

**North Carolina Department of Labor
Division of Occupational Safety and Health**

Raleigh, North Carolina

Field Information System

Operational Procedure Notice 101A

Subject: Third Party Litigation

- A. Purpose and Scope. This OPN communicates guidelines to be followed by all OSH Division personnel who are asked or subpoenaed to participate in a lawsuit to which the Department of Labor is not a party. These suits are collectively known as third party litigation and may involve workers' compensation claims or civil actions for damages. This OPN replaces OPN 101.
- B. Discussion. In accordance with federal law, federal OSHA personnel are not required to participate in third party lawsuits. North Carolina law does not afford OSH Division personnel the same protection. Since our program is required to be "as effective as" the federal program it is important for the Division to carefully manage participation in these suits to minimize the amount of time spent from primary duties, to avoid the appearance of "taking sides," and to protect our ability to prosecute our enforcement actions.

In addition, there is case file information that cannot be revealed pursuant to statutory protection. NC General Statute 95-136 prohibits the release of witness and complainant names and identifying statements unless they are used for enforcement purposes by the North Carolina Department of Labor or by permission of the Commissioner of Labor for other public purposes such as criminal investigations. Medical records, and any information therein, which have been released to OSH and are contained in case files may not be released without permission of the patient, his/her executor or next of kin pursuant to NCGS 158-53. Trade secrets and confidential information are protected under NCGS 15 132-1.

It is the responsibility of OSH personnel who participate in third party litigation to be completely unbiased. In order to minimize the amount of time OSH Division personnel spend on third party litigation and to provide appropriate neutrality, all substantive conversations with attorneys must occur following the filing of a lawsuit and when both parties are represented. Telephone conference calls can be arranged to minimize the amount of time involved. These conversations may involve the participation of the Attorney General's office.

C. Action. When initially contacted by an attorney involved in a third party suit:

1. Indicate that you are represented by counsel and may not discuss the case except pursuant to this written policy.
2. Fill out the Third Party Litigation Contact form attached to this OPN.
3. Send the form to the Assistant Director, so that a letter explaining the Division's policies regarding participation in third party suits can be sent to the counsel. A copy of the letter is attached and you and your supervisor will be copied when the letter is sent.
4. Keep a log of all time spent on any third party litigation in which you are asked to participate, testify, etc. Assessment of the time spent working on third party litigation should include preparation, conversations, travel time, waiting time, in addition to any actual court or deposition appearances, and any actual expenses incurred including mileage, per diem, copying, etc. Account for all such time on the OSHA 31S under 9 17 Optional Information by designating it S-13 Third Party Litigation.
5. If the attorneys want to talk with you pursuant to this policy, you may discuss a convenient date and time for the discussion to avoid potential conflicts with your schedule. Let the Assistant Director know if you are scheduling a conference or deposition with an attorney.
6. Any documents related to the case shall only be provided by the Statistical Section of the MIE Bureau.
7. Deliver or fax a copy of any subpoena received for a third party suit to the Assistant Director's office. If the subpoena is overly broad or you have been improperly subpoenaed, we may ask the Attorney General's office to narrow the subpoena or quash it. The Attorney General's office may need to represent you in any depositions or court appearances; therefore, it is critical that you keep the Assistant Director informed.

If attorneys object or wish to discuss this policy further, please refer them to the Assistant Director or the Director of the Division of Occupational Safety and Health.

Due to your workload, it is not mandatory for you to spend extensive time reviewing the case file to refresh your memory. It is permissible to testify in court or attest in a deposition or affidavit that you either cannot recall something from a file or do not know the answer to a question.

If at any time you feel that any attorney or a representative involved in a third party matter is pressuring or badgering you, please refer that person to the Assistant Director or the Director of the Division of Occupational Safety and Health.

March 11, 1997
Signed on Original

Dear,

I understand that you recently contacted the Occupational Safety and Health (OSH) Division regarding a civil law suit. I am sending you this letter to explain our policies and procedures regarding the involvement of our employees in these suits.

