Immersion Session

CRISES AND CALAMITIES

HANDLING HIGH-PROFILE WORKPLACE ACCIDENTS

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I. PREPARING FOR AN OSHA CATASTROPHIC ACCIDENT INVESTIGATION

The Occupational Safety and Health Act of 1970 authorizes the Occupational Safety and Health Administration to investigate workplace accidents and illnesses involving death and serious injury to determine if a violation of a standard, rule, or order occurred. Citations issued by OSHA fall into four general categories: Other than Serious, Serious, Willful, and Repeat violations. If OSHA makes such a determination, OSHA has the authority to assess and collect fines and penalties against an employer.

The OSH Act also provides criminal penalties for an employer who is convicted of willfully violating an OSHA standard, rule, or order when the violation results in the death of an employee. In addition, incidents that result in an OSHA investigation often lead to an employer facing civil litigation or investigation from other agencies, such as the Environmental Protection Agency, or the U.S. Chemical Safety Board.

Fatality or catastrophe investigations require additional considerations. An employer must report any work-related fatality to OSHA within eight hours. An employer must report certain other serious work-related injuries to OSHA within 24 hours, including the hospitalization of one or more employees, any amputation, or the loss of an eye. Unlike other types of OSHA inspections, catastrophe often involve numerous other governmental agencies, from paramedics to police, the coroner’s office, other federal and state agencies, such as the EPA, as well as family members and the media.

Employers need to consider all of these possibilities before a crisis occurs. Needless to say, being properly prepared to respond to a workplace safety crisis is essential to minimizing a company’s liability risk from OSHA and beyond.

A. Initial Considerations

1. Consent or Warrant

A company can either consent to an inspection or require a warrant. In rare circumstances you may require a warrant particularly if there is a threat of criminal liability.

2. Designate a Primary Contact

One person should be designated as the primary contact with OSHA. This individual should determine who will be called if a Compliance Officer arrives, and who will accompany him or her on the walkaround portion of the investigation.

3. Determine Who Will Participate in Walkaround with OSHA

If your operation is larger, you should use a management team for the inspection. The following individuals should be considered:

- One safety professional who most likely is your designated contact person with OSHA and the principal spokesperson for the company;
- An individual who can take detailed notes of the walk around and take detailed still pictures and/or videos of the inspection (make sure photo
and video equipment is charged and ready to go – take pictures of everything the investigator photographs);

- The manager from the specific area where an accident occurred;
- An overall manager as well, if the scope of the investigation calls for it;
- A maintenance foreman with a radio to permit immediate corrections as desired;
- Legal counsel in appropriate cases.

4. Understanding of Process

Make sure all of the individuals who participate on the company’s behalf in an OSHA investigation have been trained ahead of time to understand their roles in the investigation and to:

- Let the designated spokesperson lead any discussions with OSHA;
- Answer OSHA’s questions where necessary but do not volunteer additional information;
- Convey the impression that you have a safe operation; and
- Be able to take immediate corrective action where desired.

5. Role of Legal Counsel in an OSHA Inspection

It may be appropriate to have legal counsel participate in the opening conference with OSHA in a death case where you anticipate there may be a willful violation, which could result in criminal prosecution, or in any major accident which did not result in a fatality. In addition,

- Attend opening conference to verify basis of inspection and scope;
- Prepare managers for interviews with OSHA investigators and attend the interviews;
- Participate in walkaround inspection of facility;
- Assist in preparing document responses for the company in response to OSHA’s document requests and noting appropriate objections based on scope and privilege;
- Participate at closing conference to assist in asking questions of OSHA concerning its inspection, proposed corrective actions and ensure that no admissions or commitments are made by the company;
As a general rule, counsel does not sit in on interviews of hourly employees (although they can do so if the individual requests it and there is no apparent conflict). This should be considered ahead of time. The company should take a neutral position on this, so as not to be seen as attempting to coerce the hourly employees.

B. OSHA Is At The Door—A Checklist

1. Verify Credentials and Purpose

When OSHA arrives you should review the credentials of the Compliance Safety and Health Officer (CSHO) and determine the purpose of the inspection. After a catastrophe or fatal accident the purpose of the inspection may be obvious but you should have the CSHO confirm the purpose in case it also involves an imminent danger, a formal or informal complaint, a programmed inspection, or a re-inspection.

