

SENATE BILL NO. 205

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY SENATOR LEMAN

Introduced: 5/10/97

Referred: L&C, Judiciary

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to occupational health and safety audits to determine compliance
2 with certain laws, permits, and regulations."

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 * **Section 1.** FINDINGS; INTENT. The legislature finds and intends as follows:

5 (1) as occupational health and safety regulations evolve, performance-based
6 standards will increasingly replace the traditional command-and-control approach of state
7 regulatory practices; this shift is expected to save money for both the state and regulated
8 entities and to lead to the integration of occupational health and safety protections and normal
9 operating procedures for regulated facilities and operations; in order to foster a partnership
10 between the public and private sectors and promote this integration, it is the intent of the
11 legislature to establish under this Act a responsible incentive program to encourage voluntary,
12 critical self-evaluation and analysis by regulated entities of their compliance with occupational
13 health and safety requirements by authorizing certain qualified privileges and immunities
14 related to those self-evaluations;

- 1 (1) a civil action, whether legal or equitable; or
2 (2) an administrative proceeding, except for workers' compensation
3 proceedings.

4 (b) With respect to confidential self-evaluation and analysis in an occupational
5 health and safety audit, in order to qualify for the privilege under this section and the
6 immunity under AS 09.25.475, at least 15 days before conducting the audit, the owner
7 or operator conducting the audit must give notice by electronic filing that complies
8 with an ordinance or regulation authorized under (j) of this section or by certified mail
9 with return receipt requested to the commissioner's office of the department, and, when
10 the audit includes an assessment of compliance with a municipality's ordinances, to
11 the municipal clerk, of the fact that it is planning to commence the audit. The notice
12 must specify the facility, operation, or property or portion of the facility, operation, or
13 property to be audited, the date the audit will begin and end, and the general scope of
14 the audit. The notice may provide notification of more than one scheduled
15 occupational health and safety audit at a time. Once initiated, an audit shall be
16 completed within a reasonable time, but no longer than 90 days, unless a longer period
17 of time is agreed upon between the owner or operator and the department or the
18 municipality, as appropriate. The audit report must be completed in a timely manner.

19 (c) The following persons may claim the privilege available under (a) of this
20 section:

21 (1) the owner or operator who prepared the audit report or caused the
22 audit report to be prepared;

23 (2) a person who conducted all or a portion of the audit but did not
24 personally observe or participate in the relevant instances or events being reviewed for
25 compliance;

26 (3) a person to whom confidential self-evaluation or analysis is
27 disclosed under AS 09.25.455(b); or

28 (4) a custodian of the audit results.

29 (d) A person who conducts or participates in the preparation of an audit report
30 and who actually observed or participated in conditions or events being reviewed for
31 compliance may testify about those conditions or events but may not, in a proceeding

1 covered by (a) of this section, be compelled to testify about or produce documents
2 consisting of confidential self-evaluation and analysis.

3 (e) A person claiming the privilege described in this section has the burden of
4 establishing the applicability of the privilege.

5 (f) To facilitate identification, each document in an audit report that contains
6 confidential self-evaluation or analysis shall be labeled "AUDIT REPORT:
7 PRIVILEGED DOCUMENT."

8 (g) A government agency or its employees or agents may not, as a condition
9 of a permit, license, or approval issued under an occupational health and safety law,
10 require an owner or operator to waive the privilege available under this section.

11 (h) Except when the privilege is waived under AS 09.25.455(a) or disclosure
12 is made under AS 09.25.455(b)(3) or 09.25.475 or 09.25.480, neither a government
13 agency nor its employees or agents may review or otherwise use the part of an audit
14 report consisting of confidential self-evaluation or analysis during an inspection of a
15 regulated facility, operation, or property or an activity of a regulated facility, operation,
16 or property.

17 (i) This section may not be construed to

18 (1) prevent a government agency from issuing an emergency order,
19 seeking injunctive relief, independently obtaining relevant facts, conducting necessary
20 inspections, or taking other appropriate action regarding implementation and
21 enforcement of an applicable occupational health and safety law, except as otherwise
22 provided in AS 09.25.475; or

23 (2) authorize a privilege for uninterrupted or continuous occupational
24 health and safety audits.

25 (j) The department or municipality may, by regulation or ordinance,
26 respectively, allow the notice required under (b) of this section to be filed by facsimile
27 or other electronic means if the means ensures adequate proof of

28 (1) submittal of the notice by the owner or operator; and

29 (2) receipt by the department or municipality.

