

WHAT TO DO FOLLOWING A SERIOUS INCIDENT OR FATALITY AT WORK



Health and Safety Guidance Notes



NFU Mutual
RISK MANAGEMENT SERVICES

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INTRODUCTION

Imagine this: an incident has occurred at your workplace. The worker involved has been seriously injured, or even worse, has died as a result of the incident.

We all hope that we never have to experience a serious work-related incident or fatality, but unfortunately these still happen on a far too regular basis across all industries. Not only do these types of incidents rock the world of the individual involved and their loved ones, they can also have catastrophic consequences for the company, their co-workers, and anyone who may have been involved in or witnessed the incident or its aftermath.

It can sometimes be easy to lose sight of the steps that must immediately follow in the wake of a serious workplace incident. Being prepared for what to do in the event of an incident means that it will be one less thing to worry about at the time. Having the confidence that you know what to do, what to expect and who to contact should not be underestimated. The information outlined in this guide will help you to be better prepared.

WHEN THE WORST HAS HAPPENED

In the immediate aftermath of an incident, your first priorities should be to ensure that any injured individuals are being attended to and to secure the area. It is key to act fast. This involves:

- Contacting the emergency services as the absolute priority.
- Providing first aid treatment if safe to do so.
- Clearing non-essential people from the area.
- Controlling or eliminating sources of imminent danger.
- Ensuring that there is minimal disturbance to the area, aside from anything required to be disturbed to deliver first aid and/or control or eliminate imminent danger.
- Where the situation allows, taking photos of the area and collecting names and details of any witnesses to the incident. In fact, it is beneficial to keep a record of all workers on site at the time, even if they didn't appear to have witnessed the incident as these could be of assistance further down the line.

Whilst the immediate first priorities are being taken care of, the next thing to do is to seek legal advice. This is especially important where a death has occurred or the incident is very serious, although it should be considered for any incident. This is because, at an early stage, it is often difficult to ascertain what the ultimate outcome might be, and even incidents which don't appear to be serious can become so, and even non-serious incidents can be investigated by enforcing authorities.

When seeking legal advice make it clear that you are seeking advice in connection with an incident which has occurred which may, in all likelihood, result in enforcement proceedings being taken by an enforcing authority.

NOTIFYING YOUR INSURANCE PROVIDER

Many insurance policies (including those from NFU Mutual) provide some cover for the legal costs of dealing with regulatory investigations and prosecutions following a workplace incident, in addition to covering the more routine costs of defending personal injury claims. Most insurers retain a panel of law firms to deal with personal injury claims, who will have specific expertise in this area and can often handle the regulatory side as well. However, you are always entitled to instruct solicitors of your own choice, should you not wish to take the solicitors from the appointed law firm.

It is also important that you notify your insurance provider of any incident which may give rise to an insurance claim under the terms of your insurance policy. Early notification will aid with investigation of the claim.

So, before you do anything else, make sure you contact your insurance provider/agent as soon as possible.

INVESTIGATING AUTHORITIES

Depending on the type of workplace and circumstances of a work-related fatality/serious incident, the relevant authority has a duty to investigate. Typically, the investigating authority is either the relevant Local Authority's Environmental Health Department (for workplaces such as shops, offices, warehousing, hospitality, leisure, beauty services etc.), or the Health and Safety Executive (HSE) (for workplaces involving manufacturing, construction, agriculture, forestry, education, utilities etc.). The Fire and Rescue Authority has a duty to investigate fatalities resulting from a fire. Additionally, the Police have a duty to investigate workplace incidents resulting in fatalities when there is a possibility that a serious crime may have been committed (such as corporate or gross negligence manslaughter).

In relation to workplace fatalities, the Police will take the lead (known as "assuming primacy") until such time as it becomes apparent that manslaughter offences (either corporate manslaughter by a company or gross negligence manslaughter by an individual) have been ruled out. This can often take weeks or months to determine, depending on the circumstances of the incident.

