

SENATE FILE 2206
BY COMMITTEE ON BUSINESS
AND LABOR RELATIONS

(SUCCESSOR TO SSB 3076)

Passed Senate, Date _____ Passed House, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

1 An Act relating to occupational safety and health audits,
2 including privilege and immunity protections, and providing a
3 penalty.

4 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

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SF 2206
BUSINESS & LABOR

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SUBCHAPTER I

Section 1. NEW SECTION. 88.0A TITLE.

This chapter shall be known and may be cited as the "Occupational Safety and Health Inspections and Audit Act".

SUBCHAPTER III

SAFETY AUDIT PRIVILEGE AND IMMUNITY

Sec. 2. NEW SECTION. 88.31 DEFINITIONS.

As used in this subchapter, unless the context otherwise requires:

1. "Commissioner" means the same as defined in section 88.3.
2. "Employee" means the same as defined in section 88.3.
3. "Employer" means the same as defined in section 88.3.
4. "Inquiring party" means any party appearing before a court or a presiding officer in an administrative proceeding seeking to review or obtain an in camera review of a safety audit report.
5. "Privilege" means the protections provided in regard to a safety audit report as provided in this subchapter.
6. "Safety audit" means a voluntary evaluation of any factory, plant, establishment, construction site, or other area, workplace, or environment where work is performed by an employee of an employer, of an activity or operation at the business when the activity or operation is regulated under state or federal occupational safety and health laws, rules, or variance conditions, conducted by an employer, an employee of the employer, or an independent contractor retained by the employer, that is designed to identify historical or current noncompliance with state and federal occupational safety and health standards, laws, rules, or variance conditions, discover hazards, and remedy noncompliance or improve compliance with occupational safety and health laws.
7. "Safety audit report" means a document or set of documents generated and developed for the primary purpose and in the course of or as a result of conducting a safety audit.

1 A "safety audit report" includes supporting information that
2 may include, but is not limited to, the report document
3 itself, observations, samples, analytical results, exhibits,
4 findings, opinions, suggestions, recommendations, conclusions,
5 drafts, memoranda, drawings, photographs, computer-generated
6 or electronically recorded information, maps, charts, graphs,
7 surveys, implementation plans, interviews, discussions,
8 correspondence, and communications related to the safety
9 audit. A "safety audit report" may include any of the
10 following components:

11 a. An executive summary prepared by the person conducting
12 the safety audit, which may include the scope of the safety
13 audit, the information gained in the safety audit,
14 conclusions, recommendations, exhibits, and appendices.

15 b. Memoranda and documents analyzing portions or all of
16 the report and discussing implementation issues.

17 c. An implementation plan which addresses correcting past
18 noncompliance, improving current compliance, or preventing
19 future noncompliance.

20 d. Periodic updates documenting progress in completing the
21 implementation plan.

22 Sec. 3. NEW SECTION. 88.32 PRIVILEGE.

23 1. Material included in a safety audit report generated
24 during a safety audit conducted on or after July 1, 2004, is
25 privileged and confidential and is not discoverable or
26 admissible as evidence in any civil or administrative
27 proceeding, except as otherwise provided in this subchapter.
28 The safety audit report shall be labeled "SAFETY AUDIT REPORT:
29 PRIVILEGED DOCUMENT". Failure to label each document within
30 the report does not constitute a waiver of the safety audit
31 privilege or create a presumption that the privilege does or
32 does not apply.

33 2. A person shall not be compelled to testify in regard to
34 or produce a document included in a safety audit report in any
35 of the following circumstances:

1 a. If the testimony or document discloses any component
2 listed in section 88.31, subsection 7, that was made as part
3 of the preparation of a safety audit report and that is
4 addressed in a privileged part of a safety audit report.

5 b. If the person is any of the following:

6 (1) A person who conducted any portion of the safety audit
7 but did not personally observe the physical events of a safety
8 violation.

9 (2) A person to whom the results of the safety audit
10 report are disclosed under section 88.33, subsection 2.

11 (3) A custodian of the safety audit report.

12 3. A person who conducts or participates in the
13 preparation of a safety audit report and who has observed
14 physical events of a safety violation may testify about those
15 events but shall not be compelled to testify about or produce
16 documents related to the preparation of or any privileged part
17 of a safety audit or any component listed in section 88.31,
18 subsection 7.

19 4. An employee of a state agency or other governmental
20 employee shall not request, review, or otherwise use a safety
21 audit report during an agency inspection of a regulated
22 facility or operation, or an activity of a regulated facility
23 or operation.

24 5. A party asserting the privilege under this section has
25 the burden of establishing the applicability of the privilege.

26 6. The privilege provided in this section is in addition
27 to the confidentiality requirements applicable to educational
28 and informational programs under section 88.16.

29 Sec. 4. NEW SECTION. 88.33 WAIVER OF PRIVILEGE --
30 DISCLOSURE.

31 1. The privilege described in section 88.32 shall not
32 apply to the extent that the privilege is expressly waived in
33 writing by the employer who prepared the safety audit report
34 or caused the report to be prepared.

35 2. Disclosure of a safety audit report or any other

1 information generated by a safety audit does not waive the
2 privilege established in section 88.32 if the disclosure meets
3 any of the following criteria:

4 a. The disclosure is made to address or correct a matter
5 raised by the safety audit and the disclosure is made to any
6 of the following:

7 (1) A person employed by the employer, including temporary
8 and contract employees.

9 (2) A legal representative of the employer.

10 (3) An officer or director of the regulated business or a
11 partner of the employer.

12 (4) An independent contractor retained by the employer.

13 b. The disclosure is made under the terms of a
14 confidentiality agreement between any person and the audited
15 employer.

