

Legal Strategies – Crisis Management and Accident Investigation

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Safety and health professionals play a critical role in the management of crisis situations, including industrial and mine accidents affecting employees, customers, contractors and other members of the public. Some of these incidents may result from unsafe acts, while others relate to unsafe conditions that may also constitute violations of legal requirements imposed by federal agencies, including but not limited to: the Occupational Safety and Health Administration (“OSHA”), the Mine Safety and Health Administration (“MSHA”), the Environmental Protection Agency (“EPA”), the Department of Homeland Security (“DHS”). State safety and health agencies, as well as state attorneys general, may also have an interest in prosecuting companies for accidents that violate state-specific statutory requirements.

Moreover, if third parties (contractors, customers or members of the public) are injured or killed as a result of a workplace incident, tort litigation may ensue. There are other entities who may become involved in investigation of serious incidents, including the National Transportation Safety Board, the Chemical Safety and Hazard Investigation Board, the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, Firearms and Explosives, and state law enforcement officers.

Failure to plan in advance for crisis management of natural disasters, business disruptions, and incidents involving safety/health/environmental hazards, and to carry out such plans in an effective and efficient manner, may result in heavier enforcement by OSHA, MSHA and/or EPA. It almost certainly will complicate processing of insurance claims, increase the likelihood of tort litigation against the company and, potentially, its agents, and could even result in criminal prosecution.

Key Definitions – “Crisis” and “Accident”

Generally speaking, a “crisis” is any unplanned event, occurrence or sequence of events that has a specific undesirable consequence. Such events can be sudden or be the result of cumulative failures. This is where incident investigation can be of value, as cumulative failures must be accurately identified if preventative measures are needed at related facilities owned and operated by the company, or even at

similar operations within the industry sector. Some examples of “crises” that may require the services of safety and health professionals include:

- Natural disasters
- Safety/health accidents
- Environmental incidents (spills, releases of toxics into the air)
- Workplace violence
- Business disruption caused by fire or outside factors

An accident is **any unplanned event that results in personal injury or in property damage**. These range from situations where personal injuries require little or no treatment to fatality cases, as well as incidents involving either minor or serious property damage. It is wise to investigate all accidents, regardless of the extent of injury or damage, as this may reveal shortcuts or procedural deficiencies that warrant immediate corrective action. The causes of accidents may be direct (unsafe release of energy or hazardous material) or indirect (unsafe acts and conditions). Without doubt, however, failure to investigate “near misses” increases likelihood of REAL catastrophe occurring! Accidents and near-misses may have 10 or more events that can be “causes” and could be prevented by eliminating one or more such “events”.

Goals of Crisis Management

There are several goals to be achieved in legally effective crisis management. These include:

- **Prevention:** This can be achieved by taking all necessary measures to provide safe and healthful workplaces, including regular audits, use of Job Safety Analysis, contractor prequalification, and ensuring that all individuals are aware of statutory and regulatory requirements through appropriate training so they have the tools necessary to conduct themselves in a safe and healthful manner.
- **Detection:** This involves investigation of all accidents (including near-misses), maintenance of injury/illness data for site and industry trends, and review of similar accidents at related or industry sector locations.
- **Recovery:** This step is critical to regain the confidence of workers, customers, community, and regulators.
- **Measurement:** Post-incident evaluation is critical to remediate root causes of problems. The “quick fix” or “blame the victim” approach must be avoided.

Crisis Management Approaches

There are several different types of crisis management programs that may be needed, depending upon the type of industry involved. These include:

- Evacuation plans
- Fire protection plans
- Safety and health programs
- Environmental programs
- Internal corporate policies and procedures

- Insurance and worker's compensation coverage
- Plant closing policies
- Emergency notification procedures
- HazMat plans
- Process safety assessments

In addition, Job Safety Analysis (“JSA”) – which is also known as Job Hazard Analysis – is an indirect method of anticipating potential crisis situations and developing methodologies for preventative action that can avoid hazardous conditions from resulting in loss to persons, property or the environment.

