

WORK AT HEIGHT



ESSENTIAL ACCIDENT & FATALITY STRATEGY

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No matter how well something is planned, accidents can happen, and when they do people often react to a situation on instinct without thinking clearly.

In the event of a fall from height, the immediate concern is obviously to deal with the casualty. Once this has been done an investigation will need to be carried out and it is here that many companies will find themselves in difficulty if they don't have a clear strategy in place on how to deal with an investigation. Depending upon the severity of the accident an investigation will more likely than not include the HSE, and possibly the police, so it is essential that you have a clear and coordinated approach in order to ensure that vital evidence is not missed and information is collected in an effective manner.

The following is an overview of what happens in the event of a major incident or fatality, what a company should include in its strategy on how to deal with incidents and what to expect from an investigation.

A Coordinated Approach

1. Secure the site and evidence

Immediately after an incident you should make sure that the area is safe and, if necessary, restrict access so that those investigating the incident can see the area exactly as it was at the time of the accident. In addition to restricting access, make sure that any physical evidence including plant and machinery is preserved.

Take photographs of the scene and prepare a sketch of the area, taking note of any measurements, the time of the incident and environmental conditions. These will enable accurate scaled drawings of the scene to be produced later.

2. Witnesses

Collect names of witnesses. Witness statements should be taken as soon as possible while the incident is still fresh in people's minds. However, bear in mind that some witnesses may not be able to give an accurate account straight away as they may have been emotionally affected by the incident.

Interview witnesses separately and include their full name, address, telephone number and signature on their statement.

Expert witnesses should also be considered, for example if the incident was a fall from height, you may want to call upon evidence from an expert in height safety.

3. Who to notify

Assuming HSE and, if necessary, the police have already been informed your first priority should be to notify your insurers who will also confirm if your legal costs are covered as far as investigation and proceedings are concerned.

You should seek legal advice as soon as possible so that you are clear on what steps to take in assisting the investigation.

If available and depending upon the severity of the incident, you may also need to contact your company's press department or agency.

Finally, as is standard practice, any major incident or fatality will need to be reported under RIDDOR

4. Clear Documentation

All relevant health & safety information must be made available to those investigating the incident. These should include your health & safety policy, site specific risk assessments and method statements, permits to work in addition to training and maintenance records as well as information on any similar incidents or near misses.

Make sure that your documents are consistent, if regular inspections are required, make sure these took place and if so, what was noted at the time. If a risk assessment or method statement says work should be carried out in a particular manner, check that it did and if not, why not?

All health & safety documentation should be either up to date or under review. It is easier to show compliance to those investigating the incident if documentation is up to date or being reviewed. Any out of date or incomplete documentation will be viewed unfavourably.

The Investigation

Internal Investigation Report

An internal investigation must be undertaken as soon as possible so that you can determine how the incident took place and its causes. An in-depth report should then be prepared.

Appoint a single point of contact who is responsible for co-ordinating the investigation and preparing the report. This person should also be responsible for liaising with the investigating authority/authorities to ensure consistency of messages and information.

If any areas of concern arise as a result of the investigation, they should be dealt with immediately. If a problem has been identified that may affect other sites or methods of work, look into what changes can be made to prevent future incidents or problems.

External Investigation

The HSE/Local Authority will investigate an incident. If it involves a fatality, there will be a joint police and HSE/LA investigation with the police taking the lead.

The investigation usually focuses on the company, however this can move on to individuals in particular directors, managers and anyone involved in the management of the company, and even employees.

Section 20 of the Health & Safety at Work Act 1974 allows investigators to enter a premises at any time without giving prior notice. They are also able to seize items and take photographs and recordings.

Witness Statements

The HSE has the additional power to interview and take statements from any person they believe is able to give information relevant to the investigation. These people can include witnesses and anyone able to comment on how the company operates and is managed. The person being questioned has the right to have someone else present but that person can not be the solicitor acting on behalf of the company.

The HSE can take **Voluntary Statements** under Section 9 of the Criminal Justice Act 1967 or a **Compulsory Statement** under Section 20 of the Health and Safety at Work Act. If a witness provides a voluntary statement it is important to understand that this statement will be admissible in evidence, against both the person making the statement and the company, so the witness should only sign this statement when they are completely happy that it is accurate.

It is an offence to refuse to answer questions as part of a compulsory statement. Answers given under these circumstances can not be used as evidence against the statement maker. The person being interviewed has a right to be accompanied and to have a copy of their statement.

Before providing a statement make sure you know what type of statement the HSE will be taking and what areas they are planning to cover so that you can be sure you, or the person being interviewed, are able to assist them. If the areas they wish to cover are beyond that person's remit or knowledge this should be made known to the HSE.