16 3. A party to a confidentiality agreement described in
17 subsection 2, paragraph "b", who violates that agreement is
18 liable for damages caused by the disclosure and for any other
19 penalties stipulated in the confidentiality agreement.

20 4. Information that is disclosed under subsection 2,
21 paragraph "b", is confidential and is not subject to
22 disclosure under chapter 22. A governmental entity,
23 governmental employee, or governmental official who discloses
24 information in violation of this subsection is subject to the
25 penalty provided in section 22.6.

26 5. The protections provided by federal or state law shall
27 be afforded to individuals who disclose information to law
28 enforcement authorities.

29 6. The provisions of this chapter shall not abrogate the
30 protections provided by federal and state law regarding
31 confidentiality and trade secrets.

32 Sec. 5. NEW SECTION. 88.34 REQUIRED DISCLOSURE.

33 1. A court or a presiding officer in an administrative
34 hearing may require disclosure of a portion of a safety audit
35 report in a civil or administrative proceeding if the court or

1 presiding officer affirmatively determines, after an in camera
2 review, that any of the following exists:

3 a. The privilege is asserted for a fraudulent purpose.

4 b. The portion of the safety audit report is not subject
5 to the privilege under section 88.35.

6 c. The portion of the safety audit report shows evidence
7 of noncompliance with a state or federal occupational safety
8 and health standard or other law, rule, or variance condition
9 and appropriate efforts to achieve compliance with the
10 standard or other law, rule, or variance condition were not
11 promptly initiated and pursued with reasonable diligence after
12 discovery of noncompliance.

13 d. The portion of the safety audit report shows clear and
14 convincing evidence of substantial actual personal injury,
15 which information is not otherwise available.

16 e. The portion of the safety audit report shows a clear
17 and present danger to the public health or safety.

18 2. A party seeking disclosure under this section has the
19 burden of proving that subsection 1 applies.

20 3. A decision of a presiding officer in an administrative
21 hearing under subsection 1 may be directly appealed to the
22 district court without disclosure of the safety audit report
23 to any person unless so ordered by the court.

24 4. A determination of a court under this section is
25 subject to interlocutory appeal to an appropriate appellate
26 court.

27 5. If a court finds that a person claiming privilege under
28 this subchapter intentionally claimed the privilege for
29 material not privileged as provided in section 88.35, the
30 person is guilty of a serious misdemeanor punishable by a fine
31 not to exceed one thousand dollars.

32 6. Privilege provided in this subchapter does not apply if
33 the employer has been found in a civil or administrative
34 proceeding to have committed serious violations in this state
35 that constitute a pattern of continuous or repeated violations

1 of state or federal occupational safety and health laws,
2 administrative rules, or variance conditions, that were due to
3 separate and distinct events giving rise to the violations
4 within the three-year period prior to the date of disclosure.

5 Sec. 6. NEW SECTION. 88.35 MATERIALS NOT PRIVILEGED.

6 1. The privilege described in this subchapter does not
7 apply to any of the following:

8 a. A document, communication, datum, report, or other
9 information the commissioner is required to collect, develop,
10 retain, or report under a state or federal occupational safety
11 and health law, rule, or variance condition.

12 b. Information obtained by observation, sampling, or
13 monitoring by the commissioner or the commissioner's
14 authorized designee.

15 c. Information obtained from a source not involved in the
16 preparation of the safety audit report.

17 2. This section does not limit the right of a person to
18 agree to conduct a safety audit and disclose a safety audit
19 report.

20 Sec. 7. NEW SECTION. 88.36 CRIMINAL PROCEEDINGS --
21 REVIEW OF PRIVILEGED DOCUMENTS.

22 1. The privileges created in this subchapter shall not
23 apply to criminal investigations or proceedings. A safety
24 audit report, supporting documents, and testimony relating
25 thereto may be obtained by a prosecutor's subpoena pursuant to
26 the rules of criminal procedure. If a safety audit report is
27 obtained, reviewed, or used in a criminal investigation or
28 proceeding, the administrative and civil evidentiary privilege
29 established in this subchapter is not waived or made
30 inapplicable for any purpose other than for the criminal
31 investigation or proceeding.

32 2. Notwithstanding the privilege established in this
33 subchapter, the commissioner may review information in a
34 safety audit report, but such review does not waive or make
35 the administrative and civil evidentiary privilege

1 inapplicable to the report. The commissioner shall not adopt
2 a rule or impose a condition that circumvents the purpose of
3 this subchapter.

4 3. If information is required to be made available to the
5 public by operation of a specific state or federal law, rule,
6 or variance condition, the commissioner shall notify the
7 person claiming the privilege of the potential for public
8 disclosure prior to obtaining such information under
9 subsection 1 or 2.

10 4. If privileged information is disclosed under subsection
11 2 or 3, on the motion of a party, a court or the presiding
12 officer in an administrative hearing shall suppress evidence
13 offered in any civil or administrative proceeding that arises
14 or is derived from review, disclosure, or use of information
15 obtained under this section if the review, disclosure, or use
16 is not authorized under section 88.35. A party having
17 received information under subsection 2 or 3 has the burden of
18 proving that the evidence offered did not arise and was not
19 derived from the review of privileged information.

