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# Role of In-House Counsel in Managing a Crisis or Internal Investigation, Pandemic or Employment Claim

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## Agenda

- 1) Preparing for a Crisis
- 2) Workplace Investigations in Crisis Situations
- 3) Communication Strategies
- 4) COVID-19: What We Have Experienced and Lessons Learned

## Wide Range of Crisis Scenarios

- Allegations of corporate misconduct
- Lawsuits by former employees / clients
- Loss of an important client or downturn in business
- Allegations against high level executives
- Security breach
- Pandemic
- Natural disaster

# Planning for the Inevitable: Crisis Preparation

Number #1 Rule:

*Don't wait until a crisis arises to put a plan in place*

## Specific Goals of a Crisis Management Plan

- 1) Providing guidance and reducing tension when a crisis occurs;
- 2) Demonstrating the company's competence and leadership;
- 3) Controlling the flow and accuracy of information (not letting the rumor mill and media speculation take over);
- 4) Protecting the company from liability and loss; and
- 5) Providing reassurance and information to key stakeholders as well as the media and government regulators.

## Preparing for a Crisis

1. Identify Likely Scenarios
2. Determine your vulnerabilities
  - Personnel/HR, digital security, operations, environmental/health
3. Develop a Management Team
4. Develop a Communications Strategy
5. Ensure that, in times of crisis, you can act quickly and intelligently
6. Crisis drills?

## Preparing for a Crisis -- Management Team

- Senior management, public relations, security, operations, finance, and human resources.
- External resources such as publicists, lawyers, accountants, computer experts and government relations experts.
- Identify Investigators, external and internal, and establish Investigation Protocols.
- Each person on the team should understand duties and scope of authority. Train them!
- Depending upon the crisis, the members of the team may change. Be prepared to be flexible.

## Preparing for a Crisis -- Communications

- Identify spokespeople and train them!
- Identify and implement notification systems -- Checklists should be prepared that address all parties that should be contacted and by whom.
- Map out audiences, communications channels, & staff responsibilities (including media protocols).
- Draft holding statements for various scenarios.
- Ensure that, in times of crisis, you can act quickly.



## Investigations

- Whether or not to do the investigation.
- Purpose and goals of the investigation.
- Who should conduct the investigation.
- Who should be responsible for investigation.
- Confidentiality vs. Transparency.
- What is to be done with results.

## Whether or Not to do the Investigation

- Sometimes the answer is **NO**.
- Sometimes an informal inquiry is enough.
- Why might you not do an investigation?
  - You know the allegation is false.
  - You just covered this issue and cannot justify doing it again.
  - The likely outcome is worse than the problem.

## Purpose and Goals of the Investigation – What are They?

### Purpose

- To uncover all the relevant facts.
- To decide what to do.

## Purpose and Goals of the Investigation – What are They?

### Goals

- Correct the problem
- Prevent future problems
- Maintain fair/healthy workplace
- Protect a reputation
- Avoid publicity
- Avoid a lawsuit
- Generate favorable publicity

## Goals Affect Nature and Method of Investigation

- Its scope.
- Who conducts it.
- To whom are the results reported.
- What action is taken based on investigation.
- Whether or not the results are made public.
- What will be the publicity plan.

## Role of Policies

- Whistleblower / Ethics policies.
- EEO and Harassment policies.
- Grievance policies.
- Reporting Mechanisms -
  - Access to Board of Directors?
  - Sarbanes-Oxley Act.

## Who Should Conduct the Investigation?

- How high up in the food chain is accused?
- Is special knowledge required?
- Is confidentiality important?
- Is public involvement likely?
- Is legal action a risk?
- Internal vs. external investigators.

## Investigator Credentials

- Independence from the subject of the investigation.
- Personal integrity.
- Sufficient experience and skill in investigations to not only do a good job, but also be able to convince any observer that a good job was done.
- Too often external investigators are not that good, which can make a bad situation worse.



## Confidentiality

- Whether or not it is needed.
- How to obtain and maintain it.
- The “Me Too” Movement as an example of the need for transparency.
- Attorney Client Privilege.

## What is to be Done with Results

- Internal Use Investigation.
- Public Use Investigation.
- The Danger of Confidential Separation Agreements.
- The Threat of Criminal Prosecution.

## Communicating During a Crisis

1. Act quickly – communicate early & often
2. Convene crisis management team to assess the crisis
  - Leadership, subject matter experts, PR, legal
3. Map out audiences and messages
  - Who needs to know what?
  - Internal and external audiences
  - Tailor messages to audiences and to channels – but be consistent
  - Fill in the blanks in your holding statement

## Communicating During a Crisis

### 4. Identify spokespeople

- Leadership & subject matter experts
- Frontline workers

### 5. Define the right tone

- Show empathy for those affected
- Convey gravity and exhibit responsibility (not culpability)
- Don't be defensive

### **3 Takeaways: Timely, Accurate, and Consistent**

- The initial response to a crisis must be timely; ideally you can be the first to tell your story to your stakeholders.
- If stakeholders view the company as the primary source of information regarding the crisis it means they believe the company has the crisis under control.
- Being first to tell the story cannot excuse being inaccurate.
- Stakeholders want to know what happened and how the crisis may affect them. Blame can be placed later.
- The company must avoid any appearance of misleading or shading the truth. And the message must be consistent.

## **First Address Any Threat to Employee or Public Safety**

- Nothing is more damaging to a company than causing a threat to employee or public safety.
- Failure to recognize such a threat and give it first priority may severely harm the reputation of the company.
- The public must know and understand that your primary concern is for employee and public safety, not your own financial or reputational impact.

## COVID-19 – Our Observations

- Businesses were unprepared.
- Confusion about what to do and what to say.
- Varying degrees of concern about employee and customer safety.
- A sense of panic - Survival first; Protecting reputational damage second.
- This is a motivator for changes already being considered.

## COVID-19 – Lessons Learned

- For many, this is an opportunity to develop employee and customer loyalty.
- Those that acted quickly and kept a calm head will fare better.
  - When the dust settles, for those who were not prepared and thoughtful in their response, there will be legal claims, increased union activity, qui tam actions, lost business.
- This is a prolonged crisis – businesses need to be fluid – things are going to continue to shift.



## Damage Recovery

What steps need to be taken to recover?

- Reputation rehabilitation
- Employee morale
- Client/customer retention

## Post Crisis Reflection

When the crisis passes and the company regains something resembling normal operations, it is time to review how well the company was prepared for the crisis.

- Should there be changes made to the crisis management plan and perhaps to the make up of the crisis management team?
- Are there steps to be taken to reduce the chances of another crisis developing, particularly in the areas over which the company has control?

## Questions?

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