of the hearsay rule it is banned from the courtroom. Or is it?

In the Federal Rules of Evidence (FRE) there are over 30 exceptions to the hearsay rule. State evidence codes often have even more. In fact, there are so many exceptions to the hearsay ban that some scholars have pondered whether the exceptions "swallow the rule."† Thus, in many instances, a statement that is truly hearsay can still be admissible because it meets the elements of one or more of the many hearsay exceptions. Table 9.1 illustrates several universally recognized hearsay exceptions.

TABLE 9.1
Hearsay Exceptions That Might Be Applicable in IH/S Cases

Exception	Definition	Example
Present sense impression	A statement describing or explaining an event or condition made while or immediately after the declarant perceived it	"He was texting when he drove past me a few minutes ago."
Excited utterance	A statement relating to a startling event or condition, made while the declarant was under the stress of excitement it caused	"Oh my God! That guy just ran a red light!"
State of mind	A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health)	"That smell is making me feel sick."
Medical diagnosis or treatment	A statement that is made for medical diagnosis or treatment, and describes medical history, past or present systems or sensations, their inception, or their general cause	To the doctor: "I have been getting headaches ever since I started working with that new stuff."
Business records	A record of an act, event, condition, opinion, or diagnosis if the record was made at or near the time by someone with knowledge, the record was kept in the course of regularly conducted activity of a business or organization, and making the record was a regular practice of that activity	A completed IH sampling form
Absence of a record	Evidence that a matter is not included in a record described as Business Record, if used to prove the matter did not occur, and a record was regularly kept for a matter of that kind	A company conducts weekly inspections of eyewashes and has records to show each inspection. The record for the week of August 7 is missing

(*Continued*)

* Remember also that either party may want to introduce the evidence depending on its value to proving or defending against the claim.

† Beaver, James E., *The Residual Hearsay Exception Reconsidered*, 20 Fla. St. U. L. Rev. 787 (1993).

TABLE 9.1 (*Continued*)
Hearsay Exceptions That Might Be Applicable in IH/S Cases

Exception	Definition	Example
Ancient documents	A statement in a document that was prepared before January 1, 1998, and whose authenticity is established	A line in a memo dated in 1966 that says the floor tile mastic, which was removed in 1985 contained asbestos
Learned treatises, periodicals, or pamphlets	A statement contained in a treatise, periodical, or pamphlet if it is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and the publication is established as a reliable authority	"The ACGIH TLV in 1998 for silica was …". [This can be read into evidence by the expert, but the document itself cannot be introduced as an exhibit.]
Dying declaration	In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances. [Must show Declarant is unavailable.]	Made under belief death was imminent: "John told me he turned the power off before I touched the conductor…"
Statement against interest	A statement a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability. [Must show Declarant is unavailable.]	"Don't blame Ralph, I lied about the cause of the accident."

9.6 THE BUSINESS RECORDS EXCEPTION

Hearsay exceptions can include things a person says during his last dying breath, or while under the stress of having witnessed a startling event, but one of the most relevant hearsay exceptions for IH/S practice is the business records exception. Federal and state courts have long recognized that information (e.g., facts) contained in business records is particularly reliable and as so does not require the safe guards to reliability inherent in the hearsay ban.

The elements of the business records exception vary by jurisdiction, but for the most part include a record of any business transaction:

1. Made in the **regular course** of business;
2. By a person who has a **duty** of making the record;
3. With **personal knowledge** of the matters recorded;
4. Recorded **at or near** the time of the transaction.

After looking at these elements it becomes clear what an IH/S practitioner needs to do to better his chances of making the data he generates admissible. The first element

suggests that all the procedures, policies, best management practices, etc. that comprises an "IH/S program" should be formalized. A written health and safety program should include forms for collecting data, and should be used by all professionals in the organization. Formalizing procedures and practices, particularly around data collection, helps meet the "regular course of business" element because it shows the judge that taking samples or recording the results of accident investigations *is* the regular business of the IH/S practitioner.

The duty element is easily met by including clear-cut roles and responsibilities in the written program. Be sure to clearly differentiate the roles of discipline versus technician level tasks. In the hypothetical case we have discussed, a likely scenario would be that a technician took the sound level readings and then reported them to the IH who prepared the email. This is fine so long as the technician uses the established forms for recording the measurements, follows all the steps outlined in a written procedure (i.e., perhaps initials are required), and stays within the boundaries of his written duties. In our hypothetical, the bare-naked email is probably not admissible as hearsay, but if a formal "Noise Sampling Record" is attached and properly filled out in accordance with procedure, the judge is likely to conclude that taken together the email and the noise sampling record comprise regularly recorded business information prepared by a person with a duty for doing so.

All evidence other than expert witness testimony (or the expert's written report) requires *personal knowledge* about the facts purported, so it is not surprising to find this requirement embedded in the business records exception. This means the person taking the readings, or handling the sample cassettes, should be the same person filling out the record. Again, insert a rule of this sort into the written program so that is it clear to the judge that only those with personal knowledge of the events are under a duty to prepare the record.

It is important to clearly define the differences between a record and a document. How many times have we said, "Make sure you *document* your observations"? IH/S practitioners should be in the habit of using the word "record" rather than "document" when it comes to IH/S information or data. If you wonder why this is important, think back to the issue of hearsay – *how do we know the statement or information is reliable*? A record is a picture of what actually happened in the past. A document on the other hand is a collection of information that describes the way we want the world to look or the way we would like to see things happen. Policies, procedures, written guidance are all "documents" because they describe the organization's expectations about IH/S practice (or any other organizational task for that matter). Documents can and should be revised from time to time to reflect lessons learned, changes in the law, etc. Records can be corrected but never revised. Revising a record is in essence lying about the truth. The foundation of the business record exception is that records, not documents, are reliable because they reflect what actually happened absent human intermeddling. Telling the court that you "revised your record" will be met with a valid hearsay objection. It should be a "Noise Sampling *Record*", not a "Noise Sampling *Document*."