2. Opening Conference

Establish the ground rules for a consent inspection (assuming you don’t require a warrant) such as:

- Scope
- Areas to be entered
- Trade secrets to be protected
- Separate opening and closing conferences without employee representative

3. Walkaround

The Management Team that participates in the walkaround with the OSHA Compliance Officer should keep the following in mind:

- Stay with the CSHO at all times
- Plan the route to the area the Compliance Officer is to inspect—“plain view” doctrine (an inspector can note all evidence that is within plain view)
- Take the same photographs and measurements as the CSHO
- Ask the CSHO why a photograph or measurement was taken
- Be polite; do not argue; but point out where there is no hazard, or no employee exposure to any hazard, or that the standard does not apply
- Do not volunteer information
- Be careful what you say to the CSHO – it may be considered an admission
• Make note of conversations with employees
• Do not permit demonstrations of equipment or the interruption of the work of employees
• Consider how to address apparent violations

4. Management Interviews

During management interviews, keep in mind:

• Entitled to have company representative or attorney present
• No video or audio recording
• No signed statements
• Prepare the witness (likely questions and documents)

5. Employee Interviews

During employee interviews, keep in mind:

• Company decision to allow during work time
• Company right to interview
• Employee right to ask for a representative (including a member of management) be present
• Employee can decline to be interviewed or end the interview at any time (absent a subpoena)

6. Document Requests

A single person should be designated to receive document requests from OSHA and prepare a response. They should consider the following when preparing the response:

• Review requests for reasonableness as to scope and burden
• Verify that documents produced are responsive to the request
• Determine if documents to be produced are privileged and withhold production on that basis
• Determine if any documents contain trade secrets or other confidential information
• Maintain a separate copy of all documents produced

7. Closing Conference

The focus of the closing conference should be on seeking information from the CSHO rather than providing information. The following should be considered at the closing conference:

• Ask the CSHO why they believe an apparent violation exists and ask them to specify the hazard, the standard at issue, the exposure, and how it will be characterized

• Determine what the CSHO believes is necessary for abatement

• DO NOT argue with the CSHO

• DO NOT agree or admit to anything particularly that any hazard exists, that the suggested abatement measure or time to complete abatement is reasonable

• If you have clear evidence to refute an alleged violation, provide it

III. DEVELOPING A CRISIS MANAGEMENT PLAN

An effective crisis management plan should be capable of responding to any type of crisis quickly, decisively, and in a coordinated manner. The plan should establish relationships that will assist in first response, responsibilities for managing the event and the immediate aftermath, and continuity of the business operations. It should include a notification system with a specific and up to date listing of current contact information on the team members, chain of command, outside relevant agencies.

The key elements of a Crisis Management Plan are:

• Risk and Hazard Assessment
• Define Events Triggering Plan
• Crisis Management Team (Roles, Responsibilities, and Resources)
• Communication Plan (Internal and External)

A. Risk and Hazard Assessment

Companies should identify the risks and hazards that could impact the organization in the development of a crisis management plan. Knowing the risks will assist in developing the plan. Significantly, the risk and hazard assessment should include both the obvious but also those risks that may be unique to your company and its operations. Some examples of risks that may trigger a crisis management plan include natural events such as earthquakes, floods, hurricanes, tornadoes, blizzards and ice storms. Man-made event that could trigger a crisis management plan include workplace violence, workplace accidents, fires and explosions, chemical exposures and leaks, environmental releases, significant product recall, data breach, and criminal conduct by third parties, employee, and management. Unique hazardous materials or operations as well as geographic location may present additional risks and hazards for a company and should be considered.
B. Events Triggering Plan

Not all events trigger the implementation of a crisis management plan. Organizations face incidents of varying degrees from routine incidents, temporary emergencies, and significant crises that all have varied impacts on business operations. However, not all of these events may trigger your crisis management plan.

*Incidents* are routine occurrences that are addressed with existing resources or limited external assistance that have little or no impact on business operations and do not require activation of a crisis management plan. Examples: workplace/reportable injuries, routine employment allegations, minor incidents involving business premises, and illness outbreaks.

*Emergencies* would include those major emergencies that impact multiple departments and/or buildings, and affects sizable portions of the business operations. These events may trigger your crisis management plan since addressing these events may require significant internal and external coordination with external agencies. Examples: workplace deaths, fires, severe weather (hurricane, tornado, ice/snow storm), serious crime, bomb threat, chemical spills/leaks, power loss, significant data breach.

*Crises* are those catastrophic events that impact the continuation of your entire business operation and/or local community. They can be emergencies but on a greater scale. Examples: Multiple employee injuries and/or death, explosions and fires impacting continuing operations, executive criminal conduct, chemical discharge/spill, explosion, terrorist attacks.

A crisis management plan should set parameters for activation based on the risks and hazards faced as well as the severity of the event. In addition, there should be a clear definition of the individual or group charged with activating the plan. Once activated, the focus then shifts to your crisis management team to navigate the crisis the company faces.

C. Crisis Management Team—Roles, Responsibilities, and Resources

Most companies have developed disaster plans that deal with interruptions in a company’s operations due to a disaster event be it an act of God, criminal conduct, or accidental event. Events beyond a company’s control like a natural disaster rarely put the company in a bad light. However, governmental enforcement actions and civil lawsuits arising out of an industrial accident at one of your facilities killing several workers or a workplace violence incident are the type of events where the company is immediately on the defensive. Publically, it is presumed the facts of the allegations are probably true, or in the case of an accident, the company was at fault for the worker injuries and deaths.

The company in the initial stages must have a team in place to effectively define and implement the company response. This team will be headed by a team leader (individual or small group) who will direct the activities of both internal and external resources. A good crisis management plan will define all members of the team and their specific roles for event triage, response to the event, and recovery after the initial crisis passes.