20 Sec. 8. NEW SECTION. 88.37 VOLUNTARY DISCLOSURE OF
21 SAFETY VIOLATION -- IMMUNITY.

22 1. An employer is eligible for immunity under this section
23 from the time the commissioner receives official notification
24 from the employer of a scheduled safety audit. Once
25 notification is given to the commissioner, a safety audit
26 shall be completed within a reasonable time not to exceed six
27 months unless an extension is approved by the commissioner
28 based on reasonable grounds. An employer is immune from any
29 administrative or civil penalty associated with the
30 information disclosed if the employer makes a prompt voluntary
31 disclosure to the commissioner regarding an occupational
32 safety and health violation that is discovered through the
33 safety audit. The employer's actions in disclosing
34 information create a rebuttable presumption that the
35 disclosure is voluntary by meeting the criteria provided in

1 subsection 2 at the time of disclosure. To rebut the
2 presumption that a disclosure is voluntary, the commissioner
3 or other party has the burden of proving that the disclosure
4 was not voluntary. Immunity is not provided if the violations
5 of state or federal occupational safety and health law, rule,
6 or variance condition are intentional or if the violations of
7 state or federal law, rule, or variance condition resulted in
8 substantial actual injury or imminent and substantial risk of
9 injury to an employee.

10 2. The disclosure of information is voluntary if all of
11 the following circumstances exist:

12 a. The disclosure arises out of a safety audit and relates
13 to privileged information as provided in section 88.32.

14 b. The person making the disclosure uses reasonable
15 efforts to pursue compliance and to correct the noncompliance
16 within a reasonable period of time after completion of the
17 safety audit in accordance with a remediation schedule
18 submitted to and approved by the commissioner. If evidence
19 shows that the noncompliance is due to the failure to obtain a
20 variance, reasonable effort may be demonstrated by the
21 submittal of a complete variance application within a
22 reasonable time. Disclosure of information required to be
23 reported by state or federal law, rule, or variance condition
24 is not considered to be voluntary disclosure and the immunity
25 provisions in this section are not applicable.

26 c. Occupational safety and health violations are
27 identified in a safety audit report and disclosed to the
28 commissioner before there is notice of a citizen suit or a
29 legal complaint by a third party.

30 d. Occupational safety and health violations are
31 identified in a safety audit report and disclosed to the
32 commissioner before the violations are reported by any person
33 not involved in conducting the safety audit or to whom the
34 audit report was disclosed.

35 3. If an employer has not provided the commissioner with

1 notification of a scheduled safety audit prior to performing
2 the audit, a disclosure of information is voluntary if the
3 occupational safety and health violations are identified in a
4 safety audit report and disclosed by certified mail to the
5 commissioner prior to the commissioner's commencement of an
6 investigation.

7 4. If a person is required to make a disclosure relating
8 to a specific issue under a specific variance condition or
9 under an order issued by the commissioner, the disclosure is
10 not voluntary with respect to that issue.

11 5. Except as provided in this section, this section does
12 not impair the authority of the commissioner to require a
13 technical or remedial action or to order injunctive relief.

14 6. Upon application to the commissioner, the time period
15 within which the disclosed violation is corrected under
16 subsection 2 may be extended if it is not practical to correct
17 the noncompliance within the reasonable period of time
18 initially approved by the commissioner. The commissioner
19 shall not unreasonably withhold granting an extension. If the
20 commissioner denies an extension, the commissioner shall
21 provide the requesting party with a written explanation of the
22 reasons for the denial. A request for de novo review of the
23 commissioner's decision may be made to the appropriate court.

24 7. Immunity provided under this section from
25 administrative or civil penalties does not apply under any of
26 the following circumstances:

27 a. If an employer has been found in a civil or
28 administrative proceeding to have committed serious violations
29 in this state that constitute a pattern of continuous or
30 repeated violations of occupational safety and health laws,
31 administrative rules, and variance conditions and that were
32 due to separate and distinct events giving rise to the
33 violations within the three-year period prior to the date of
34 disclosure.

35 b. If a violation of an occupational safety and health

1 law, administrative rule, variance condition, settlement
2 agreement, or order on consent, final order, or judicial order
3 results in a substantial economic benefit which gives the
4 violator a clear advantage over its business competitors.

5 8. In cases where the conditions of a voluntary disclosure
6 are not met but a good faith effort was made to voluntarily
7 disclose and resolve a violation detected in a safety audit,
8 the state regulatory authorities shall consider the nature and
9 extent of any good faith effort in deciding the appropriate
10 enforcement response and shall consider reducing any
11 administrative or civil penalties based on mitigating factors
12 showing that one or more of the conditions for voluntary
13 disclosure have been met.

14 9. The immunity provided by this section does not abrogate
15 the responsibility of a person as provided by applicable law
16 to report a violation, correct the violation, conduct
17 necessary remediation, or respond to third-party actions.
18 This chapter shall not be construed to confer immunity from
19 liability in any private civil action.

20 10. Information required by rule to be submitted to the
21 commissioner as part of a disclosure made pursuant to this
22 section is not privileged information.

23 Sec. 9. NEW SECTION. 88.38 OTHER PRIVILEGES NOT
24 AFFECTED.

25 This subchapter does not limit, waive, or abrogate the
26 scope or nature of any statutory or common-law privilege,
27 including the work product doctrine and the attorney-client
28 privilege.

29 Sec. 10. NEW SECTION. 88.39 SAFETY AUDITOR TRAINING
30 PROGRAM.

31 A training program for, and standards for certification of,
32 safety auditors shall be developed and administered by the
33 commissioner. The program shall provide training on the
34 proper conduct of a safety audit; local, state, and federal
35 environmental ordinances, rules, and laws that apply to

1 businesses in this state; and the safety audit laws in this
2 state. The program shall be made available to small and large
3 business owners and operators, consulting engineers,
4 regulatory personnel, and citizens through the community
5 college system. A fee may be assessed for participation in
6 the program. Upon completion of the training program, program
7 participants may elect to be tested by the commissioner for
8 certification as a safety auditor for the purposes of this
9 subchapter.

10 Sec. 11. NEW SECTION. 88.40 SUMMARY.

11 On or before December 1 of each year, the commissioner
12 shall make available a summary of the number of safety audit
13 notices received, the violations, and the remediation status
14 of the violations reported pursuant to this subchapter during
15 the preceding fiscal year.

