

QBE European Operations

# Major Accident Tool Kit

**Issues Forum**





# Issues Forum

## Major Accident Tool Kit

### Contents

A risk management perspective	1
A liability perspective	1
Health and safety prosecutions	2
Work related deaths	3
Managing the investigation	3
The accident	3
Making the site safe	4
Visiting the site - gathering essential evidence and information	4
Supporting your employees	5
Making contact with a victim's family	5
Controlling the flow of information	5
Reporting to the HSE	5
Specialist legal advice	5
Your investigation	6
Witnesses	6
Information sources	6
When the authorities call	7
Evidence gathering: site documentation	7
Witness interviews	7
Inquests	8
Police and Criminal Evidence Act 1984 PACE - interview under caution(s)	9
Keeping out of trouble	9
Further information	9
Author biographies	9
Disclaimer	10



## Major accident tool kit

**Serious accidents and fatalities at work can trigger interventions from enforcing authorities with significant legal implications for firms and senior managers. We have prepared the following guide to help employers carry out thorough accident investigations.**

### A risk management perspective

One of the main reasons for conducting health and safety investigations is to build a better understanding of the risks associated with particular work activities. Such investigations can help develop and refine a risk management system that combines targeted risk control measures with effective supervision and monitoring to minimise the risk of prosecution.

### A liability perspective

It is important to strike a balance between, using the accident investigation process as an opportunity to audit and modify your systems and, protecting your legal position.

This guide aims to help you and your staff through the potentially complex aftermath of a serious or fatal accident on site. It covers some of the key areas of the law and offers practical guidance on what to do if you face charges under health and safety or under individual and/or corporate manslaughter legislation.



### Health and safety prosecutions

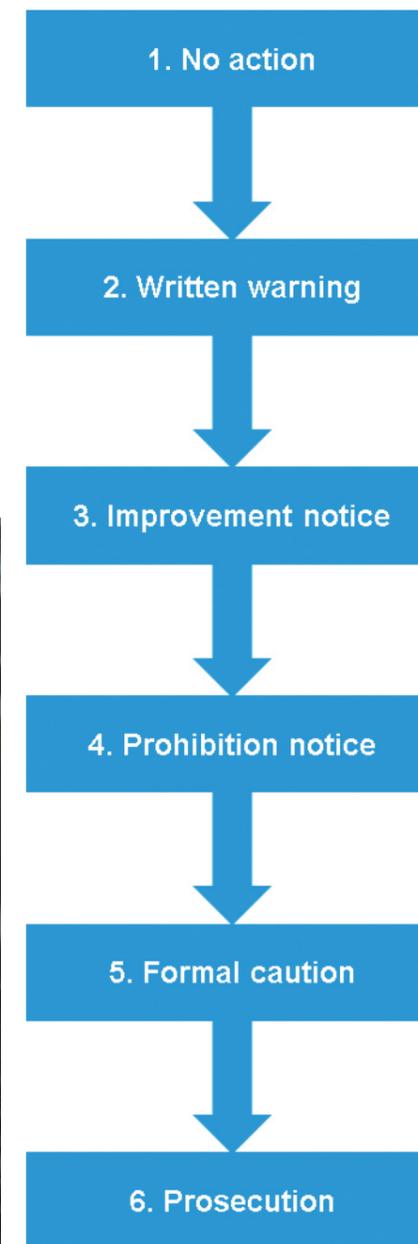
- Minor infringements of health and safety legislation will not generally result in prosecutions. Self-regulation is the authorities' primary mechanism for managing workplace health and safety, with a strong emphasis on risk assessment.

Prosecutions are likely to be considered where:

- there is a need to draw the attention of the public, an industry, or a particular employer to the necessity of complying with current laws and standards
- prosecution is expected, for example: where a breach of duty has led to death or serious injury
- there is, or has been, potential for considerable harm resulting from a breach of duty
- the significance of the offence merits a prosecution, for example: where there have been repeated breaches and a reckless disregard for the law



Responsibility for enforcing health and safety legislation is shared between the Health and Safety Executive (HSE) and local authorities. These regulatory bodies have a variety of options open to them where they believe health and safety legislation has been contravened:



Where a HSE inspector believes a breach of health and safety regulations is ongoing or likely to be repeated, an **improvement notice** may be issued requiring that the contravention be remedied within a specified period of time.

