

Major Accident Response

Managing the First 96 Hours

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The Incidents



The Stakes

- High profile incidents continue to drive focus on crisis response and liability management
- “Stakes” are higher than ever
 - Accidents are increasingly criminalized
 - Significant potential for lasting reputational harm
- Anticipate an “alphabet soup” of investigating and enforcement agencies (e.g., U.S. EPA, OSHA, CSB, NTSB, etc.)
- Pose challenges unlike any most organizations have faced
- Coordinated, well-managed response is essential

Criminalization of Accidents

- EPA Criminal Investigations Division often among first to respond
- DOJ Worker Endangerment Initiative continues to drive scrutiny
 - Continued effort by DOJ to obtain and use information from CSB investigations
- Basis for criminal investigation
 - Clean Air Act
 - Negligent and knowing endangerment
 - OSH Act
 - "Any employer who willfully violates" any OSHA standard when "that violation cause[s] death to any employee"
 - False Statements
 - Obstruction of Justice

Primary Legal Issues

- Evidence Preservation
- Interacting with the Government Agencies
- Document Collection and Production
- Witness Interviews
- Internal Investigations and Experts

Evidence Preservation

- Preventing claims of spoliation and obstruction are critical
- Common for agencies to request agreement regarding preservation of evidence and changes to incident site
- Change log for incident site
- Preserving electronic data (e.g., SCADA, DCS, data historians)
- Procedures for collecting physical evidence
- Procedures for securing critical hardcopy documents (e.g., operator checklists, control room logs, IC scribe notes)
- “Preservation Order” for record retention

Interacting with the Government

- Single points of contact with dedicated legal support
- Understanding on process for requests for interviews and documents
- Control of and access to incident site
- Notice to agencies on site stabilization activities
- Memorialize consents (or lack of objection) by agency
- Recognize that correspondence with agencies is discoverable
- Exercise firm, but reasonable controls
- Do not be afraid to say "No" - BUT
 - Have good reasons and recognize potential for consequences

Document Collection and Production

- Insist all document requests be in writing
 - Clarify any unclear document requests
 - Object to and negotiate overbroad document requests (e.g., “any and all...”)
- Identify main custodian (should not be legal counsel)
- Establish process for collection, review and production
- Assign responsibility for each document request to one person
- Review for privilege and withhold privileged documents
 - Include language in cover letter on issue of inadvertent disclosure
- Review and label documents as appropriate
 - Confidential Business Information (Freedom of Information Act)
 - Sensitive Security Information (Maritime Transportation Security Act)

Witness Interviews

- Inform employees of their rights and employer's expectations
 - Whether to submit to interview is employee's decision
 - Can have someone accompany them during the interview, take notes, etc.
 - If interviewed -
 - Imperative to tell the truth
 - Listen carefully to the question and then answer only that question
 - Request that employee not speculate
 - Cautions regarding request for written statement
- Use talking points to prevent mischaracterization of effort
- Imperative that employees understand that company counsel does not represent them individually

Experts and Internal Investigations

- Establish internal teams to conduct investigation
 - PSM- / RMP-mandated investigation
 - Privileged and confidential investigation at direction of legal counsel
- Imperative to reinforce controls on both investigations
 - Guidelines on document preparation and retention
 - Limitations on collecting documents outside of formal process
- Act as if everything that is written is discoverable
 - May be inadvertently disclosed or company may waive privilege
- Protect consultants and experts
 - Issue of consulting vs. testifying experts
 - Anything given to expert who testifies is discoverable

Final Thoughts

- Prepare for crisis
- Take a hard look at crisis management plans
 - Are roles and responsibilities up to date?
 - Have there been changes in reporting requirements?
 - Is level of media training at local level sufficient?
 - Is contact information for outside resources (legal counsel, technical consultants) current?
- Consider developing more detailed procedures (crisis management “toolkits”)
 - Reporting, inspections, interviews, document management
- Practice, practice, practice – drills are key!