16 Sec. 12. NEW SECTION. 88.41 RULEMAKING.

17 The commissioner shall adopt rules pursuant to chapter 17A
18 necessary to administer this subchapter.

19 Sec. 13. NEW SECTION. 88.42 COSTS.

20 The necessary costs incurred by the commissioner under this
21 subchapter shall be funded from appropriations made to the
22 commissioner from the general fund of the state.

23 Sec. 14. CODIFICATION. The Code editor shall divide the
24 provisions of chapter 88, Code 2003 and Code Supplement 2003,
25 into subchapters consistent with this Act in Code 2005, and is
26 directed to change references from chapter to subchapter as
27 necessary.

28 EXPLANATION

29 This bill relates to the occupational safety and health
30 provisions of the Code by establishing provisions granting
31 privilege and immunity protections to an employer that
32 conducts a safety audit that meets certain criteria.

33 The bill provides that a safety audit is a voluntary
34 evaluation of a business or of an activity or operation at the
35 business when the activity or operation is regulated under

1 state or federal occupational safety and health laws, rules,
2 or variance conditions. The audit is conducted by an
3 employer, an employee, or an independent contractor, and is
4 designed to identify historical or current noncompliance with
5 occupational safety and health laws, rules, ordinances, or
6 variance conditions; discover hazards; and remedy
7 noncompliance or improve compliance with occupational safety
8 and health laws. Once notification is given to the
9 commissioner, the audit must be completed within a reasonable
10 time not to exceed six months.

11 Material included in a safety audit report and generated
12 during the audit is privileged and confidential and is not
13 discoverable or admissible as evidence in any civil or
14 administrative proceeding. The bill provides circumstances
15 under which certain persons shall not be compelled to testify
16 about or produce a document related to a safety audit. The
17 privilege may be waived and circumstances are provided under
18 which information is not privileged.

19 Disclosure of a portion of an audit may be required by a
20 court or presiding officer in a civil or administrative
21 proceeding. The bill provides an appeal process. If a court
22 finds that a person claiming privilege intentionally claimed
23 the privilege for material that is not entitled to be
24 privileged, the person is guilty of a serious misdemeanor
25 punishable by a fine not to exceed \$1,000. Privilege does not
26 apply if an employer has been found in a civil or
27 administrative proceeding to have committed serious violations
28 in this state that constitute a pattern of continuous or
29 repeated violations.

30 Privilege for safety audits does not apply to criminal
31 proceedings; however, if an audit report is obtained,
32 reviewed, or used in a criminal investigation or proceeding,
33 or reviewed by the commissioner, the administrative and civil
34 evidentiary privilege is not waived or made inapplicable.

35 The bill provides that an employer is eligible for immunity

1 from the time the commissioner receives official notification
2 from the employer of a scheduled safety audit. An employer is
3 immune from any administrative or civil penalty associated
4 with the information disclosed if the employer makes a prompt
5 voluntary disclosure to the commissioner regarding the
6 violation discovered. The bill provides for the circumstances
7 under which disclosure is considered voluntary, and provides
8 that immunity does not apply if the violations are intentional
9 or if the violations resulted in substantial actual injury or
10 imminent and substantial risk of injury to an employee.
11 Immunity also does not apply if an employer is found to have
12 committed serious violations that constitute a pattern of
13 continuous or repeated violations or if a violation results in
14 a substantial economic benefit which gives the violator a
15 clear advantage over its business competitors.

16 The bill requires the commissioner to develop and
17 administer a training program and standards for certification
18 of safety auditors, and to annually make available a summary
19 of the number of safety audit notices received, the
20 violations, and the remediation status of the violations
21 reported during the preceding fiscal year.

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**Fiscal Services Division
Legislative Services Agency
Fiscal Note**

SF 2206 - Safety Audit Privilege & Immunity (LSB 5325 SV)
Analyst: Russell Trimble (Phone: (515) 281-4613) (russ.trimble@legis.state.ia.us)
Fiscal Note Version - New

Description

Senate File 2206 creates a new chapter in the Code of Iowa concerning occupational safety and health inspections and audits. The proposed legislation allows an employer, employee, or independent contractor to conduct a safety audit. The Bill specifies the safety audit is voluntary and that materials contained in the audit are privileged and confidential and not discoverable or admissible as evidence in any civil or administrative proceeding. Senate File 2206 specifies circumstances where materials are not to be considered privileged. If a court finds that a person claiming privilege intentionally claimed the privilege for material that is not entitled to be privileged, the person is guilty of a serious misdemeanor punishable by a fine of up to \$1,000.

Assumptions

1. Senate File 2206 would not reduce the number of safety audits performed by the State Occupational Safety and Health Program each year.
2. The Division of Labor Services in the Department of Workforce Development receives federal funds from the Occupational Safety and Health Administration for enforcement and education of occupational safety and health standards. The federal funds require a state match. These federal funds would not be available for use in implementation of the provisions of this Bill.
3. The Division of Labor Services would require additional staff to implement the provisions of the proposed legislation. A Training Specialist II would be hired at an annual salary of \$59,000, and a Secretary I would be hired at an annual salary of \$34,000. Support and travel costs for the two positions would be \$20,000 annually.
4. The estimate does not include the potential impact from the loss of federal funds resulting from the proposed legislation. The federal Occupational Safety and Health Administration (OSHA) provides federal funding to the Division of Labor Services provided that state enforcement efforts are seen at least as effective as federal enforcement efforts. According to the Division of Labor Services, the audits allowed in the Bill and the immunity granted to employers who meet certain requirements, may compromise enforcement efforts, which could in turn result in the loss of federal funding. If this occurs, Iowa will lose its State Occupational Safety and Health Program. However, if Iowa loses the State Program, a State appropriation would no longer be necessary for the Program, which would result in a General Fund savings. The General Fund savings would then be offset by a like amount from the loss of revenue deposited into the General Fund from penalties or fines collected from occupational safety and health violations issued. The State OSHA Program is funded by a General Fund allocation of \$1.6 million and a federal allocation of \$2.2 million.
5. The Bill allows the Division of Labor Services to charge a fee for the training provided. The Bill does not specify that the Division is allowed to retain the fee revenue. If the Division was allowed to retain the fee revenue, the fiscal impact would be reduced. The number of individuals who would seek training and pay the fee is unknown.
6. The proposed legislation requires the courts to perform an in camera review of audit reports and allows an appeal to the district courts under Section 88.34(3) Code of Iowa.