1. Crisis Team Leader

The Crisis Team Leader (or lead group) will be accountable for successful execution to the Crisis Management Plan. This person should be a manager with broad experience across many areas of the business with excellent judgment. This person should not be the CEO or
other member of senior management. Instead, the Team Leader should be solely committed and focused on managing the crisis. The senior management should be focused on continuing the business and operations.

The Team Leader’s responsibilities will include tailoring and directing team assignments, ensuring that critical needs are met during 24/7 coverage, facilitating intra-team communication, conducting team meetings, and providing management status reports. The job will require the time (sometimes over 24 hour periods for several days) and commitment of various internal and external sources to drive successful outcomes.

2. Internal Resources

a. Senior Management

The CEO and Board of Directors of any company faced with a workplace crisis will obviously have a keen interest in the handling of the problems facing the organization. The CEO will be expected to be at the forefront of the company response and be the face of the company on the scene of any disaster. Certainly there will not be an expectation of day-to-day involvement with the management of a crisis; however, the CEO and Board of Directors need to be timely informed of all significant developments as they occur.

b. Health & Safety

Health & Safety needs to ensure safe access to the worksite in the event of on-site workplace crisis. They must preserve and document the accident scene in the event of significant worker injury and/or death. They will coordinate the team that investigates a workplace accident and the preparation of a report. Health & Safety will interface with government investigators such as OSHA, MSHA, EPA, and CSB. In addition, this person will know the specific additional internal resources that can be brought to bear to address immediate concerns and provide assistance to those at the affected facility during the period of restoration.

At times, a company may decide on its own to shut down all operations and conduct a wall-to-wall safety audit of all physical assets as well as all policies and procedures affecting operations while undertaking repairs. In this extraordinary circumstance, the Health and Safety personnel on-site will be overwhelmed and may require additional help from other facilities or outside engineering and workplace safety consultants. This work may include monitoring hot work permits for repair work on site, a daily walk-through to ensure that all visiting contractors are complying with safety requirements including the use of personal protective equipment, training of all vendors on site doing repairs, and reviewing and re-writing policies and procedures that may be implicated in the accident.

In short, the Health and Safety Group will be directly involved in all activities when a significant workplace accident occurs and the need for their expertise and personnel will be acute.

c. Human Resources

The Director of Human Resources is a key member of the crisis management team. This person and the HR department as a whole will be charged with dealing with the specific HR issues involved in any employment claim and, along with the Legal Department, will assist and
support in the investigation of any claims of misconduct. They may also be involved in initiating drug and alcohol testing in the aftermath of a workplace accident.

If the crisis involves a workplace accident, HR personnel will be at the forefront of interfacing with the victims’ families to ensure that their needs are met and that all insurance issues such as workers compensation or life insurance issues are timely addressed. In addition, they will ensure that the Employee Assistance Program is implemented for any employees that want counseling. They also will be responsible for communications to the workforce to keep them apprised of significant events as the response to the crisis unfolds.

d. Public Relations

Depending on the size of the company, if it has an internal public relations department that group will be directly involved in molding the company message and preserving its image during and after a workplace crisis. This group will media train the key personnel (one or two people) who may be called upon to speak on behalf of the company and should be the sole point of contact with the press. As such, the point person must promptly respond to media inquiries and provide information that has been vetted by representatives of the core crisis team. The Public Relations Department should also monitor all press releases, stories and social media sites for commentary concerning the crisis and be prepared to respond, if necessary.

e. Legal/Compliance

Internal legal departments are inevitably thrust into action when a workplace crisis occurs due in great measure to the fact that the potential for litigation is always present. The internal corporate legal team may be charged with assembling the resources both within the company and outside of the company to address the issue at hand. Internal counsel are usually best suited to have a working understanding of the internal organization of the company and their skill sets to bring to bear when a crisis occurs.

Internal counsel will have an eye on the legal ramifications of any action taken by the company in addressing the crisis. This may include working with Risk Management when presenting a claim for property damage and business interruption coverage in property damage claim. Also, the internal counsel may be charged with dealing with customer contracts and may need to issue force majeure letters to customers in a supply chain. As the internal legal counsel, company communications providing legal advice as opposed to strictly business advice will be protected by privilege. As such, the internal counsel should be the primary conduit for all information internally and externally that is in the best interest of the company to protect.

The Chief Compliance Officer, who also may be in the legal department, is a critical member of the internal team for fielding and addressing complaints of alleged wrongdoing of all kinds, engaging the internal and external assets necessary to investigate and resolve such complaints to ensure that the company is in compliance with its legal obligations, Code of Conduct, and best practices.

f. Security and IT

The Security group will be charged with maintain site security and enforcing protocols for access to the business and its property. They will assist in maintaining a secure perimeter in conjunction with first responders that may be on site. In addition, the security group should
make sure that any security tapes and all ingress and egress records are preserved not only the day of the event but also in the days preceding an event.

