

Incident response procedure

Purpose of this document

This document has been drafted to help FASET members should they experience an adverse incident, either involving one of their workers or a third party, and to guide them through the initial steps which it may be reasonable and prudent for them to take in the immediate aftermath.

The most effective management is not to have the initial set of circumstances that brings about regulator interest and enforcement action.

However, despite an organisation's commitment to health and safety, adverse incidents can still occur - often with long-lasting or even fatal consequences for the injured person, not to mention financial and reputational damage to the business concerned.

Although no organisation wishes harm on its workforce, all businesses must be prepared to respond immediately when such an incident occurs, or in the event that a regulator decides to commence an investigation.

It is not in anyone's interest for an organisation to 'learn on the job' following an adverse incident and it is important that organisations have a plan in place to appropriately manage regulatory interventions and investigations from the outset.

About Pannone Corporate

Pannone Corporate's Regulatory team is consistently recognised by clients, peers and legal directories in this field. Having represented both organisations and individuals in connection with some of the most significant and high-profile health and safety cases of recent years, it has the experience to be the trusted final link in your incident response team.

For more information please contact Bill Dunkerley on 0161 393 9087 or 07920 237 681, or email bill.dunkerley@pannonecorporate.com

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1. Ten step plan: Summary of immediate steps to take

Following a health and safety incident, various authorities have the power to investigate. Principally it will be the Health & Safety Executive or the Local Authority and, where there has been a fatality, the Police will initially lead the inquiry.

All will use criminal investigatory procedures and all have the power to prosecute.

The HSE and Local Authorities have very wide-ranging powers to help them investigate (see Annex 3). It is important that you know what they are and how they are used so that you can protect your business and employees.

The following pages provide additional detail as to the steps it may be appropriate to take following an adverse incident, but by way of summary when faced with a regulatory investigation you should:

1. Instruct a specialist lawyer to advise you.
2. Submit a RIDDOR report if one is required.
3. Notify your broker and/ or insurer.
4. Appoint a single point of contact to act as a focal point for the investigation.
5. Consider all requests received carefully.
6. Track and record the regulator's investigation.
7. Keep a duplicate copy of all documents disclosed.
8. Consider separate legal representation for your employees, especially if there is a risk of conflict.
9. Seek advice if you receive a Notification of Contravention, a Prohibition Notice or an Improvement Notice.
10. Seek legal advice before responding to an invite to attend any form of interview.

2. Initial Notifications

- ***Appoint a specialist lawyer to advise you***

They will be able to help with your initial investigation of the incident and will be able to provide you with advice as to the potential offences which may be being considered, as well as your exposure to the investigation more generally.

Your legal representative will also be able to liaise with the regulators on your behalf.

- ***Notify your EL/ PL/ D&O insurer***

Regulatory investigations can be both protracted and costly, often taking several years to reach conclusion.

However the majority of liability policies provide an indemnity in respect of legal defence costs incurred in responding to regulatory investigations and prosecutions. It is important therefore to appreciate the scope of any applicable policy and to know who to contact should an indemnity be required. Delay in notification may affect the availability of cover.

Insurance companies usually have a number of 'panel' firms who are instructed in the event of an insured event. However, insured organisations have freedom of choice to appoint (or 'nominate') their own preferred legal provider and seek that the costs are met/ contributed to by their insurer.

We recommend that any such nominations are put in hand before the need for legal input arises.

- ***Notify your broker***

It is important for your broker to be notified of any adverse incidents which may trigger indemnity under an applicable policy, as they will be able to assist with discussions with your insurer.

- ***Submit RIDDOR report to HSE***

Any injury resulting in a worker's absence of more than seven consecutive days must be reported to the HSE within 15 days of its occurrence.

In addition, certain injuries are automatically reportable, including those involving fractures, death, amputations, loss of sight or burns to more than 10% of the body. See <http://www.hse.gov.uk/riddor/reportable-incidents.htm> for more information.

It is a criminal offence (punishable by a fine) to not submit a RIDDOR report when required.

Ensure that the account of the incident contained within the report is concise, factual and avoids speculation or opinion.

- ***Complete accident book entry***

Ensure the entry is factual and avoids speculation or opinion.

3. Internal investigation

Although there is no legal requirement to undertake an internal investigation following an adverse event, best practice dictates that an inquiry of some sort ought to take place, especially when serious injury or death has occurred in order to understand what has happened, learn lessons and prevent a recurrence.

