

PRECEDENT DRAFT ACCIDENT RESPONSE PLAN WITH COMMENTARY - ONTARIO

**These are Privileged and Confidential Internal Procedures for Use in
Dealing with a Critical or Fatal Accident and For Dealing with Ministry
of Labour Investigations under the Ontario *Occupational Health and
Safety Act***

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PRECEDENT DRAFT ACCIDENT RESPONSE PLAN

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An Accident Response Plan is more than conducting an accident and injury investigation when a serious or potentially serious accident or injury occurs, to discover the cause. It is more than steps to comply with accident reporting requirements, and taking preventative measures to stop a similar accident or injury from recurring. While these are important goals of our existing internal (**xxx name internal accident reporting policies**), this privileged and confidential Response Plan is directed to protecting the interests of the Corporation, its' supervisors, and officers and directors, should there be a critical or fatal accident investigated by the Ministry of Labour, or potentially the police, coroner's office, or other regulatory agency.

In addition to contacting legal counsel as early as possible following a critical or fatal workplace accident, the following steps should be taken to respond:

IMMEDIATE STEPS FOR FRONT-LINE PERSONNEL ON SCENE

Immediate Obligation to Notify Management and Accident Coordinator

1. Notify the office and notify **xxx** immediately (**name senior Management individuals and individual who has been appointed as Accident Coordinator and trained in these procedures**) of any serious accident or injury. Do not attempt to deal with reporting duties, Ministry officials or other matters without first attempting to notify **xxx** or a member of senior Management.

Notes: See Item 5 below on Appointment of Accident Coordinator. Accident Coordinator should be appointed in advance. Purpose of this obligation is to ensure that Management and Accident Coordinator are aware immediately of a critical or fatal workplace accident.

Medical Aid

2. Go to the accident scene as soon as possible and provide medical aid where needed.

Notes: Accident Coordinator should be at scene immediately. Police and Ministry of Labour will normally attend immediately upon calling 911 or ambulance. Attendance and initial investigation by police does not indicate “criminal” investigation but Accident Coordinator should be aware of Bill C-45 and investigation for potential “criminal negligence”. All items below to be managed to extent possible by a single Accident Coordinator who organizes all responses on behalf of the Corporation.

Securing Area and Obligation not to Disturb Scene

3. Secure the area. Ensure that any machinery involved is turned off and do not touch anything. The Ontario *Occupational Health and Safety Act (OHS)* provides that if a person is fatally or critically injured at a workplace, no person shall interfere with, disturb, destroy, alter, or carry away any wreckage, article, or thing from the scene of an accident until permission has been granted by the inspector. The only exceptions to this are for the purpose of:
 - Saving life or relieving human suffering;
 - Maintaining an essential public utility service or public transportation system;
 - Preventing unnecessary damage to equipment or other property.

It is a serious offence under the *OHS* to disturb an accident scene where fatal or critical injury has occurred.

Notes: See Section 51(2) *OHS* for these provisions. Scene may not be disturbed until permission to do so has been given by Ministry of Labour Inspector.

Notification to Ministry of Labour

4. If the accident involves a fatal or critical injury (see definition of “critical” in Reg. 834 to the *OHS*), the Ministry of Labour, and the joint health and safety committee must be notified ***immediately***. Contact **xxx** or a member of senior Management so that the Ministry can be advised right away by telephone.

Notes: See Section 51(1) *OHS*. Must be immediate notification by telephone, telegram or other direct means.

“***Critical Injury***” means an injury of a serious nature that, (a) places life in jeopardy; (b) produces unconsciousness; (c) results in substantial loss of blood; (d) involves the fracture of a leg or arm but not a finger or toe; (e)

involves the amputation of a leg, arm, hand or foot but not a finger or toe; (f) consists of burns to a major portion of the body; or (g) causes the loss of sight in an eye.

STEPS FOR MANAGING INTERNAL AND EXTERNAL ACCIDENT INVESTIGATION PROCESSES ONCE IMMEDIATE STEPS TAKEN

Immediate Appointment of Accident Coordinator

5. After all notifications have been made, a management representative trained in these procedures should be appointed as early as possible as Accident Coordinator. The police and Ministry of Labour should be provided with the name of the Accident Coordinator and put into contact with the Accident Coordinator as their primary point of contact upon arrival. Requests for documents, materials, statements, can all be dealt with by the Accident Coordinator and other management representatives who have been appointed to assist in the matter.