These provisions would result in additional court time per hearing as well as additional court hearings. The provision would require the following staff to spend additional time per hearing:

- District Court Judge (\$62/hr) 16 to 24 additional hours per hearing
- Court Reporter (\$33/hr) 4 additional hours per hearing
- Court Attendant (\$19/hr) 16 additional hours per hearing
- Clerk of Court (\$16/hr) 4 additional hours per hearing

The total cost for additional hours for staff to spend on each hearing is approximately \$1,500 - \$2,000. The number of hearings that would result from the proposed legislation is unknown.

7. The authorization of an interlocutory appeal would result in an increased workload for the Supreme Court. This would require the following staff to spend additional time per appeal:

- One Justice (\$74/hr) 80 additional hours per appeal
- One Law Clerk (\$26/hr) 80 additional hours per appeal
- Six additional Justices (\$74/hr) 12 additional hours per appeal
- Six additional Law Clerks (\$26/hr) 12 additional hours per appeal

The total cost of this provision is approximately \$15,000 per appeal. The number of appeals that would result from the proposed legislation is unknown.

8. If a court finds that a person claiming privilege intentionally claimed the privilege for material that is not entitled to be privileged, the person is guilty of a serious misdemeanor punishable by a fine of up to \$1,000. The cost per case to the courts for the criminal violations would range from \$100 per case for a bench trial, to \$500 per case for a jury trial. The number of cases that would result in criminal violations from this provision is unknown.

Correctional Impact

There is no significant correctional impact anticipated as a result of SF 2206 since the serious misdemeanor specified in the Bill is only punishable by a monetary fine.

Fiscal Impact

Senate File 2206 would result in a General Fund cost to the Division of Labor Services within the Department of Workforce Development of \$113,000 and 2.0 FTE positions annually starting in FY 2005. The cost to the General Fund would be reduced by fee revenue collected from the training provided if the Bill were to specify that the Division of Labor Services was to retain the fee revenue generated. The anticipated fee revenue that would be generated is unknown.

The courts would incur additional costs from various provisions of the proposed legislation. The total cost to the courts detailed above would depend on the number of cases/hearings, and appeals that would result from the provisions of this Bill. The number of cases/hearings and appeals that would result is unknown.

Sources

Department of Workforce Development, Division of Labor Services
Judicial Branch
Department of Human Rights, Criminal and Juvenile Justice Planning Division

Dennis C Prouty

March 8, 2004

The fiscal note and correctional impact statement for this bill was prepared pursuant to Joint Rule 17 and pursuant to Section 2.56, Code of Iowa. Data used in developing this fiscal note and correctional impact statement are available from the Fiscal Services Division, Legislative Services Agency to members of the Legislature upon request.

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SUBCHAPTER I

Section 1. NEW SECTION. 88.0A TITLE.

This chapter shall be known and may be cited as the "Occupational Safety and Health Inspections and Audit Act".

SUBCHAPTER III

SAFETY AUDIT PRIVILEGE AND IMMUNITY

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3. "Employer" means the same as defined in section 88.3.
4. "Inquiring party" means any party appearing before a court or a presiding officer in an administrative proceeding seeking to review or obtain an in camera review of a safety audit report.
5. "Privilege" means the protections provided in regard to a safety audit report as provided in this subchapter.
6. "Safety audit" means a voluntary evaluation of any factory, plant, establishment, construction site, or other area, workplace, or environment where work is performed by an employee of an employer, of an activity or operation at the business when the activity or operation is regulated under state or federal occupational safety and health laws, rules, or variance conditions, conducted by an employer, an employee of the employer, or an independent contractor retained by the employer, that is designed to identify historical or current noncompliance with state and federal occupational safety and health standards, laws, rules, or variance conditions, discover hazards, and remedy noncompliance or improve compliance with occupational safety and health laws.
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- 20 d. Periodic updates documenting progress in completing the
 21 implementation plan.

22 Sec. 3. NEW SECTION. 88.32 PRIVILEGE.

23 1. Material included in a safety audit report generated
 24 during a safety audit conducted on or after July 1, 2004, is
 25 privileged and confidential and is not discoverable or
 26 admissible as evidence in any civil or administrative
 27 proceeding, except as otherwise provided in this subchapter.
 28 The safety audit report shall be labeled "SAFETY AUDIT REPORT:
 29 PRIVILEGED DOCUMENT". Failure to label each document within
 30 the report does not constitute a waiver of the safety audit
 31 privilege or create a presumption that the privilege does or
 32 does not apply.

33 2. A person shall not be compelled to testify in regard to
 34 or produce a document included in a safety audit report in any
 35 of the following circumstances:

1 a. If the testimony or document discloses any component
2 listed in section 88.31, subsection 5, that was made as part
3 of the preparation of a safety audit report and that is
4 addressed in a privileged part of a safety audit report.

5 b. If the person is any of the following:

6 (1) A person who conducted any portion of the safety audit
7 but did not personally observe the physical events of a safety
8 violation.