The final element of the business records exception is the fuzziest. Whenever a rule of law includes "at or near," it is up to the courts to decide what "at or near" means and different jurisdictions may, and often do, come to different interpretations.

As a practical matter, prepare your IH records as soon as the information is generated, but within reason. It is probably okay to record the information in a lab notebook and then go back to the office to fill out the record, but strive to avoid this practice whenever possible. At the very least, make sure records are completed by the end of the work shift. Again, the timing of record preparation should be clear in the written program.

You might be wondering how written results from an outside analytical laboratory fit into the business records exception. Isn't a report prepared by a third party "an out of court statement offered to prove the truth of the matter asserted"? In reality though, this is not a concern. Commercial analytical firms are under strict certification requirements and must prepare their business records (e.g., result reports) appropriately to maintain certification. Thus, the reliability of analytical reports from certified labs is not an issue for the courts. Nevertheless, the written program should include policy and procedures on the inclusion of the raw analytical data in IH reports. The typical IH report includes data tables prepared by the IH, but these self-generated tables should be backed up with the actual analytical results report from the lab.

9.7 PRESENT SENSE IMPRESSIONS AND EXCITED UTTERANCES

I mentioned earlier in this chapter that there are many exceptions to hearsay and we just discussed the business records exception. Two more exceptions to hearsay are commonly encountered in IH/S practice, particularly in the area of accident or injury investigation. These are the present sense impression and excited utterance.

As defined in the Federal Rules of Evidence (FRE), a present sense impression is a statement describing or explaining an event or condition, made while or immediately after the declarant perceived it. The key to the present sense impression is the timing. Akin to an eye witness account of events, the statement must be said while perceiving the events described, or very soon after. This kind of hearsay evidence is excepted from the ban on hearsay because people generally do not have the capacity or inclination to make up facts as they are being unfolded in front of them. Thus, the statement, "that's Johnny running into the store with a gun" is reliable because the declarant doesn't have the time or inclination to consider the ramifications of implicating Johnny in the store's robbery.

Similar to the present sense impression is the excited utterance. Under the FRE, an excited utterance is a statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused. Like the present sense impression, the excited utterance relates to describing a witnessed event (e.g., seen, heard, felt, etc.), but differs in the timing elements. The key to the excited utterance is the emotional state of the declarant. The statement, which describes something witnessed must be made while the witness is still under the excitement (or agitation) of the events seen or heard. Unlike the present sense impression, the excited utterance can be made well after the event (although realistically and depending on the facts witnessed, the courts are probably not going to entertain an utterance made several hours after the event). The requirement is that when made, even made sometime after the events, the declarant is still under the stress of having

witnessed the events. The psychology behind the excited utterance exception is that people while under intense stress or excitement, are generally not capable of making things up or considering the ramifications down the road of their statements. Thus, while in an agitated state, the things people say are usually true, at least that is what the courts view.

9.8 *UNITED STATES V. MITCHELL*

The following case, decided May 14, 1998 in the Federal Court of Appeals, Third District, provides a good illustration of these two important hearsay exceptions.

9.8.1 Facts

The facts which appear not to be disputed are that between 9:00 a.m. and 9:15 a.m. on September 12, 1991 two men waited in a check cashing store at 29th and Girard Avenue in North Philadelphia, when an armored truck made a delivery of currency to the store. The assailants were armed with handguns and attacked the deliveryman as he entered the store, robbing him of currency in excess of $20,000. The two men fled the scene in a beige car driven by a third person and engaged in gunfire with those in the armored truck before they sped away. There was evidence that the two men who robbed the currency were Robinson and Stewart, both dead at the time of trial. Mitchell was indicted on the theory that he was the third conspirator and operator of the getaway car.

During trial, the police officers testified that at 9:37 a.m. on September 12, 1991 the 911 radio room received an anonymous call in which the caller stated: "In the 1600 block of 32nd street, these guys just dumped this beige car. Apparently, they stole it because they jumped into another car and took off." The caller also gave the license plate number of the deserted car, which turned out to be the beige getaway car that had been seen at the scene of the robbery. That car had been stolen shortly before the robbery at a gas station not far from the site of the robbery.

At 10:00 a.m., based on the 911 call, police officers found the beige car where the 911 caller had stated it was. A search by FBI agents recovered latent fingerprints and two anonymous notes from the front seat. One note contained the license plate number of the getaway car itself, ZPR-274, and is not challenged on appeal. The other note, which is the subject of this appeal, stated: "Light green ZPJ-254. They changed cars; this is the other car." A check on the light green car revealed that it was a green 1978 Buick registered to Anita Young, then fiancée and later wife of defendant Mitchell.

That afternoon, an FBI agent who was part of a surveillance unit searching for that car observed Mitchell park the green Buick and enter Young's house. He exited shortly thereafter and drove away, with the agent following him. When the agent had grounds for a stop because of traffic violations, he searched Mitchell who was carrying $1,400 dollars in small bills. He also had a receipt from a lawyer for a $600 payment in cash, which was made earlier that day.

In addition to the testimony about the note referencing the light green Buick that led the authorities directly to Mitchell, the government presented testimony from

Kim Chester, the girlfriend of Robinson, one of the other two robbers, who testified that in early September she overheard the three men discuss the robbery and discuss who had a gun and the need to get a car for the robbery. She further testified that while she was waiting for a bus on the morning of September 12, 1991, Robinson, Stewart, and Mitchell drove by in Anita Young's green car and picked Chester up before 8:00 a.m. and drove her to work. While in the car, she heard them discussing how to obtain a getaway car and heard Mitchell say he was not going to use Young's car for that purpose.

The government also presented testimony of Duane Johnson, an FBI agent specializing in fingerprint analysis, who testified that there were nine points of similarity between two of the fingerprints found in the getaway car and those taken from Mitchell. One fingerprint was on the outside door handle and the other was on the gearshift of the car. Agent Johnson conceded that it was common to have up to one hundred points of comparison when identifying an individual by fingerprint but stated that he had made identifications on as little as seven.

