

Labor and Employment Issues for the Safety Professional



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Thomas D. Schneid



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Labor and Employment Issues for the Safety Professional

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Foreword

Don't be afraid to think outside the book.

Dr. Schneid has put together a complete compendium of important topics, tools, and most importantly, practical thoughts.

The topic of labor and employment is an increasingly complex and changing field.

In your role as safety manager, human resources, security, or any or all of the above, this text is a tool that you will refer to daily. Its best use is to be on your desk, with pages underlined and marked up. You may be wearing many of these hats, all at the same time!

We don't operate in a vacuum in our profession, and neither should you.

Most labor situations are governed by a series of overarching federal rules and regulations. These rules are guidelines and are impacted by site agreements, interpretations, collective bargaining, and common sense.

This text is not a substitute for competent legal advice, and must not be used to avoid close working relationships with counsel. In fact, many problems may be averted by a careful review of the chapters that support the framework for how you work. And remember, no two situations are the same. Safety rules and regulations must be carefully interfaced into the entire environment as well. If you are unsure, seek advice from a competent professional, and don't forget that most states operate a free OSHA consultation program, as well as inside of federal OSHA. Ask advice; it's better to take the steps to protect your people with a team approach than choosing to ignore the situation. Afford your fellow workers the same opportunity to have a safe and healthy job experience. Would you do that same job, day in, day out, without protection or training? Education is the key, and training is but one component of that process. It evolves.

Human resources, safety, and security are a continuous process—no beginning, no end, just progress as the process moves forward!

Tom is always learning, and this book will help you to do just that.

As you scan the Table of Contents, don't be afraid of the myriad chapter headings.

These are but a few of the topics that come up in the daily life of a safety or HR manager. Supervisory staffs who have been promoted from the "line" to a more people-oriented position would do well to learn from this text, too.

The landscape is changing, almost on a daily basis, but this thorough text will help you navigate it in a more cohesive method.

A key point: Do not tread in these areas without a complete understanding of the subject.

New rules and interpretations change, cases make precedents, but the concepts that Tom has explicitly put before you are key to your understanding and survivability in the unique environment in safety, legal, and making a difference.

I have managed many facilities safety programs, as well as interfaced with human resources at all levels to do the best job we could. Tom and I helped get facilities in the OSHA VPP program together in the 1990s. Currently I work in homeland

security, worldwide. Tom has remained a close friend and ally of mine for decades. He has been instrumental in my success, and we want to be part of yours.

Don't make the mistake of complacency and carelessness. Do your homework, and seek out competent professionals before the need arises in a crisis. Decisions made in haste can have significant impacts.

One key element of this wide-ranging text is that it will help you understand when you may need to reach out for support.

As I tell my students, the only poor question is one you don't ask.

Good luck as you use this book, and remember, highlight and turn the pages; use the book as but one of many tools in your tool box.

Tom will be glad you did, and so will you. You, your people, and your organization will benefit.

Be safe!

Michael J. Fagel, PhD, CEM*

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Preface

Safety professionals do not work in a vacuum! The safety professional interacts with many other functions within the organization, including but not limited to production, human resources, and medical, with each function possessing specific laws and regulations that govern their actions and inactions. In order for a safety professional to function within the organizational structure, he or she should have a working knowledge of the laws and regulations that impact his or her area of responsibility as well as the laws and regulations that impact employees, managers, and the overall organizational structure.

In this text, we address many of the laws and regulations that impact the safety function, especially in the expanding areas of labor and employment laws. The primary reason for this emphasis is the fact that the safety function interacts daily with employees and management, and it is imperative that safety professionals possess a working knowledge of the impacts, requirements, and implications of their actions and inactions as related to these functions and laws. All too frequently very competent safety professionals get themselves “into the soup” simply because they are not aware of the new law, regulation, or interpretation, or they are not aware of their specific responsibilities or rights under the law. In this text, we cover a substantial number of the laws and regulations that can impact the safety function and hopefully provide at least an awareness level of the law or regulation for the safety professional to permit the “light bulb” to go off when he or she encounters situations where these laws or regulations are applicable.

The author reminds the reader that laws, especially in many of the areas that are addressed in this text, are constantly evolving and moving. Although the author has made every attempt to provide the most current information possible, safety professionals are advised to research the status of any specific issue and acquire competent legal assistance where necessary. The law is constantly changing, and it is imperative that safety professionals know the status of the law or regulation at the time of the issue. Remember, ignorance of the law is never a good defense; knowledge of the law can avoid many potential pitfalls!