30 (k) There is no privilege under this section for documents or communications
31 in a criminal proceeding.

1 **Sec. 09.25.455. Waiver and disclosure.** (a) The privilege in AS 09.25.450
2 does not apply to the extent the privilege is expressly waived in writing by the owner
3 or operator who prepared the audit report or caused the report to be prepared.

4 (b) Disclosure of the part of an audit report or information consisting of
5 confidential self-evaluation or analysis does not waive the privilege established by
6 AS 09.25.450 if the disclosure is made

7 (1) to address or correct a matter raised by the occupational health and
8 safety audit and is made to

9 (A) a person employed by the owner or operator, including
10 temporary and contract employees;

11 (B) the owner's or operator's lawyer or the lawyer's
12 representative;

13 (C) an officer or director of the regulated facility, operation, or
14 property;

15 (D) a partner of the owner or operator;

16 (E) an independent contractor retained by the owner or operator;

17 or

18 (F) the principal of the independent contractor who conducted
19 an audit on the principal's behalf;

20 (2) under the terms of a confidentiality agreement between the owner
21 or operator who prepared the audit report or caused the audit report to be prepared and

22 (A) a partner or potential partner of the owner or operator of the
23 facility, operation, or property;

24 (B) a transferee or potential transferee of an interest in the
25 facility, operation, or property;

26 (C) a lender or potential lender for the facility, operation, or
27 property;

28 (D) a person engaged in the business of insuring, underwriting,
29 or indemnifying the facility, operation, or property; or

30 (E) a person who, along with the person who prepared the audit
31 report or caused the audit report to be prepared, also is an owner or operator

1 of part or all of the facility, operation, or property; or

2 (3) under a written claim of confidentiality to a government official or
3 agency by the owner or operator who prepared the audit report or who caused the audit
4 report to be prepared.

5 (c) Documents consisting of confidential self-evaluation and analysis that are
6 disclosed under (b)(3) of this section are required to be kept confidential and are not
7 subject to disclosure under AS 09.25.110 - 09.25.220.

8 (d) A party to a confidentiality agreement described in (b)(2) of this section
9 who violates the agreement is liable for damages caused by the violation and for other
10 penalties stipulated in the agreement.

11 **Sec. 09.25.460. Nonprivileged materials.** There is no privilege under
12 AS 09.25.450 for that part of an audit report that contains the following:

13 (1) a document, communication, datum, report, or other information
14 required by a government agency to be collected, developed, maintained, or reported
15 under an occupational health and safety law, under a permit issued under an
16 occupational health and safety law, as a requirement for obtaining, maintaining, or
17 renewing a license, as a requirement under a contract or lease with the state or a
18 municipality, or as a requirement under an administrative order or court order or
19 decree;

20 (2) information that a government agency obtains by observation,
21 sampling, or monitoring;

22 (3) information that a government agency obtains from a source that
23 was not involved in compiling, preparing, or conducting the occupational health and
24 safety audit report;

25 (4) a document, communication, datum, report, or other information
26 collected, developed, or maintained in the course of a regularly conducted business
27 activity or regular practice other than an occupational health and safety audit;

28 (5) a document, communication, datum, report, or other information
29 that is independent of the occupational health and safety audit, whether prepared or
30 existing before, during, or after the audit; and

31 (6) a document, communication, datum, report, or other information,

1 including an agreement or order between a government agency and an owner or
2 operator, regarding a compliance plan or strategy.

3 **Sec. 09.25.465. Exception: disclosure required by court.** (a) A court or
4 administrative hearing officer with jurisdiction may require disclosure of confidential
5 self-evaluation and analysis contained in an audit report in a civil or administrative
6 proceeding if the court or administrative hearing officer determines, after an in camera
7 review consistent with the appropriate rules of procedure, that the

8 (1) privilege is asserted for a criminal or fraudulent purpose;

9 (2) information for which the privilege is claimed is evidence of
10 substantial injury, or the imminent or present threat of substantial injury, to one or
11 more persons at the site audited or to persons, property, or the environment offsite or
12 is evidence of the causes and circumstances leading to such injury or the imminent or
13 present threat of such injury;

14 (3) audit report shows evidence of noncompliance with an occupational
15 health and safety law and appropriate efforts to achieve compliance with the law were
16 not promptly initiated and pursued with reasonable diligence after discovery of
17 noncompliance;

18 (4) audit report was prepared for the purpose of avoiding disclosure of
19 information required for an investigative, administrative, or judicial proceeding that,
20 at the time of the report's preparation, was imminent or in progress; or

21 (5) privilege would result in a miscarriage of justice or the denial of
22 a fair trial to the party challenging the privilege.