Except for the testimony of Eileen Lamper, who testified that Mitchell was friends with one of the other robbers (thus supporting Chester's testimony), the other witnesses did not inculpate Mitchell per se; they established that the crime did happen, how it happened, and how it was investigated.

Mitchell sought exclusion of the anonymous note and certain other evidence before trial. He contended that the note was inadmissible hearsay and that its admission violated the Confrontation Clause of the Sixth Amendment. The district court overruled the objections, and the note was admitted. Mitchell was convicted by the jury on each count, and was sentenced to 24 years imprisonment, three years of supervised release, a special assessment of $150, and was ordered to pay restitution in the amount of $19,100.00. The district court held that the anonymous note referencing the light green car was admissible as an exception to the hearsay rule as a present sense impression or an excited utterance under the FRE.

9.8.2 Analysis

Federal Rule of Evidence 803(1) provides that a present sense impression is admissible so long as it is "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." There are three principal requirements that must be met before hearsay evidence may be admitted as a present sense impression: (1) the declarant must have personally perceived the event described; (2) the declaration must be an explanation or description of the event rather than a narration; and (3) the declaration and the event described must be contemporaneous.

To qualify as an excited utterance, the FRE requires that it be "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The requirements for a hearsay statement to constitute an excited utterance are: (1) a startling occasion, (2) a statement relating to the circumstances of the startling occasion, (3) a declarant who appears to have had opportunity to observe personally the events, and (4) a statement made before there has been time to reflect and fabricate.

Both Rules 803(1) and (2) share certain requirements. One of the principal requirements is that the declarant personally perceived the event or condition about which the statement is made. In addition, both hearsay exceptions have temporal limitations that limit admissibility of certain statements.

Mitchell's principal challenge to the admission of the anonymous note is that there is no evidence that the person who wrote the note personally perceived what it described. In support, Mitchell cites our opinion in *Miller*, 754 F.2d at 511, which presented facts similar to those here, as the statement at issue was anonymous.

In *Miller*, we stated that "[a] party seeking to introduce [an anonymous statement] carries a burden heavier than where the declarant is identified to demonstrate the statement's circumstantial trustworthiness." We further emphasized: "circumstantial evidence of the declarant's personal perception must not be so scanty as to forfeit the 'guarantees of trustworthiness' which form the hallmark of all exceptions to the hearsay rule."

In *Miller*, the trial court admitted a statement of an unidentified bystander at the scene of an automobile accident. Contradictory testimony was provided as to whose fault the accident was. Plaintiff sought the admission of the statement of the unidentified person who said, "the bastard cut in," and sought by that statement to establish that the accident was caused by the actions of defendant.

On appeal we reversed, holding that admission of the anonymous statement was erroneous because the record was "empty of any circumstances from which the trial court could have inferred, by a preponderance, that the declarant saw [the defendant] 'cut in.'" We found the trial court erred in inferring personal perception on the ground that the declarant would have made the declaration only if he was in a position to do so. Instead, we stated that the words of the statement, or the circumstances surrounding the event, "do not show more likely than not that the declarant saw the event." Inasmuch as it was equally likely that the unidentified declarant was "hypothesizing or repeating what someone else had said," the statement was inadmissible as an excited utterance.

Miller is dispositive here. Although the government argues that "[a] common sense reading of the note suggests that the person writing the note was perceiving the event and in close proximity," the record here is devoid of circumstances indicating by a preponderance that the author of the anonymous note actually saw Mitchell change cars. Thus, the requirement of personal perception necessary for both the present sense impression and excited utterance exceptions to the hearsay rule is not satisfied.

In light of our conclusion, the issue of the temporal limitations of the exceptions is less critical. Nonetheless, we note that there is also no evidence to suggest that the unidentified writer of the note made the statement before s/he had time to reflect and fabricate. The time lapse between the robbery and the writing of the note is not clear. Because the robbery occurred between 9:00 a.m. and 9:15 a.m. and the notes were found in the getaway car a mile away from the scene of the robbery at approximately 10:00 a.m. there could have been a 40-minute time span, probably too long for applicability of the present sense exception. Therefore, the government cannot rely on a hearsay exception that requires the statement to be made virtually contemporaneously with the event being perceived.

Of course, if the writer and the 911 caller were the same, and the notes were left shortly before the 911 call at 9:37, the temporal limitation might have been satisfied. However, given the total lack of information regarding the circumstances of the note's creation, the trial court could not reasonably find that there was no time to fabricate the statement.

We note that there are other problems as to admission of the note as an excited utterance. There was no indication that the author was under the stress of excitement when s/he wrote the note (or when the 911 call was made), a requirement of the excited utterance exception. "The assumption underlying the hearsay exception of Rule 803(2) is that a person under the sway of excitement temporarily loses the capacity of reflection and thus produced statements free of fabrication." Further, there is no evidence that the parking of the beige car was a shocking or exciting event.

9.8.3 Holding

For all the above reasons, we feel bound to conclude that it was error to introduce the anonymous note as either a present sense impression or an excited utterance exception to the hearsay rule.

9.8.4 Author's Comments on the Case

Thus, in this case the court would not allow the note left in the beige car to come into evidence because there was no additional evidence to show the author of the note was under the stress of excitement or describing events as they were unfolding.

In IH/S practice, we run up against these issues in accident or injury investigation. I like to fold witness statements into injury investigation reports and assessment reports. It adds richness to the report and makes your points and conclusions more valid. When interviewing a witness, always try find out whether they saw the entire injury causing event, or whether they are piecing together some of the facts from things they heard from others (hearsay) or assumptions. Getting a handle of these kinds of evidentiary aspects will help you get to the truth faster and with more confidence you have captured what actually happened.