The investigation of health and safety and/or other offences will be carried out in parallel to the investigation of manslaughter. For example, in relation to a fatal incident which involves potential health and safety offences you might receive queries/requests from both the police and HSE at an early stage, or from the police on behalf of the HSE. Interviews (discussed further below) might be conducted jointly until such time that the police interest ceases.

CO-OPERATION VS INCRIMINATION

Following an incident, the key is to get the right balance between co-operation with the investigating authorities, without incriminating the company or any individual and without increasing any culpability (this is the level of blame that can be attributed, e.g. was the incident an uncharacteristic error or a complete disregard for health and safety?). Co-operating, but knowing your rights to resist where appropriate, is important.

Many companies and individuals incriminate themselves unnecessarily as a consequence of an overzealous desire to co-operate and sometimes being misled by the investigating authority into believing that their dialogue is "off the record" or otherwise informal. It is therefore important that you seek and follow the advice given by your solicitor and under no circumstances provide any documentation or interview or commentary to the investigating authority without having first sought legal advice. This is why contacting your insurer/solicitor as soon as possible is so important.

INVESTIGATION VISIT

The Police, HSE, local authority and fire and rescue authorities have similar specific powers to enter premises, or visit any site, at any reasonable time (or where the situation is dangerous – at any time) for the purposes of conducting an investigation.

Any visit by the investigating authorities after an incident should be managed carefully and, where possible, all employees/workers should be briefed in advance. It is important to try and establish a protocol with the investigating authority so that all dealings are through a reliable single point of contact (“Liaison Manager”). A detailed log should be maintained by the Liaison Manager of all contact with the investigating authority (phone calls, visits, emails etc).

When the first individual/s from the investigating authority arrives on the scene (usually the police, who may even arrive at the scene before other emergency services) they will aim to secure the scene of the incident and preserve any evidence. They will usually seek to:

- Obtain information about the company.
- Take copies of documents.
- Inspect/remove/photograph any equipment/articles involved.
- Take statements from any witnesses and key individuals; and
- Establish what action has been taken since the incident.

They will also perform an initial assessment of any immediate health and safety risks.

FIRST IMPRESSIONS COUNT!

If the HSE is leading the investigation, they may decide to turn the visit into a more general site inspection and it is therefore important to make sure that you present your premises in the best way possible, such as ensuring that everyone is wearing the appropriate PPE, that equipment is being appropriately used and suitably guarded, render any equipment that is not in good order inoperable and ensure housekeeping is in order (except where relevant to the scene of the incident) etc. First impressions count! The investigating authority may take a view that the incident is symptomatic of wider management failings, so you want to make sure that you showcase what are the company’s best features.

Anyone attending your premises from an investigating authority should be accompanied at all times whilst on your premises and a note should be taken of all discussions, documents examined, equipment inspected, and requests made. If possible, the investigators should be afforded a suitable location from which to conduct their enquiries.

DOCUMENTS AND THE IMPORTANCE OF LEGAL PRIVILEGE

Investigating authorities have powers to take copies of all documents except those that are legally privileged. Briefly, legal professional privilege entitles a client to refuse to disclose certain confidential legal communications between them (or those acting on their behalf) and their solicitor to third parties including courts, tribunals, investigating authorities and enforcement agencies.

It can be applied to certain documents that are created for the purpose of receiving legal advice in contemplation of litigation (e.g. investigation reports or health and safety audits conducted after the event) AND correspondence between lawyers and clients.



It is important to note that certain documents will not be privileged, including any documents produced prior to the incident and any statements provided to any investigating authorities. Your solicitor will provide you with the necessary direction as required.

The investigating authorities will usually identify documents they require and ask for them to be volunteered. The documents should be willingly and openly volunteered unless there are valid legal reasons for not disclosing (i.e. that there is a privilege argument), because failure to do so may lead to them being seized in any event. Before agreeing or refusing to disclose any documents, you should always take legal advice.