There are a variety of reasons why companies fail to adequately prepare for crisis situations, such as those described above. Paramount is a sense of denial – that “it can’t happen here” – which can impair all phases of safety, security and environmental program effectiveness. Other factors that contribute to system failure are lack of information that could be obtained in advance through hazard analysis, review and update of existing policy and procedures, system audits, and other readily available site-specific data scrutiny. A contributing factor is failure to communicate with support systems in advance, such as police and emergency responders, to notify them of the nature of operations, potentially toxic or hazardous chemicals used on-site, and foreseeable situations where their assistance might be required (e.g., confined space rescue). Companies that fail to investigate “near miss” events also lose a critical opportunity to identify system weaknesses in advance, which could (if done) result in remedial measures that would prevent a more catastrophic occurrence.

Crises become more likely when there is lack of understanding of statutory and regulatory obligations, and the situation is exacerbated where on-site personnel ignore obligations for reporting to key agencies (such as OSHA and EPA) that are triggered by emergency situations. A final factor is poor definition of responsibilities for key organization personnel. As discussed more fully below, crisis management is not a job for a single individual – it requires a team approach with advance delineation of duties and back-up systems in the event that key personnel are absent or incapacitated during the emergency and cannot carry out their assigned tasks. An advance “chain of command” must be established to prevent confusion, and delineate lines of authority.

Determination of what approach is required depends on a situation-by-situation analysis and is not amenable to a “one size fits all” strategy. Companies should, however, develop a type of “decision-tree” model to ascertain which types of situations are appropriately handled under the following models:

1. Crisis or accident can be handled or investigated by on-duty personnel only. This typically would include injuries requiring first aid or minor medical treatment involving employees only, or property damage events that do not trigger any reporting requirements to insurance or governmental entities.
2. Crisis or accident can be handled or investigated by company personnel only, but requires bringing in some off duty employees or personnel from other locations. This typically could involve the types of injury events set forth above, plus system failures that require reconfiguration or remediation of processes or equipment, including work by in-house engineers, safety professionals or industrial hygienists.

3. Crisis or accident requires utilization of both company personnel and outside counsel/consultants. This would include anything that could potentially result in litigation by OSHA, MSHA, and EPA, involves injury to third parties or damage to property of third parties, or requires employment of outside experts.
4. The situation requires all of the above plus use of emergency responders and/or notification of government investigators and law enforcement personnel. This would include the situations described above, where the crisis or accident also triggers notification of these agencies (e.g., a fatality, multiple hospitalizations, or evacuations).

In addition, company personnel should be aware of various “publics” that may be notified (either directly by the company or through information obtained from third parties) and have someone authorized to speak on behalf of the company to emergency responders, police, media, next-of-kin, regulators, licensing boards, and insurance carriers. Designated person(s) should also have advance authority to contact or retain counsel in more critical situations.

The incident investigation team leader (and there should be redundant system with more than one individual trained for leadership tasks) is primarily in charge of the following aspects of crisis management:

- assessing the situation and determining gravity,
- contacting counsel if appropriate,
- notifying regulatory agencies (if mandated),
- directing efforts in area,
- evacuating and accounting for personnel,
- directing plant shutdown,
- coordinating site security, and
- making authorized statements to media.

Incident Investigation Techniques

Although there are many models for incident investigation that can be adopted, and the resources devoted will obviously be linked with the gravity of the situation, a number of principles are applicable for virtually all types of investigations. Wherever possible, all documents should be privileged (attorney/client or attorney work product) to the extent possible, as even “near miss” accident investigation reports can be admissible evidence to show prior knowledge of conditions involved in a subsequent catastrophe and can also trigger “willful” violation findings by OSHA and other agencies. Such prior knowledge is also a key factor in determinations of whether a criminal prosecution is warranted where significant casualties are involved.

