

By Gerard M. Giordano, Esq.

Risks of Using In-house Employees for Environmental Cleanups

In an attempt to save money, property owners may be tempted to use their own employees to clean up contamination at their facilities in order to comply with state or federal environmental laws. However, there may not be any real savings because when property owners (as employers) do commit to such a venture, they must comply with the Occupational Safety and Health Administration's (OSHA) regulations that may be applicable. These are designed to protect employees from occupational injuries and illnesses, and failure to comply with these regulations could result in fines that may offset any savings.

A property owner who orders his employees to clean up or work with hazardous substances must comply with a number of precautionary regulations. The most comprehensive is 29 CFR 1910.120, which deals with hazardous waste operations and emergency response. An employer is required to develop and put into writing a safety and health program for any employees engaged in hazardous waste cleanup operations.

The elements of an effective program include requiring an employer to identify and evaluate specific hazards and to determine the appropriate safety and health control procedures to protect employees before any work is initiated. Likewise, protective equipment

must be utilized by employees during the initial site entry and, if required, during subsequent work at the site.

The employer must also periodically monitor employees who may be exposed to hazardous substances in excess of OSHA's regulations. Once the presence and concentration of specific hazardous substances and health hazards have been established, employees involved in the cleanup operations must be informed of any risks associated with their work. Under certain circumstances, regular ongoing medical surveillance of employees by a licensed physician, and without cost to the employees or lost pay, may be required.

Numerous other safeguards are also required by OSHA. For example, OSHA's hazardous communications program, 29 CFR 1910.120, requires an employer to establish and implement a hazard communication program if, during the course of the cleanup, employees may be exposed to hazardous chemicals. The requirements are essentially the same as those in workplaces where employees are routinely exposed to hazardous chemicals. The program must include container labeling, production of material safety data sheets and employee training.

The employer must also provide a full description of the OSHA compliance program to employees, contractors and subcontractors involved with

the cleanup operations as well as OSHA, and to any other federal, state or local agency with regulatory authority over the cleanup. Regulation 29 CFR 1910.120 also requires an employer that retains the services of a contractor or subcontractor to inform them of any identified potential hazards of the cleanup operations.

Generally, it is the involvement of employees that triggers an employer's obligations under the Occupational Safety and Health Act. If contractors were retained, it would be the contractors' responsibility to comply with these OSHA requirements on behalf of their employees, assuming that the employer retaining the contractor has neither employees involved in the cleanup nor employees potentially exposed to health hazards arising from the cleanup.

In addition to the contractor's required compliance with OSHA regulations, it is imperative that a property owner include in any agreement with the contractor that the contractor must comply with all pertinent OSHA regulations. If possible, the agreement should also provide for indemnifications from the contractor to the property owner for claims arising from the cleanup. These indemnifica-



tions will be important if the employees of the contractor are injured or subsequently become ill because of such work. The indemnifications should survive the completion of the work. These precautions will help insulate the property owner from both governmental actions and potential third-party claims.

Failure to comply with OSHA regulations on the part of the property owner who uses his own employees to perform a cleanup or work with hazardous substances may result in substantial penalties. Under OSHA, fines can be levied for each violation found by an inspector. These violations can result in non-serious, serious or willful violations with penalties as high as \$70,000 for each violation. If a subsequent inspection is performed and violations are found which have not been corrected from an original inspection, daily penalties could be levied resulting in substantial fines.

Compliance with OSHA regulations should be a factor when a property owner decides to use in-house employees for cleanups. In the long run, there may not be any savings to the employer. Furthermore, because of the employer's lack of familiarity with the OSHA regulations governing the cleanup of hazardous sites, the employer could be subject to fines as a result of its failure to comply with the OSHA regulations. Therefore, it may be prudent in the long run to retain a company whose business is devoted to doing only cleanups. This company will have the expertise and continuing obligations to protect its employees. ■

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