Where an inspector believes a particular activity, or the use of a particular area, poses a risk of serious injury, a **prohibition notice** may be issued requiring that the activity be stopped or the area restricted.

Improvement or prohibition notices do not in any way preclude prosecution at a later date. Most prosecutions follow earlier enforcement notices. Ignoring a prohibition or improvement notice constitutes a breach of that notice, and can result in the company being prosecuted or the individual responsible receiving a prison sentence.

In the event of a subsequent prosecution, having failed to challenge a notice may be regarded as tantamount to admitting unsafe practices. If you are served a notice which you believe may be inappropriate to the circumstances, you should seek immediate legal advice from your QBE panel solicitor on the merits of appealing.

The correct enforcing authority is determined primarily by the type of activity carried on in a particular workplace. Further information on this can be found in schedules 1 and 2 of The Health and Safety (Enforcing Authorities) Regulations 1998.

A **formal caution** is an officially recorded reprimand for specific failings prior to notification of an incident. Should any further breach occur this caution will be taken into consideration.

The Government have introduced **Fees for intervention (FFI)** to recover the costs from businesses failing to comply with health and safety regulation. The scheme applies to all businesses and organisations inspected by the HSE. The intention is that the HSE recovers the cost of its regulatory work, currently £124 per hour, from duty holders found to be in "material breach" of health and safety law that occurred after 1 October 2012.



**Work related deaths**

The offence of manslaughter can only be investigated by the police. There is no time limit for such investigations. The Crown Prosecution Service (CPS), or in Scotland the Procurator Fiscal, will then decide whether a prosecution should proceed.

Where there is an indication of a serious criminal offence, such as individual or corporate manslaughter, the police will conduct an investigation jointly with the HSE or local authority, who will look specifically at health and safety offences.

The HSE, Police and Crown Prosecution Service's joint framework for effective liaison is set out in 'Work Related Deaths: A Protocol for Liaison' [HSE, September 2011]

**Managing the investigation**

Following a serious incident, it is important for any organisation or individual faced with potential criminal charges to put themselves in the best position possible to:

- a) avoid prosecution
- b) defend themselves, should prosecution ensue
- c) diminish the severity of any sentence they may receive if convicted

QBE recommends having detailed crisis management plans and procedures in place for handling both internal and external investigations. Communicate to staff that you have a plan and train people so they know what to do in the event of a major accident.

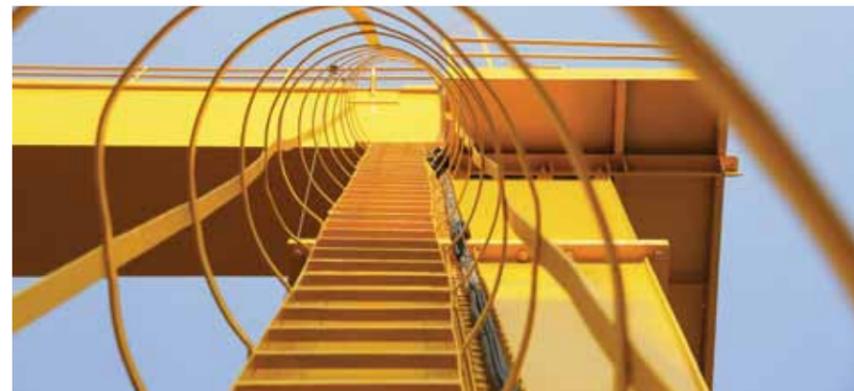
**The accident**

The first indication of a serious incident will often be a distressed call from one of your managers or employees. What you do from this moment on lays the foundations for the investigation ahead. The first few hours are crucial. Your site could soon become a designated crime scene while the police, HSE or local authorities gather and assess the evidence. This will clearly have an immediate and significant impact on your business.

Acting in the best interests of your organisation, its directors, and employees involves striking a balance between

- a) protecting your legal position
- b) making the necessary changes to prevent recurrence
- c) acting (and being seen to act) in an appropriate way towards the injured person and their family, your employees, the authorities, and - important not to forget - the media.

