



ANATOMY OF A WORKPLACE FATALITY APMA FORUM 2014

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The following presentation contains general information and is provided as a courtesy to our clients and friends. It should not be relied upon in any particular fact situation without consulting your legal counsel for specific advice.

HOW WILL YOU REACT IF TRAGEDY STRIKES?



FATALITY STATISTICS

- U.S. fatality rates for workers have gradually decreased over time.
 - The fatality rate for immigrant workers has increased rapidly.

- The occupational fatality rate for Latinos has been the highest among all groups in the United States for 15 years.
 - 3.9 per 100,000 workers in 2010.

- Agriculture, forestry, fishing and hunting sector had the highest fatal work injury rate in 2011 – 24.9 killed per 100,000 workers.

- Studies suggest that foreign-born workers are more likely to work in risky jobs than native-born workers.
 - Disproportionately employed in agriculture and construction – sectors that see some of the highest injury and fatality levels.

FATALITY SETS IN MOTION

- Legal Issues
 - Government enforcement (OSHA/DA)
 - Private claims (workers' comp / tort)

- Emotional Issues
 - Employee wellness / workplace trauma
 - Dealing with worker's family
 - Personal "breathing room:

- Practical issues
 - Media coverage
 - Return to productivity
 - Healing

THE ACCIDENT and IMMEDIATE RESPONSE

- Call emergency responders / next of kin
- Contact legal counsel
- Secure the scene
- Secure and segregate witnesses
- Preserve evidence
- Contact on-site support for employees
- Report to Cal/OSHA (within 8 hours)
- Identify recent, similar accidents.

The Investigation

■ Witnesses

- Have sensitivity to what they have seen
- Ask detailed questions
- Keep detailed notes
- Obtain signed statement if possible
- Identify agencies who have interviewed the witness (get police reports)

■ Physical evidence

- Take photographs [for your attorney]
- Rope off the area if possible.
- Identify and tag involved equipment

The Day of the Accident

■ Local Law Enforcement

- Typically respond first
- Looking for criminal activity – give them cooperation
- Typically will not examine detailed safety issues

■ Cal/OSHA

- Will usually try to arrive the same day (if possible)
- Try to get a list of items needed.
- Try to postpone interviews if possible.
- Initiate contact, arrange for cooperation, and focus on priorities.

■ Media

- Limit access and determine appropriate strategy.
- When in doubt, remain silent.

The Day of the Accident

■ Workplace support

- Counselors
- Clergy – but make sure to include all churches represented in the workplace
- Consider shutting down for a day or two

■ Witness support

- May need additional support and counseling
- Consider transportation home
- Try to postpone interviews if possible – take the pressure off.

■ Legal Coordination

- Gather related documents and records
- Identify additional witnesses
- Formulate media strategy

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CAL/OSHA INVESTIGATION

- Cal/OSHA Enforcement
 - Standard investigation to issue citation.
 - Expect, at minimum, at least one serious violation.
 - Avoiding the citation altogether is not the objective.
 - May accompany the inspector, take notes, and photograph any items photographed by OSHA.
 - Will want to interview employees, supervisors, management, and other witnesses.
 - Rank and file employees may be interviewed without counsel.
 - Company counsel has a right to be present for management and supervisors.
 - Will request documents – IIPP, training records, maintenance records, etc.

CAL/OSHA INVESTIGATION

- **Bureau of Investigations (BOI)**
 - Conducts criminal investigations.
 - Mandatory in fatality cases.
 - Usually follows the Enforcement investigation.
 - Expect aggressive and intimidating approach.
 - May contact rank and file employees without notice.
 - Know your rights!
 - Cooperation is preferable, but a warrant is needed for access to the facility.
 - Cooperation is preferable, but a warrant is needed to seize evidence.
 - You have a right to counsel.
 - Never forget – this is a criminal investigation.
- Files report with local District Attorney with recommendations.

Potential Legal Consequences

- Cal/OSHA citation
 - Expect at least one serious violation.
 - Worst case – “willful” violation.
 - Appeal should be automatic – but will be on hold pending the BOI investigation

- Criminal Prosecution
 - Can be felony or misdemeanors
 - Both individuals and business entities can be prosecuted.

- Workers Compensation
 - Underlying benefit case usually simple – based on dependents
 - Serious and Willful Misconduct – 50% of benefits paid

- Tort Exposure
 - Limited exceptions to exclusive remedy.

Potential Legal Consequences

- Every employer and any individual with control over any employee or place of employment commits a misdemeanor if he or she who does any of the following:
 - Knowingly or negligently violates any Cal/OSHA standard where the violation is classified as serious.
 - Repeatedly violates any Cal/OSHA standard that creates a real and apparent hazard to employees.
 - Knowingly fails to report a death to Cal/OSHA
 - Fails or refuses to comply, after notification and expiration of any abatement period, with any Cal/OSHA standard that creates a real and apparent hazard to employees.
 - Directly or indirectly, knowingly induces another to commit any of these acts
- 6 months in county jail, and/or by a fine not to exceed five thousand dollars(\$5,000) Repeat offense is one year in jail and/or a \$15,000 fine.
- If the violator is a corporation or a limited liability company, the fine may not exceed \$150,000.

Potential Legal Consequences

- Every employer and any individual with control over any employee or place of employment who willfully violates a Cal/OSHA standard that causes a fatality or permanent/prolonged disability/impairment can be prosecuted for a felony or a misdemeanor, at the discretion of the prosecutor.
 - Misdemeanor – 1 year in county jail, and/or a fine of \$100,000
 - Felony – 16 mos., 2 years, or 3 years and/or by a fine of \$250,000
 - If the defendant is a corporation or a limited liability company, the fine may not exceed one million five hundred thousand dollars(\$1,500,000).
 - Additional prison time and heavier fines attach for offenses committed within 7 years of a prior offense.

Potential Legal Consequences

■ Civil Prosecution

- B&P Code 17200 - Business and Professions Code section 17200 defines unfair business practices as any unlawful, unfair or fraudulent business practice.
 - Safety violations are predicate acts

- Remedies
 - Injunctive Relief
 - Restitution
 - \$2,500 penalty per violation
 - Costs of local consumer agency

Potential Legal Consequences

- **Workers' Compensation Benefits** (After January 1, 2013)
 - Burial expenses up to \$5,000

 - 1 dependent = \$250,000

 - 2 dependents = \$290,000

 - 3 or more = \$320,000

 - Additional formulas used for “partial dependents”

Potential Legal Consequences

■ Workers' Compensation Penalty – Serious & Willful Misconduct

- 50% of benefits paid

- Difficult standard of proof – quasi-criminal disregard for safety
 - Even beyond gross negligent – almost intentional
 - Must appreciate the potential consequences and deliberately disregard the hazard
 - Requires action by higher level management than front line supervisors

- Filed routinely in fatality cases.

- Latest twist – discrimination.

Potential Legal Consequences

■ Tort Liability

- Exclusive remedy provides broad protection from liability.
- Where the employee's injury or death is caused by a willful physical assault by the employer.
- Where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment. This exception is most often triggered in hazardous material exposure cases, such as asbestos related illnesses.
- Where the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person.
- The employer fails to obtain workers compensation insurance or approved self-insurance.
- Failure to install power press guards. A “power press” means any material-forming machine that utilizes a die which is designed for use in the manufacture of other products.

This is not just about liability.



It is about lives.

Safety must be a constant commitment