23 (b) A party seeking an in camera review as provided under (a) of this section
24 shall provide to the court or administrative hearing officer a factual basis adequate to
25 support a good faith belief by a reasonable person that the documents or
26 communications for which disclosure is sought are likely to reveal evidence to
27 establish that an exception in (a) of this section applies.

28 (c) A party seeking disclosure of confidential self-evaluation and analysis
29 during an in camera review under this section has the burden of proving that an
30 exception in (a) of this section applies.

31 **Sec. 09.25.475. Voluntary disclosure; immunity.** (a) Except as provided by

1 this section, an owner or operator who makes a voluntary disclosure of a violation of
2 an occupational health and safety law, or of circumstances, conditions, or occurrences
3 that constitute or may constitute such a violation, is immune from an administrative
4 or civil penalty for the violation disclosed, for a violation based on the facts disclosed,
5 and for a violation discovered because of the disclosure that was unknown to the
6 owner or operator making the disclosure.

7 (b) Immunity is not available under this section if the violation resulted in, or
8 poses or posed an imminent or present threat of, substantial injury to one or more
9 persons at the site audited or to persons, property, or the environment offsite.

10 (c) A disclosure is voluntary for the purposes of this section only if

11 (1) the disclosure is made promptly after knowledge of the information
12 disclosed is obtained by the owner or operator;

13 (2) the disclosure is made in writing by certified mail to the department
14 or a municipality with enforcement jurisdiction with regard to the violation disclosed;

15 (3) an investigation of the violation was not initiated or the violation
16 was not independently detected by the department or a municipality with enforcement
17 jurisdiction before the disclosure was made using certified mail; under this paragraph,
18 the department or municipality has the burden of proving that an investigation of the
19 violation was initiated or the violation was detected before receipt of the certified mail;
20 and

21 (4) the disclosure arises out of a voluntary occupational health and
22 safety audit.

23 (d) To qualify for immunity under this section, the owner or operator making
24 the disclosure must

25 (1) promptly initiate appropriate efforts to achieve compliance and
26 remediation and pursue those efforts with due diligence;

27 (2) promptly initiate appropriate efforts to discontinue, abate, or
28 mitigate any conditions or activities causing injury or likely to cause imminent injury
29 to one or more persons at the site audited or to person, property, or the environment
30 offsite;

31 (3) correct the violation within 90 days or enter into a compliance

1 agreement with the department or the municipality, as appropriate, that provides for
2 completion of corrective and remedial measures within a reasonable time;

3 (4) implement appropriate measures designed to prevent the recurrence
4 of the violation; and

5 (5) cooperate with the department or municipality, as appropriate, in
6 connection with an investigation of the issues identified in the disclosure; the
7 department or municipality may request that the owner or operator allow the
8 department or municipality to review, under a written claim of confidentiality as
9 described in AS 09.25.455(b)(3), the part of the audit report that describes the
10 implementation plan or tracking system developed to correct past noncompliance,
11 improve current compliance, or prevent future noncompliance.

12 (e) A disclosure is not voluntary for purposes of this section if it is a
13 disclosure to the department or municipality expressly required by an occupational
14 health and safety law, a permit, a license, or an enforcement order or decree.

15 (f) Immunity under this section for violation of an occupational health and
16 safety law is available only for a violation that is discovered as a result of information
17 or documents first produced or obtained during the time period specified in the notice
18 required under AS 09.25.450(b).

19 (g) During the period between receipt of the audit notice required under
20 AS 09.25.450(b) and the specified end date of the audit, the department or
21 municipality may not initiate an inspection, monitoring, or other investigative activity
22 concerning the audited facility, operation, or property based on the receipt of a notice
23 under AS 09.25.450. The department or municipality has the burden of proving that
24 an inspection, monitoring, or other investigative activity concerning the audited facility,
25 operation, or property initiated after receiving a notice under AS 09.25.450 was not
26 initiated based on receiving the notice.

27 (h) A violation that has been voluntarily disclosed and to which immunity
28 applies under this section shall be identified by the department or municipality in its
29 compliance history report as having been voluntarily disclosed.

