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MANAGING POST-ACCIDENT COMMUNICATIONS - PRESERVING LEGAL PRIVILEGES AND LIMITING LIABILITY

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INTRODUCTION

Hopefully most employers will never experience a serious workplace accident involving personal injury, property damage or both. This article will provide recommendations for an employer to respond in a forthright manner while avoiding potential additional legal liability and a public relations fiasco that can damage the employer's reputation.

SCENARIO

An accident just occurred at one of your Company's worksites, injuring an employee. Upset employees across the country are calling and emailing each other, speculating on the root causes of the accident, the inadequacies of safety procedures, and the Company's response to the accident. One email even suggests that the Company knew about the hazard and willfully exposed the employee. Any of the unfounded speculations in these emails could serve as a "smoking gun," supporting a personal injury plaintiff and his attorney or an OSHA compliance

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officer's theory as to why the Company could be liable for the accident. If the accident resulted in a fatality, a manager could be facing a criminal prosecution by the Department of Justice, a $250,000 personal fine and six months in federal prison. If employee interviews are not properly managed and employees provide false or untruthful information, including documents, to OSHA, there can be personal criminal liability for lying or obstruction of justice.

Advances in communication technologies (e.g. smartphones) have made communication easier and faster than ever. As these communications will now be preserved digitally for future litigation, the legal risks of miscommunications have become far more serious. Studies indicate that the period immediately following an accident is the breeding ground for workplace miscommunications -- rampant communications with the lowest instances of factual accuracy and containing potential unfounded "**admissions**" of Company or management liability in the form of "**finger pointing**." Employers need to develop crisis management policies and train employees to restrict their communications to accurate information and avoid speculations that could hurt the Company. The Company should have a crisis communication plan in place, to centralize information flows through a designated Company spokesperson and inform the appropriate authorities regarding crisis response. The Company must regulate what statements are made, and be careful to create and maintain legal privileges including attorney-client privilege and work product, where applicable.

CAREFUL COMMUNICATIONS POLICY

The best way to prevent a communications mishap following a workplace accident is to have comprehensive and effective policies in place beforehand, which informs employees on how to communicate. With a ***careful communications policy***, employers can train employees to think ahead, scrutinize their methods of communication, and limit their communications to accurate and necessary information. With this policy, employees will be mindful of the need for coordinated communications that are based on whether there is a "**need to know**" the information before communicating it internally or to third parties. The basic elements of a careful communications policy are:

- **Method of Communication** (In-person, Telephone, Email, Social Media)
  The policy should help employees evaluate whether an email is the necessary and preferable form of communication. Communications made on ***social media*** may not be private (regardless of the employee's privacy settings) and may not be deleted. Social media comments must be prohibited as a means of disseminating authorized Company communications.

- **Audience**
  Employees are required to evaluate who will be the audience for the communications, and how the sender can carefully craft the communication to be appropriate for the audience. In a crisis, this may require the sender to limit technical language and detail for a high-level audience for the communication to be effective.

- **100% Factual Accuracy**
  Employees should be instructed to speak factually in all authorized

communications and emails. Their communications should clearly state facts of which they have first-hand knowledge and therefore are credible. Relaying hearsay information that may not be credible since it may be nothing more than "**gossip**" and needs to be prohibited.

- **Speculation**
  Employees should be instructed to avoid speculations, including unfounded "**opinions**" on what may have occurred or assessing "**fault**" or "**blame**" in emails, particularly on areas outside of their expertise. Absent specialized knowledge, speculations and assumptions result in inaccurate communications.

- **Professionalism**
  Workplace communications such as email and text should maintain a level of professionalism akin to respectful in-person communication. A professionalism provision will help prevent harassing, offensive, and retaliatory communications.

- **Legally Valuable Documentation**
  Sometimes documentation ***is*** necessary to confirm that employers have timely responded and corrected or abated hazards. Employee discipline, particularly with regard to addressing potential violations of safety rules that may have caused or contributed to the accident, should be carefully scrutinized before being committed to a documentary format.

