

# 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.*



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# 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