9 (2) A person to whom the results of the safety audit
10 report are disclosed under section 88.33, subsection 2.

11 (3) A custodian of the safety audit report.

12 3. A person who conducts or participates in the
13 preparation of a safety audit report and who has observed
14 physical events of a safety violation may testify about those
15 events but shall not be compelled to testify about or produce
16 documents related to the preparation of or any privileged part
17 of a safety audit or any component listed in section 88.31,
18 subsection 5.

19 4. An employee of a state agency or other governmental
20 employee shall not request, review, or otherwise use a safety
21 audit report during an agency inspection of a regulated
22 facility or operation, or an activity of a regulated facility
23 or operation.

24 5. A party asserting the privilege under this section has
25 the burden of establishing the applicability of the privilege.

26 6. The privilege provided in this section is in addition
27 to the confidentiality requirements applicable to educational
28 and informational programs under section 88.16.

29 Sec. 4. NEW SECTION. 88.33 WAIVER OF PRIVILEGE --
30 DISCLOSURE.

31 1. The privilege described in section 88.32 shall not
32 apply to the extent that the privilege is expressly waived in
33 writing by the employer who prepared the safety audit report
34 or caused the report to be prepared.

35 2. Disclosure of a safety audit report or any other

1 information generated by a safety audit does not waive the
2 privilege established in section 88.32 if the disclosure meets
3 any of the following criteria:

4 a. The disclosure is made to address or correct a matter
5 raised by the safety audit and the disclosure is made to any
6 of the following:

7 (1) A person employed by the employer, including temporary
8 and contract employees.

9 (2) A legal representative of the employer.

10 (3) An officer or director of the regulated business or a
11 partner of the employer.

12 (4) An independent contractor retained by the employer.

13 b. The disclosure is made under the terms of a
14 confidentiality agreement between any person and the audited
15 employer.

16 3. A party to a confidentiality agreement described in
17 subsection 2, paragraph "b", who violates that agreement is
18 liable for damages caused by the disclosure and for any other
19 penalties stipulated in the confidentiality agreement.

20 4. Information that is disclosed under subsection 2,
21 paragraph "b", is confidential and is not subject to
22 disclosure under chapter 22. A governmental entity,
23 governmental employee, or governmental official who discloses
24 information in violation of this subsection is subject to the
25 penalty provided in section 22.6.

26 5. The protections provided by federal or state law shall
27 be afforded to individuals who disclose information to law
28 enforcement authorities.

29 6. The provisions of this chapter shall not abrogate the
30 protections provided by federal and state law regarding
31 confidentiality and trade secrets.

32 Sec. 5. NEW SECTION. 88.34 REQUIRED DISCLOSURE.

33 1. A court or a presiding officer in an administrative
34 hearing may require disclosure of a portion of a safety audit
35 report in a civil or administrative proceeding if the court or

1 presiding officer affirmatively determines, after an in camera
2 review, that any of the following exists:

3 a. The privilege is asserted for a fraudulent purpose.

4 b. The portion of the safety audit report is not subject
5 to the privilege under section 88.35.

6 c. The portion of the safety audit report shows evidence
7 of noncompliance with a state or federal occupational safety
8 and health standard or other law, rule, or variance condition
9 and appropriate efforts to achieve compliance with the
10 standard or other law, rule, or variance condition were not
11 promptly initiated and pursued with reasonable diligence after
12 discovery of noncompliance.

13 d. The portion of the safety audit report shows clear and
14 convincing evidence of substantial actual personal injury,
15 which information is not otherwise available.

16 e. The portion of the safety audit report shows a clear
17 and present danger to the public health or safety.

18 2. A party seeking disclosure under this section has the
19 burden of proving that subsection 1 applies.

20 3. A decision of a presiding officer in an administrative
21 hearing under subsection 1 may be directly appealed to the
22 district court without disclosure of the safety audit report
23 to any person unless so ordered by the court.

24 4. A determination of a court under this section is
25 subject to interlocutory appeal to an appropriate appellate
26 court.

27 5. If a court finds that a person claiming privilege under
28 this subchapter intentionally claimed the privilege for
29 material not privileged as provided in section 88.35, the
30 person is guilty of a serious misdemeanor punishable by a fine
31 not to exceed one thousand dollars.

32 6. Privilege provided in this subchapter does not apply if
33 the employer has been found in a civil or administrative
34 proceeding to have committed serious violations in this state
35 that constitute a pattern of continuous or repeated violations

1 of state or federal occupational safety and health laws,
2 administrative rules, or variance conditions, that were due to
3 separate and distinct events giving rise to the violations
4 within the three-year period prior to the date of disclosure.

5 Sec. 6. NEW SECTION. 88.35 MATERIALS NOT PRIVILEGED.

6 1. The privilege described in this subchapter does not
7 apply to any of the following:

8 a. A document, communication, datum, report, or other
9 information the commissioner is required to collect, develop,
10 retain, or report under a state or federal occupational safety
11 and health law, rule, or variance condition.

12 b. Information obtained by observation, sampling, or
13 monitoring by the commissioner or the commissioner's
14 authorized designee.

15 c. Information obtained from a source not involved in the
16 preparation of the safety audit report.

17 2. This section does not limit the right of a person to
18 agree to conduct a safety audit and disclose a safety audit
19 report.

20 Sec. 7. NEW SECTION. 88.36 CRIMINAL PROCEEDINGS --
21 REVIEW OF PRIVILEGED DOCUMENTS.

22 1. The privileges created in this subchapter shall not
23 apply to criminal investigations or proceedings. A safety
24 audit report, supporting documents, and testimony relating
25 thereto may be obtained by a prosecutor's subpoena pursuant to
26 the rules of criminal procedure. If a safety audit report is
27 obtained, reviewed, or used in a criminal investigation or
28 proceeding, the administrative and civil evidentiary privilege
29 established in this subchapter is not waived or made
30 inapplicable for any purpose other than for the criminal
31 investigation or proceeding.