The author hopes that this text will provide a working knowledge of these peripheral laws and regulations that can impact the safety function. Recognition and knowledge of these impacting laws and regulations can often help safety professionals avoid potential legal issues and possible legal liabilities for themselves as well as their organizations.

Disclaimer: The author has gone to great lengths to provide the most current information in a format that is most effective and efficient for safety professionals. However, the law changes virtually daily, and it is vital that the reader acquire competent legal counsel when addressing any of the topics or issues discussed in this text. The information contained in this text should in no way substitute for advice by your legal counsel.

Acknowledgments

Many apologies to my wife, Jani, and my girls, Shelby, Madison, and Kasi, for my absence at a number of basketball and softball games, as well as many social events, while I researched and drafted this text. And my thanks for your acceptance in permitting me the time on weekends and evenings to research and write this text without major drama. I know I will not get back the games I missed, but I will definitely be there for your future games.

Special thanks to my parents, Bob and Rosella, for branding the importance of education on their children and grandchildren. Without their continuous reinforcement and encouragement, your children and grandchildren would not have been able to reach the levels they have achieved in their lives.

Introduction

Whether you know the shape of a pebble or the structure of the solar system, the axiom remains the same: that it exists and that you know it.

—Ayn Rand

Safety professionals may be exposed to a number of different laws on a daily basis, depending on the circumstances, and often are not even cognizant of the law or the implications until after a potential violation has already occurred—and by this time it is often too late. This unconscious ignorance of the law can often result in legal actions against the company, the safety professional, or both. Knowledge of the applicable laws, or at least recognition of the potential liability, can often permit the safety professional to avoid the potential misstep or take proactive measures to minimize any possible damage. Conversely, failure to recognize the law and the legal requirement of the law can place the safety professional in a position where he or she is not aware of the violation and potential liability until it is often too late to avoid or minimize the potential damages. And in the long run, the results can be damaging not only in monetary terms for the company, but also in myriad ways to the safety professional and his or her career.

The purpose of this text is to educate and provide awareness to the safety professional with regard to a number of laws within labor, employment, and related areas that may impact him or her in the course of his or her daily activities. Safety professionals are not expected to become lawyers or even human resource professionals, but they must have a rudimentary knowledge of these laws to avoid “stepping on their tail.” Simple recognition of the law and the basic requirements of the specific law can often permit safety professionals to avoid a potential pitfall or violation in their actions or inactions.

In this text, the author has attempted to identify and select several of the most pertinent laws that may impact a safety professional beyond the OSHA regulations; however, not all laws can be addressed within the confines of this text. It is the author’s hope that this text will shed light on and open the eyes of safety professionals to the fact that we do not work in a vacuum, and that other laws do impact our daily safety-related activities. Awareness of the laws that can impact a safety professional is the first step in avoiding or minimizing a potential legal issue in the workplace.

The Author



Thomas D. Schneid is a tenured professor in the Department of Safety, Security and Emergency Management (formerly Loss Prevention and Safety) at Eastern Kentucky University and serves as the graduate program director for the online and on-campus master of science degree in safety, security and emergency management.

Tom has worked in the safety and human resource fields for over 30 years at various levels, including corporate safety director and industrial relations director. He has represented numerous corporations in OSHA- and labor-related litigations throughout the United States. Tom has earned a BS in education, MS and CAS in safety, as well as his juris doctor (JD in law) from West Virginia University and LLM (graduate law) from the University of San Diego. Tom is a member of the bar for

the U.S. Supreme Court, 6th Circuit Court of Appeals, and a number of federal districts, as well as the Kentucky and West Virginia Bar.

Tom has authored numerous texts, including *Corporate Safety Compliance: Law, OSHA and Ethics* (2008), *Americans With Disabilities Act: A Compliance Guide* (1994), *ADA: A Manager's Guide* (1993), *Legal Liabilities for Safety and Loss Prevention Professionals* (2010), *Fire and Emergency Law Casebook* (1996), *Creative Safety Solutions* (1998), *Occupational Health Guide to Violence in the Workplace* (1999), *Legal Liabilities in Emergency Management* (2001), and *Fire Law* (1995). Tom has also coauthored several texts, including *Food Safety Law* (1997), *Legal Liabilities for Safety and Loss Prevention Professionals* (1997), *Physical Hazards in the Workplace* (2001), and *Disaster Management and Preparedness* (2000), as well as over 100 articles on safety and legal topics. He is currently completing work on a new text, *Labor and Employment Issues for Safety Professionals*, and is also coauthoring a text on legal issues in safety.

