

Reducing Workplace Accident Liability

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In his poem, "If," Rudyard Kipling provides advice to a young man coming of age that remains relevant to the modern business leader today.

...Keep your head when all about you are losing theirs and blaming it on you; [and] trust yourself when all men doubt you, but make allowance for their doubting...

This advice is especially relevant for executives in the fast-paced wholesale/distribution industry when a workplace accident is involved. The ability to remain calm, keep a clear head and confidently handle the initial phases of a crisis involving a workplace injury is the key to mitigating loss and reducing liabilities.

Assemble Your First Responders

Just as emergency medical staff and first responders of all types are uniquely trained and focused on their role at an accident site, so too, can an experienced defense counsel provide expertise when and where it is most needed.

Legal counsel's role is to guide management personnel through the potential minefield of reporting to insurance carriers and workers' compensation officials, preserving the scene and other artifacts, and preparing critical documentation to put the distributor in the best possible position to defend itself and avoid claims. The use of experienced counsel has the added benefit of creating a layer of protection by creating attorney work-product protections.

With counsel in place, below are some issues to consider when accidents occur, including examples designed to help everyone involved to "keep their head."

Insurance and Workers' Compensation

Most liability policies require "reasonable notice" of a claim or of an event that may result in a claim. Reasonable notice generally requires an analysis of the unique facts of the particular situation. There are no hard and fast rules for determining what is reasonable from a coverage perspective. However, in most states the insurer is required to show some prejudice by the delay for it to be considered "unreasonable." Failure to provide the carrier with reasonable notice can serve as a basis for the denial of coverage. Therefore, it's important to notify your carrier in a timely manner after a workplace injury occurs. The liability carrier can also be an asset to management or internal claims personnel by referring or providing expert consultants during the initial phases of the investigation.

There may also be notice requirements for accidents that will lead to workers' compensation claims. Key personnel should be well-versed in these requirements as well, utilizing counsel to help determine what agencies and carriers need to be put on notice of an accident and potential claim.

Notice to Other Potential Parties

Lift trucks, material loaders, conveyors, forklifts and other machinery used in the wholesale and distribution industry can be frequent sources of workplace accidents. These devices, although generally simple to operate, can be extremely powerful and technologically-complex pieces of machinery. When an accident occurs, many manufacturers of industrial machinery have staff or outside experts who can visit the accident site and inspect the machinery to confirm whether a malfunction with the device was a cause of the accident. The manufacturers of industrial machinery may also provide additional technical advisors to further the investigation and preserve

the evidence. However, before allowing external representatives to inspect the area, a confidentiality or joint defense agreement may be necessary to protect all sides. Counsel can create these documents and coordinate access to the scene or machinery in such a way to be sure that the investigation is complete and accurate while preserving the confidential nature of any information or communications.

Evidence Preservation

A recent trend is for claimants to make a claim for Spoliation of Evidence. Spoliation is the act of destroying or suppressing evidence and, even if the accident was not caused by workplace negligence, the way evidence is handled during an investigation can lead to a spoliation claim. If key material is not preserved, and a plaintiff believes that his or her ability to pursue a claim against a third party is damaged because of the lack of evidence, a separate claim may be made against one with a duty to preserve evidence.

For example, in a recent construction accident, key evidence was nearly lost when fractured boards and construction material were thrown on a trash pile. While the damaged materials had no further use to the construction professionals cleaning up the job site, they were of utmost importance to engineers and investigators trying to determine how the accident occurred. Preservation of materials and debris from an accident, including photographic evidence of markings on pavement, equipment or materials, can be crucial to determine the cause of an accident and to avoiding a spoliation claim. While there is value in cleaning up an accident site and returning the area to productive use, these situations call for intense focus on the proper protection and documentation of evidence.

Protected Investigation

A further benefit to involving legal counsel at the initial stage of the investigation is the attorney work-product protection which shields against disclosure of investigation results.

For background, in most state and federal courts, the rules of civil procedure broadly allow parties to obtain discovery of any non-privileged matter that is relevant to the subject matter of the pending action. This applies whether the discovery would be admissible at trial, or is merely reasonably calculated to lead to the discovery of admissible evidence. Such a broad scope of discovery in civil actions can permit opposing parties to obtain results of investigations -- including internal incident reports -- unless the reports are privileged. However, where information qualifies for protection as work-product, a party seeking discovery may obtain disclosure of such information *only* upon demonstration of need and undue hardship to obtain the materials through other means. It's important to note that jurisdictions may vary on the interpretation of this protection or may have different prerequisites for the use of the protection.

Preparing for the Inevitable

Given the nature of the wholesale/distribution business, one must be aware that even the most careful training and supervision cannot eliminate all accidents. However, working with experienced counsel when the inevitable accident occurs can provide a level of control to the otherwise chaotic environment surrounding an injury-causing accident. The relationship provides a key asset in the investigation of the accident, the safety of workers, and the protection of the company from claims.



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