- **Record Retention**
  Employees should follow the Company's record-retention guidelines for maintaining documents, including those containing **electronically stored information** (ESI). In some cases, the documents generated may need to be retained by law, for example, those documents which may constitute ESI and may relate to potential litigation. The Company will have to issue a "**litigation hold**" notice within the Company to preserve such documentation.

- **Second Opinion**
  Employees should consider obtaining a second opinion on communications which are questionable through the designated Company spokesperson or legal counsel.

- **Emotional Emails**
  The greatest risks may come from impulsive emails, sent under the stresses and strains of a workplace accident. In many cases, there is a kneejerk reaction to a serious accident in which employees express shock, outrage or disgust about the occurrence through internal or external communications. The policy should direct employees to consider talking through issues rather than writing an emotional email, or to save a draft and review it after the emotional environment has subsided.

CRISIS COMMUNICATION PLAN

For reasons outlined above, employers should have a Crisis Communication Plan in place to manage communications during a crisis. The plan will instruct employees on how to centralize information, release verified information, deliver a pre-written initial press statement, deal with rumors, and keep accurate logs of inquiries and news coverage. The crisis communication plan will prohibit speculation on the causes of the accident, or the time for resolving a crisis. The plan will prohibit the release any information potentially placing blame for the crisis, misleading the media, and releasing information that is confidential or privileged, unless it has been cleared by the communications department or the crisis team. With regard to the physical site of an accident, the plan will designate who will control access to the site, and who will escort and monitor third parties on the site. An effective crisis communications plan will simplify information management, provide employees with a resource for accurate information, and limit potential sources of miscommunications, particularly to the media or third parties.

CREATING LEGAL PRIVILEGES

The attorney-client privilege only protects a communication between an a attorney and a client in which legal advice was sought or rendered, and which was intended to be and was in fact kept confidential. This means a client cannot protect facts simply by incorporating them into a communication with the attorney. Merely cc'ing in-house counsel will not create an attorney-client privilege. Where the client also seeks business advice, the communication will only be protected so far as the communications concern the provision of legal advice. Accordingly, employers should take caution with regard to attorney-client privilege, and limit emails to attorneys to legal advice. Attorney-client privileged communications should be appropriately labeled in the email or other correspondence, for example "**Privileged and Confidential Legal Matter**".

MAINTAINING LEGAL PRIVILEGES

As discussed above, to be protected by the attorney-client privilege, a communication must reasonably have been intended to be confidential. This includes documents generated by or at the direction of legal counsel which are the attorney's "**work product**". Work product cannot be disseminated within the Company to employees who are outside of the "**control group**", that is, those employees whose job responsibilities will require them to have access to and utilize the work product to make decisions affecting the Company within their area of responsibility. Dissemination beyond the control group can result in waiver of the legal privilege and make work product discoverable in litigation. The communication must not be shared with any third party, which will waive the privilege. Where an attorney seeks information, the attorney's discussions with an employee may generally be shared with other designated non-attorney employees and still maintain privilege. However, employees should be careful not to disseminate legal advice outside of the Company, or to copy legal advice in internal business discussions.

CONDUCTING INVESTIGATIONS OF AN ACCIDENT THROUGH COUNSEL

Following an accident, investigations into the causes of an accident can be protected by attorney-client privilege and work product if they are conducted at the direction of counsel.

Employers regularly consult outside counsel to commission investigations and protect them in privilege. The Company should create and maintain the documentation confirming engagement of counsel for the post-accident investigation.

CONCLUSION

Employers should maintain clear communications and crisis response policies. Following an accident, employers should maintain attorney-client privilege and conduct third-party investigations through counsel. In the event that there is litigation or a regulatory inspection, including OSHA, the Company will not have to defend itself against (1) unfounded or conflicting communications within the Company that may create the impression of wrongdoing by the Company or Management (2) waiver of important legal privileges that can be utilized to defend against liability claims.

NOTE: If you wish to receive complimentary copies of this article and future articles on OSHA and employment law related topics, please contact Mark A. Lies, II at mlies@seyfarth.com to be added to the address list.