

# NORTHEAST MINE SAFETY & HEALTH CONFERENCE

APRIL 4, 2017

J a c k s o n   K e l l y   P L L C

# EMERGENCY RESPONSE AND CRISIS MANAGEMENT

PRESENTED BY: PATRICK WAYNE DENNISON, ESQUIRE  
THREE GATEWAY CENTER, SUITE 1500,  
401 LIBERTY AVENUE, PITTSBURGH, PA 15222

Client Focus | Industry Insight | National Reputation

# CONFIDENTIALITY NOTE

This presentation from the law office of Jackson Kelly PLLC is for the sole use of the intended viewers and contains confidential and privileged information. Any unauthorized review, use, disclosure, distribution, or other dissemination of this presentation and/or the information contained herein is strictly prohibited.

# EMERGENCY RESPONSE AND CRISIS MANAGEMENT

---

- Are you ready to handle a crisis?

# EMERGENCY RESPONSE AND CRISIS MANAGEMENT

- Crisis management involves dealing with threats before, during, and after they have occurred.
- Effectiveness is determined within the first 24 hours.

# EMERGENCY RESPONSE AND CRISIS MANAGEMENT

- Two key things must occur:
  - ▣ Understand the issues and the ramifications of decisions made during the investigation; and
  - ▣ Have a process in place that can be immediately accessed to implement the necessary precautionary measures.

# EMERGENCY RESPONSE AND CRISIS MANAGEMENT PLANS

- **Elements of emergency response planning include:**
  - Facility and process assessment
  - Evaluate the applicability of local, state, and federal laws and regulations
  - Facility audits for compliance in advance of any crisis

# EMERGENCY RESPONSE AND CRISIS MANAGEMENT PLANS

- **Elements of emergency response planning include:**
  - Clearly articulated and communicated positions:
    - agency interface/compliance
    - rescue and recovery
    - document control
    - internal investigation
    - family/survivor assistance
    - legal assessment of liability/notification
    - appropriate backup or contingency plans
    - media interface

# JURISDICTION

---

- There may be a variety of state, federal, and local agencies with shared or overlapping responsibility.
- Burden is on the operator to know.



# JURISDICTION

---

- With respect to document production – entities typically share documents.
- Every plan should include notification requirements for all agencies, (*i.e.*, MSHA, OSHA, EPA, DOT) since all will differ slightly.

# LIABILITY ASSESSMENT

- Assess injuries or conditions.
- Compliance with agency notification requirements and record keeping.
  - ▣ MSHA is 15 minutes based upon the definition of an accident 50.2
  - ▣ Call the 1-800-number first.
- Assess potential enforcement/compliance issues as to the operator, agents, directors, and officers.

# LIABILITY ASSESSMENT

- **Identify other liabilities:**
  - Employer's protection under the state workers' compensation exclusivity provision for injuries to employees;
  - Statutory employer issues; liability for injuries of non-employees.

# LIABILITY ASSESSMENT

---

- Product liability claims against third parties, including equipment manufacturers.
- Contractual agreements, including indemnification pursuant to agreements with independent contractors or other potentially involved parties.

# AGENCY NOTIFICATION

## □ MSHA NOTIFICATION

- The types of accidents for which immediate notification of MSHA is required are set forth in 30 C.F.R. § 50.2(h) and include:
  - a death at a mine;
  - an injury which has a reasonable potential to cause death;
  - an unplanned inundation of a mine by liquid or gas; and,
  - an unplanned mine fire not extinguished within 30 minutes.

# ADDITIONAL NOTIFICATION

- **Whom to notify:**
  - MSHA 1-800 and other office or
  - Company management
  - Counsel
  - Affected families of employee(s)

# ADDITIONAL CONCERNS

---

- Rescue and Recovery
- Scene and Equipment Preservation
- Media
- Insurance

# INCREASED SCRUTINY FOR WORKPLACE INJURIES

- December 17, 2015, Memorandum of Understanding
  - Specifically addressed the coordination of matters pertaining to worker safety that could lead to criminal prosecution by DOJ.
  - Establishes a process and framework for notification, consultation and coordination between DOL and DOJ to aid both agencies in more effectively implementing...workplace statutes.



# INCREASED SCRUTINY FOR WORKPLACE INJURIES

- Statements made to an inspector or special investigator that contain information that could lead to the discovery of a violation under the Act, or to an admission of a violation or other criminal activity can be used to prosecute you or someone else.
- An inspector or investigator will not give you a Miranda warning.

# THE INVESTIGATION

- Operators are required by § 103(d) of the Mine Act and 30 C.F.R. § 50.11(b) to conduct their own investigations of all accidents and occupational injuries (defined in 30 C.F.R. § 50.2).
- Protect some aspects of the investigation through the work product doctrine and attorney-client privilege.

# THE INVESTIGATION

---

- The Mine Act grants MSHA broad authority to enter upon mine property to investigate the cause of accidents, determine appropriate remedial measures and to determine whether any willful or knowing violations occurred.

# THE INVESTIGATION

- MSHA Personnel
  - ▣ May include specialists in ventilation, electrical, ground control, etc.
  - ▣ If a serious accident or fatality is involved, an MSHA special investigator may accompany the team.
- Management Representatives
- Employees' Representatives

# THE INVESTIGATION

---

- Maintain chain of custody.
  
- Contemplate destructive testing.
  - Agree on the laboratory or facility and make arrangements to participate with the necessary expert consultants present.

# THE INVESTIGATION

---

- MSHA is permitted to review any records that the operator is required to keep under the Mine Act and regulations.