The following steps are recommended for legally sound incident investigations:

- Define the scope of investigation;
- Select and brief the investigative team, and make work assignments:
- Determine the type and extent of incident and estimate damage (human and property). This involves use of the basic “who, what, when, where, why and how” questions;
- Determine the equipment involved (including manufacturer, model and serial number – in case of related product liability actions), and what control were in place or should have been in place at the time of the occurrence;
- Evaluate normal operating procedures;
- Review maps where appropriate (e.g., mine disasters);
- Secure the accident site and restrict access to only those personnel critical to the activities at hand;
- Identify witnesses, including getting home and work addresses and telephone numbers, and isolate them (to the extent feasible) until they can be interviewed. This prevents valuable testimony from being tainted by “group recollection” that occurs when witnesses compare notes with each other before their statements are taken;
- Review the events preceding incident to lay the groundwork for a root cause analysis;
- Ensure investigators, experts, company personnel and others who must be in the incident area are properly protected (PPE, ventilation etc.);
- Obtain and preserve physical and documentary evidence to the extent possible. If government officials plan to remove evidence from the site, determine where it will be taken, and ask to receive advance notice of any destructive testing that may occur so that a company representative or its expert can be present to witness such testing;
- Take photos, videotape site, make drawings and obtain measurements where feasible;
- Obtain and analyze data (including police and government reports, autopsies, etc.);
- Ultimately, determine causation and remedial measures (use third-party experts where needed, prepare new JSAs etc.);
- Conduct post-investigation briefing of employees and others with a need to know;
- Prepare a summary report if required by law (e.g., OSHA, MSHA);
- Prepare a privileged, detailed report for use by company management and counsel concerning possible legal exposures and proposed remedial measures.

Analysis of human and physical factors must be part of the accident investigation process. Key human factors include:

- Inadequate training
- Failure to follow written procedures (LOTO, confined spaces, use of PPE, etc.)
- Failure to adequately identify hazards (failure to use JSA or to task train workers)
- Impairment (drug, alcohol, exhaustion, ill)
- Operating equipment without authority
- Horseplay
- Improper lifting, loading, placement
- By-passing safety devices
- Inadequate supervision or job planning
- Safety rules not communicated or enforced
- Unsafe acts of third parties (contractors, customers, trespassers)

Unsafe conditions that may be factors in personal or property damage incidents include:

- Poor housekeeping
- Unsafe access to the work area
- Hazardous substances or noise
- Improper material storage
- Improper/defective tools or equipment
- Inadequate guarding
- Insufficient ventilation
- Poor lighting
- Missing or broken safety devices
- Failure to use appropriate confined space procedures
- Poor workstation design, and
- Environmental conditions (ice, snow, excessive heat/cold).

Any still-existing hazards identified during the investigation should be immediately remedied (hazardous area should be barricaded against entry until protective measures are taken, and defective

equipment tagged out) to prevent additional harm from occurring. Once the root causes and indirect factors have been identified, it is imperative to train/retrain employees, modify written policies and procedures if deficiencies were identified, inform everyone with a “need to know” of corrective actions (and get necessary funding authorization from management), implement actions needed to remediate conditions, and follow-up to ensure results achieved to prevent future incidents (and document all remedial actions taken).

It is critical that no consultants or “expert witnesses” be identified by name in reports that must be disclosed (non-privileged documents). Moreover, “testifying experts” (those likely to be used by the company as experts at a civil or criminal hearing) should refrain from preparing initial written reports and from reviewing privileged documents as anything that a testifying expert uses in formulating his/her opinion is discoverable. Finally, as noted above, it is critical to involve counsel in all of the above phases of the investigation, where litigation is possible or the company may be subject to civil proceedings by OSHA, MSHA, EPA or other federal or state agencies. This may preserve privilege for work product such as witness statements, investigator notes, expert opinions, and internal analytical reports. All such documents should be designated (prominently marked) as **“Privileged and Confidential, Prepared at Direction of Counsel in Anticipation of Litigation.”** The documents should be transmitted only to counsel, who can then determine the stream of distribution appropriate to the document and who can view the information without waiving privileged status.