30 (i) This section may not be construed to prevent the department or
31 municipality from

- 1 (1) seeking injunctive relief; or
 2 (2) issuing an emergency order in a situation involving an imminent
 3 and substantial danger to public health or welfare or the environment.

4 **Sec. 09.25.480. Exceptions to immunity; mitigation.** (a) There is no
 5 immunity under AS 09.25.475 if a court or administrative hearing officer finds that

- 6 (1) the owner or operator claiming the immunity has
 7 (A) intentionally, knowingly, or recklessly committed or
 8 authorized the violation;
 9 (B) within the 36 months preceding the violation, committed,
 10 at the same facility or associated facilities located in the state, a pattern of
 11 violations that are the same as or closely related to the violation for which the
 12 immunity is sought; or
 13 (C) not attempted to bring the facility, operation, or property
 14 into compliance so as to constitute a pattern of disregard of occupational health
 15 and safety laws;

16 (2) the violation was authorized or committed intentionally, knowingly,
 17 or recklessly by a member of the owner's or operator's management and the owner's
 18 or operator's policies contributed materially to the occurrence of the violation; or

19 (3) the owner or operator, after taking into account the cost of
 20 completing corrective and remedial measures within a reasonable time and
 21 implementing appropriate measures to prevent recurrence of the violation, realized
 22 substantial economic savings in not complying with the requirement for which a
 23 violation is charged; the exception to immunity in this paragraph applies only to that
 24 portion of a penalty that reflects the economic savings of noncompliance after taking
 25 into account the cost of completing the corrective, remedial, and preventive measures
 26 necessary to qualify for immunity.

27 (b) There is no immunity under AS 09.25.475 from an administrative or civil
 28 penalty for the violation of an administrative or court order or for violation of a term
 29 or condition of an administrative or court order.

30 (c) An administrative or civil penalty that is imposed on an owner or operator
 31 for violation of an occupational health and safety law when the owner or operator has

1 made a voluntary disclosure under AS 09.25.475(a) but is not granted immunity
 2 because of (a) of this section may, to the extent appropriate and not prohibited by law,
 3 be mitigated by

4 (1) the good faith actions of the owner or operator in disclosing the
 5 violation;

6 (2) efforts by the owner or operator to conduct occupational health and
 7 safety audits and to complete any resulting implementation plan or tracking system for
 8 corrective and preventive action;

9 (3) remediation;

10 (4) cooperation with government officials investigating the disclosed
 11 violation;

12 (5) the nature of the violation; and

13 (6) other relevant considerations.

14 **Sec. 09.25.485. Relationship to other recognized privileges.** AS 09.25.450 -
 15 09.25.490 do not limit, waive, or abrogate the scope or nature of a statutory or
 16 common law privilege, including the work product doctrine, the attorney-client
 17 privilege, and any other privilege recognized by a court with appropriate authority in
 18 this state.

19 **Sec. 09.25.490. Definitions.** (a) In AS 09.25.450 - 09.25.490,

20 (1) "audit report" means a report that includes each document and
 21 communication, other than those set out in AS 09.25.460, produced from an
 22 occupational health and safety audit; general components that may be contained in a
 23 completed audit report include

24 (A) a report, prepared by an auditor, monitor, or similar person,
 25 including the scope of the audit, the dates the audit began and ended, the
 26 information gained in the audit, findings, conclusions, recommendations,
 27 exhibits, and appendices; the types of exhibits and appendices that may be
 28 contained in an audit report include supporting information that is collected or
 29 developed for the primary purpose and in the course of an occupational health
 30 and safety audit, including

31 (i) interviews with current or former employees;

