

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

Raleigh, North Carolina

Field Information System

Operational Procedure Notice 101E

Subject: Third Party Litigation

A. Purpose and Scope.

This Operational Procedure Notice (OPN) communicates guidelines to be followed by North Carolina Department of Labor (NCDOL) Occupational Safety and Health (OSH) Division personnel who are contacted by an attorney and/or representative from an attorney's office directly or are subpoenaed to participate in a lawsuit to which NCDOL is not a party. These suits are collectively known as "third party litigation," and may involve workers' compensation claims or civil actions for damages.

B. Discussion.

In accordance with federal law, Occupational Safety and Health Administration (OSHA) personnel are not required to participate in third party lawsuits. North Carolina law does not afford OSH Division personnel the same protection. Since the North Carolina program is required to be "as effective as" the federal program, it is important for the department to carefully manage participation in these suits to minimize the amount of time spent away from primary duties, to avoid the appearance of "taking sides," and to protect the ability to prosecute the OSH Division's enforcement actions.

OSH Division case files contain information that cannot be revealed pursuant to North Carolina General Statute (NCGS) 95-136(e1) - Inspections. This statute prohibits the release of witness and complainant names and identifying information unless the information is used:

- i. For enforcement purposes by the department,
- ii. By permission of the commissioner of labor for other public purposes, such as criminal investigations; or,
- iii. By signed release from the witness or complainant.

In addition, North Carolina Administrative Code, 13 NCAC 07A. 0303 – Disclosure, sets forth what information in an OSH case file that may or may not be disclosed, and when it may be disclosed. Medical records, and any information contained therein, which have been released to the department 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 8-53 – Communications Between Physician and Patient. Trade secrets and confidential information are protected under NCGS 95-152 – Confidentiality of Trade Secrets and NCGS 132-1.2 – Confidential Information and may not be released.

It is the responsibility of OSH Division 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:

- i. Following the filing of a lawsuit, and
- ii. Through use of the deposition process when both parties to the suit are appropriately noticed and allowed to be present.

C. **Action.**

Legal Affairs Division (LAD) must be notified IMMEDIATELY upon receipt of a subpoena. The following steps must be taken by OSH Division personnel when subpoenaed or contacted by an attorney/representative involved in a third party suit:

- i. Indicate that OSH Division personnel are represented by counsel and may not discuss the case.
- ii. Notify the attorney/representative that someone from LAD will contact them at a later date.
- iii. Obtain contact information and case identification information necessary to fill out the [Third Party Litigation Contact Form](#) and fill out the form.
- iv. Immediately send the Third Party Litigation Contact Form to LAD via email, fax or hand delivery so that a letter explaining the division's policies regarding participation in third party suits can be sent to the attorney/representative. Affected personnel and their supervisor will receive a copy of the letter when it is sent.
- v. Keep a log of all time spent on any third party litigation including time spent participating, testifying, 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 in field 46 on the weekly program activity form in OSHA Express.
- vi. If the attorney/representative wants to talk with OSH Division personnel pursuant to this policy, they shall be advised that they should schedule a deposition through LAD. This is so LAD can ensure that all interested parties are represented at this deposition, so that the time away from primary duties is minimized, and if needed, that affected personnel are represented by counsel from the N.C. Attorney General's (AG's) Office – Labor Section.
- vii. If the attorney/representative requests copies of the OSH inspection file (a written request is required, such as a letter, subpoena, fax, or email), this must be indicated on the Third Party Litigation Contact Form. If the written request is in the form of a letter, fax or email, the request shall be immediately forwarded to the Planning Statistics and Information Management (PSIM) Bureau and this action shall be noted on the Third Party Litigation Contact Form. If the written request is in the form of a subpoena, it should accompany the Third Party Litigation Contact Form when sent to LAD. Once LAD receives this Third Party Litigation Contact Form and the related subpoena from the third party for OSH Division file documents, LAD will review the subpoena to ensure it is for

releasable documents. If so, it will forward the records request to PSIM. If the subpoena is for documents LAD believes to be unreleasable, contact will be made with the AG's Office – Labor Section in order for appropriate action to be taken. PSIM is the only entity that will disclose OSH Division files to outside parties.

If a written request in the form of a subpoena is received by PSIM, they will communicate with LAD, who will in turn contact the AG's Office – Labor Section, for instructions on forwarding the necessary documents to the appropriate party in response to the subpoena. Please note that only the written requests in the form of a subpoena associated with a Third Party Litigation Contact Form will be forwarded to LAD. General disclosure requests will continue to be handled by and forwarded directly to PSIM.

- viii. A copy of any subpoena received for a third party suit must be IMMEDIATELY delivered to LAD by hand, email, or fax. If the subpoena is overly-broad, or personnel have been improperly subpoenaed, LAD may ask the AG's Office – Labor Section to narrow the subpoena or quash it. It is important to note that there are very stringent civil and superior court deadlines for narrowing or quashing a subpoena. Failure of OSH Division personnel to immediately forward subpoenas to LAD has the potential to cause adverse results that could force NCDOL to disclose an inspection file that would otherwise be unreleasable.

The AG's Office – Labor Section may need to represent personnel in any depositions or court appearances; therefore, it is critical that personnel keep LAD informed. If an attorney/representative objects, becomes argumentative, is difficult to obtain the required information from, or wishes to discuss this policy further, they shall be referred to LAD at 919-707-7713.

Due to workload, it is not mandatory for personnel to spend extensive time reviewing the case file to refresh their memory. It is permissible to testify in court or attest in a deposition or affidavit that they either cannot recall something from a file or do not know the answer to a question. OSH Division personnel will never take a copy of an inspection file with them to a deposition or court appearance.

If at any time personnel feel that any attorney or a representative involved in a third party matter is pressuring or badgering, that person will be referred to LAD at 919-707-7713.

D. **Expiration.**

OPN 101D is canceled. This OPN is effective on the date of signature and will remain in effect until revised or canceled by the director.

Signed on Original
J. Edgar Geddie, Ph.D.
Health Standards Officer

Signed on Original
Kevin Beauregard
Director

11/4/2019
Date of Signature