Notes: The Accident Coordinator should be fully familiar with and trained in Accident Response Plan procedures.

Written Report of Accident to Ministry of Labour

6. After telephone notification to the Ministry of Labour, a written accident report must be provided if the accident involves a fatal or critical injury. Accident reporting is more than filing the Form 7 report of accident to the WSIB. It is advisable to have a legal representative review any written accident report, to ensure that incriminating details have not been included inadvertently in this form.

Notes: Section 51 OHSА requires written report of the circumstances of the occurrence of a fatal or critical injury. Information and particulars set out in the applicable Regulations must be provided (for example, see sections 8 and 9 Construction Projects Regulations; see Section 5 Industrial Establishments Regulations). Section 51 requires written notice within 48 hours of the occurrence.

See also Section 52 OHSА requiring notice within 4 days of disabling accident in particular circumstances; Section 53 OHSА requiring notice within 2 days of particular events including explosions, fires, failure of equipment or machinery at a project site , mine or mining plant. OHSА and Regulations should be consulted carefully before determining when and extent to which notice must be provided.

It is advisable to have a legal representative review any written accident report, if possible, to ensure that necessary details, but no incriminating details, have been included in the Report form.

Role of Accident Coordinator in External Investigation and On Behalf of Company

7. An on-site Accident Coordinator should be appointed immediately. Ideally the Accident Coordinator will be an individual trained in these procedures for accident response. The Accident Coordinator will be responsible for all of the duties set out below, which will include dealing as a front line contact for the Ministry of Labour and other agencies, tracking requests for information and materials provided, and coordinating an internal investigation to preserve details and evidence. The duties of Accident Coordinator are not listed in order below. All of these duties will be carried out through the investigative stage:

The Duty to Cooperate

- (a) Cooperate fully with the police department and Ministry of Labour. The OHS Act contains an obligation to not obstruct or interfere with any aspect of an investigation. However, the Accident Coordinator and Corporation must keep in mind that cooperation does not mean self-incrimination. This means that the Corporation should not release any documents, materials, any internal investigation report (however brief or preliminary), and that Management should not give information or statements without first contacting and organizing this through **xxx (the Accident Coordinator)**. The Accident Coordinator should communicate immediately to Company representatives, particularly supervisors and managers, that any and all requests for information, documents, materials should be directed through **xxx (the Accident Coordinator)**.

Notes: All workers, supervisors or individuals who witnessed an event must be co-operate, whether being questioned by the police or Ministry of Labour or other regulatory body. Individuals have obligations to provide statements of what they saw, heard, were involved in doing. Where possible, Company witnesses should be permitted opportunity to review documents or materials which could remind them of due diligence steps before giving statements. The Accident Co-ordinator can facilitate requesting this on their behalf. Initial statements may not deal with “due diligence” aspects of the matter, although there may be questions about training and procedures. Where possible, detailed questions respecting training or procedures or instructions should be dealt with after reviewing due diligence materials.

See OHS Act Section 52, which provides that no person shall hinder, obstruct, molest or interfere with (or attempt to do same) with an

Inspector in the exercise of a power or the performance of a duty under the *OHSA*. The provisions of Section 52 also require persons to facilitate entries, searches, investigations, examinations and testing by an Inspector. It is a serious offence to obstruct a Ministry of Labour Inspector.

Shadow the Ministry of Labour/Police Investigation

- (b) Take detailed notes of the investigation of government officials (usually the Ministry of Labour), including all observations of the investigation, all persons interviewed, comments made, all tests performed and results. All Ministry of Labour or police theories, conclusions, requests, comments should be recorded. This process of tracking the government investigation allows the company to be in a position to correct any negative information, and to provide any positive information which is not gathered or requested.

Notes: Keep detailed notes respecting items which the Ministry of Labour or other agencies request and which are handed over. Keep a log and copies of all documents handed over, for use by legal counsel if necessary. Keep all detailed notes regarding the investigation of government officials in a file marked “privileged and confidential” so that a claim of either “contemplated litigation privilege” can be made or a claim of “solicitor client privilege” can be made over these notes and details.

Search Warrants

- (c) The Ministry of Labour may be required to obtain a warrant to search for items or to interview individuals, or seize documentation. If the police or inspector arrive with a warrant to enter or to put equipment into motion, or to seize items, the Accident Coordinator should review the warrant to see if the request or item is listed in the warrant.