32 2. Notwithstanding the privilege established in this
33 subchapter, the commissioner may review information in a
34 safety audit report, but such review does not waive or make
35 the administrative and civil evidentiary privilege

1 inapplicable to the report. The commissioner shall not adopt
2 a rule or impose a condition that circumvents the purpose of
3 this subchapter.

4 3. If information is required to be made available to the
5 public by operation of a specific state or federal law, rule,
6 or variance condition, the commissioner shall notify the
7 person claiming the privilege of the potential for public
8 disclosure prior to obtaining such information under
9 subsection 1 or 2.

10 4. If privileged information is disclosed under subsection
11 2 or 3, on the motion of a party, a court or the presiding
12 officer in an administrative hearing shall suppress evidence
13 offered in any civil or administrative proceeding that arises
14 or is derived from review, disclosure, or use of information
15 obtained under this section if the review, disclosure, or use
16 is not authorized under section 88.35. A party having
17 received information under subsection 2 or 3 has the burden of
18 proving that the evidence offered did not arise and was not
19 derived from the review of privileged information.

20 Sec. 8. NEW SECTION. 88.37 VOLUNTARY DISCLOSURE OF
21 SAFETY VIOLATION -- IMMUNITY.

22 1. An employer is eligible for immunity under this section
23 from the time the commissioner receives official notification
24 from the employer of a scheduled safety audit. Once
25 notification is given to the commissioner, a safety audit
26 shall be completed within a reasonable time not to exceed six
27 months unless an extension is approved by the commissioner
28 based on reasonable grounds. An employer is immune from any
29 administrative or civil penalty associated with the
30 information disclosed if the employer makes a prompt voluntary
31 disclosure to the commissioner regarding an occupational
32 safety and health violation that is discovered through the
33 safety audit. The employer's actions in disclosing
34 information create a rebuttable presumption that the
35 disclosure is voluntary by meeting the criteria provided in

1 subsection 2 at the time of disclosure. To rebut the
 2 presumption that a disclosure is voluntary, the commissioner
 3 or other party has the burden of proving that the disclosure
 4 was not voluntary. Immunity is not provided if the violations
 5 of state or federal occupational safety and health law, rule,
 6 or variance condition are intentional or if the violations of
 7 state or federal law, rule, or variance condition resulted in
 8 substantial actual injury or imminent and substantial risk of
 9 injury to an employee.

10 2. The disclosure of information is voluntary if all of
 11 the following circumstances exist:

12 a. The disclosure arises out of a safety audit and relates
 13 to privileged information as provided in section 88.32.

14 b. The person making the disclosure uses reasonable
 15 efforts to pursue compliance and to correct the noncompliance
 16 within a reasonable period of time after completion of the
 17 safety audit in accordance with a remediation schedule
 18 submitted to and approved by the commissioner. If evidence
 19 shows that the noncompliance is due to the failure to obtain a
 20 variance, reasonable effort may be demonstrated by the
 21 submittal of a complete variance application within a
 22 reasonable time. Disclosure of information required to be
 23 reported by state or federal law, rule, or variance condition
 24 is not considered to be voluntary disclosure and the immunity
 25 provisions in this section are not applicable.

26 c. Occupational safety and health violations are
 27 identified in a safety audit report and disclosed to the
 28 commissioner before there is notice of a citizen suit or a
 29 legal complaint by a third party.

30 d. Occupational safety and health violations are
 31 identified in a safety audit report and disclosed to the
 32 commissioner before the violations are reported by any person
 33 not involved in conducting the safety audit or to whom the
 34 audit report was disclosed.

35 3. If an employer has not provided the commissioner with

1 notification of a scheduled safety audit prior to performing
2 the audit, a disclosure of information is voluntary if the
3 occupational safety and health violations are identified in a
4 safety audit report and disclosed by certified mail to the
5 commissioner prior to the commissioner's commencement of an
6 investigation.

7 4. If a person is required to make a disclosure relating
8 to a specific issue under a specific variance condition or
9 under an order issued by the commissioner, the disclosure is
10 not voluntary with respect to that issue.

11 5. Except as provided in this section, this section does
12 not impair the authority of the commissioner to require a
13 technical or remedial action or to order injunctive relief.

14 6. Upon application to the commissioner, the time period
15 within which the disclosed violation is corrected under
16 subsection 2 may be extended if it is not practical to correct
17 the noncompliance within the reasonable period of time
18 initially approved by the commissioner. The commissioner
19 shall not unreasonably withhold granting an extension. If the
20 commissioner denies an extension, the commissioner shall
21 provide the requesting party with a written explanation of the
22 reasons for the denial. A request for de novo review of the
23 commissioner's decision may be made to the appropriate court.

24 7. Immunity provided under this section from
25 administrative or civil penalties does not apply under any of
26 the following circumstances:

27 a. If an employer has been found in a civil or
28 administrative proceeding to have committed serious violations
29 in this state that constitute a pattern of continuous or
30 repeated violations of occupational safety and health laws,
31 administrative rules, and variance conditions and that were
32 due to separate and distinct events giving rise to the
33 violations within the three-year period prior to the date of
34 disclosure.

35 b. If a violation of an occupational safety and health

1 law, administrative rule, variance condition, settlement
2 agreement, or order on consent, final order, or judicial order
3 results in a substantial economic benefit which gives the
4 violator a clear advantage over its business competitors.

