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Environmental Audit Opportunities to Consider for Return-to-Work in the Wake of COVID-19

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As regulated companies and facilities around the country consider their approaches to partially or even fully returning to the workplace – even essential facilities that have remained open but with limited staffing – it seems inevitable that they will discover certain environmental compliance obligations that have been delayed or fallen through the cracks while facilities have adopted alternate operating scenarios and while many workers have been operating remotely without eyes on the facility. Realistically, the environmental laws, regulations, and permits that facilities are subject to require periodic monitoring, inspections, maintenance, training, labeling, tracking, recordkeeping, reporting, and other actions that seem virtually impossible to have been done perfectly during pandemic-altered operations.

The strong and proper instinct of many EHS professionals upon returning to work will be to promptly dig in to find and begin addressing those gaps. As a reminder, there are audit policies and laws available all around the country that provide for immunity or other penalty relief when you make disclosures after voluntarily undertaking efforts to detect and address environmental noncompliance. Importantly, though, many of these policies and laws have fundamental legal prerequisites that must be satisfied in order to qualify for the immunity or penalty relief.

In Texas, Oklahoma, and North Dakota, for example, the state environmental audit statutes provide an opportunity for penalty immunity but require the submission of a formal, written “notice of audit” to the relevant state agencies prior to commencing any investigation in order to qualify. As another example, the EPA’s Audit Policy requires that any investigation be “systematic” such that some formal, organized process for the investigation needs to be put in place and documented in order to properly qualify for penalty relief. Once well-meaning EHS professionals have run a problem to ground, it can be too late to go back and establish those prerequisites.

Although there may be pandemic-related enforcement discretion available to companies with omissions that have occurred in recent weeks, there remain questions about how broadly those policies will be honored in hindsight or whether they will survive some of the ongoing legal

challenges. Long-standing audit-related tools that extinguish penalties for missed actions can support your primary return-to-work compliance strategy, or at least serve as an important backstop to enforcement discretion, effectively minimizing the penalty consequences of compliance gaps that may have arisen during the pandemic.

Taking advantage of these audit tools, however, requires thoughtful pre-planning and careful coordination with your EHS professionals to make sure that their return-to-work investigations will meet the prerequisites of the relevant penalty relief laws and policies. As you are likely to find some forms of noncompliance, you may also want to consider any evidentiary privileges companies may want to pursue – including attorney-client privilege – to protect against the discovery and use of audit-derived information against them in future proceedings.

If you have any questions about environmental issues you are likely to encounter as you implement your return-to-work strategy and how to design that strategy to minimize your liability exposure with these audit-related tools, we stand ready to assist.