



How to conduct your own investigation after a workplace accident

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Even the safest and most successful business can experience a workplace accident. While the well-being of the worker is always of first concern, rarely is it the only concern. An inspector from the Ministry of Labour can attend at the workplace for any reason, and almost certainly will attend following the reporting of a critical injury. While this can be a very busy and intense period, an employer should promptly conduct its own investigation in order to understand how and why the accident occurred, preserve evidence and make changes to improve health and safety, if necessary.

It is important to understand the results of a ministry inspection may not be shared with or useful to the employer. An inspector is not tasked with protecting an employer's interests and instead is focused on whether an employer has complied with the applicable occupational health and safety legislation. The inspector's findings form part of "Crown Disclosure" used exclusively for the purposes of prosecution. An employer should not assume the inspector's report will be complete, shared with the employer in a timely fashion or that all relevant evidence will be preserved for a successful defence.

By the time charges are filed (up to one year later), the employer may have lost the opportunity to take its own witness statements, photographs or engage its own expert to consider the specifics of the accident. Moreover, memories fade over time and not every witness will remain employed by or reachable to the employer.

As well, the information collected by an inspector may not capture the entire story. Often an employer will review an inspector's report and wonder why relevant facts, documents and explanations were not included or considered.

These "gaps" may be the result of several factors including: the inspector's perspective; the inspector's available resources; the inspector's lack of knowledge of the industry including proper use of equipment; and witness reluctance to co-operate or participate fully.

Establishing a due diligence defence

Conducting an internal investigation promptly following a workplace accident helps an employer understand why the accident occurred, what should be done to prevent future accidents, and facilitates the preservation of information and evidence necessary to defend against any future charge. Set out below are key steps to consider when conducting an investigation:

Preliminary considerations

At the outset of the investigation, consider:

- Who will conduct the investigation
- Whether any findings will need to be provided to the Ministry of Labour, and if so, whether that is desired
- Steps necessary to maintain privilege over the investigation and any resulting report

These decisions will vary depending on the nature and seriousness of accident. For example, it may not be appropriate for management to investigate an accident involving serious injuries or involving a worker they are close to. In addition, the accident may involve very technical conclusions the team does not have the expertise to assess.

While an internal investigation team may have the advantage of speed and lower costs, the team may not have the skill, experience or time to carry out a thorough investigation. Further, any findings will not be subject to privilege and may need to be produced to the Ministry of Labour. However, if the investigation is conducted with the assistance of legal counsel and steps are taken to maintain confidentiality and privilege, any findings may not have to be produced.

Gather relevant documents and engage experts

An investigation should consider all documents (hard and electronic) regarding health and safety in the workplace, including policies, safety orientations, training, training sign-offs, supervisor notes and discipline records. In most cases the content of these documents will help shape the scope of the investigation and may identify individuals who will need to be interviewed. In addition, experts may be engaged to comment on any technical aspects of the accident, such as equipment failures, misuse of machinery or forensic engineering.

Conduct interviews

The objective of the interview is to elicit and record as much detail as possible about a practice, procedure and the accident. Each individual interviewed during the investigation should be treated with fairness and impartiality. Ideally, each interview should be conducted with two people present — one to ask the questions and the other to take notes.

At the outset, the interviewee should be given a brief description of the purpose of the interview and advised that the investigation process is private and should not be discussed with others. If possible, interviews should be conducted on the same day to reduce the opportunity for witnesses to discuss the questions and answers with others. Open-ended questions should be used to allow the interviewee to tell the story in his or her own words.

Document the interview

Accurate and succinct notes should be taken at each interview. They may be produced in subsequent litigation. They should record:

- The date of the interview
- Who was interviewed
- Who was present during the interview
- The author of the notes
- Where the interview took place
- The questions asked
- Verbal and non-verbal responses given in as much detail as possible
- Whether the witness is relaying the information directly or from a second-hand source

The notes should not contain any conclusions, opinions or editorial comments by the note-taker. There is no requirement for the interviewee to sign the notes to confirm accuracy, but the interviewee may be asked to do so or to sign a statement prepared after the interview setting out the information provided.

Assess, evaluate and report

The investigation team will analyze the evidence and prepare a report which should:

- Summarize the events leading to the accident
- Summarize what is believed to have occurred
- Summarize the relevant evidence obtained from the documents reviewed and the individuals interviewed
- Identify and evaluate any inconsistencies in the evidence
- Assess credibility and weigh competing evidence to attempt to reach a factual conclusions
- Explain the reasons for any conclusions reached
- Identify any remedial steps taken pending completion of the investigation

Once the investigation is finished, all notes, documents and reports should be marked confidential and privileged, sealed and maintained in a secure location until needed to defend against any charges, or at least one year following the date of the accident has passed.

Implement health and safety improvements as required

After completing its investigation, an employer should consider whether steps should be taken to improve the health and safety of the workplace, including retraining employees or issuing discipline. Taking remedial steps is not an admission of guilt but rather emphasizes a strong commitment to health and safety in the workplace. The actions taken and any followup monitoring conducted should be recorded.

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