If a report is to be prepared, it may be helpful to:

- Appoint an internal investigation team. Their purpose should be to obtain objective evidence, therefore it may not be appropriate to include within the investigation team anyone who may have been involved in, or responsible for, the incident.
- Append any relevant (non-privileged) documents to the report which is prepared, for ease of reference.
- When collating information as to the circumstances of an incident, any witness statements should be factual and avoid opinion evidence, or matters which are outside the knowledge of the statement maker.
- Preserve the scene and evidence including CCTV, photographs, physical evidence, health and safety documentation, risk assessments, permits to work, method statements and training records.
- Consider whether any disciplinary action is required. If so, this should occur as soon as is reasonably practicable and be undertaken in accordance with appropriate disciplinary procedures.
- A confidential report prepared for the purposes of giving or obtaining legal advice may attract legal privilege. If it does, the report does not have to be disclosed to the investigating regulator or to another party in an associated civil claim for compensation (see below).
- Where expert evidence is required, for example in respect of the adequacy or sufficiency of guarding, such individuals should be instructed by a solicitor to ensure that any reports produced are subject to privilege.

4. How Pannone Corporate will establish privilege

- On receipt of instructions Pannone Corporate will carry out an assessment which will determine the prospect of criminal and/ or civil litigation.
- Pannone Corporate will write to the organisation confirming the outcome of that assessment.
- If it is considered that privilege will attach Pannone Corporate will request that the following works should be put on all documents that come into existence as a result of the legal investigation process, to be co-ordinated by Pannone Corporate:

"This document relates to an incident involving [NAME] which occurred on [DATE] at [LOCATION]. It is prepared for Pannone Corporate for the purpose of obtaining advice in connection with existing or contemplated criminal and/ or civil litigation. As such this document is legally privileged and must not be read by or disclosed to any third party."

- Any requests by a regulator or third party for a privileged document should be directed to Pannone Corporate.

Note: merely labelling a document as 'private and confidential' or 'privileged' does not make it so.

5. Employees

Once an organisation has appointed its legal representative, it is often the case that a conflict arises between that organisation and one or more employees who may be involved in the circumstances giving rise to an adverse incident. For example, whilst a company may consider that it has adequately trained its workforce, individuals within the business may consider that they have received insufficient instruction.

In such instances it would be inappropriate for the same legal representative to advise both the company and individual concerned, and so it is appropriate for separate solicitors to represent each of the parties under investigation.

The cost of separate representation is likely to be included as part of the company's liability insurance policy.

6. External Communication

Depending on the circumstances and nature of an adverse incident, there may be significant press and media interest in the investigation and any enforcement action which results. This may have a serious and material impact on an organisation's day to day activities and can result in additional scrutiny of any actions taken by the business following the incident.

To minimise the possibility of miscommunications, and prevent misunderstandings from arising, you may consider it sensible to:

- Appoint one person to act as the point of liaison between the organisation and regulators, press, insurer and legal representatives. This minimises the potential for 'off the cuff' comments being provided to regulators, which may ultimately prejudice an organisation's position.
- Obtain prior approval from your liability insurer(s) and solicitor before releasing any statements to the press.
- Ensure that employees who may be targeted by the media for information are aware to direct any such queries to the relevant individuals.
- If considered necessary due to the nature of the incident and media interest, appoint a third party media company to assist with handling press enquiries.

7. Dealing with injured person/ their family

Regulatory investigations and not only stressful and emotional for the business and those employed by it, but it must also not be forgotten that in many instances the investigation arises from an injury to a worker, or even a fatality.

The impact of this on the employee and their family cannot be underestimated, especially where the injuries are life-changing.

As when dealing with external press enquiries, when corresponding with the injured party and/ or their family, we suggest that you:

- Appoint one point of contact to communicate with the injured person/ their family.
- Obtain approval from liability insurer(s) and solicitor before making any concessions or admissions.
- If appropriate, agree a strategy in terms of the injured party's return to work, counselling, continued payment of salary and rehabilitation. This may assist with reducing the amount of any compensation ultimately paid out.

Don't forget – any employees who witnessed the adverse event may have been emotionally affected by it. If considered appropriate in the circumstances, you may consider it reasonable to provide counselling services for them.

Annex 1: Who will investigate and what are the offences?