10 Influencing IH/S Organizational Policy and Compliance Strategy

10.1 INTRODUCTION

If you have gotten this far in this book, no doubt you have at least a little more background on the kinds of legal issues that crop up in IH/S practice. You certainly are not ready to hang a shingle and start giving legal advice (which of course would not be permitted), but you might find yourself armed with enough knowledge to influence your organization's policies and strategies for complying with health and safety regulations. You now need some tips on how to best communicate with the decision makers in your organization, such as your boss, senior management, or even in-house counsel, to help them make the best decisions about IH/S policy and strategy. This chapter is intended to give you some valuable tips to enhance your persuasive and objective writing to be more of a positive influence on sound policy development in your organization.

As IH/S professionals we often find ourselves in the position of answering questions about compliance or policy matters. Sometimes the questions are inquiring about our professional opinion about how the organization should comply with a new regulation, or what regulations apply to our operations, or even what our policy should be about a particular aspect of IH/S. These questions can come from superiors, line managers, senior leaders, in-house counsel, oversight personnel, and even workers. But often it is you pushing the question at issue.

Suppose you notice a weakness in an IH/S program area, or that you feel the company has not implemented an important control to a new hazard on-site. It might be you initiating the conversation with the boss, senior leaders, or in-house counsel. Sometimes when you pitch something to the boss you get the response, "let's see what 'legal' has to say about it." This is a good thing! It shows that the boss shares your concerns and wants to get the legal department's opinion on it. Now you can volunteer to draft the white paper about the issue and present it to counsel for consideration.

I will present several tips and tricks to be a better persuasive writer in the coming pages but know this for now: there is virtually no difference in writing to an attorney versus a senior manager. The only possible difference, and it is slight, is that attorneys are used to seeing annotations in the white paper than can lead them to published authority. I will walk you through that when we get to the discussion on "rules" below.

10.2 WRITE LIKE AN EIGHTH GRADER

I have seen this time and time again. The most persuasive written communications are the simplest, both in form and word choice. Law school professors tell their students to write like eighth graders, or even really smart sixth graders. This might come as a shock as the perception of legal writing is that it is long, boring, and impossible to decipher unless you are a lawyer. But in this age of electronic communications where everything moves at a mile a minute, there is no room for flowery language or lengthy discourse. Decision makers do not have time to decipher complex sentences or look up word definitions. If your writing looks like it is trying to impress the reader with command of vocabulary, it will not be impressive substantively.

You should try to use as few words as possible to convey your message. A good exercise is to write out what you want to say and then see how many words you can eliminate and still convey the same thought. For example, the sentence:

> It is my opinion that the worker, who had been engaged in custodial work the morning of the incident, slipped on a banana peel that had been inadvertently left out on the floor of the cafeteria, causing him to fall and break his leg.

Can easily be replaced with:

> The custodian broke his leg when he slipped on a banana peel in the cafeteria.

This second version still conveys your opinion about what happened but does so in 15 words rather than 45.

There are some prepositional phrases or clauses that can be reduced easily to make your writing less wordy. Table 10.1 provides some examples to consider.

Try not to use fancy or buzz words or phrases. Table 10.2 provides examples of this.

Also, I recommend eliminating these words or phrases as they add no value, have no actual meaning, or are redundant and only used to (unsuccessfully) impress the reader:

- World-class
- Workable solution
- Transformational change

TABLE 10.1
Preposition Phrases Replacements to Improve Writing

Replace …	With …
Prior to	Before
In the event that …	If
With respect to …	About
In order to …	To
In order that …	So that
In addition to …	Also
What was the reason for …?	Why did …?

TABLE 10.2
Buzz Words That Should Not Be Used

Replace …	With …
Utilize	Use
Reach out	Ask
Socialize it	Ask about it
Take it off line	Talk about it later
Circle back around	Follow up
Let's re-group	Start over
Get our ducks in a row	Organize
Low hanging fruit	Easy
Run this up the flagpole	Get feedback
Paradigm shift	Change

- Crystalize (unless you're talking about chemistry …)
- Bandwidth
- Value-added
- Leverage (unless you are explained how someone through their back out …)
- To be fair
- Game changer
- Synergy
- All-in effort
- Bring to the table
- Downsize
- Let's get some face time on this
- Outside the box.

There are probably many more, and I know that I have used some of these words and phrases in this book. But the idea is to minimize these in our writing.

Another tip is to avoid complex verb constructions whenever possible. Such constructions frequently involve the verbs "to be" or "to have." Table 10.3 provides examples.

TABLE 10.3
Eliminate Complex Verb Constructions

Replace …	With …
The dog had to have a bath	The dog needed a bath
He needed to have an operation	He needed an operation
Most historians consider him to have been the most important poet of his generation	Most historians consider him the most important poet of his generation
Before his early death, Smith was to have been the next president	Before his early death, Smith was chosen as the next president

TABLE 10.4
Minimize the Use of Passive Voice

Replace …	With …
The poacher was shot by the farmer	The farmer shot the poacher
The case was argued for the plaintiff by Jackie	Jackie argued the case for the plaintiff
John was cited for contempt by the judge	The judge cited John for contempt

Use the active voice mainly in your writing. However, sometimes the passive voice is useful to preserve anonymity or when the actor is unknown. The trick is to not overuse the passive voice. Table 10.4 provides examples.

10.3 THE IRAC METHOD – ISSUE, RULE, ANALYSIS, CONCLUSION

Reducing words, redundancies, and distractors such as buzz words and phrases will strengthen your writing, making it more persuasive. But how should your writing be formatted to give your reader a clear picture of the point you are trying to make? A very effective method for organizing your arguments is the IRAC method. IRAC means issue, rule, analysis, and conclusion. It reflects a logical thought process that guides the reader to accept your conclusion. This helps decision makers get to where you want them. Lawyers love IRAC because this is the form of writing they are taught the first year of law school. Let's take a look at each component of IRAC writing, and then I will give some examples or good IRAC, from case law and for IH/S practice.