5 8. In cases where the conditions of a voluntary disclosure
6 are not met but a good faith effort was made to voluntarily
7 disclose and resolve a violation detected in a safety audit,
8 the state regulatory authorities shall consider the nature and
9 extent of any good faith effort in deciding the appropriate
10 enforcement response and shall consider reducing any
11 administrative or civil penalties based on mitigating factors
12 showing that one or more of the conditions for voluntary
13 disclosure have been met.

14 9. The immunity provided by this section does not abrogate
15 the responsibility of a person as provided by applicable law
16 to report a violation, correct the violation, conduct
17 necessary remediation, or respond to third-party actions.
18 This chapter shall not be construed to confer immunity from
19 liability in any private civil action.

20 10. Information required by rule to be submitted to the
21 commissioner as part of a disclosure made pursuant to this
22 section is not privileged information.

23 Sec. 9. NEW SECTION. 88.38 OTHER PRIVILEGES NOT
24 AFFECTED.

25 This subchapter does not limit, waive, or abrogate the
26 scope or nature of any statutory or common-law privilege,
27 including the work product doctrine and the attorney-client
28 privilege.

29 Sec. 10. NEW SECTION. 88.39 SAFETY AUDITOR TRAINING
30 PROGRAM.

31 A training program for, and standards for certification of,
32 safety auditors shall be developed and administered by the
33 commissioner. The program shall provide training on the
34 proper conduct of a safety audit; local, state, and federal
35 environmental ordinances, rules, and laws that apply to

1 businesses in this state; and the safety audit laws in this
2 state. The program shall be made available to small and large
3 business owners and operators, consulting engineers,
4 regulatory personnel, and citizens through the community
5 college system. A fee may be assessed for participation in
6 the program. Upon completion of the training program, program
7 participants may elect to be tested by the commissioner for
8 certification as a safety auditor for the purposes of this
9 subchapter.

10 Sec. 11. NEW SECTION. 88.40 SUMMARY.

11 On or before December 1 of each year, the commissioner
12 shall make available a summary of the number of safety audit
13 notices received, the violations, and the remediation status
14 of the violations reported pursuant to this subchapter during
15 the preceding fiscal year.

16 Sec. 12. NEW SECTION. 88.41 RULEMAKING.

17 The commissioner shall adopt rules pursuant to chapter 17A
18 necessary to administer this subchapter.

19 Sec. 13. NEW SECTION. 88.42 COSTS.

20 The necessary costs incurred by the commissioner under this
21 subchapter shall be funded from appropriations made to the
22 commissioner from the general fund of the state.

23 Sec. 14. CODIFICATION. The Code editor shall divide the
24 provisions of chapter 88, Code 2003 and Code Supplement 2003,
25 into subchapters consistent with this Act in Code 2005, and is
26 directed to change references from chapter to subchapter as
27 necessary.

28 EXPLANATION

29 This bill relates to the occupational safety and health
30 provisions of the Code by establishing provisions granting
31 privilege and immunity protections to an employer that
32 conducts a safety audit that meets certain criteria.

33 The bill provides that a safety audit is a voluntary
34 evaluation of a business or of an activity or operation at the
35 business when the activity or operation is regulated under

1 state or federal occupational safety and health laws, rules,
 2 or variance conditions. The audit is conducted by an
 3 employer, an employee, or an independent contractor, and is
 4 designed to identify historical or current noncompliance with
 5 occupational safety and health laws, rules, ordinances, or
 6 variance conditions; discover hazards; and remedy
 7 noncompliance or improve compliance with occupational safety
 8 and health laws. Once notification is given to the
 9 commissioner, the audit must be completed within a reasonable
 10 time not to exceed six months.

11 Material included in a safety audit report and generated
 12 during the audit is privileged and confidential and is not
 13 discoverable or admissible as evidence in any civil or
 14 administrative proceeding. The bill provides circumstances
 15 under which certain persons shall not be compelled to testify
 16 about or produce a document related to a safety audit. The
 17 privilege may be waived and circumstances are provided under
 18 which information is not privileged.

19 Disclosure of a portion of an audit may be required by a
 20 court or presiding officer in a civil or administrative
 21 proceeding. The bill provides an appeal process. If a court
 22 finds that a person claiming privilege intentionally claimed
 23 the privilege for material that is not entitled to be
 24 privileged, the person is guilty of a serious misdemeanor
 25 punishable by a fine not to exceed \$1,000. Privilege does not
 26 apply if an employer has been found in a civil or
 27 administrative proceeding to have committed serious violations
 28 in this state that constitute a pattern of continuous or
 29 repeated violations.

30 Privilege for safety audits does not apply to criminal
 31 proceedings; however, if an audit report is obtained,
 32 reviewed, or used in a criminal investigation or proceeding,
 33 or reviewed by the commissioner, the administrative and civil
 34 evidentiary privilege is not waived or made inapplicable.

35 The bill provides that an employer is eligible for immunity

1 from the time the commissioner receives official notification
2 from the employer of a scheduled safety audit. An employer is
3 immune from any administrative or civil penalty associated
4 with the information disclosed if the employer makes a prompt
5 voluntary disclosure to the commissioner regarding the
6 violation discovered. The bill provides for the circumstances
7 under which disclosure is considered voluntary, and provides
8 that immunity does not apply if the violations are intentional
9 or if the violations resulted in substantial actual injury or
10 imminent and substantial risk of injury to an employee.
11 Immunity also does not apply if an employer is found to have
12 committed serious violations that constitute a pattern of
13 continuous or repeated violations or if a violation results in
14 a substantial economic benefit which gives the violator a
15 clear advantage over its business competitors.

16 The bill requires the commissioner to develop and
17 administer a training program and standards for certification
18 of safety auditors, and to annually make available a summary
19 of the number of safety audit notices received, the
20 violations, and the remediation status of the violations
21 reported during the preceding fiscal year.

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