The IT department should ensure that all electronic data is preserved by securing servers and data back-ups. Alternative sources of power should be activated to ensure data is preserved and electronic systems are operational. This work will be integral to continuing business operations but also with respect to any investigation of an event. In the case of manufacturing companies there is a tremendous amount of data that is recorded concerning production and operations. This information can be vital to a root cause investigation in the event of an industrial accident. In addition, if the incident is one that may result in litigation, electronic data preservation will be expected by the courts and litigants to avoid spoliation claims.

g. Technical/Engineering/Operations

When an industrial accident occurs, the company’s internal engineering and operations experts should be involved in not only the remediation of the facility and securing hazardous chemical or other products on site, but also should be available to assist in information gathering for investigators on the scene and participate in the development of any improvements that may be implemented after the crisis passes.

h. Risk Management/Finance

Risk Management should be involved in any workplace accident crisis as insurance issues will certainly arise. Property and casualty insurers that may have exposure should be put on notice of the incident and the potential for claims from the company and third parties. Risk Management will want to monitor the investigation of any type of property damage so they can present the property damage and business interruption claim to the insurer.

Likewise, someone from the Finance Department will need to be charged with tracking all loss expenses to be presented as part of an insurance claim if that is the situation faced by the company. In addition, Finance will need to be in charge of processing all of the additional expenses that may occur. Finally, Finance will be looked upon by senior management to timely report the status and amount of all additional expense.

3. External Resources

a. Outside Legal Counsel

Outside legal counsel can provide valuable input to the company when it is faced with a workplace crisis. Generally, a company will retain outside counsel adept at a workplace crisis situation because of their:

• Expertise—Legal counsel that can bring to bear expertise in a particular area of law (such as mining disasters, workplace accidents involving fires and explosions, etc.) is a powerful asset assisting a company in its strategy to defend the claim at hand or the potential claims down the road. At times, in a workplace crisis, immediate action may be needed to protect a company’s interests such as motions for protective orders, contesting requests for information or access, or responding to a governmental agency’s attempts to shut down the facility. In
these situations you want outside counsel with the knowledge and resources to quickly react as legal needs arise;

- **Experience**—Legal counsel that has prior experience navigating a workplace crisis brings valuable assistance to the company from a foundation of having successfully done it before for other clients. This experience can include past work with regulatory agencies that may be involved in an investigation or enforcement action, like OSHA, MSHA, EPA, and CSB;

- **Relationships**—Legal counsel retained to assist a company in a workplace crisis must be able to quickly contact and retain outside resources and experts for the client’s benefit to achieve its goals and expedite the desired outcome. This may include contacts with outside PR firms, investigators, engineers, fire investigators, forensic accountants, forensic IT experts, and a whole myriad of experts that can assist a company in a crisis;

- **Privilege Protections**—Outside legal counsel provides protected legal advice to the company and can work with the outside experts to protect information developed in the investigation from disclosure based on the attorney client privilege and the work product doctrine. Reports generated by outside technical experts retained by legal counsel can be privileged and protected from disclosure. This is especially important in an investigation where some of the investigatory findings may be critical of the company’s role, practices, or procedures; and

- **Advice**—Outside legal counsel is uniquely positioned to challenge some of the internal thinking from an outsider’s point of view so that an ideal consensus can be determined. In addition, the outside counsel can provide a thorough, privileged report of the crisis, its causes, resolution, and the necessary steps to avoid a recurrence.

b. **Outside Technical Experts**

Experts in certain technical fields are crucial to assist the company when working through a crisis. A workplace accident may require engineers with expertise in fires and explosions, mechanical, electrical, materials, chemical, process safety and other specialized fields. External experts on data recovery and preservation may need to be retained to provide additional support to continue business operations. Outside counsel should retain these experts to conduct the investigation so as to preserve privilege with respect to their findings and communications.

c. **Public Relations Firms**

Managing the company message is critical to navigating a workplace crisis. Several outside PR firms specialize in workplace crisis situations. Like outside legal counsel, the best outside vendors are those that have partnered with clients in the past navigating a significant crisis. The message you portray to the public, the markets, and to your customers and vendors can have a significant impact on the success of managing the crisis at hand but also the aftermath once the crisis passes. In at least one jurisdiction, the attorney client privilege protection has been extended to a public relations firm retained by outside counsel to assist a
company involved in a crisis because the use of the firm’s services is necessary to the outside
counsel’s representation. See In re Grand Jury Subpoenas, 265 F. Supp. 2d 321, 326 (S.D.N.Y.
2003).

D. Communication Plan

Crisis communications plans are a subset of the company’s overall crisis management
plan and are not an overall emergency response program. The communication plan goes into
effect immediately when a crisis occurs, and works in conjunction with the company’s policy on
incidents, injuries, or death. The plan focuses on key decision-making that must occur in the
vast majority of these situations. Customers, employees, management, financial supporters,
industry peers and others, should all feel that a company is well-organized and handling an
emergency in a professional manner. Companies need to be able to respond very quickly to any
type of situation because crises do not pause to allow them to think through the problem.

