



412 Top 10 Management Practices for Ensuring EH&S Compliance

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Faculty Biographies

Kathleen R. Gibson

Kathleen R. Gibson is senior counsel for environment, health, and safety at John Deere in Moline, Illinois. John Deere has manufacturing locations throughout the world.

She has just retired from her tenure as an editor of the Trends publication for the ABA's environmental section.

She graduated from Northwestern Law in Chicago.

Steven J. Ginski

Steven J. Ginski is chief counsel for environment, health, and safety (EHS) at International Paper Company in Memphis, Tennessee. His expertise includes compliance counseling and defense, negotiation, and representation of the company's businesses on a wide range of EHS issues. He also provides counsel and representation of company EHS interests in mergers and acquisitions matters, divested and surplus property remediation under solid and hazardous waste laws, permit negotiations, and appeals. Internationally, Mr. Ginski has responsibility for EHS legal matters with a focus in Latin America and Europe.

Prior to joining International paper, Mr. Ginski was an EHS attorney at Fort Howard Corporation in Green Bay, Wisconsin. He also practiced at Pfannerstill and Camp in Milwaukee focusing on litigation and business law.

Mr. Ginski received a Bachelor's from Thomas Aquinas College and is a graduate of Marquette University Law School.

Brian E. Heim

Brian E. Heim is senior counsel for environment, health & safety (EH&S) with International Paper Company (IP) in Memphis, Tennessee. Mr. Heim has counseled IP on a wide range of EH&S matters arising under federal and state environmental laws, private causes of action, and OSHA. He serves as lead counsel in negotiations with governmental agencies on air, waste, and water permitting and enforcement actions against the company and manages environmental litigation by and against the company. Mr. Heim also provides environmental counsel on mergers and acquisition, leases, and other contractual matters and is a principal crisis response attorney for the company.

Prior to joining IP, Mr. Heim was an environmental and toxic tort attorney with Womble Carlyle Sandridge & Rice in Charlotte, North Carolina.

He received his B.A. from Wittenberg University and his J.D. from George Washington University.

William M. Messner

William M. Messner is a senior attorney with Southern California Edison Company (SCE), in Rosemead, California, where he primarily practices in the areas of environmental, health, and safety, political law, and negotiating electrical franchises for the utility.

Prior to joining SCE, Mr. Messner worked for Exxon Mobil Corporation (ExxonMobil). While at ExxonMobil he spent many years as an environmental attorney and prior to obtaining his Juris Doctorate, as an environmental engineer remediating retail stations and product terminals.

Mr. Messner received his B.S. from California State Polytechnic University Pomona, his J.D. from Suffolk University Law School in Boston, and is scheduled to graduate from the University of California Los Angeles' Anderson School of Management.



Number 10: Sarbanes – Oxley and the Need for Internal Controls

- Sarbanes – Oxley Certification Requirements
 - Certify in each report (eg. 10K & 10Q) that the financial information is fairly presented “in all” material reports
 - Material Reports – Any factors or circumstances that a reasonable investor is substantially likely to consider important in making an investment decision.
 - CEO & CFO must certify that a system of “internal controls” have been established & are maintained to disclose material information.



Number 10: SOX and the Need for Internal Controls

- Goals of EHS System of Internal Controls
 - Evaluating actual & potential costs of EH&S compliance
 - Tracking actual & potential EH&S enforcement liabilities and pending legal proceedings
 - Estimating prospective, material financial impacts of EH&S trends



Number 10: SOX and the Need for Internal Controls

● Environmental Internal Controls

Focus on the information collection & reporting “processes” and document these, such as:

- Environmental self-audit programs & Corrective Action Plan (CAPs)
- Estimating environmental capital requirements
- Evaluating known contamination on owned property
- Environmental compliance certifications submitted internally to business group management & director, environment
- Corporate reserve management
- Reporting internally non-compliance situations promptly:
 - Any un-permitted release
 - Release above permit limits
 - Environmental control system & equipment failures
 - Any indication of an enforcement action



Number 10: SOX and the Need for Internal Controls

● Health & Safety Internal Controls

Same as environmental: Focus on the information collection & reporting “processes” and keep good documentation to track events such as:

- On site inspection by OSHA or other regulatory agency
- Receipt of notification from agency of an employee complaint and the company’s response
- Fatalities or other serious injuries
- Any indication of enforcement action