10.3.1 Issue Statements

When you are trying to convince a lawyer or senior manager to side with your way of thinking about an IH/S issue, you need to start with the problem you are attempting to resolve. This is done with a short, concise issue statement. Issue statements are questions. They are the starting point of effective persuasive writing. If you were not clear and concise in your issue statement, you will lose your decision maker and the rest of your IRAC writing will be for nothing. Issue statements can be written in question format or in statement format beginning with the word "whether." I prefer the ladder.

Here are some examples of well-written issue statements:

- Whether the Company is required to offer audiograms to contract employees.
- Is the Company required to have a written Confined Space Program for its operations in the UK?
- Whether the Company is required to certify its fume hoods on an annual or semi-annual basis.

Each of these issue statements are concise and tell the reader exactly the problem you will be resolving through your analysis. Of course, many IH/S issues are very

complex, and you might be tempted to tackle multiple issues into one analysis. Do not do this. I have found that the most complicated issues can be broken down into a set of single-issue statements. It is okay to analyze the overall problem as a series of separate IRACs.

10.3.2 Rule Statements

A rule statement in IRAC is the actual requirement given a set of facts, and should include the relevant exceptions that apply. For example, a rule statement could be, the speed limit is 25 MPH, except that emergency vehicles operating with sirens and lights may exceed 25 MPH during an emergency response, but in no case shall the speed exceed 65 MPH.

For IH/S concerns, you get the rule statement for your written communications from several sources. These might be policy statements, or regulatory and statutory references. It is important to correctly cite the rule of the topic you are communicating because this is the standard you are going to analyze against the facts you've gathered. Rule statements should be concise, but do not be afraid to add supporting information where needed. For example, you might find that your analysis is based not on the rule itself, but an exception to the rule. If you omit the exception from the rule statement you will have missed the main point of your communication.

Whenever easy to do so, rule statements should be annotated, especially when writing for in-house counsel. This is easy to do if you are citing directly from 29 CFR or a consensus standard. If the rule comes from an organizational manual or policy document, simply cite the section number for the source. Here are a few examples, written in a format attorneys are used to reading:

- Every employer shall establish, implement, and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum: (1) identify the person or persons with authority and responsibility for implementing the Program; (2) include a system for ensuring that employees comply with safe and healthy work practices; and (3) include a system for communicating with employees in a form readily understandable by all affected employees. (*See* Title 8, California Code of Regulations, Section 3203 (a).)
- Every employee of Company X, exposed to noise exceeding 85 dBA, calculated as a time-weighted average, shall be offered a baseline and annual audiogram. (*See* Company X policy manual, section …, Hearing Conservation Program.)

The word *See* in italics in the annotation of the rules instantly signifies to the reader (especially if they have a legal background) where to go for more information, and also that your rule statement is backed up with authority.

Sometimes the published rules and policies you have access to are vague and ambiguous and might require some interpretation. Note that regulations are often promulgated "intentionally vague" so as to avoid unintended consequences. The idea

is that vagueness will be worked out in subsequent interpretations and decisions during litigation. Thus, it is a good skill to be aware of the different sources of rule interpretation.

The most commonly used source of rule interpretation for IH/S practice is the published Occupational Safety and Health Administration (OSHA) interpretation letters. Such letters, which are available on the OSHA website, provide insight into how OSHA might enforce a particular issue encountered at a workplace. They are not law and should always be provided with a caveat that they only apply to the specific circumstances written about the employer's inquiry (i.e., OSHA is not legally bound to follow them either). Nevertheless, OSHA interpretation letters can be persuasive because they are referenced frequently and are meant to communicate to employers the ways in which OSHA inspectors would view a particular issue.

The best source of rule interpretation is case precedent. These are the appeals of citations argued before the Occupational Safety and Health Review Commission (OSHRC). Unlike interpretation letters, precedent represents actual issues that were litigated. Thus, they show the *legal* interpretation of rules (i.e., should this happen again this is how we will decide). Putting an OSHRC decision in your communication will be very powerful, especially if it's being reviewed by in-house counsel. But where can you find such precedents? Unfortunately, there may be not many available precisely on topic, but it's always worth a try to find them. If you have access to a legal database, such as Westlaw, OSHRC decisions are found under the Federal Administrative Law Decisions area. This is the best way to get to them as you can search by topic. If you do not have access to a legal database but have an in-house counsel on-site, you can consult with them to conduct a search. All OSHRC decisions going back to 1993 are posted on the OSHRC website. They are divided into Administrative Law Judge decisions and review commission decisions and sorted by the year of decision. If you are able to find a decision that fits with your recommendations you have struck gold. But fear not if you find a precedent that does not fit with your initial thoughts on the matter. Your goal is to provide management and counsel with sound precedent and it's just as valuable, perhaps more so, to know the company is doing things wrong than right.

10.3.3 Analysis

The analysis section of your IRAC persuasive writing is where the meat is found. This should be your longest section of the communication, and it's a good idea to use headings showing that this is the place you are making your arguments for or against a particular proposition. Although it's the lengthiest part of IRAC, it should still be brief focusing only on factual statements that support whether the rule has been satisfied or not.

Sentences in analysis writing should be structured like this as much as possible: "Conclusory result … *because* … fact." The word "because" is one of my favorite words in the dictionary. It is the essence of good analysis. You are telling your readers why your conclusion holds weight. Do not be afraid to use it. Here are some examples of good analysis sentences.

- The worker was over exposed to benzene *because* the air monitoring results exceeded the permissible exposure limit.
- The fume hood is not working properly *because* the anemometer readings are less than 100 feet per minute.

When you have conducted a good analysis, you have a set of statements that show support for your final conclusion.

10.3.4 Conclusion

The conclusion is where you simply tell your reader what you think their decision should be. Some writers prefer to state the conclusion right up front. I am good with that. But if you do so, you want to include a background paragraph that ends on your conclusion statement. This is an elegant way to inform your reader what you will be analyzing and what you want them to know (or do).