1. Triage Communications-Internal

Triage communications are those contacts made in the initial minutes and hours of a

- **Corporate Security**—Security must be notified to provide first aid, secure the
scene, provide initial fire support in the initial minutes.

- **Local Police/Fire/Rescue**—911 calls for police and fire support depending on
the situation.

- **Employee Messaging**—your other employees not directly impacted by a crisis
must be notified of the event and follow established procedures. These may
include evacuation, departmental lock downs, or other specific actions to protect
other employees and business property from harm. In addition, employees
should be made aware of an incident to allay any fear or concern they may have
and to reassure your workforce that steps are being taken according to your plan.

- **Employee Assistance Program**—Activate your EAP to provide support for your
employees directly and indirectly impacted by and incident. Employees should be
reminded of these resources and the methods to contact EAP representatives.

- **Data Recovery**—Steps must be taken immediately to secure data servers and
systems to protect them from further damage.

- **Remote Access**—Employees with the capacity to work remotely should do so if
your facility is destroyed by a major event. Service to support and maintain these
systems should be in place and activated so that business can continue in this
trying circumstance.

2. External Communication

The crisis response will be as varied as the type of possible crises a company can face.
The key is that the company makes quality decisions in the first hours and days of the crisis to
ensure that the assets and wisdom are in place to achieve the goals set forth by the senior
management. Once put in motion, the response to the crisis at hand will be focused on
resolution and communication toward a successful outcome. Thoughtful communication and responsiveness to the needs of these stakeholders will enhance the company’s reputation significantly.

a. The Stakeholders

Part and parcel with the company response is keeping all of the company’s stakeholders updated and advised of the progress of the company’s response to a workplace crisis. These stakeholders include:

1. General Public

The company’s public image and the effectiveness of its response will be scrutinized by the public and news media. A consistent message from the company showing its responsiveness and sensitivity to a crisis is critical.

2. Affected Employees and Their Families

When a workplace crisis occurs that involves serious injury or death to an employee it is important to keep the lines of communication open with the employee and his/her family. Make sure that financial considerations such as medical, workers compensation, and funeral expenses are addressed. Promptly return the employee’s personal property to them and their families.

Keep in mind that investigative agencies such as OSHA will contact injured employees and family members as part of their investigation. For this reason, great care should be taken with the company’s contact with families.

3. Other Employees

No matter the crisis, communication with your employees is important to not only pass on critical information but also to show sensitivity to the crisis at hand. If the crisis involves a worker death or injury, some things you may wish to consider in an internal company communication would be: 1) expressing sadness over the event; 2) the company’s cooperation with investigative authorities; 3) expectation that the employees will fully cooperate in any investigation; 4) discouraging discussing the event with the press; and 5) assurance that you will keep the employees informed as to the progress of any investigation. In every situation in which employees have been or will be involved, they need to be assured of the company’s commitment to compliance and zero-tolerance for retaliation.

4. Board of Directors/Audit Committee/Investors

An individual or a small group of senior managers should be tasked with acting as the liaison between the crisis management team and the Board of Directors and/or Audit Committee, as the case may be and other members of senior management. This may include daily summaries to the senior management on the status of the on-going investigation or response to the crisis. The senior management may need to respond to inquiries from the markets and investors on how it is addressing the crisis. In these situations, on-going communications as the crisis unfolds and is resolved provides clarity in the message communicated.
5. Customers/Suppliers

Customers and suppliers of a company faced with a crisis will certainly take notice of the unwanted attention. Depending on the crisis a customer or supplier may question its willingness to continue to do business with a company involved in a workplace disaster or a claim that may question a company’s financial stability. If the company crisis involves a plant shut-down, customers will worry about their supply of product to meet their requirements and the same holds true for suppliers who may choose to supply to a competitor if your company reduces its orders. In this situation you may need to consider your contractual rights that may excuse your performance under a supply contract such as a force majeure provision. Likewise, suppliers may worry about the on-going relationship if a plant shutdown continues for a long period of time and they may choose to place their business with another company to avoid an interruption in their own business.

6. Insurers

A company’s risk management group should keep in mind that insurance coverage may be implicated in a workplace crisis. This would include first party property insurers where a company may make a property damage or business interruption claim as a result of a natural disaster or accident involving fires, explosions, or chemical emissions. Liability insurers may be called upon to provide coverage for third party claims against the company involving personal injury, death, property damage, employment claims, fidelity claims, errors and omissions claims, as well as director and officer liability. Prompt notice should be provided to the insurers of any expected claim to allow them an opportunity to investigate claims and evaluate coverage.