By providing an overview of the typical pattern of events following a death or serious injury on site, this guide will help you exercise strong leadership and good judgement, and coordinate an investigation that does everything possible to protect all concerned.



**Making the site safe**

One of the first priorities will be to ensure the site is safe and take any immediate remedial actions such as isolating power sources. In practice, however, the investigating authorities will probably insist that everything be left undisturbed. In which case, you should touch nothing and ensure the area is sealed or cordoned off, restricting access to investigators only.

A picture, as they say, paints a thousand words. Photographs taken at this stage may well become crucial evidence in court. So it is always advisable to have a camera on site. Keeping a written record of what each picture shows is also important. This should include the date and time taken and the identity of the photographer.

**Visiting the site - gathering essential evidence and information**

It is essential you visit the site as soon as possible after an accident to collate all relevant schematic drawings, plans and photographs and so compile a clear picture of the scene at the time of the incident. The accident scene may be familiar to those operating it, but will clearly be less so to others.

Important clues or evidence of unsafe conditions and/or actions may well be found at the locus of the incident. The longer the delay in investigating, the greater the chance conditions will have changed, evidence been lost, and vital contributory factors missed.

Things to check at the accident scene would include:

- the condition and appropriate use of tools and equipment
- the cause of any slip or trip claimed (avoid focusing solely on the immediate cause)
- defects in the work environment e.g. obstructions, holes, depressions or slippery floors

- the suitability, position and effectiveness of all necessary guards
- the condition, location and dimensions of plant, lighting etc. (take measurements).

If there is no obvious reason for the accident, then record this fact. Making a record that a site is in good order, is just as important as recording any faults.

To help capture a full picture of the events leading up to an incident, we recommend you:

- determine and describe the location of those involved and their respective roles and relationships
- determine and describe the events preceding the accident
- if the injured person is not your employee, ascertain the name of the sub-contractor, the name and contact details of their most senior representative on site and of the relevant contact for further information and ongoing liaison



### Supporting your employees

It is clearly advisable to offer immediate support and advice to any employees involved in or affected by the incident. This might include counselling, line management support, or legal advice – depending on the individual and how they have been affected.

Having a director or a health and safety adviser present during the aftermath and the subsequent investigation can provide invaluable support. It also shows you take the incident seriously and care about your employees' welfare, as does discussing the incident with employees, even if you do not specifically require a witness statement from them.

### Making contact with a victim's family

The people liaising most closely with the family will normally be the immediate employer and the Police Family Liaison service. But even if you are not the employer, you may still have an important part to play in providing support and information.

### Controlling the flow of information

Establishing clear lines of communication helps everyone, not least the authorities. One senior individual should have sole authority to speak and act on behalf of your organisation. All onsite employees should be aware of this person's contact details, so they can pass them on to the authorities or any other interested parties on request.

This person, or another senior person – preferably someone with media skills – should handle all press enquiries. Dealing with the media can be a minefield. It is important to provide journalists with appropriate information and/or carefully worded statements in a timely fashion. Inappropriate 'off the record' statements or a poorly expressed comment in an interview can seriously damage your reputation.

### Reporting to the HSE

The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (RIDDOR) impose a legal duty on the immediate employer or the company in control of the premises to report any death or serious incident to the relevant enforcing authority forthwith, by the quickest practicable means. It is important you keep a record of your report.

You can fulfil your legal duty to report the death or serious workplace accident,

without delay, by reporting online at [www.hse.gov.uk/riddor](http://www.hse.gov.uk/riddor). A telephone service is also provided for reporting fatal and specified injuries only - call the Incident Contact Centre on 0845 300 9923 (opening hours Monday to Friday 08.30 to 17.00).

### Specialist legal advice

Once your organisation – and potentially its directors and employees – have become the subject of a criminal investigation, it is essential you have access to legal advisers with the right expertise and resources to guide you through what can be an intense and stressful process.

The police and HSE inspectors investigating you will be trained and experienced in criminal procedure and law, so it is vital your organisation can call on similar expertise. All QBE's panel solicitors are selected for their expertise in this field. They can advise you, amongst other things, about the concept of Legal Professional Privilege. This effectively protects you from having to disclose documentation, statements and reports prepared in the aftermath of an incident to the police or HSE. This is something your own internal investigation should be aware of from the very outset!