10.4 PUTTING IT ALL TOGETHER – IRAC WRITING EXAMPLES

In this section, I am providing two examples of good IRAC writing both in the persuasive writing context (in the next section we will shift the focus to objective writing). The first is from a U.S. Supreme Court case, *Loving v. Virginia*. It takes the form of a case brief. The original opinion was many pages long, going into excruciating detail. The use of IRAC in this example basically cuts to the chase and informs the reader what the new law is on marriage in the United States. Because this is a case brief, I have selected to start with some facts. This is equivalent to having a background section as discussed above. The second example is a persuasive bid for a company to adopt a policy in the IH/S arena. It too is in IRAC form and uses a background section to start things off.

Example (1) – *Loving v. Virginia*, 388 U.S. 1 (1967)

FACTS

Richard Loving, a causation man residing in Virginia married Mildred Jeter, an African-American woman in 1958. The wedding ceremony took place in Washington D.C., a jurisdiction that did not outlaw interracial marriage. In 1924, the State of Virginia, enacted the Racial Integrity Act of 1924, which prohibited marriage between people classified as "white" and people classified as "colored." Upon returning to Virginia, the couple was arrested, tried, and convicted of felonies under the Virginia Criminal Code.

ISSUE

Whether the Virginia anti-miscegenation law, which prevents marriages solely on the basis of racial classifications, violates the Equal Protection Clause of the 14th Amendment.

RULE

The 14 Amendment of the U.S. Constitution provides that no state shall deny a person the equal protection of the laws. Marriage is a fundamental right requiring strict scrutiny (*See Myer v. Nebraska*, 262 US 390 (1923)). Under strict scrutiny, a law must be necessary to achieve a compelling state interest.

ANALYSIS

The State of Virginia argues its statute does not violate equal protection because it applies equally to all races, punishing all to the same degree for its offense. This argument is not square with the 14th Amendment because equal protection in the context of marriage equates to one being able to choose to marry whoever he or she wants. It is true that in the area of marriage we have held strong to the notion that regulation of marriage is a State issue. However, where a State statute runs in the face of a fundamental right, such as here we must apply strict scrutiny. We see no compelling state interest in denying a person a marriage license simply because of the color of her skin.

CONCLUSION

The Virginia anti-miscegenation law violates the 14th Amendment of the U.S. Constitution.

Example (2) – Company X's Policy on Hearing Conservation

BACKGROUND

Company X contracts with service providers and vendors to perform a variety of activities, including construction work. These contractors vary in size and capability, ranging from large, nationally focused general construction contractors, to small "mom and pop shop" service providers.

Depending on the scope of a contract, contract workers could be exposed to hazardous levels of noise while performing duties at the Company X site. Hazardous noise can be generated from the contractor's activities, such as operating heavy equipment, or it might be present in the work location itself, such as working in a server room or near large vacuum pumps. In either case, the contractor must operate under a hearing conservation program to protect workers against hearing loss.

Company X's EH&S Department reviewed several contractor-written hearing conservation programs in April 2017. The review included walk-throughs of various on-site construction projects, and was conducted, in part, as a follow up to a 2014 review of ABC, Inc.'s written hearing conservation program. [ABC, Inc., is Company X's primary supplemental labor contractor.] In this earlier review, Company X found "ABC had not established a program for conducting baseline and periodic audiometric testing of construction workers."

One of the corrective actions addressing the ABC issue was to revise the Company X construction safety specifications. This was done, and the revised specifications now provide that "[contractors] must conduct audiometric testing for workers whose noise exposures are at or above the TWA of 85 dBA and who are (or expected to be) at the jobsite for one year or longer."

Following the review in April 2017, EH&S reported a deficiency in the ABC program, contending its annual audiometric testing program still does not fully address OSHA regulations. Furthermore, EH&S plans to issue another report soon, contending the construction specifications, as revised in 2014, still do not comply with OSHA.

ISSUE

Whether Company X's revised contract specifications, which limit audiometric testing to workers that are on-site for a year or longer, complies with OSHA standards, and if not, what provisions should be put in place for the ABC labor contract to ensure compliance?

RULE

OSHA has two standards addressing noise; (1) 29 CFR 1926.62 for construction work and (2) 29 CFR 1910.95 for general industry. Depending on the type of contracted work involved at Company X, either the general industry or construction standard for noise or both are applicable. The two OSHA noise control regulations include requirements for a hearing conservation program whenever noise exceeds specified levels.* Prior to 1983, both standards provided that "in all cases where the sound levels exceed [specified values in the standard], a continuing, effective hearing conservation program shall be administered" 29 CFR 1926.52(d)(1).

ANALYSIS

In litigation concerning an order by the OSHRC to enforce the general industry hearing conservation program requirement, the United States Court of Appeals, Fourth Circuit, held that the provision for "a continuing, effective hearing conservation program shall be administered" is "unenforceably vague," and that OSHA is required to specify to employers the elements that comprise a hearing conservation program (see *Kropp Forge Company v. Secretary of Labor*, 651 F.2d 119 (1981)). This litigation and other data calling into question the standard's effectiveness at hearing loss prevention drove OSHA to amend the general industry standard for noise in 1983. However, the vague language "a continuing, effective hearing conservation program" sustains in the construction noise standard to this day.

The vague hearing conservation program requirement in the construction noise standard has caused confusion in the construction industry. In an attempt to clarify the requirement, OSHA published an interpretation letter stating that "a continuing, effective hearing conservation program consists of six elements, including a requirement to conduct baseline and annual audiometric testing for workers exposed to excessive noise" (Letter from OSHA Director, Directorate of Compliance Programs to F.W. Lundy, August 4, 1992). The letter also stated that "every construction industry employer's hearing conservation program must incorporate as many of the [six] elements as are feasible."