Interview under Caution

This is the final stage of the HSE investigation and is not compulsory but you should still seek legal advice. The interviewee is not under arrest or obliged to remain*. These interviews are an opportunity to provide information for the defence, but it should be remembered that it also allows the HSE to gather evidence for a prosecution. Refusal to attend an interview cannot be held against a person, but it could affect the outcome of an enforcement issue when it comes to assessing 'attitude'.

A clear distinction must be made prior to the interview as to whether the person is being interviewed as an individual or on behalf of a corporate body. If the person is being interviewed on behalf of a corporate body, a letter of authorisation **MUST** be obtained from the body before the interview can proceed.

If a person is to be interviewed on behalf of the corporate body, it's essential that the right person is selected. They must be senior enough to speak on behalf of the corporate body, be knowledgeable of the incident and cause and be able to communicate clearly. Preparation is key so ask the HSE what documents they may refer to during the interview.

The interviewee's attitude is extremely important. If appropriate, or unavoidable, admit to failings but counteract these with positives such as any remedial steps you have or are putting in place as a result of the incident. If the interviewee appears to be confrontational or unhelpful this can go against them and make prosecution more likely.

* **NOTE:** If the police are involved in the investigation they **do** have the power to arrest a person and require an interview.

What Happens Next?

Once all the information has been collected, the HSE will then decide whether an offence has been committed, and if so is it in the public interest to prosecute the defendant?

A prosecution is less likely if the incident was found to be as a result of a genuine mistake or misunderstanding (compared against the seriousness of the offence) the loss or harm is seen as minor and was as a result of a single incident or if it is felt that the penalty imposed by the court will not justify the cost of a prosecution.

If it decides that the company breached its duties, an **Improvement Notice** may be issued whereby action is required by a specific date. Failing to implement these improvements by the set date is an offence.

If the alleged breach relates to a serious risk of personal injury, then a **Prohibition Notice** may be issued. This means that the relevant work or action must be stopped until remedial action has been taken.

Improvement and Prohibition Notices will be published on the HSE's enforcement notice database. Appeals can be made against these, but they must be done within 21 days at the Employment Tribunal. A magistrate's court can impose a maximum penalty for failure to comply with an Improvement or Prohibition Notice of a £20,000 fine and/or a year's imprisonment. A Crown Court can impose an unlimited fine and/or two years' imprisonment.

A **Formal Caution** is only issued by the HSE in exceptional circumstances when it is deemed that the public interest firmly outweighs a prosecution. A formal caution must be accepted and signed by the company or person it is addressed to.

The HSE will only pursue a **Prosecution** if it is felt that there is enough evidence and if it is in the public's interest. As soon as a prosecution is brought you should seek legal advice on whether the charges are appropriate and what plea should be entered.

It can be many years before a prosecution is brought and is more likely to occur in cases where:

- there has been a fatality
- the offence or injury is serious
- there has been repeated poor compliance
- work has been carried out without a licence or in breach of the terms of a licence
- the standard of safety management falls below what is expected
- there has been a failure to comply with an improvement/prohibition notice
- there has been a conscious attempt to deceive or obstruct an investigation

October 2011 saw measures brought in to fast track prosecutions in the event of a death. Previously prosecutions would be delayed until after an inquest however the revised protocol allows prosecution before an inquest where manslaughter or homicide charges are not relevant. This will speed up the whole process for both the bereaved family as well as for the company/person being prosecuted.

The Impact of Prosecution/Sentencing

Many companies/people underestimate the actual cost of a prosecution. For a corporate body, the costs can be vast and are not limited to financial costs. Financially there are the obvious costs associated with legal fees and a prosecution not to mention the fine which could be based on turnover. What many fail to consider are the non-financial costs to the corporate body as well as individuals within the company. For example, there will be an effect on business in general as people within deal with the aftermath of the incident and subsequent prosecution and the company's reputation can suffer, particularly if the media become involved. If the prosecution is under the Corporate Manslaughter Act, a publicity order can be issued whereby the organisation will be required to publicise details of the conviction in the press and/or to their customers and suppliers. A downturn in business could lead to redundancies which will put the whole workforce under pressure and those dealing with the incident/prosecution will find their stress levels and workloads increase as their time is taken up dealing with the case.

Conclusion

As stated at the beginning, accidents do happen, however if you have a clear health & safety policy and provided you implement the policy effectively and it becomes central to your business's culture, fewer accidents will happen so you will have a greater degree of protection from prosecution. In the unfortunate event of an accident, a clear accident and fatality strategy will help those involved understand their duties and hopefully make the investigation more coordinated and so less stressful for all concerned.