- 1 (ii) field notes and records of observations;
2 (iii) findings, opinions, suggestions, conclusions,
3 guidance, notes, drafts, and memoranda;
4 (iv) legal analyses;
5 (v) drawings;
6 (vi) photographs;
7 (vii) laboratory analyses and other analytical data;
8 (viii) computer generated or electronically recorded
9 information;
10 (ix) maps, charts, graphs, and surveys; and
11 (x) other communications and documents associated with
12 an occupational health and safety audit;
- 13 (B) memoranda and documents analyzing all or a portion of the
14 materials described in (A) of this paragraph or discussing implementation
15 issues; and
- 16 (C) an implementation plan or tracking system to correct past
17 noncompliance, improve current compliance, or prevent future noncompliance;
- 18 (2) "confidential self-evaluation and analysis" means the part of an
19 audit report that consists of interviews with current or former employees conducted by
20 the auditor; field notes and records of observations made by the auditor; findings,
21 opinions, suggestions, conclusions, guidance, notes, drafts, and analyses performed by
22 the auditor; memoranda and documents that evaluate or analyze all or part of the
23 material contained in the audit report, including findings, conclusions, opinions,
24 recommendations made by the auditor, and an audit implementation plan or tracking
25 system to correct past noncompliance, improve current compliance, or prevent future
26 noncompliance with an occupational health and safety law; and that is
- 27 (A) a voluntary, confidential, critical, internal, and retrospective
28 review, self-evaluation, or analysis of conduct, practices, and occurrences and
29 their resulting consequences; and
- 30 (B) prepared and maintained with the expectation that it will be
31 kept confidential;

1 (3) "department" means the Department of Labor;

2 (4) "occupational health and safety audit" means a voluntary audit that
 3 an owner or operator of a regulated facility, operation, or property conducts or causes
 4 to be conducted, whether or not on a regular basis or in response to a particular event,
 5 that is specifically designed and undertaken to assess compliance with occupational
 6 health and safety laws or a permit, license, or approval issued under those laws,
 7 including an assessment that is part of the owner's or operator's compliance
 8 management system and that is a

9 (A) systematic, objective, and periodic review of the facility,
 10 operation, or property related to meeting the requirements of occupational
 11 health and safety laws or a permit, license, or approval issued under those laws;
 12 or

13 (B) documented, systematic procedure or practice that reflects
 14 the owner's or operator's due diligence in preventing, detecting, and correcting
 15 violations of occupational health and safety laws or a permit, license, or
 16 approval issued under those laws at the facility, operation, or property;

17 (5) "occupational health and safety law" means

18 (A) a federal or state occupational health and safety law
 19 implemented by the department; or

20 (B) a rule, regulation, or municipal ordinance adopted in
 21 conjunction with or to implement a law described by (A) of this paragraph;

22 (6) "operator" means a person or persons who direct, control, or
 23 supervise all or part of a regulated facility, operation, or property;

24 (7) "owner" means a person or persons with a proprietary or possessory
 25 interest in a regulated facility, operation, or property;

26 (8) "penalty" means an administrative or civil sanction imposed by the
 27 state or a municipality to punish a person for a violation of a statute, rule, regulation,
 28 or ordinance; the term does not include a technical or remedial provision ordered by
 29 a government agency;

30 (9) "regulated facility, operation, or property" means a facility,
 31 operation, or property that is regulated under an occupational health and safety law.

1 (b) To fully implement the privilege and immunity established under
2 AS 09.25.450 - 09.25.490, the term "occupational health and safety law" shall be
3 construed broadly.

4 (c) For purposes of this chapter, unless the context requires otherwise, a person
5 acts

6 (1) "intentionally" with respect to a result described by a provision of
7 law defining a violation when the person's conscious objective is to cause that result;
8 when intentionally causing a particular result is an element of a violation, that intent
9 need not be the person's only objective;

10 (2) "knowingly" with respect to conduct or to a circumstance described
11 by a provision of law defining a violation when the person is aware that the conduct
12 is of that nature or that the circumstance exists; when knowledge of the existence of
13 a particular fact is an element of a violation, that knowledge is established if a person
14 is aware of a substantial probability of its existence, unless the person actually believes
15 it does not exist; a person who is unaware of conduct or a circumstance of which the
16 person would have been aware had that person not been intoxicated acts knowingly
17 with respect to that conduct or circumstance;

18 (3) "recklessly" with respect to a result or to a circumstance described
19 by a provision of law defining a violation when the person is aware of and consciously
20 disregards a substantial and unjustifiable risk that the result will occur or that the
21 circumstance exists; the risk must be of such a nature and degree that disregard of it
22 constitutes a gross deviation from the standard of conduct that a reasonable person
23 would observe in the situation; a person who is unaware of a risk of which the person
24 would have been aware had that person not been intoxicated acts recklessly with
25 respect to the risk.

26 * **Sec. 3. APPLICABILITY.** The privilege and immunity created by AS 09.25.450 -
27 09.25.490, added by sec. 2 of this Act, apply to occupational health and safety audits that are
28 conducted on or after the effective date of this Act.