It is the word "feasible" in the interpretation letter that has fueled the present issue. ABC states it is not feasible to provide audiometric testing to a temporary, or transient, construction worker. The logic behind this is that ABC calls up workers

* Construction standard is 90 dBA, 8-hr TWA; General Industry standard is 85 dBA, 8-hr TWA.

from labor organizations to perform short-term projects, some lasting two weeks or less, but does not retain these workers long term. ABC contends that by the time a worker is identified as exposed to noise above specified levels, the worker is long gone, making audiometric testing of that worker "administratively infeasible."

There is no precedent in OSHRC case law establishing the circumstances in which audiometric testing becomes "feasible." Thus, Company X not only must decide which standard to flow down to contractors, but also determine under what circumstances is audiometric testing feasible. Given the lack of regulatory precedent or guidance, Company X must make these decisions based on its perception of risk.

A reasonable starting point is to require contractors to follow the general industry provisions, regardless of whether the contract is for construction. As mentioned above, the general industry standard contains requirements for conducting baseline and periodic audiometric testing for all workers exposed to hazardous levels of noise. Specifically, "within 6 months of an employee's first exposure at or above the action level, the employer shall establish a valid baseline audiogram against which subsequent audiograms can be compared" (see 29 CFR 1910.95(g)(5)(i)). Based on this requirement, the one-year or more threshold for audiometric testing put forth by Company X in 2014 is arbitrary. A worker could be hired with the expectation that he is retained for less than a year, but for more than six months. The worker could be exposed to noise above the limits during his first week, but because the worker is not going to be around for one-year, audiometric testing would not be scheduled, even though it is required after six months following the exposure.

The above scenario may seem a little "farfetched" but it points to the fact that a one-year requirement is arbitrary and creates a risk that some workers may not receive audiometric testing where it is clearly required under the general industry standard.

One solution is for Company X to implement a six-month residency requirement for audiometric testing. This is rationally related to the OSHA standard that requires testing after six months from first exposure. And since it is difficult to know when first exposure will occur in every case, baselines should be conducted for every ABC worker who is expected to be at the Company X site for six months or more. Of course, this would add costs, but it is the most logical way of minimizing the risk that some workers that need testing will not get it.

The point is that the standard says a hearing conservation program must contain as many elements as are feasible, but what is feasible has not been determined. In a situation like this, management must decide how much risk it will bear. On one end is an arbitrary one-year residency requirement (high risk), the other end is to conduct testing on all workers (no risk). Looking at it from this perspective, a six-month residency requirement is the right balance of risk.

CONCLUSION

The OSHA standards for hearing conservation in construction are vague, and there is no precedent on the issue of when audiometric testing is "feasible" in a construction setting. Given the ambiguity, it is logical for Company X to adopt the general industry standard for hearing conservation for all contracted work.

For the ABC supplemental labor contract, it is recommended that workers expected to be on-site for six months or more receive audiometric baselines. This could be accomplished by conducting baselines for all ABC workers on a six-month cycle (e.g., a mobile testing contractor could come by every six months).

I realize that this second example is not exactly brief, but it contains no more information than needed to accomplish its goal of making a sound recommendation to management. Notice that in the analysis section, interpretation rules from OSHA letters and OSHRC precedent are woven in. This is probably more complex example of this kind of writing than you are ready to tackle right now, but like everything else in life, you will get better with practice. Following the IRAC approach will keep you on track in developing this important communication tool.

10.5 ASSESSMENT REPORTING – OBJECTIVE WRITING

Many IH/S practitioners conduct safety inspections or workplace assessments. This kind of work is more objective than what we have been talking about above in persuasive writing. Thus, if you are involved in these efforts your writing style must change from persuasive to objective.

In essence, when you conduct an assessment or inspection you are on a fact-finding mission. You go to the workplace, look around, interview the workers, review documents, and perhaps take measurements. The information gathered is facts. You then return to your office and analyze the facts you've gathered against rules, which can be policies, statutes, adopted consensus standards, or regulatory requirements, and make a judgment about whether any deficiencies are present.

In any IH/S assessment, there are two main goals: (1) identify problems discovered or encountered during the assessment; and (2) prove to management or the client that the problems exist and are worthy of devoting time and money to correct them.

The first goal covers the technical side of IH/S practice. It is easy for most of us to identify things that are wrong, unsafe, and non-compliant, etc., based on our professional experiences.

The second goal is much harder for many of us. We have to prove, using objective evidence, that the observed condition is a problem (e.g., wrong, unsafe, non-compliant). This proof must be sound enough to convince management that it must invest time and money to correct the problem.

The good news is that the best way to convince management there is a problem worth fixing is to communicate the problem using IRAC, which you have already learned about in persuasive writing. Thus, good objective writing is actually persuasive writing, and can rely on the same kinds of writing tools as persuasive writing. Using IRAC will help you prove your observations or deficiencies exist and that management should take action.

It is the issue statement of IRAC that differs somewhat between objective writing and persuasive writing. As we have learned, in persuasive writing, the issue statement is truly a question – whether something actually exists, whether something should be done about it, etc. In contrast, the issue statement in objective writing is a fact – the training program does not meet OSHA standards; the ventilation controls do not provide adequate protection for the workers; the Company's written confined space program does not address the C(5) alternate entry procedures, etc. So, in essence, an issue statement in objective writing is the conclusion.

Issue statements should be concise statements of fact (one sentence is usually best). If you have more than one issue statement break them down into separate statements. As statements of fact, issue statements are conclusory (as long as you prove them in the analysis). Here are some tips to writing great issue statements:

- Include the source of evidence used to make the statement (e.g., during two work observations, from the interview with "Bob," etc.)
- Avoid compound statements (e.g., the fume hood is broken and the worker overexposed)
- No personal opinions ("I think that it would be better to …")
- No speculation ("this could be due to the fact that …")
- No recommendations or corrective action content (this comes later in your report)
- Avoid vague terms such as "less than adequate" or "did not meet the assessors expectations"

Like persuasive writing, the analysis part of IRAC is the most important element in objective writing. This is where we prove through objective evidence that a deficiency exists. Analysis writing should consist solely of factual statements drawn to conclusions linked by the word "because." Analysis reflects the objective evidence discovered during the assessment and explains why the acceptance criteria were met or not met (more on acceptance criteria later). Direct admissions (i.e., things people told you during the assessment) should always be included in analysis, and in quotation form.