- a. If there has been a fatality:
 - The police and HSE; or
 - HSE.
- b. If there has not been a fatality, the HSE/ local authority public protection officers will investigate all offences (apart from those relating to manslaughter).

Offences

a. *Corporate Manslaughter*

An organisation is guilty of an offence if the way in which its activities are managed or organised causes a person's death and this amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

An organisation is guilty of an offence only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach.

'Senior management' means the persons who play significant roles in:

- i. The making of decisions about how the whole or a substantial part of the business' activities are to be managed or organised; or
- ii. The actual managing or organising of the whole or a substantial part of those activities.

b. *Individual gross negligence manslaughter*

A gross breach of a duty of care by an individual which causes another's death.

'Gross' is more than mere negligent conduct and is conduct which is 'exceptionally bad' and may amount to:

- Being indifferent to an obvious risk;
- Foreseeing a risk but nevertheless running it; or
- Foreseeing a risk, intending to avoid it but showing such a high degree of negligence in that failed attempt that the conduct becomes 'criminal.'

c. *Section 2 Health and Safety at Work etc Act 1974*

It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.

This is not an absolute duty and requires organisations to undertake a balancing exercise between the likelihood of harm occurring (and the severity should it occur) and its overall size, scope of operations and resources, as well as the time, cost and effort involved in minimising the risk.

d. *Section 3 Health and Safety at Work etc Act 1974*

It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.

e. *Section 7 Health and Safety at Work etc Act 1974*

It shall be the duty of every employee while at work to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work.

f. Section 37 Health and Safety at Work etc Act 1974

Where an offence under any of the relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence

Annex 2: To whom might the police/ regulator wish to speak?

As suspects (those whom the regulator considers may have committed a criminal offence):

- The company
- Directors and managers
- Employees

As witnesses (those who may be able to comment on the circumstances, but who are not suspected of having committed an offence):

- Directors and managers
- Employees

Format of interviews

Whichever form of interview is requested, it is vitally important for the proposed interviewee to obtain legal advice, in order to ensure that their rights are protected.

a. Under caution:

These interviews are conducted in accordance with the Police and Criminal Evidence Act 1984 ('PACE'), and will be recorded. They are only appropriate where the interviewee is a suspect in the investigation and it is considered that they may have committed a criminal offence.

The HSE and other regulators, unlike the police, do not have a power of arrest and cannot compel a suspect's attendance at interview.

All individuals interviewed under caution have a right of silence and cannot be compelled to answer any question. Should an interviewee choose not to answer a question however, it will be possible for a court at a later date to draw an adverse inference from that silence if a response is later provided to that question.

It is often appropriate for a suspect to provide a response however, as PACE interviews allow suspects to provide their account in relation to any alleged wrongdoing.

b. As a voluntary witness (section 9 Criminal Justice Act 1967)

This is a voluntary statement and will include details as to what an individual witness saw, heard, said and did. It is not appropriate to request a section 9 statement from a potential suspect in an investigation.

The contents of a section 9 statement can be used against the maker in subsequent court proceedings, which means that the interviewee can be cross-examined on its contents.

c. As a compelled witness (section 20 Health and Safety at Work etc Act 1974)

Where an individual refuses to provide a voluntary section 9 statement, the HSE can compel them to provide a section 20 statement. It is a criminal offence to refuse to comply with a section 20 request.

As these statements are compelled and not provided voluntarily, they cannot be used against the maker in subsequent court proceedings and cannot form the basis of cross-examination.

Annex 3: Investigatory powers of the police/ regulators

It is a criminal offence to obstruct an officer in the exercise of their duty. Therefore those subject to investigation should cooperate with any enquiries which are made of them.

Regulators are entitled to:

- Enter premises
- Conduct interviews
- Take items of equipment
- Issue a direction to leave undisturbed
- Take measurements, photographs and recordings
- Take samples
- Dismantle or subject dangerous articles to testing
- Take possession of and detain dangerous articles or substances
- Issue Prohibition and/ or Improvement Notices
- Issue Fee for Intervention invoices (recovery of investigation costs) – HSE only
- Seize documents

The police/ regulators are entitled to copies of pre-incident documents created in the usual course of business, which may include:

- Risk assessments and safe systems of work
- Health and safety policy and procedure
- Training records
- Investigations and reports into previous similar incidents

In addition, the police/ regulators are likely to request certain post-incident documents, including:

- RIDDOR report
- Accident book entry
- Internal investigation into current incident