It is vital to maintain a record/copies of all documents given to the investigating authorities. Invite them to request documents in writing and reply in writing so there is a complete audit trail of documentation requested and supplied.

Remember that all post-incident documents (as well as pre-incident) are vulnerable to being seized by the authorities (unless privileged) so be very careful about what is committed to print and do not overlook the significance of e-mails which are often regarded as informal.

It is also important to note that any third parties, such as health and safety consultants, should not be instructed to conduct any work for you post incident, unless your solicitor has reviewed whether legal privilege should apply.

REMOVAL OF ARTICLES/ EQUIPMENT

The investigating authorities may seek to inspect, photograph and/or remove any equipment, machinery or other articles necessary for the purposes of the investigation. The HSE has specific powers under section 20 of the Health and Safety at Work etc. Act 1974 (HSWA) to take possession of such items for as long as is deemed necessary (e.g. until after any prosecution). A notice should be provided to you, making it clear what items have been seized.

ENFORCEMENT NOTICES

Under sections 21 and 22 HSWA, inspectors from the HSE have the power to serve Improvement Notices and Prohibition Notices. It is a criminal offence to fail to comply with the requirements of either Notice.

An Improvement Notice may be issued where an HSE Inspector is of the opinion that the recipient is contravening or likely to

contravene health and safety law. The purpose of an Improvement Notice is to require the recipient to take steps to remedy the breach in a specified time period.

A Prohibition Notice can be issued where the Inspector is of the opinion that an activity that is carried out or likely to be carried out involves a risk of serious personal injury. A Prohibition Notice requires the recipient to cease the relevant activity, usually immediately, until remedial steps in relation to the risk of injury and addressing any breach of health and safety law have been taken.

Both Improvement and Prohibition Notices can be appealed to the Employment Tribunal in certain circumstances and recipients have a time limit of 21 days for bringing an appeal. It is therefore imperative to obtain legal advice on service of either type of Notice, whilst taking the time to consider the contents of the Notice and acting promptly and appropriately in respect of the contents.

FEE FOR INTERVENTION

The Fee For Intervention (FFI) regime allows the HSE to recover the costs of its time spent investigating a health and safety incident when it deems that there has been a “material breach” of health and safety law. If the HSE determines that a material breach has taken place then, once it has served a “Notification of Contravention” it is entitled to charge its hourly rate for time spent in its investigation. Companies can dispute the FFI but there are strict time frames to adhere to, so legal advice should be sought promptly upon receipt of a Notification of Contravention or an FFI invoice.

RIDDOR REPORTING

The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR) places duties on employers, the self-employed and people in control of

work premises (the Responsible Person) to report certain serious workplace accidents, occupational diseases and specified dangerous occurrences.

Not all accidents need to be reported, a RIDDOR report is required only when the accident is:

- work-related,
- and the resulting injury/disease or dangerous occurrence is of the reportable type (which has a fixed definition under RIDDOR).

For reports relating to England, Scotland and Wales, you have the option of reporting to the HSE’s Incident Contact Centre or direct to your local Enforcing Authority (if different). You can report to the Incident Contact Centre via telephone or the online reporting system:

- online: www.hse.gov.uk/riddor, or www.hseni.gov.uk for Northern Ireland.
- by phone (for reporting of deaths and specified injuries in England, Scotland and Wales only): 0345 300 9923 (Monday to Friday 8.30am – 5.00pm). The HSE has an out-of-hours duty officer, who can be contacted in the event of a work-related death, following a serious incident where there have been multiple casualties and following an incident which has caused major disruption such as evacuation of people, closure of roads, large numbers of people going to hospital etc.

Deaths and specified injuries must be reported immediately, but it is strongly recommended that you take legal advice before you do so. For all types of reports, always avoid using “emotional wording” and stick to the facts that are known at the time. Please do note that there are time limits for the completion of RIDDOR reports and these should be adhered to. For further information on RIDDOR reporting, please see Further Guidance overleaf.

