



## MANAGING WORKPLACE FATALITIES AND CATASTROPHES

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“Chaos and order are not enemies, only opposites.”

~ Richard Garriott

# WHAT IS A CATASTROPHE?

## Characteristics may include:

- Employee and public fatalities or mass injuries
- High visibility
- Challenging political or governmental environment
- Multiple conflicting area of legal exposure, perhaps including criminal
- Harm to business operations or reputation
- Product or financial crisis, criminal allegations, union corporate campaigns, etc.

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# CAN IT HAPPEN TO YOU?

- Almost 5,500 workplace fatalities still occurred in 2007, the lowest year on record
- 25% occurred in supposedly “low risk” industries (retail, hospitality, professional financial sections)
- Workplace vehicular accidents often involved members of the public and great liability

# PRE-INCIDENT PREPARATION

## Why Prepare?

Boy Scouting Executive, Lloyd Roitstein, commenting after the June 2008 tornado hit the Little Sioux Scout Camp, killing four:

They lived up to the Boy Scout Motto “Be Prepared.” They knew what to do, they knew where to go, and they prepared well.

# PRE-INCIDENT PREPARATION

## Develop An Emergency Management Plan Which Includes

1. Crisis Management Action Procedure with an Incident Command System.
  - Determine what to do if the office is lost or communications disrupted.
  - Simple guidance to all management levels
  - Designated “coordinators”
2. Regulatory Response Procedure
  - not just for handling OSHA
  - consider criminal exposure
  - supervisor training

# PRE-INCIDENT PREPARATION

## Emergency Response Plan (Cont'd)

### 3. Media Coordination Procedure

- Recognize the effect of the internet
- build relationships in advance
- written scripts
- Recognize the roll of press on legal and employee issues
- Protect the “brand”

# PRE-INCIDENT PREPARATION

## Emergency Response Plan (Cont'd)

4. “Practice” Emergency Plans – EAP, ERP, FPP, HAZ Whopper
5. Conduct Regular Safety and Compliance Audits
  - safety “job descriptions” at every level
  - pre-shift/pre-work meetings
  - supervisor or employee inspections
  - legally “protected” audits

# PRE-INCIDENT PREPARATION

## Emergency Response Plan (Cont'd)

6. Up-to-date Hazard Assessments
  - Include the effects of other employers on site
  - PPE
  - Loto, guarding, PIT's, motor vehicles, electrical, CSE
  - “General Duty” issues

# PRE-INCIDENT PREPARATION

## Emergency Response Plan (Cont'd)

7. Build safety management around discipline and the unpreventable employee misconduct defense.
8. Analyze company, industry, and plant history.
9. Evaluate legal/regulatory/political environment.
10. Plan for Community Outreach, and long-term support of employees and families.

# RESPONSE TO THE EMERGENCY

## First Priority - Protect Employees!

- Initial response/evacuation
- Take control/account for all employees
- Coordinate with emergency responders
- Isolate accident/incident area
- Prevent further injury or damages
- Provide prompt care for injured
- Reach out to families

# RESPONSE TO THE EMERGENCY

## Handling The Accident Or Incident

- Implement accident scene safety procedures, including evidence preservation
- Restore normal operations (if necessary, shut down operations)
- Identify accident/incident area hazards and take interim measures
- Prevent recurrence of accident/incident

# RESPONSE TO THE EMERGENCY

## Notification Of Corporate Office And Appropriate Legal Counsel

- Provide initial details of accident/incident and status report
- Request needed resources (2 – deep)
- Contact OSHA counsel and obtain directions for asserting legal privilege, response to investigations, and coordination with other counsel and insurers
- Consider exposure to claims by customers , the public, or other employers

# RESPONSE TO THE EMERGENCY

## Respond To Employee Concerns

- Assigning duties during accident/incident response
- Scheduling of work, leave
- Activate employee assistance program
- Address safety concerns
- Control communications about investigation
- Union coordination

# RESPONSE TO THE EMERGENCY

## Respond To The Needs Of Families

Balancing “the need to do what’s right” with legally prudent behavior.

Do the “right thing;” it’s usually the legally correct course as well.

# RESPONSE TO THE EMERGENCY

## Successfully Dealing With News Media

- Designate Company's spokesperson
- Protect "the Brand"
- Respond quickly and proactively
- Unified message
- Never say – "No comment"
- Stick to minimum uncontroverted facts – keep it brief

# RESPONSE TO THE EMERGENCY

## Successfully Dealing With News Media (cont'd)

- “Company extends its condolences and is conducting an investigation, and fully cooperating with investigations”
- Limit written communications
- Continue to develop and disseminate pro-active message to public, customers and vendors
- Be sensitive to “community issues”

# RESPONSE TO THE EMERGENCY

## Notification of appropriate governmental agencies

- Fire, Police and EMT
- OSHA – 8 hour rule
- MSHA – “one call” procedure
- State emergency management officials
- EPA, DOT, etc.
- Notify only government agencies who are required to be notified