Notes: The Search Warrant provisions are complex. If possible, contact legal counsel, since this is an indication that a search for evidence is occurring. No Accident Coordinator or other company representative should make a determination about whether a search is valid or attempt to refuse entry. Search warrants are Court authorized and must be respected and searches for evidence permitted, subject to legal challenges at a later point.

Even a warrant is not enough for the Ministry of Labour request or obtain any confidential internal investigation report, or any notes prepared for the use of counsel. This issue is discussed further below. A warrant should not and cannot be demanded before each entry, since

the Ministry of Labour and other officials have the right to enter. It is only upon their conclusion that there are “reasonable and probable grounds” to believe that an offence has been committed” that a search warrant may be required before a search for evidence.

Requests for Documents Without Search Warrant

- (d) Keep detailed notes respecting all items which the Ministry of Labour or other agencies request and which are handed over. Keep a log and copies of all documents handed over for use by legal counsel if necessary.

Notes: If any items are handed over, and the Ministry of Labour or other agencies do not have a search warrant, the Accident Coordinator should indicate that it is the Company’s expectation that the Ministry of Labour will not use those items in a prosecution against the Company or any individual. Ideally, a letter will be written to accompany the items, indicating this. No Company representative should be attempting to make a determination that a matter is a search as opposed to an investigation. Legal counsel can and should be contacted as items are requested, in order to assist in a process of determining whether protective language when handing over the documents ought to be utilized.

The Need for Immediate Company Investigation

- (e) Commence an investigation on behalf of the Company as early as possible (not once Ministry of Labour and other officials leave the scene) to preserve physical evidence of the scene and evidence from any witnesses. If possible, obtain photographs (or video evidence if appropriate) of the accident scene, or any reconstruction of the accident, immediately. Gathering evidence may include preserving damaged equipment, and other items, in a safe place, to the extent that they are not seized by the Ministry of Labour or police.

Notes: The Accident Coordinator (or another Company representative appointed) should conduct interviews to ask questions regarding what happened and relevant “due diligence” steps, such as knowledge of hazards, knowledge of rules, training, reminders of rules or warnings:

- with those directly involved; and
- with those indirectly involved.

If appropriate, and as the accident investigation by the Ministry or police proceeds, take measurements, tests, gather physical evidence (and copy any materials taken by officials). An independent investigation by the Company should proceed, which as a minimum

parallels the investigation by government officials. After completion of Company investigation, assess whether incorrect conclusions arrived at by Ministry of Labour or police, or whether improper information provided by any witness. This can identify any opportunity to correct any misinformation.

See also Section (j) below.

Determine if Third Party Expert Reports of Assistance

- (f) Assess whether the scene should be reviewed by an expert such as an engineer, explosion expert, consultant or other party who might provide a professional opinion on causation, potential remedial steps, and who could preserve measurements and tests and physical evidence should this be required in an *OHS*A or other proceeding.

Notes: Any third party consultant or expert report provided to the Company should be marked “privileged and confidential-in contemplation of litigation”. These can even be provided directly to legal counsel as privileged documents. If these reports are prepared with a bona fide view to potential litigation, or are prepared for the purpose of assisting the Company to obtain legal advice, they are privileged and do not have to be disclosed. There may be good reason to release such a report, but before release of any such report to the Ministry of Labour or other officials, it should be reviewed by legal counsel. Ordinarily such reports obtained on the request of the Company are not released to the Ministry of Labour or other officials, but preserved in case of a proceeding. (See also item 9 below for process where Ministry of Labour Orders an expert report).

Interviews by Ministry of Labour or Police

- (g) The Ministry of Labour and other officials will interview individuals. The Accident Coordinator should request the opportunity to be present, and to obtain a statement copy once the statement is complete. If this request is granted, the Accident Coordinator should take detailed notes of the interview and statement-taking. If not granted, witnesses should be interviewed and asked details of questions and answers provided during the interview. This post-interview “debriefing” should be recorded by the Accident Coordinator.

Statements from Supervisors or Senior Management

- (h) If the Ministry of Labour or other agencies wish to take statements from supervisors or members of senior Management, these individuals have the right to know whether the Ministry of Labour, police, or other agency is considering potential charges and should confer with legal counsel at this

point, before providing any statements.

Notes: This section addresses requests for statements beyond the initial interview of direct witnesses respecting what occurred, what was observed. This section deals with requests for statements from persons at risk of potential liability. If or when any official in a position to commence a prosecution seeks a statement beyond an initial statement respecting what was observed at the scene, legal counsel can and should be consulted. The individual should clearly stress their desire to co-operate and provide all information, once having an opportunity to speak with legal counsel.