As an example, an analysis section might be written (with my annotations):

The assessment team toured the metal shop on January 5 (fact). There were three workers using machines (fact). One worker did not wear safety glasses (fact). When asked about it, the worker replied, "I never wear safety glasses, they irritate my skin (fact, at least this worker's perception of fact)." The Machine Safety Manual requires workers to wear safety glasses at all times while machines are running (fact – and easily verifiable, which is another plus). The acceptance criteria were not met because at least one worker did not wear safety glasses as required by the Machine Safety Manual (conclusion linked to a fact by the word because).

Depending on where you work, you might have to follow an assessment plan format prescribed by your employer. The good news is that IRAC can be applied regardless of the format for an assessment. And now that you speak the language of IRAC, we can take a look at how any assessment approach can be mapped to IRAC, with the ultimate goal of improving our writing to be more influential to decision makers in IH/S policy.

Effectiveness assessments usually follow this format: the assessor first determines the scope of the assessment. This is usually a topical area, such as non-ionizing radiation, or training compliance, or controls for methylene chloride handling. It is very specific. The assessor also must decide whether to focus broadly or narrowly – "am I going to look at all laboratories, or just those in the Engineering Department, etc."

These kinds of decisions are usually made, but not always, at a higher level and part of an overall organizational assessment plan.

The next step is to determine the lines of inquiry. What kinds of things do I want to find out about? Do I want to see if workers understand what to do if hydrofluoric acid spills on their skin? Or something else? The lines of inquiry are important because they provide a road map for the kinds of things the assessor will be looking into.

Lines of Inquiry are the questions to be answered by the evidence discovered during the assessment. They should begin with the word "whether" or take the form of a question … thus, they are akin to the 'issue' in IRAC format. Compound questions are okay but should be broken into elements whenever possible.

After developing the lines of inquiry, the assessor needs to establish acceptance criteria. These are rules but not in a regulatory sense. Acceptance criteria are the rules you create in the assessment to determine the answers to your lines of inquiry.

Use the word "must" in the acceptance criterion statement (e.g., 90% of workers assigned to the forklift task, *must* have current forklift operators licenses). Compound acceptance criteria can be stated but be careful about the conjunctions "and" and "or". In general, you should use "or" more often than "and," and never use the term "and/or" in any writing.

Acceptance criteria should be very specific and written in such a way that an outsider (an objective person not associated with the assessment) could easily conclude whether they have been satisfied by looking at the evidence you have presented.

The final step is to analyze the facts against the acceptance criteria. Is this starting to sound familiar? The best stuff occurs in the analysis, as this is where you prove your point. But in this case, you are going to end the analysis with conclusions. These are your issue statements of the assessment. They say what you found that is wrong and needs fixing.

Table 10.5 is a map of common assessment terminology to the IRAC elements. This is something to keep in mind when you're conducting assessment planning.

The following example shows how a section of an assessment report can be laid out to prove your findings to the reader:

TABLE 10.5
Mapping Assessment Elements to IRAC Format

Assessment Elements	IRAC
Line(s) of inquiry	Issues – questions to be answered
Acceptance criteria	Rule of the assessment
Analysis of the facts (i.e., the "factual basis")	Analysis
Issue statement (e.g., deficiency)	Conclusion

10.5.1 Scope of Assessment

This assessment focuses on actual use of respirators by employees in the field, particularly of the efficacy of respirator fit testing efforts.

10.5.2 Lines of Inquiry

1. Whether fit testing actions meet the requirements of the Company's written Respiratory Protection Program (RPP) (*See* 29 CFR 1910.134).
2. Whether workers perform fit checks before putting on a respirator.

10.5.3 Acceptance Criteria

1. 100% of fit tests observed must adhere to the listed requirements in the RPP, Section 5, *Fit Testing*.
2. 100% of workers observed performed both a positive and negative pressure seal check (i.e., a fit check) each time before putting on a respirator without being asked to do so.

10.5.4 Analysis of the Facts

10.5.4.1 Line of Inquiry (1) – Fit Testing Procedure

Conclusion: Acceptance Criteria are met.

Factual Basis: The assessment team observed the fit testing of a worker on 4/6/2018. The respirator technician ("RT") fit the worker for both a half mask and full face air purifying respirator (APR).

The assessment team observed that:

- RT verified worker completed the required training course
- RT verified worker's medical certification was completed on 3/30/18
- RT explained the screening and testing procedure to the worker
- RT asked the worker to verify positive and negative fit checks
- RT guided worker through the various steps of fit testing while the PortaCount took the required measurements.

10.5.4.2 Line of Inquiry (2) – Positive and Negative Fit Checks

Conclusion: Acceptance criteria are not met because a worker failed to conduct the required positive fit check before putting on a respirator.

Analysis of the Facts: This assessment included four work observations, in which several workers were observed putting on respirators, using them, and then taking them off and placing into storage. This particular inquiry pertained to positive and negative fit checks before donning the respirator.

This is what was observed:

- One out of seven respirators wearers failed to conduct a positive pressure fit check before donning the respirator.
- All respirators wearers conducted a negative pressure fit check before donning the respirator.

Issue Statement: Not all workers at the Company understand the requirement to conduct a positive fit check before putting on a respirator.

You can see from the example that more prescriptive you are the more you are able to prove a non-compliance. IRAC can help you achieve the goal of being more influential in your organization.

By this time, you have learned a lot about the law and how it might apply to work in the IH/S field. The previous chapters in this book were aimed at giving a foundation of the law and how it works. It is hoped that armed with some legal knowledge, and the skills learned in this final chapter, you can communicate with senior managers and attorneys on a more effective level.

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