

# Incident Response: Don't Let Prosecutors Use Results of Your Internal Investigations to Incriminate You

## Incident Reporting

While you may be unable to prevent safety incidents, you can limit the damage they do. Damage control begins with managing the investigation you do to get to the bottom of the incident. Recognize that in digging out the facts, you may be unwittingly helping to build the legal case against you. That's why it's essential to be able to manage the report so that it doesn't turn into a document that prosecutors can use to incriminate your company.

### How Incident Reports Become Exhibit A in Your Prosecution

Incident reports are materials prepared by an outside engineer or technical expert (whom we'll refer to as the 'engineer') that you bring in to investigate the incident, identify its cause and recommend corrective actions. 'In many cases, the government orders the company to do the report and doesn't do its own investigation,' according to a Toronto OHS lawyer. It then relies on the report for 100% of its evidence in prosecuting the company.

OHS laws require companies to cooperate with government investigators and obey their orders. But while you must comply with the government order to obtain an incident report, you don't necessarily have to hand over the prosecution its whole case on a silver platter.

### How to Protect Yourself

How do you balance your duty to cooperate with investigators and your right not to incriminate yourself? Answer: By managing the report so that it provides the needed information but in a format that you can shield from disclosure. More precisely, managing the report means preparing clear and specific instructions for the engineer doing the investigation about the kind of information to include in the report.

Caveat: Your window for managing an incident report is narrow. You must act **before** you order the report. Once the engineer delivers a draft of the report, it may be too late. So, if the report comes back full of incriminating information, you may try to send it back and ask the engineer for a new one. But if charges are laid, smart prosecutors will ask not just for the final report but all drafts, lawyers caution.

## **5 Ways to Manage the Incident Report**

There are 5 specific steps you can take when you order the incident report:

### **Step 1: Limit Scope of Report to Government Inquiry**

When OHS officials order you to get an incident report, you need to provide the engineer clear and specific instructions. This is important because engineers might think you're inviting them to point out everything you did wrong. Such a thorough, candid analysis might be great for your OHS program; but it's a potential liability disaster. These criticisms of your safety program might persuade prosecutors to lay charges and serve as evidence in their case against you.

**Example:** A serious machine incident occurs at an Ontario factory. MOL officials investigate and order the company to get an incident report to determine whether the machine can be put back into commission without endangering anybody. The factory owner orders the report from an engineering firm. Instead of confining itself to the narrow question raised by the MOL, the engineer reports on the cause of the incident and lists a litany of deficiencies in the factory's machine safety program. It even digs up an old MOL alert that expressly warns about some of these deficiencies—an Alert so obscure that even the MOL officials investigating the including didn't know about it. The MOL charges both the factory and its president for machine guarding violations and uses the Alert as evidence in the case.

**What to Do:** Spell out precisely what you want the engineer to cover in the report. If you're ordering the report because OHS officials order you to, instruct the engineer to address only the issues they specifically ask about—nothing more, nothing less. Thus, the company in the above example should have clearly told the engineer to limit its findings to the issue of whether the machine could be put back into operation since that's all the MOL asked.

### **Step 2: Keep Additional Findings Separate**

The advice above applies to the situation when OHS officials order you to get an incident report from the engineer. We're not suggesting that you shouldn't ask engineers to dig deeper than the government asks you to. On the contrary, you should do this so you can identify the problem and prevent a recurrence. But recognize that you need to position this additional inquiry so you don't have to disclose its findings.

**What to Do:** Instruct the engineer to do 2 reports—one covering the government inquiry and a separate report covering the broader issues you've asked it to look into. You can also ask for a verbal report covering the matters not related to what the government asks about. This may enable you to keep the results of the former report 'privileged' and enable you to shield them from disclosure.

### **Step 3: Make Sure Engineers Know the Facts**

This might sound obvious. But lawyers warns that engineers have a tendency to assume that the incident was the product of the worst case scenario. 'The report will be written based on the assumption that what was involved was the heaviest possible load, greatest possible distance, etc.,' according to the Toronto lawyer. Engineers also have a tendency to provide the most conservative advice

possible, i.e., advice erring on the side of safety. This distorts the report and puts the employer in the worst possible light in the eyes of the government officials who read it and decide whether to lay charges.

**Example:** A forklift driver at a manufacturing facility hits a racking system and causes it to collapse. A worker is killed. Other racking systems suffer damage. The government orders a report to determine if racks can still support their loads. The engineer who writes the report assumes that the containers on the racks will be filled to capacity and, accordingly, concludes that the racks are overloaded. The government prosecutes the company and cites the report as evidence. In fact, however, the containers in the racks are kept only half-filled. As a result, the company is in the awkward position of having to persuade the government that its own engineering report was wrong.

**What to Do:** Give the engineer a thorough account of what happened and list precise details such as the exact weight of loads being supported by structures or machinery involved in the incident and precise details of equipment maintenance or other matters.

#### **Step 4: Shape the Report**

There are also subtle things you can do to manage the incident report to highlight positives and perhaps even exclude certain negative information in a way that doesn't result in obstruction of the investigation. 'Ask the engineer to note and highlight the positive things your company has done and not to mention deficiencies that don't address questions that weren't asked for when the report was ordered,' the lawyer explains.

#### **Step 5: Ask Lawyer to Order the Report**

If possible, have your lawyer hire the engineer or other expert who will prepare the report and request the report in writing. Explanation: If a lawyer orders the report in an appropriate way, you might be able to use the solicitor-client privilege to protect yourself. ([Click here](#) for a 'Model Request for Report' you can use to make that request.)

One way to make a report privileged is to use a lawyer and invoke the solicitor-client privilege. Another is to prepare the report in contemplation of litigation (like the Model Request does. In either case, you'll still have to turn over the report to the government. But if the solicitor-client privilege applies, the lawyer can review the report and ask the engineer to rewrite certain sections and/or leave out certain unnecessary information that may make you or your OHS program look bad. Consequently, the report that you ultimately turn over to the government is less likely to result in your being charged and prosecuted for the incident.