7. Government Regulators and Agencies

Many industries are regulated by outside governmental agencies such as OSHA or the EPA among others. Oftentimes they are involved in the investigation of a workplace crisis. As will be discussed in more detail below with respect to OSHA/MSHA investigations, these investigations should be handled with great care.

b. Media Management

In a high profile event, the media will inevitably take an interest. Companies must work with, and use the press to their advantage. The company’s statements to the media will be the primary mechanism to get its side of the story out to the public at-large. A media inquiry contact list is helpful to manage inquiries to the company. Outside media consultants can assist the company in its overall message and legal strategy to communicate its message. Security ground rules should be in place at your facility to manage media access.

The company should provide updates on its website and other electronic media to disseminate information. The cumulative effect of these communications should lead to an enhanced public image consistent with the company’s overall strategy.

c. Spokesperson

One of the early considerations is who on behalf of the company should be the spokesperson? Larger companies have spokespersons specifically trained for this role; however, others may not have this luxury. In these situations one or two senior managers should be designated for the task of dealing with press inquiries. Ideally, these managers would
also have the benefit of media training in advance. Once selected, their interface with the press should be guided by several fundamental principles:

1. Tell the Truth

Nothing hurts a company more than a misstatement or out-right lie that will haunt a company throughout the crisis.

2. Never Say “No Comment”

This statement is quite simply a cop-out. At a minimum, if you lack information at the time of the inquiry you can simply make a forward looking statement that you are conducting your own investigation and will provide updated information as it becomes available.

3. Prepare Comments in Advance

All comments should be prepared in advance and vetted by the crisis team. Have a generic news media response prepared. In addition, sample “Questions and Answers” may be helpful in anticipation of a press inquiry.

4. Express Regret

Acknowledging an event occurred and that it is a difficult time for the victims is a significant statement by the company that can create goodwill without admitting fault. The public desires a statement from the company that it is more than bricks and mortar and can acknowledge the acute loss suffered by the catastrophic incident.

5. Describe the Company’s Response and Action Plan

A company should describe how it is addressing the crisis, the actions it is taking to make things right, and the resources it is committing to the effort. This should also include a statement that the company is fully cooperating with the investigative authorities. The company’s actions and approach to resolve the crisis at hand will enhance the company’s reputation as the crisis wanes.

6. Build Rapport and a Relationship with the Media

As time goes by, the company’s designated media contact will inevitably develop a relationship with those members of the media charged with covering the event. Provide timely information to them and also respond promptly to their requests for information even if there is no new substantive information. In the end, a positive, responsive message, can go a long way toward softening the tone of the coverage and may result in more favorable media coverage.

7. Don’t Succumb to Persistent/Hostile Reporters

Stand firm in your statement to the media even if they are hostile to your response. Tell the reporter that the company will not speculate or guess what happened and that the investigation should be allowed to run its course. If they don’t take no for an answer and continue to press for more of a response, politely advise them that you do not have more to add and say good bye and hang up or ask them to leave.
8. Monitor Press Statements and Commentary

As a crisis unfolds, the company should monitor media coverage so it is aware of all public statements concerning the crisis and the company’s handling of the event. This information presumably will be known to your important business partners and stakeholders as well. To the extent any of the coverage is particularly inflammatory, you should be in a position to assess its effects promptly and prepare an appropriate response, if necessary.

IV. CONCLUSION

Effectively handling a workplace crisis is a rare opportunity for a company to exhibit its expertise, sensitivity, and competence in a high profile way that no amount of advertising could achieve. Planning is the key to successful crisis management under trying circumstances. The company will have worked closely with all of its stakeholders to enhance communication and goodwill during the crisis. While some business may be lost in the short term because of a workplace crisis, the company that handles it with exceptional care can emerge not only with its reputation intact but also can position itself as an industry leader that confronted the crisis and emerged stronger for the experience.
Crises and Calamities: Handling High-Profile Workplace Accidents

Presenters
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Moderator
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Introduction

- Who We Are
  - Our Speakers
  - Our Topic
Agenda

- OSHA Investigations – Best Practices
- Criminal Liability
- Crisis Management
- Interactive Case Study

Introduction

- Who Are You?
  - HR with a Safety Department?
  - HR without a Safety Department?
  - In-house Counsel?
  - Outside Consultant?
  - Company safety professional?
Managing OSHA Investigations

- Opening Conference
- Walkaround
- Document Requests
- Employee Interviews
- Closing Conference

OSHA

- The Occupational Safety and Health Act of 1970 created the Occupational Safety and Health Administration to reduce injuries, illnesses, and deaths on the job.
- States with OSHA-approved programs must set standards at least as effective as federal standards
  - 22 states and Puerto Rico have state plans that cover private employers (4+ USVI cover state/local government)
Pop Quiz

- How are employers chosen for inspection?
  1. Report of amputation
  2. OSHA hears about an incident on the news
  3. Employee complaint
  4. Neutral selection for National Emphasis program
  5. All of the above

Injury Reporting

- Hospitalization of one or more employees
- Amputations
- Loss of an eye or eyes
  - Must be reported to OSHA within 24 hours
- Fatalities
  - Must be reported to OSHA within 8 hours
Inspection Begins

- Alert appropriate Corporate officials
- Request credentials
- Determine purpose of Inspection
- Insist on an Opening Conference
- Treat inspections like litigation
- Establish cooperative relationship

Knock, Knock, May I Come In?