# RESPONSE TO THE EMERGENCY

## Notification of Insurance Carriers

- Provide initial details of accident/incident
- Ascertain insurance carrier's response
- Ask for counsel and/or experts
- Preparation for on-site investigation by insurance carrier personnel and experts
- Coordinate workers' compensation, GL, and other counsel
- Cooperate with but manage non-attorney investigators

# RESPONSE TO THE EMERGENCY

## Handling Requests From Other Third Parties

- Equipment manufacturers
- Contractors, Property Owners
- Vendors
- Attorneys representing injured or deceased employees

# RESPONSE TO THE EMERGENCY

## Institution of Accident/Incident Investigation

- Internal investigation
- Initial Investigation
- First report of injury filing
- Follow company procedures
- Consider legal implications
- Avoid snap conclusions

# RESPONSE TO THE EMERGENCY

## Institution of Accident/Incident Investigation

(cont'd)

- External investigation
- Consider role of counsel
- Identification of witnesses
- Identification of evidence
- Avoid spoliation, obstruction of evidence
- Special considerations when a site is declared “a crime scene”

# RESPONSE TO THE EMERGENCY

## Document Control

- Collection of documents
- Creation of documents
- Distribution of documents
- Privilege and other protections
- “Document Holds”
- Electronic Communications
- Criminal Considerations
- Issues with other employers

# RESPONSE TO THE EMERGENCY

## Governmental Agency Investigations

- OSHA
- MSHA
- Bureau of Alcohol, Tobacco, Firearm & Explosives (ATF)
- Chemical Safety Board (CSB)
- DOT
- U.S. Justice Department (DOJ)
- State Attorney General
- State Attorney's DA's
- State/Local Fire Marshal

# RESPONSE TO THE EMERGENCY

## OSHA Investigation

Entry of facility (warrants, subpoenas, scope)

Opening Conference

- Attendees
- Parameters established
  - Establish cooperative atmosphere
  - Employee interviews
  - Coordination with other investigators
  - Document requests
  - Photos and trade secrets
  - Union involvement

# RESPONSE TO THE EMERGENCY

## OSHA Investigation

### Walk-Around

- Attendees and timing, union involvement, security
- Scope
- Role of other employers onsite
- Expansion of investigation
- Monitoring
- Note taking, filming, photos
- Discussions with inspectors

# RESPONSE TO THE EMERGENCY

## OSHA Investigation

Records and document inspection

Self-audits and inspections

“Correction” issues

# RESPONSE TO THE EMERGENCY

## OSHA Investigation

### Employee interviews

- Hourly
- Management
- Former employees
- Pay issues
- Preparation versus obstruction
- Handling emotional or injured employees
- Recording interviews
- Signing statements

# RESPONSE TO THE EMERGENCY

## OSHA Investigation

### “Target” or “witness”

- Dealings with U.S. Solicitors

## Closing Conference

- Attendees
- Scope
- Response

# RESPONSE TO THE EMERGENCY

## OSHA Citations

- Timing and scope
- Posting requirement
- Abatement
- Communication to employees and public

# RESPONSE TO THE EMERGENCY

## OSHA Investigation – Informal Conference

- Timing of meeting
- Who to attend
- Preparation – discussion with OSHA counsel regarding presentation of company position and possible defense
- Possible informal settlement
- Effect of civil and criminal actions.

# RESPONSE TO THE EMERGENCY

## OSHA Investigation

### Contest of Citations

- Timing – generally within 15 working days of receipt
- File Notice of Contest
- Stay of abatement
- State plan procedures may vary

# RESPONSE TO THE EMERGENCY

## OSHA Investigation

### Appeal Process

- Review Commission – ALJ hearing and decision
- Appeal of ALJ decision
- Review Commission – review and decision as well as appeal process
- State plan procedures markedly differ and may affect strategy
- Continuance or stays where ancillary civil or criminal actions

# BALANCING COMPETING CRIMINAL AND CIVIL CONCERNS

- Law enforcement
- CSB, ATF, etc.
- Fire Marshals
- Workers' Compensation
- Civil Claims
- Contract Claims
- Individual Defense
- Indemnifications

# BALANCING COMPETING CRIMINAL AND CIVIL CONCERNS

## Criminal and Civil Concerns

- OSHA/DOJ Referrals
- Environmental Criminal Issues
- States Attorney Investigations

# BALANCING COMPETING CRIMINAL AND CIVIL CONCERNS

## Criminal and Civil Concerns

Stays

Multi-Employer Issues/Conspiracy

Obstruction/False Statements

# DEALING WITH SURVIVING FAMILY MEMBERS

- Usually meet in person
- Use both formal and informal communications
- Determine who is the best company representative
- Utilize several members of management and employees to provide assistance and support
- Provide material or monetary support

# DEALING WITH SURVIVING FAMILY MEMBERS

- Provide contact information of company officials, family liaison, benefits managers
- Provide benefit information
- Response to questions
- Site visit issues
- Treat all involved with respect and dignity

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