Privileged and Confidential Records in Contemplation of Litigation and for Legal Counsel

- (i) Mark all notes of interviews and of the investigation, and the file or location where they are kept, as “privileged and confidential-in contemplation of litigation”. Marking these clearly indicates that they are privileged for possible use by legal counsel should there be charges or other litigation.

Notes: There is no legal obligation to hand over privileged notes or documents. If the Ministry of Labour or other agency attempts to seize information which has been prepared for use in your defence, or which has been prepared for legal counsel, attempt to contact legal counsel before handing the materials to the Ministry of Labour or at least ensure that they are marked “privileged and confidential-in contemplation of litigation” before handing them over and ask the Ministry of Labour to seal these materials in an envelope on which you write “privileged and confidential”. Legal counsel can then apply to a Court for the return of these privileged and confidential materials.

Assessing Material Gathered and Providing Further Positive Information if Available

- (j) The Accident Coordinator should, together with **xxx (Management Official)**, assess the internal investigation report and materials seized or taken and witness statements, as early as possible after the external investigation is substantially complete. At that point, any misinformation can be corrected, letters can be written to clarify points, and further due diligence information should be provided, as necessary and appropriate, taking into account the circumstances of the situation.

Comments to Media

8. If any member of the media (newspaper, television) is in attendance, decline answering any questions. Do not make a statement on behalf of the Company. Have them contact **xxx**.

Notes: If and as statements are made to the media through a representative, comments should be brief. Where an Accident Coordinator has been appointed, any messages to the media should go through the Accident Coordinator as a single point of contact. If necessary, messages reassuring that the site or situation is under control and is being fully investigated to ensure future safety, can be given.

Orders or Requests for Consultants or Engineering Reports

9. Often the Ministry of Labour requests or orders an external third party consultant or expert report, i.e. an engineering report, or a report that confirms that equipment is not likely to endanger.

Notes: If such an order is given or report requested by the Ministry, carefully review the order or request. Often, a consultant or expert Report will comment far beyond the scope of the order, providing unnecessary incriminating details. Where possible, have the third party or consultant provide this initially as a draft “privileged and confidential report in contemplation of litigation”. You may even want to have this provided directly to counsel initially, or reviewed by counsel. If these reports are prepared with a bona fide view to potential litigation, or are prepared for the purpose of assisting the Company to obtain legal advice, they are privileged and do not have to be disclosed further. Thus, often a detailed “privileged and confidential” third party report is retained by the Company. A separate brief Report can be prepared and provided to the Ministry of Labour, which satisfies the Ministry of Labour request, but does not provide any unnecessarily confidential incriminating details.

Review of Orders

10. All orders issued by the Ministry should be forwarded immediately to **xxx (Accident Coordinator)** so that they can be reviewed and so that the Company can take immediate corrective action. They should also be reviewed by legal counsel within thirty days to determine whether there is a basis for appeal to the Ontario Labour Relations Board. Orders cannot be appealed after the thirty-day limitation.

Notes: See the provisions for appeal of orders under Section 61 *OHS*A. Any party that is aggrieved by an order may appeal the order. The definition of “order” includes a decision of an inspector. Detailed information must be provided in support of why the order is factually or legally incorrect in support of the appeal.

Assessing Accident Causation

11. Identify the cause of the accident after thoroughly investigating and speaking to the injured worker (if applicable or possible) and the witnesses. Avoid making snap decisions and jumping to conclusions. Identify and assess whether the accident could have been prevented by further training, reminders to workers, written instructions, supervisory monitoring, or other matters, or whether all steps necessary to prevent the accident seemed to be in place. Assessing accident causation does not mean that all conclusions respecting causation will be shared with the Ministry of Labour or other agencies, unless the conclusions are favorable to the Corporation.

Follow Up and Preventive Action

12. Follow up on your investigation. The investigation is not over until preventive action is taken. Do not assume that rectifying the circumstances which caused the accident, and making overall improvements will indicate guilt. Post-accident steps are in fact crucial for reducing any potential penalty against the Corporation and any individuals involved, should there be charges.

Notes: Have the Accident Coordinator keep detailed notes and records of all post-accident steps in the file of information marked “privileged and confidential-in contemplation of litigation”, so that this material is both organized for possible future use, and kept privileged for possible use by legal counsel in the future.