### Your investigation

Your internal accident investigator should be on site as soon as possible to begin investigating the incident's causes and identifying any necessary improvements to current working practices. It is essential, however, that your investigation reflects the fact that a criminal investigation is also underway. Taking prompt and pertinent legal advice can be critically important in this context.

Key considerations include:

### Witnesses

Record the accounts of all witnesses who are in a fit condition to be interviewed as soon as possible. Ensure those who are not, receive proper medical attention and arrange to see them at a more appropriate time.

### Information sources

The exact location of persons and/or equipment at the time of the incident will often be unclear. Equipment, barriers and other items can become displaced in the process of helping the injured party – creating confusion as to how an incident occurred. Photographs or video footage of the scene can help avoid this – particularly when accompanied by detailed notes.

CCTV footage can also sometimes provide valuable clues.

It is important to preserve all relevant materials, plant, equipment and paperwork, as these may be required much later as part of a civil or criminal investigation.

It is also vital you notify your company's directors, brokers and insurers of any accident.

The form and content of your report have legal implications which could prove crucial if proceedings are subsequently issued. It is important your **'draft'** report is marked as such at all stages. Each page should also be marked **'without prejudice – prepared for the purposes of taking legal advice.'**

The person undertaking your investigation should have been trained for the task. If you need to use health and safety consultants or other external providers to carry out your investigation, you should maintain close control over how they do so, and/or contact your nominated QBE claims inspector/QBE panel solicitor. If the authorities ask for a copy of your report, take legal advice before providing one and ensure you limit the circulation of your draft report to the fewest people possible.





#### When the authorities call

The way you communicate with the authorities can significantly affect the company's legal position, your employees' position, and your reputation. In the event of a death, both the police and HSE will normally arrive on your premises to commence their investigations. Both have a legal right to enter under Section 20 of the Health and Safety at Work Act 1974.

Under Corporate Manslaughter legislation, the police are obliged to remain involved until they can eliminate the possibility of bringing charges. It could take weeks, months, even years for them to satisfy themselves that your senior managers are not culpable.

The police and the HSE have different legal powers. If in doubt as the extent of their respective powers, consult your QBE panel solicitor.

The police will treat the site as a crime scene. They may insist that all work stops in the area of the incident while they assess the scene and gather evidence. Equipment in use at the time of the accident may be seized and removed from your site. You may be asked to help dismantle and transport this equipment.

If possible, it is a good idea to make office facilities on site available to police officers and inspectors.

#### Evidence gathering: site documentation

Paper and/or computer records for the period prior to the incident may well be requested or even seized. This could include method statements, risk assessments, inspection documentation, training records and any permits to work. Before removing from site, we strongly recommend taking three copies of any relevant documents. If the police or HSE take the only copy of a document, there is a danger you may lose track of it.

You should also:

- take legal advice on the categories of documentation seized or copied
- keep a copy of everything removed from your premises
- record all documentation taken by the authorities
- ask any contractor whose employee has been injured on your site for copies of any documents they provide to the authorities

**It is important to keep all correspondence with your legal team separate and marked "covered by legal professional privilege." The authorities have no right to seize these documents.**

#### Witness interviews

The enforcing authorities will want to interview eye-witnesses first, followed by anyone else involved in the lead-up to the incident. They will aim to do this at the earliest opportunity and normally write up witness statements on the spot. It is worth remembering that the evidence provided by your senior managers will be central to any investigation into either individual or corporate manslaughter charges.

If you think employees may not be fit to be interviewed, take legal advice - and be sure to raise the issue with the authorities. Where possible, interview all employees as part of your internal investigation before they speak to the authorities.

The HSE has powers to force witnesses to answer questions. Your solicitors can establish the legal basis of employees' interviews and advise accordingly. Your QBE panel solicitor can offer general advice to your employees on the interview process. For anything more detailed, however, it is best to consult an independent solicitor.

