

Does employer have to share internal accident investigation reports with labour ministry?

QUESTION: Following a workplace accident must an organization's internal accident investigation report be disclosed to the Ontario Ministry of Labour?

ANSWER: The short answer is no. However, to protect the investigation report from disclosure, an organization must first have taken proactive and deliberate steps to protect the investigation report through the application of "privilege."

Following a workplace accident, many prudent organizations will conduct an internal accident investigation to determine the reasons for the accident and, if appropriate, remedial steps to ensure a similar accident does not occur in future.

Under Ontario's Occupational Health and Safety Act (OHSA), for example, a Ministry of Labour inspector has broad powers to investigate an accident, including requiring disclosure of a range of documentation and other information. This often includes a request for disclosure of internal investigation notes or reports if any have been prepared.

An internal accident investigation report can serve a vital role in the defence of charges laid against the organization and managers under the OHSA or other legislation including the Criminal Code of Canada. A well prepared internal accident investigation report can contain information that might not otherwise be uncovered by a Ministry of Labour inspector, including facts related to prior incidents, related incidents or regarding the accident itself, names of witnesses, witness statements, admissions, photographs and expert reports.

However, the usefulness of an internal report can be significantly undermined if it falls into the hands of a Crown prosecutor. Determining which documents are accessible to



LISA
BOLTON

ASK AN EXPERT

the Ministry of Labour and how to protect those documents is therefore critical to a successful defence.

There are a number of proactive steps that must be taken, and issues that should be considered in order to protect an investigation accident report. In particular, there are substantive and procedural steps an organization can take to place itself in the best position to argue that an internal accident investigation report is privileged and therefore beyond the reach of the Ministry of Labour or Crown prosecutor.

The following is a summary of the key steps an organization should take to create and protect the privileged status of an internal accident investigation report:

- Consult with experienced legal counsel as early as possible to obtain specific advice in relation to the circumstances at hand and to best protect the organization's interests.

- On the written advice of legal counsel, begin to collect the information necessary to prepare an internal accident investigation report that can be used to receive legal advice and defend against charges anticipated under the OHSA or any other act.

- Prepare a privileged, internal report separate and independent of any other report required by law (such as a report required to be prepared by a Joint Health and Safety Committee under subsection 9(31) of

the OHSA).

- Inform every member of the internal investigation team that the investigation is being carried out and that all materials are being produced for the purposes of receiving legal advice and in contemplation of litigation.

- Arrange for legal counsel to explain to the investigation team the rationale for and importance of privilege, and how privilege applies to the investigation report.

- Inform anyone interviewed during the investigation that their interview is being carried out in contemplation of litigation and the organization intends it to remain confidential.

- Ensure very limited circulation of the report under the direction of counsel, and that those in receipt of the report are directed to return or destroy their copy.

- Keep all investigation files separate and secure from other workplace files.

- Consult with and receive advice from legal counsel before disclosure to any party, including a Ministry of Labour inspector. Disclosure should be limited and only as necessary.

- Clearly mark as privileged and confidential and prepared in contemplation of litigation, any report or document that has been prepared in the course of the investigation.

Lisa Bolton practices law with the management-side employment and labour law firm, Sherrard Kuzz LLP in Toronto. She can be reached at (416) 603-0700 (Main), (416) 420-0738 (24 Hours) or visit www.sherrardkuzz.com.

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2 million hours, zero injuries

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without a lost-time injury.

"That's great for us because we never had anything over 600,000 before," says Zoschke. "So, we're really pushing along and the program is really working."

He credits a simple, hands-on, ear-to-the-ground approach.

"People complain about the little things and sometimes supervisors ignore them," he explains. "But you fix those things — like a broken knob or a mat that is worn out in one spot — then they come to you with a ton of information. They start coming to you with the medium and bigger things."

The program also involved being on the floor daily, whether it was talking to workers and supervisors or conducting a safety walk. Those inspections used to happen once a month in one area only. Today the joint health and safety committee still does a safety walk monthly, but every member is assigned a different area on a rotating basis. There are also senior management audits twice a year.

Franke Kindred has a tiered system with 12 sections that are scored weekly. If Zoschke finds at least five items that are not supposed to be in a particular area, the section is given a zero. The same goes for finding five safety hazards, and so on.

"Part of the key to the program is that we hold everyone responsible for safety equally," he says. "So, if an employee isn't wearing his PPE (personal protective equipment) and he gets cut, he gets written up. If the supervisor is handling the stuff and gets cut, that person gets written up as well. There's no double standard."

When it comes to getting injured workers back to work, Franke Kindred takes a proactive approach: finding out what the employee can do and giving that person the tools and assistance to return.

"The old mentality is, 'I'm hurt.

Doctor says take two weeks off. Go home.' People say 'I can't work,'" explains Zoschke. "We take a typical functionability form, look at the restrictions and we fit the people to the jobs that we have with those restrictions."

So, for example, a worker who sprains his back and may not be able to do a lifting job is assigned to watching the line. This works because the plant is set up in a multi-job system to begin with, where employees rotate jobs every two hours within a cell.

Implementing a more rigorous program was "tough at the beginning," according to Zoschke, but having a strong, supportive management team backing it made a difference.

"It was really pushed from our president and vice-president. If we had problems with supervisors or employees, he would call them together and say, 'No, it needs to be done and that's it,'" says Zoschke. "You get that kind of response — and people see it — and you get a lot of buy-in from everybody."

A healthy incentive plan has also helped. Franke Kindred has awarded barbecues to workers for achieving one year without a lost-time injury. Last year, the president bought everyone a watch for hitting the two-million hour mark.

At the same time, the company has been more vigilant about disciplining workers and supervisors who aren't following safety procedures. It also more closely scrutinizes the root causes of accidents and injuries and Franke Kindred has developed in-house training.

Finally, and perhaps more importantly, it knows that health and safety happens out on the floor.

"No one can run safety from an office," he says. "You get out there and do the little things for them and make it so (safety) takes care of itself."

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One Corporate Plaza
2075 Kennedy Road, Toronto,
Ontario, Canada M1T 3V4

**Director, Human Resources
and Compliance Strategic Market Group:**
Ben Wentzell

Publisher:
John Hobel

Managing Editor:
Todd Humber

E-mail:
todd.humber@thomsonreuters.com
(416) 298-5196

Contributing Writer:
Danielle Harder, a Whitby, Ont.-based
freelance writer.

Circulation and Marketing Co-ordinator:

Tiffani Iacolino
E-mail:
tiffani.iacolino@thomsonreuters.com
Tel: (416) 298-5141 ext. 2642

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