- Best Practice – Decide Approach with OSHA
Should you let OSHA in?

- OSHA cannot inspect unless consent from management OR they have a warrant
- Implicit message at Opening Conference: We will permit the inspection as long as you agree to our inspection protocols
- Consent must match the scope of the inspection (e.g., limited to cause of accident and OSHA logs)

You let OSHA in, now what?

- Opening Conference
  - Designate a single point of contact
    - to arrange interviews, request documents, etc.
  - Identify any trade secrets
  - Establish Inspection protocols
Inspection Protocols

- CSHO must be accompanied at all times
- Document requests must be written
- Advance warning of any sampling
  - Take side-by-side samples
- Procedures for photographs/videos
  - Take side-by-side
- Employee interviews must be scheduled

Walkaround

- Guidelines:
  - Stay with the CSHO at all times
  - Take same photos/videos/measurements
  - Take detailed notes
  - Pick the right people
    - Walkaround is basically a management interview
Walkaround

- **Guidelines:**
  - Carefully consider the route to the accident scene
    - Plain sight doctrine
  - Avoid damaging admissions
  - Employee conversations should be minimal
    - No right to disrupt operations
  - Need not “demonstrate” any machine/process

Document Production

- All requests submitted to a single source
  - Is the document responsive to OSHA’s written request?
  - Is the document privileged?
  - Is the request reasonable?
  - Trade Secrets?

- Only produce what OSHA requests
  - If OSHA asks for the LOTO program, do not produce training records and audits
Management Interviews

- Statements by managers/supervisors are binding on the company
- Managers and supervisors are entitled to have a management representative or attorney present during interviews
- No recordings
- Prepare as if it is a deposition

Employee Interviews

- Employees can have representation
- You can prepare employees for interview
- All interviews are voluntary, unless OSHA issues a subpoena
  - If no subpoena, employee can decline or end interview
  - Employees have the right not to be recorded or to sign
Closing Conference

- Insist on a closing conference
- Seek information; don’t offer it or argue
  - What is the hazard? Where is the exposure? Why does the standard apply?
  - Do not agree or admit anything
- Discuss abatement
- Correct misunderstandings

Citations

- Must include:
  - a description of the alleged violation;
  - a reference to the specific regulation allegedly violated; and
  - a classification of the alleged violation.
- Must issue citations within 180 days of initiating inspection
Citations – Classifications

- Serious
- Other than Serious
  - Maximum penalty: $13,260
- Willful
- Repeat
  - Maximum penalty: $132,598

Citations can end up as evidence for civil lawsuits and criminal prosecutions.

Post-Citation Challenge

- Must contest or conference within 15 working days (different time periods in state plans)
- Failure to timely file a contest will result in a final order
- Timely contest stays abatement and penalty payment
- Informal settlement vs. settlement post-contest
- Contested Case Hearing
Protected Activities

- Employee “Get Out of Jail Free” card?
  - Contacting OSHA
  - Participation in an OSHA inspection or talking to an OSHA inspector
  - Seeking access to employee exposure and injury records
  - Reporting an injury
  - Reporting safety hazards

Criminal Liability

- Potential areas for criminal prosecution
  - Section 17(e) of the OSH Act
    - It is a Class A Misdemeanor for any employer to willfully violate any standard adopted by OSHA when the violation causes the death of an employee.
  - State/Local prosecution
    - Assault and Battery
    - Criminal Conspiracy
  - EPA
Criminal Liability

Atlantic States Cast Iron Pipe Co. - Phillipsburg, N.J
OSHA/EPA investigators alleged an 8 year conspiracy:
- Concealing serious workplace injuries from health and safety inspectors
- Willfully polluting Delaware River and air
- Maintaining a dangerous workplace that resulted in
  - One fatality
  - Numerous severe burns, broken bones and amputations
Atlantic States – Charged

- DOJ charged Company and 4 Managers
  - Criminal conspiracy
  - Five counts of making false statements to OSHA and EPA
  - Four counts of obstructing a federal OSHA investigation
  - 22 counts of violating the Clean Water Act
  - One count of violating the Clean Air Act
- Seven month jury trial – 2006

Atlantic States – Convicted

$8 Million in Fines and 48 months of court supervised “probation”
Individual Liability

- All four managers convicted of various counts
- Sentenced between 6 and 70 months in prison
  - Including former HR manager – 41 months

California Criminal Liability

- Labor Code 6425
  - Willful safety violations causing death
- Corporations
  - Felony
  - $6 million+ fines
  - Victim restitution
- Individuals
  - Felony – Up to three years
  - $1 million+ fines
  - Victim restitution
Crisis Management

- What Plans should you have in place?
- Who should be on the team?
- How do you triage?
- Dealing with the major players

The Plan

- Risk and Hazard Assessment
- Events triggering plan
- Crisis Team
  - Roles
  - Responsibilities
  - Resources
- Communication Plan (Internal and External)
Crisis Team