It is good practice, though by no means the norm, for the authorities to provide your employees with a copy of any statement they have given. This helps by giving them a record they can check should they have any concerns about misstatements or omissions. If a witness volunteers a copy of their statement, it may help you identify issues to address and prepare for any interview under caution when the investigation nears its conclusion.

#### Inquests

Any sudden death at work will trigger an inquest. Those considered to be interested parties will include the deceased's family, their employer, those in control of premises where the fatal injury occurred, and anyone else whose conduct is likely to be called into question. Each is entitled to participate in the inquest process.

Inquests are limited in their scope, but allows all interested parties to explore the relevant facts and observe witnesses under questioning.

The Coroner's Court is only required to establish:

- 1 who died,
- 2 when they died,
- 3 where they died, and
- 4 under what circumstances they died

Apportioning blame is not part of the Coroner's remit. The facts that unfold at inquest, however, can strongly influence the chances of prosecution. So it makes sense to be represented at inquest - preferably by your QBE panel solicitor, who can also act for you later, should proceedings be issued.

In the context of an inquest, your QBE panel solicitor can:

- ask the coroner what evidence he or she intends calling or reading
- advise you on questioning witnesses
- help you alert the coroner to any additional witnesses with relevant testimony to add
- appear for you at inquest and make appropriate representations on legal issues



### Police and Criminal Evidence Act 1984 (PACE) - interview under caution(s)

Once the authorities have finished gathering evidence, they may well ask any employee(s) suspected of an offence - and/or a representative of their employer - to attend an interview under caution. Separate interviews will take place for each party under investigation.

Police and HSE interviews may be voluntary in the first instance. In the case of manslaughter investigations, however, the police are entitled, if necessary, to arrest suspects with a view to interviewing them under caution.

Taking legal advice is essential at this stage. This both enables you to ensure the interview complies with the law, and gives you the opportunity to present your position in the best possible light - either as a denial of liability or an acceptance of fault with mitigation.

At interview you can respond either by:

- answering the questions posed, or
- reading out a prepared statement

Being interviewed under caution does not automatically mean an employee will be prosecuted. But they will probably need separate legal advice. So multiple suspects may create a need for multiple legal teams. It is a good idea to check your insurance policies to establish whether your directors and senior managers will have access to legal advice cover in the event of a fatal accident.

### Keeping out of trouble

The best option, of course, is to take all reasonably practicable steps to avoid having a serious incident in the first place. There is some excellent guidance available on this topic, and we strongly recommend you familiarise yourself with the leaflet INDG417 (Leading Health and Safety at Work) published in June 2013 by the Institute of Directors (IoD) and The Health and Safety Commission (HSC).

INDG417 contains guidance for boards and directors on how organisations of all types can lead and promote health and safety, structured around the core principles of planning, delivery, monitoring and review. It features a useful checklist of areas in which to benchmark your health and safety performance.

In combination with the following action points, the approach outlined in INDG417 should significantly reduce the potential for prosecution.

- Make sure your directors and senior managers show strong and active leadership and a visible commitment to health and safety
- Get your employees involved, and engage your workforce in promoting health and safety in the workplace
- Review your policies and procedures in the light of our toolkit
- Prepare a major incident response procedure
- Train your accident investigation team
- Review your media and counselling facilities
- If in any kind of doubt, seek legal advice from your QBE panel solicitor.

### Further information

You can find additional information on the HSE website [www.hse.gov.uk](http://www.hse.gov.uk)

and also on the following websites:

[www.iod.com/hsguide](http://www.iod.com/hsguide)

[www.hse.gov.uk/leadership](http://www.hse.gov.uk/leadership)

[www.qbeeurope.com/risk-solutions](http://www.qbeeurope.com/risk-solutions)

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## **Risk Solutions**

This Issues Forum is produced by our Risk Solutions team. The team offer a range of services to our clients, from expert advice and technical guidance, to tailored 'risk based' improvement programmes. Our objective is to reduce the frequency and severity of our clients' Insured loss experience.

Our dedicated team of risk management professionals draw upon a wealth of experience inherited from a variety of backgrounds supported by our rehabilitation, claims and other client service functions. Through their allocated risk manager, our clients can access bespoke risk management services and advice.

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4957CC/QBE/Major AccidentToolkit/August2014  
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