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1 Labor, Management, and Safety

If you want to be respected, be respectable.
If you want to be liked, be likeable.
If you want to be loved, be lovable.
If you want to be employed, be employable.

—William J. H. Boetcker

Learning objectives:

1. Acquire an understanding of the role safety professionals play within the organization.
2. Acquire an understanding of the laws related to unionization.
3. Acquire an understanding of the labor and management issues that directly or indirectly impact the safety function.

The workplace is a balance between management and labor, with the safety function often thrust into the middle. Generally, management is production driven, dollar cognizant, quality motivated, and salary paid. Again, generally labor consists of a number of individuals who perform specific work tasks, are responsible for individual job functions, and are paid by the hour. With these philosophically diverse positions, labor and management can conflict, creating adversarial situations that encompass the safety function. Safety professionals can be the link between management and labor, serving as the point to achieve the ultimate objective of creating and maintaining a safe work environment. In very broad terms, the safety professional is employed to minimize risks and save money for the company or organization. The safety professional is also employed to minimize risks and safeguard employees from injury or illness in the workplace. The safety professional must be able to work with and between all levels of management and labor, adapting to the different motivational factors and conflicting issues.

In today's American workplace, a safety professional is more likely to be working in a nonunion environment than in a unionized private sector environment. Although this was substantially different a half century earlier, union membership in the private sector has fallen to under 9% of the private sector workplace, the lowest membership since 1932.¹ Although there are many different unions representing different occupations, the vast majority of unions are aligned with one of the two larger national and international organizations; namely, the American Federation of Labor–Congress of Industrial Organizations (AFL-CIO) and the Change to Win Federation.² The AFL-

CIO and Change to Win Federation are both active in the political arena, advocating for policies and legislation favoring their membership.

The primary law that regulates the private sector in the area of unionization is the National Labor Relations Act.³ This law, as well as other related laws governing this area, is overseen by the National Labor Relations Board (NLRB), an independent federal agency.⁴ The National Labor Relations Board has established rules and regulations governing the election process, unfair labor practices, and other areas of the collective bargaining process and the relationship between private sector employers and the union.

Safety professionals should be aware that there are very specific rules that must be followed in the event that a union attempts to organize an operation, and they must be very cognizant of the rules as well as their actions or inactions, given the fact that safety is often one of the major issues in which employees may seek union representation. The election process, which includes laboratory conditions, is proscribed and overseen by the National Labor Relations Board. After the election, if the union has won a majority of the votes of the bargaining unit and is certified in the workplace, it is the duty of the company or organization to bargain in good faith with the union over wages, hours, and conditions of employment, which includes safety. If an agreement is reached, these negotiated terms and conditions are codified in writing and become a legally binding contract. Many contracts call for disputes over the contract to be resolved through a grievance process or arbitration.

For safety professionals, the development and implementation of effective safety and health programs can be significantly different in a nonunion environment than in a unionized workplace. As discussed later in this text, safety and health issues are considered part of the collective bargaining process in unionized operations; thus mandatory bargaining is often required before implementing safety and health programs, policies, and procedures in the workplace. In comparison, safety professionals working in nonunion working environments usually do not possess the duty to bargain with a third party prior to the development and implementation of safety and health programs, policies, and procedures.

Although the goals and objectives of safeguarding employees in the workplace may be the same, the methods of achieving these goals may be significantly different for safety professionals, depending on whether the operations are unionized or without union representation.

The vast majority of safety professionals are members of the management team hired specifically to address an issue or issues within the management structure. Although many larger companies or organizations have previously integrated safety into their management structure because it made good business sense, smaller companies or organizations do not realize the need for a safety professional until after a major risk or loss surfaces. These risks or losses can include, but are not limited to, Occupational Safety and Health Administration (OSHA) violations and penalties, workers' compensation losses, substantial property or casualty losses, insurance increases, or related issues. The acquisition of a safety professional is often part of the overall mitigation efforts after an incident or loss. If a company or organization possessed no losses and maintained a minimal risk level, the organization may not have a need for the costs related to employing a safety professional. In essence,