The primary mission of the North Carolina OSH Division is the enforcement of the North Carolina Occupational Safety and Health Act. This act was passed by the North Carolina General Assembly to enable North Carolina to develop a "state plan" under the federal Occupational Safety and Health Act of 1970. All of our activities, including numbers of inspections, lapse time from inspection to issuance of citations, etc., are regularly monitored by the federal Department of Labor to ensure that our program is "as effective as" the federal program. Federal OSHA employees are not subject to subpoena and do not participate as witnesses in third party actions.

Over the last several years, particularly since the Woodson vs. Rowland decision, we have increasingly been drawn into civil litigation not involving the Department of Labor. Talking to lawyers, reviewing files, testifying, etc. has taken time away from our primary mission of enforcing the OSH Act. In addition, we are concerned that our inspectors may be perceived as 'taking sides' by testifying for one of the parties. For these reasons, we have developed some policies and procedures that seek to manage the amount of time our personnel devote to third party litigation and provide all parties with equal access to their testimony. These policies are summarized below:

- OSH personnel may only talk about inspections which are the subject of third party litigation if a lawsuit has been filed and both parties are represented during the discussion. A conference call or meeting at one of our offices can be arranged. In most cases, a representative of the Attorney General's office will participate. This allows all parties equal access to the information and eliminates "clarification calls" regarding citations and evidence.
- OSH personnel will submit to depositions and testify in court when subpoenaed if their information is germane, but subpoenaing parties are requested to work with the personnel on the best times and locations for

a deposition and to limit appearances in court as much as possible to actual time on the stand.

- OSH personnel are represented by the North Carolina Attorney General's office and may be represented at depositions or in court. Contact with OSH personnel regarding civil litigation should be through counsel unless it is to set up a convenient time and location for a deposition, conference call or meeting.
- OSH inspectors are not the custodians of OSH files and can not bring them to either depositions or trials. Certified copies of the files can be obtained by calling Anne Weaver at (919) 662-4629. There is a charge for copies of files, photographs, or videos. Information which is prohibited by law from being released will be redacted from the file. It is not necessary to request an entire file.
- GS 95-136(e) and e(1) govern when files and the names of witnesses or complainants can be released to third parties. OSH personnel can not provide information either through a deposition or in court that the statute prohibits from being released.
- Personnel laws and policies prohibit us from providing the forwarding addresses of any personnel that are no longer with the Division.

I know that these policies may seem restrictive, but they became necessary when some of our employees began spending a significant amount of time on cases that we had already closed, thereby limiting their ability to perform inspections, provide consultations or provide technical assistance. If you have any questions regarding this letter, please feel free to call me or our lead counsel in the Attorney General's office, H. Alan Pell, Assistant Attorney General, at (919) 733-4721.

Sincerely,

Angela S. Waldorf

cc: H. Alan Pell, Assistant Attorney General
Affected employee
Affected employee's supervisor

THIRD PARTY LITIGATION CONTACT

Please fill out this form and send to Angela Waldorf whenever you are contacted by an attorney regarding a private civil lawsuit or third party action

(a lawsuit where the Department of Labor is not a party, but where employees may be called as witnesses). Upon receipt of this form, a letter will be sent to the inquiring attorney regarding our policies and procedures for participation. Please refer to OPN 101A for additional information.

OSH Division Employee's Name

OSH Division Employee's Telephone Number

Today's Date

Date of Contact

Name of Person Making Contact

Mailing Address

Phone Number

Fax Number

Who is the Person Representing?

Case File Name

Case File Number

Is the Case Closed?

How was the Case Closed?

Paid _____

Settled _____

Contested Decision _____

No Citations Issued _____

Additional Information Which May be Relevant:

If you have any questions regarding this form or the Division's policies and procedures regarding third party actions, please contact either Angela Waldorf (919) 662-4285 or your Bureau Chief.