- **Internal**
  - Team Leader
  - Senior Management
  - Health and Safety
  - Human Resources
  - Public Relations
  - Legal/Compliance
  - Security/IT
  - Technical/Engineering
  - Risk Management/Finance

- **External**
  - Legal Counsel
    - Expertise and Relationships
    - Privilege
  - Experts
    - Investigation assistance
  - Public Relations
    - Crisis Communications
  - Technical
    - Evidence and asset preservation
    - Operational Recovery
Crisis Team Leader

- **Qualifications**
  - Manager
  - Broad Experience
  - Excellent Judgment
  - Problem solving capability
  - Commitment

- **Responsibilities**
  - Direct team activities
  - Ensure critical needs are met
  - Facilitate team communications
  - Provide status reports to senior management
Health and Safety

- Ensure safe access
- Preserve accident scene
- Assess PPE
- Accident Investigation Report
  - At direction of counsel?
- Notify appropriate agencies

Human Resources

- Identify affected employees
- Attend to family members
- Hospital coverage
- Initiate drug/alcohol testing
- Updates to other employees
- Activate Employee Assistance Program
Human Resources

- Dealing with the Family
  - Keep lines of communication open
  - Ensure that financial details are addressed promptly
    - Workers’ Compensation
    - Short Term Disability
    - Interim cash
    - Funeral Expenses
  - Return personal items

Spokesperson

- Good under pressure
- Not involved in events
  - Not a fact witness
- Able to stay “on message”
- Media trained
Triage

- Response in the immediate aftermath of a crisis
- Essential Elements
  - Contact emergency services
  - Implement evacuation plans
  - Emphasize life/safety as a priority
  - Preserve the scene
  - Prevent further damage
  - Manage the media
  - Communicate with key partners

Triage

- Stakeholders
  - General Public
  - Board of Directors
  - Employees
  - Customers
  - Suppliers
  - Shareholders
  - Regulators
  - Insurers
Triage Communications

- Press & Community Relations
  - Prepare statements in advance
  - Never say “no comment”

- Focus on:
  - Integrity
  - Safety and security
  - Investigation to prevent repeat occurrence
  - Do not admit fault
  - Cooperation with government investigators
  - Compassion for injured/family members

Case Study

- January 23 at 2:00pm
- Partially open air Phosgene Shed.
- Employees had been alternating between two one-ton phosgene cylinders the previous day – causing pressure to build
- Employee was checking phosgene cylinder when transfer hose ruptured and phosgene gas escaped
- Employee exposed to toxic levels of phosgene
- Employee called for help, was treated on-site, then hospitalized
- Employee died at approximately 9:40 pm on January 24.
Breakout Session #1

- **Triage and Media Response – Discussion**
  - What immediate concerns need to be addressed?
  - Who or what department in the company should address each priority?
  - How will you coordinate and track/monitor all activities?
  - How frequently will you report activities to senior management?
  - What will you say to the media?
  - Do you need to report to OSHA?

Breakout Session #2

- **OSHA investigation – Opening Conference**
  - You reported the fatality to OSHA within 8 hours – When OSHA shows up a few hours later, do you let OSHA in the Door?
  - Who attends the Opening Conference?
  - We need a copy of your internal accident investigation report
  - We need to conduct employee witness and management interviews – Do you produce these employees? How?
Breakout Session #3

- OSHA Walkaround
  - Who should accompany the CSHO?
  - The CSHO asks you to demonstrate the phosgene tank transfer process. What do you do?
  - The CSHO attempts to ask questions of employees while they are working. Do you allow this?
  - While walking to the accident site, the CSHO notices an electrical junction box with an exposed wire. What do you do?
  - OSHA shows up with a representative from the International Chemical Workers Union and insists that the Union Rep participate in the walkaround. Your facility is non-union. What is your response?

Breakout Session #4

- Employee Interviews
  - Employee expresses to you that he does not want to be interviewed. What is your response?
  - OSHA investigator seeks to record management interviews, what do you do?
  - Do you prepare employee witnesses before interviews?
  - What do you tell employees about the interview process?
  - Do you tell them to refuse to sign any written statements?
  - Do you schedule the interviews on-site or off-site?
  - Who will you have attend any management employee interviews?
  - Can you “debrief” hourly employees after their interviews?
Case Study – The Rest of the Story

- OSHA issued 6 Serious citations regarding:
  - Failure to properly inspect phosgene transfer piping
  - Failure to perform a thorough process hazard analysis for its phosgene operation
  - Failure to train workers on hazards associated with phosgene
- Total penalties of $43,000
- CSB investigation – public shaming
- EPA – $1.275 million penalty
  - This and other violations of Clean Air Act and CERLA

Crises and Calamities:
Handling High-Profile Workplace Accidents

Presenters
Kevin D. Bland (Orange County), Dee Anna D. Hays (Tampa), Phillip B. Russell (Tampa), and Hal Shillingstad (Minneapolis)

Moderator
William S. Rutchow (Nashville)