* Tract EH&S non-compliance, whether or not subject to enforcement action



Number 9: Role of EHS Counsel in Engaging Management and Corporate Culture

- Servicing multiple clients
 - Business people versus EHS group
 - Multiple facilities that may be at cross purposes

- Culture of compliance
 - Top down approach
 - Accountability
 - Mission statements
 - Sustainability reports



Number 9: Role of EHS Counsel in Engaging Management and Corporate Culture

- Influencing reporting relationships
 - EHS versus business reporting relationships

 - Facility manager accountability
 - Understanding signature obligations

 - Avoiding silos



Number 8: Communications – Controlling the Flow of Information

- Attorney-Client privileged investigations
 - Legal hold/Upjohn process
 - Ensuring email/electronic data not deleted
 - What to do when people leave the company
 - Reminders
- Pros and Cons of technology
 - Email
 - Cell phones
 - Web-based document storage

Number 8: Communications

- Communicating compliance issues to Senior Management
 - Compliance engagement
 - Monthly reports
 - Privileged investigation reports
 - Other tools



Number 7: Environmental Audits

- To conduct or not to conduct
- Environment and Safety - separate or combined
- Domestic or global
- Housed in corporate engineering or legal
- Outside consultant or in-house staff
 - In-house: dedicated or shared staff

Number 7: Environmental Audits

- Attorney-client privileged or not
- Protocol, consultant or developed in-house
- Attorney involvement in meetings onsite, review of audit reports
- Who issues the report, consultant, lawyer, etc.
- Corrective action tracking and closure
- Timely disclosure to government agencies



Number 6: Need for Uniformity for Compliance Programs & Audits

- SOx internal controls practically require enterprise-wide consistency
- Integrity of EHS programs is key – 100% compliance
 - EHS and business groups aligned – define roles
 - Transparent and effective communication
 - Effective and continuous practical training programs
 - Site Manager Responsibilities
 - Beneficial Use
 - Incident Reporting
 - Government Inspection Procedures
 - Environmental Reserve Mgt
 - Hazardous & Solid Waste Mgt
 - File Management
 - Capital Investment Projects
 - Emergency Response
 - Product Certification Letters
 - No double standards
 - Unambiguous EHS policy statements

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Number 6: Need for Uniformity for Compliance Programs & Audits

- Enterprise EHS goals and metrixs
 - Establish uniform goals
 - Measure what is expected
 - Audit program design & implementation
 - Discipline
- Uniformity necessary for stable platform for accommodating change and to preserve flexibility
 - Action alerts
 - Broad remedial activity
 - Policy Modification
- Sentencing Guidelines

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Number 5: Sentencing Policies and the Creation of Corporate Compliance Programs

- Corporate Sentencing Guidelines, effective November 2004
 - Guidance for “effective” compliance program
 - Can result in lighter criminal sentences
 - Requires more active approach towards compliance
 - Upper management must take leadership role



Number 5: Sentencing Policies and the Creation of Corporate Compliance Programs

Corporate Sentencing Guidelines

- Seven elements of an effective compliance program:
 - Standards and procedures to prevent and detect criminal conduct
 - Board members and senior executives knowledgeable and oversee compliance program
 - Reasonable efforts to exclude individuals from positions of authority if involved in noncompliant practices
 - Effective training programs
 - Monitoring and re-evaluating periodically
 - Include both disciplinary measures and positive incentives
 - Remedial measures



Number 5: Sentencing Policies and the Creation of Corporate Compliance Programs

- **Directors' Duties for Corporate Compliance - Helping your senior executives meet requirements**
 - **Be Knowledgeable**
 - Periodic reports on effectiveness of content and operations of EHS compliance and ethics programs to prevent and detect criminal conduct
 - Reports from managers with day-to-day responsibility and higher level management
 - **Training**
 - Presentations by company compliance officer, consultants, or counsel
 - **Exercise Reasonable Oversight**
 - Follow-up on effective remedial and preventative actions



Number 4: Role of Unions in EH&S Issues

- Participation of bargaining union reps on facility environment or safety committees
- Whether used as a bargaining tool
- Difference in how compliance approached
- Difference in how enforcement approached



Number 4: Role of Unions In EHS Issues

- OSHA Citations
 - OSHA takes side of employee rep
 - How does company plant management interact with union safety rep
 - Does union intervene officially in citation
 - Does union participate formally or informally in settlement conferences, separate or with OSHA or company?