Dealing with Government Investigators

A company’s investigation does not often occur in isolation and therefore may be concurrent with investigations undertaken by OSHA, EPA, state police or other agencies. It is very important to be aware, in advance, which agencies have an absolute right of entry, which laws have warrant requirements, etc. Although the agencies often will try to interview employees and other witnesses in private, it may be possible to get the individuals’ consent to sit in on these sessions and this will both advance the company’s internal investigation (by allowing discrepancies in statements to be quickly identified and concerns addressed) and also help the company be well positioned to defend itself in citation situations.

If management representatives are dealing with the officials (rather than having in-house or outside counsel handle matters), the employer representatives should understand that under certain laws, they may be the target of criminal prosecutions arising from workplace fatalities or catastrophic events. Therefore, understand “right to remain silent” where criminal prosecution is possible, know in advance what documents must be provided without warrant (if any), and **never** make a false statement or provide a falsified document to a government investigator.

Dealing with the Media

Although each situation will vary somewhat, it is recommended that a company have both designated spokespersons and a template for key messages in advance. It is helpful to do a crisis run-through and anticipate likely questions that could occur in different scenarios and which ones might require having a technical expert or advisor to support the corporate spokesperson. It is critical to “know your interviewer” and be aware in advance of any hidden agendas held by specific publications and/or media representatives. When making a statement, spokespersons must be conscious of body language, as this could conflict with “official statement” and undermine credibility.

The designated media representative also must stick with the facts and never speculate: once something appears in print it becomes “common knowledge” and a subsequent deviation will be viewed

with suspicion. Two key rules to remember are: (1) never say “no comment” (which makes it appear that the company is hiding something and is guilty) and (2) nothing is ever “off the record” (statements made to news media that conflict with statements made to government investigators can be introduced at a hearing to undermine the credibility of corporate witnesses and outside experts). Counsel should review any written statements (e.g., press releases) before they are publicly disseminated.

Tort Litigation Issues

Any accident involving harm to non-employees or damage to the property of third parties is likely to result in a tort action. Moreover, in some situations, employee victims (or their survivors) can circumvent the workers’ compensation shield and seek millions of dollars in damages, where the company or individual management agents are found to have engaged in high negligence, willful or reckless actions in violation of applicable laws. Therefore, the steps set forth above should be carried out with the additional knowledge that the company is gathering potentially admissible evidence in such tort proceedings.

An emerging tort lawsuit area is “negligent failure to plan” – often occurring where system failures were foreseeable and preventable and/or where workplace violence results in casualties and the employer knew or should have known of the security risks and failed to take appropriate preventative action or control risks to the extent possible. Foreseeable risks may include common industrial accidents, workplace violence, terrorism, product tampering and similar situations.

In an occupational context, OSHA’s “general duty clause” (Section 5(a)(1) of the Occupational Safety and Health Act of 1970) sets a statutory standard of care, and any finally adjudicated OSHA, MSHA or EPA citations are admissible as proof of “*negligence per se*.” Therefore, employers should avoid the temptation to plead guilty in exchange for reduced penalties if they believe the citations are unfounded, as the tort litigation consequences can far exceed any monetary penalties or actions taken by the government in a civil arena. Moreover, employers should be aware of applicable national consensus standards (such as those promulgated by ANSI, ASTM, NFPA, SAE etc.) as these can establish an industry standard of care or “best practices” that a judge may note in assigning negligence to the defendant(s).

Conclusion

In a perfect world, all accidents would be preventable and all crises could be averted. However, none of us live in that perfect world. The safety and health professional is likely to encounter one or more crisis situations during their career and adherence to the steps above increase the likelihood that a successful resolution can be reached, in terms of limiting corporate and personal liability, taking appropriate actions to mitigate harm and prevent reoccurrences, and restoring normal operations as soon as possible.

Protection of persons, property and the environment must always be paramount, and it is imperative to comply with all mandatory standards and regulations. A legally sound strategy for crisis management and incident investigation will accomplish these goals and help to refine programs in a proactive manner.