

HOW SAFETY DISCUSSIONS CAN HARM CORPORATE HEALTH

A new set of proposals from the Health and Safety Commission will for the first time require the compulsory investigation of all work-related accidents. Companies will also be obliged to conduct an assessment of the risks created by their operations and identify and record any precautions that they have taken to ensure that no accidents occur in the workplace.

The Health and Safety Commission (HSC) has proposed introducing a compulsory duty to investigate the causes of work-related accidents, diseases and dangerous occurrences. With consultation closed draft legislation is expected shortly.

These proposals have serious implications not only for the way that such investigations are conducted, but also for the internal communications that occur around them and the management of related documents.

Risk assessment

The risk assessment provisions of the Management of Health and Safety at Work Regulations 1999 require employers and the self-employed to conduct a general assessment of the risks created by their operations, and to identify any precautions required to prevent those risks causing harm to themselves, their employees or the public. In general, businesses with five or more employees are required to record the significant findings of their risk assessment.

Although, by implication, these findings would include the investigation of accidents, at present there's no explicit law requiring employers to investigate the causes of workplace incidents.

If enacted, the HSC's proposals would require employers to:

- investigate all reportable incidents to find out how they happened and how they might be prevented in future.
- keep a record that an investigation has been carried out and that its conclusions have been

taken into account in revising the workplace risk assessment. Such records would be kept for a minimum of three years and could be subject to scrutiny by the Health & Safety Executive (HSE).

Be aware of proposals

Steven Francis and Rakhi Talwar, from the regulatory practice of law firm DLA, warn that "companies must be alert to the full implications of the proposed provisions".

Regulatory authorities who move into prosecuting mode will seek disclosure of any relevant documents looking for evidence of system failures, management breakdown, communication problems, inadequate supervision, faulty equipment, poor safety procedures, accusations or admissions of fault.

DLA's regulatory experts suggest that companies should avoid prejudicing themselves by anticipating the consequences of all written statements before creating any written documents. Companies must also have good document management policies in place. Talwar and Francis offer the following advice for minimising the risk of inappropriate internal communications or document management.

Provide appropriate training

All staff will be required to receive practical and regular training on the company's document management policy. Employees need to understand that even the most unlikely documents (such as jottings expressing personal concerns on the back of an envelope)

may be required to be disclosed if they are deemed relevant. They also need to be reminded constantly of the risks of circulating potentially damaging documents. All writing should be kept as factual as possible and loaded statements or comment should be avoided at any cost. E-mails can be subject to disclosure, so content should be treated the same as more traditional written documents.

Avoid disclosure of damaging documents

Companies are advised to use in-house legal departments and external lawyers to ensure that legal professional privilege can be asserted, with the result that the disclosure of documents can be avoided. This is particularly important for companies that seek an honest review of their health and safety procedures so as to improve their long-term performance. If they instruct lawyers to carry out the review, legal advice privilege may be asserted over all documents created by the company for the purpose of enabling those lawyers to give the related legal advice. The advice can therefore be framed in robust terms because of the protection from disclosure. It can include criticisms and recommendations that will not prejudice the company's position.

Establish a clear document retention policy

The random unjustified destruction of documents can lead to obstruction charges being brought in the context of a regulatory

investigation, and criminal penalties may result. Companies need to establish a commercially justifiable policy on document destruction, which is adhered to consistently by all staff; such an approach is invaluable where regulatory authorities allege that relevant documents were destroyed in an attempt to obstruct justice.

The bottom line is that companies should be wary of documenting negative findings that result from investigations. They should also exercise great care when communicating any findings internally to colleagues.

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Useful links

- The consultation document, *Proposals for a new duty to investigate accidents, dangerous occurrences and diseases*, is available via the Health and Safety Executive's website: www.hse.gov.uk/condocs/closed/cd169.pdf
- DLA produces a regulatory newsletter, *As A Rule*, covering health and safety issues, accessible via DLA's website at www.dla.com/publications/pdfs/asarule.pdf
- To be added to the mailing list contact Steven Francis at Steven.Francis@dla.com