Number 3: Training Programs for Employees

- In-house programs
 - SOx compliance
 - Attorney-client privilege
 - Responding to regulator inspections
 - EHS University
- Outsourced training



Number 2: Global Compliance – Issues, Challenges and Solutions

- Manufacturing versus marketing

- Manufacturing
 - How to know what laws are in each country

 - Consultant, lawyer, or default to US standard

 - Auditing

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Number 2: Global Compliance – Issues, Challenges and Solutions

- Export and import restrictions
 - Chemicals (wood pallets)
 - Engines
 - Mercury

- Due Diligence
 - Property acquisitions and divestitures

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Number 2: Global Compliance – Issues, Challenges and Solutions

- **Marketing**
 - **Regional treaties**
 - Chemical and electronic restrictions in Europe
 - Banned chemicals elsewhere

 - **Country laws**
 - Emission regulations on different types of engines
 - Recycling content legislation
 - Take back legislation, batteries, tires, computers



**Number 1: How to Handle Unannounced
EH&S Inspections**

- Various types of environmental, health & safety visits and/or inspections by state & federal administrative agencies

- Practical inspection management procedures

- Role of legal counsel in agency site visits & inspections



Number 1: How to Handle Unannounced EH&S Inspections

- Types of OSHA inspections
 - Imminent danger
 - Fatality/catastrophe
 - Complaints or referrals
 - Follow-up
 - Programmed (high injury - rates, citation history, VVP, special emphasis programs)
- Types of Environmental Inspections
 - Routine permit inspections
 - Multimedia inspections
 - Complaints
- Civil versus Criminal – Search Warrants

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Number 1: How to Handle Unannounced EH&S Inspections

- Basic management components of any inspection. Goal is to facilitate the inspection.
 - Advance Preparation
 - Designate a walk-a-round team
 - Establish a document control system
 - Train the Team
 - Train department Supervisors
 - Initial Encounter
 - Check credentials
 - Determine kind of inspection
 - Obtain copy of written complaint, if any
 - Determine scope of inspection
 - Inform EH&S department & legal

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Number 1: How to Handle Unannounced EH&S Inspections

- ☛ Opening Conference
 - ☛ Introduce employer & employee representatives
 - ☛ Number of inspection teams
 - ☛ Employee interviews
 - ☛ Photographs & video tape (side-by-side)
 - ☛ Industrial Hygiene sampling (side-by-side)
 - ☛ Daily meeting with OSHA
 - ☛ Confidential Business Information

- ☛ Walk-A-Round
 - ☛ Safety orientation, PPE etc.
 - ☛ How to respond to questions
 - ☛ Document control/document & photo log
 - ☛ Medical records – access and medical order



Number 1: How to Handle Unannounced EH&S Inspections

- ☛ Walk-A-Round (continued)
 - ☛ Chaperone inspectors at all times
 - ☛ Measurements & sampling
 - ☛ Photographs & video
 - ☛ Trade secrets
 - ☛ Employee interviews
 - ☛ Office space for inspectors
 - ☛ Notes

- ☛ Closing Conference
 - ☛ Opportunity to determine findings and ask questions
 - ☛ Limit attendance to those actively involved in inspection
 - ☛ Employee representative present
 - ☛ Correct errors & misunderstandings
 - ☛ Take comprehensive notes
 - ☛ Do not make admissions
 - ☛ Identify follow-up issues



Number 1: How to Handle Unannounced EH&S Inspections

- Legal Department's Role in Government Inspections & Investigations
 - Involvement on a case-by-case basis
 - Often depends on potential future litigation & need to preserve & collect evidence
 - Routine permit inspections generally do not require legal involvement
- Examples of Inspections that Require Legal Participation
 - Warrants/Subpoenas
 - Multimedia inspection
 - Enforcement pending or major enforcement anticipated
 - Public complaints – citizen suits
 - If self audits are requested – suggests a bigger or expanding inspection



Number 1: How to Handle Unannounced EH&S Inspections

- Search Warrant – Criminal Investigation

Procedures for dealing with search warrant:

 - Only 1 person should interface with the agency
 - Ask for both warrant and any underlying affidavit
 - Ask to wait in reception area until attorney arrives
 - If refused, do not try to stop them – make notes of how many people entered facility, what areas searched, any seized
 - Company will acquiesce to search, but not consent
 - Be clear that counsel has been contacted and is on the way
 - Try to videotape the search, if possible