# THE INVESTIGATION

- Agencies may also request documents which are not required to be maintained under the Mine Act and regulations.
- Often a judgment must be made whether to voluntarily produce “non-required” records.
- Analyze whether the request is reasonably related to the incident.
- Even if the investigation is of a civil matter (Section 110(c)) or is conducted pursuant to Section 105(c), the information gathered during the investigation can and will be used against you.



# THE INVESTIGATION

- **Interviews:**
  - Informal device used by MSHA to gather information.
- **Objectives of the interviews:**
  - Cause
  - Violations
  - Inconsistencies
  - Possible knowing or willful
  - History



# INTERVIEWS

- **Company Interviews:**
  - Conduct a confidential investigation that generally will be protected by the attorney work product doctrine.
  - Monitor the government investigations to promote fairness and ensure the statements prepared by investigators are complete and accurate.
  - Determine if conflict exists between agents and the corporation or potential of criminal liability.

# INTERVIEWS

- Written statements from employees may become evidence.
- If a statement is given, it is important that it recounts the facts fully, clearly and accurately.

# INTERVIEWS

## □ **MSHA Investigative Interviews:**

- The employee being interviewed has the following rights:
  - The right to counsel or the presence of a management or other person during the interview;
  - The right to discontinue the interview at any time;
  - The right to refuse to answer any question during the interview;
  - The right to refuse to permit tape recording of the interview;
  - The right to refuse to sign a statement or summary of the interview.



# PRIVILEGES

- **Attorney-Client Privilege:**
  - When legal advice of any kind is sought from an attorney acting in a representative capacity, communications are protected from disclosure.
  - The purpose of the attorney-client privilege is to encourage full and frank client disclosure.
  - Because confidentiality can be waived by inadvertent disclosures, it is essential to safeguard information and documents sought to be covered by the attorney-client privilege.

# PRIVILEGES

- **Attorney Work-Product Privilege:**
  - Is designed to protect an attorneys' "work product," prepared in anticipation of litigation, from disclosure.
  - Applies only to documents prepared in "anticipation of litigation." Documents prepared in the routine course of business are not covered by the privilege. The documents or information must be gathered at the direction of an attorney.

# PRIVILEGES

- Privileges may apply to the materials generated and information learned during the course of the investigation.
- There are collateral consequences to companies directly hiring experts and media consultants without the assistance of counsel to make statements, perform employee interviews, and provide expert reports.
- Neither the attorney-client privilege nor the work product privilege is absolute.



# DOCUMENT PRODUCTION

- Production of documents or other materials to enforcement agencies may waive privilege as to all third parties.
- Establish a document control system.
- Manage E-discovery issues.
- Avoid spoliation of evidence claims.

# DOCUMENT PRODUCTION

## □ Document Control System:

- Compile a team of persons to coordinate all document control.
- Ask that all requests be made in writing and establish ground rules.
- Keep required documents in a central location to the extent possible ahead of time.
- Give each page of each document a sequential number, such as a bates-stamp system, and index all documents. Maintain originals.
- Limit the number of copies for distribution of materials on which privilege is claimed internally.



# DOCUMENT PRODUCTION

## □ Document Control System:

- Limit the subject of internal memoranda to that which is clearly privileged. In other words, do not tack on other unprivileged subject matter to such communication.
- Stamp or otherwise designate privileged documents in a conspicuous manner so that they are not inadvertently mistaken for non-privileged communications.
- When in doubt as to whether a privilege applies, consult counsel before turning any materials over to third parties.



# DOCUMENT PRODUCTION

- **Manage E-Discovery Issues:**
  - Be ready to roll out the “legal hold.”
    - Once an entity becomes involved in litigation or a regulatory investigation, or anticipates that litigation or a regulatory investigation of a matter will occur, the obligation to preserve records commences.
    - Electronically stored information must also be preserved. Legal holds must be enforced to suspend automatic deletion policies.
    - A “legal hold” notice should be sent to any employees having relevant information.

# DOCUMENT PRODUCTION

## □ **Avoiding spoliation:**

- Allows for courts to find that any destruction of evidence may give rise to an inference that production of the evidence would have been unfavorable to the party responsible for the destruction.
  - Courts have allowed jurors to assume that lost evidence would support the opposing party's claim.
- Your company may be liable for “spoliation of evidence” if relevant documents are lost through automatic-deletion protocols after a litigation hold should have been instituted.

# DOCUMENT PRODUCTION

- **Avoiding spoliation(continued):**
  - Courts have penalized companies for failing to produce electronic records during discovery in litigation. Intentional misconduct in withholding electronic documents is not necessarily required for a judge to sanction parties who fail to produce records.
  - Decisions show that courts have little patience for preservation, privilege review, or production mistakes, and are not hesitating to hold parties responsible. See Qualcomm v. Broadcom, Stanley v. Creative Pipe, and In re Intel.

# DOCUMENT PRODUCTION

- Dynamic Energy, Inc., 33 FMSHRC 1998, 2009-10 (ALJ Paez Aug. 2011): Adverse inference against operator when certain pre-shift examination records were not retained.
- Lincoln Leasing Co., Docket No. WEVA 2012-1783 (ALJ Gill July 13, 2015): Adverse inference based on missing preoperational exams.

# MEDIA COVERAGE

- **The Blame Game and other public fascination with tragedy.**
  - Interaction with families, sensitivity on communication.
    - When there are victims of tragedy, the perception of indifference on behalf of companies, governments, or leaders can cause great harm to an organization's or individual's reputation in the aftermath of crisis.
    - Timeliness and effectiveness of the response to a crisis is key.