INTERNAL INVESTIGATION

Once all of the above is set in motion, ongoing safety concerns and the learning of lessons must be the next priority. Whatever has happened, the culpability will be greater if the event is repeated by the same failure.

After an incident has taken place, an internal investigation will usually need to be carried out to establish the cause of the incident, so that lessons can be learned, and improvements made. In some instances, investigation will also be needed so that legal advice can be taken in contemplation of civil or criminal legal proceedings.

It may be necessary to seek expert professional help in conducting the internal investigation and as mentioned above it is always advisable that steps are taken to seek to ensure that any report or documents which are produced as part of the investigation are protected by legal professional privilege. Before commencing an internal investigation, or asking anyone to do this on your behalf, you should discuss this with your solicitor.

The nature of health and safety law is such that there are often parallel duties on more than one duty-holder, so you may need to consider carrying out your own investigation and taking legal advice even if the RIDDOR report is submitted by someone else.

Section 40 and the reverse burden of proof

Not all work-related incidents will result in a substantial investigation by the investigating authorities, and thereafter not all investigations will lead to criminal proceedings being instigated. It is, however, important to be mindful that this is a possible outcome, and that any proceedings brought by the investigating authorities in these circumstances would be criminal rather than civil in nature.

Unlike in most other criminal proceedings, in which the prosecution must prove the facts

of the defendant's guilt beyond reasonable doubt, section 40 HSWA places a reverse burden of proof, in relation to some sections of health and safety legislation, on the defendant to demonstrate that they had reduced a risk "so far as is reasonably practicable", or to "as low as reasonably practicable". In these circumstances, all the prosecution needs to prove is that a risk existed, which is usually easily evidenced by the fact an incident has occurred, and then the burden reverses onto the defendant to evidence that the steps it has taken in response to the risk were considered to be sufficient.

Your investigations must therefore seek to provide the evidence that would support a potential defence, if needed, that enough was done to reduce the risk as far as reasonably practicable.

STATEMENTS/INTERVIEWS

In addition to seeking documentary evidence, the investigating authorities may seek to take statements from witnesses and potentially wish to interview individuals. Make sure that you seek legal advice before you make any type of statement, whether voluntary or not. There is no such thing as an "off the record" discussion with the investigating authorities and any requests should therefore be approached with caution.

There are three main types of interviews which may be requested:

Voluntary/"section 9" statements

These can be requested by any of the investigating authorities. There is no compulsion on any individual to give a "voluntary" statement (Section 9 Criminal Justice Act 1968) to either the police or other investigating authorities. However, it is generally advised to assist an investigation where possible and to provide a statement if requested. Your solicitor will be able to provide advice on requests made for voluntary statements.

Section 20

Unlike the Police, the HSE has statutory powers (under section 20 HSWA) to compel individuals to answer all their reasonable questions and it is an offence not to answer those reasonable questions. It is partly for this reason that it may be in an individual's interest to provide the HSE with a voluntary statement (as mentioned above) if requested, as refusal could result in a statement being compelled in any event.

If a number of workers are to be interviewed (either under section 9 or section 20) then a group familiarisation session with your solicitor can sometimes be helpful, to talk them through the process and their rights while being careful not to influence the evidence they might provide. It is always an employee's choice whether they accept such advice and an employee should not be pressurised either way.

PACE interviews and statements

The investigating authorities can also interview individuals, and representatives of corporate bodies, under caution (a "PACE Interview") where they have reasonable grounds for believing that the individual/company interviewed may have committed an offence (this is applicable to England and Wales only). Such individuals must be encouraged to have a solicitor to represent them and advise as necessary. Careful preparation will be imperative if attending an interview but depending on the offence it can be possible, even advisable, to put forward written submissions instead of attending the interview depending on the nature of the offence suspected. Legal advice should again always be sought upon receipt of such a request.

Investigating authorities can also invite companies to put forward a nominated representative to attend a PACE interview on behalf of the company. Attending such an

interview may not always be in a company's best interests and there is no obligation to attend, as such legal advice should always be sought before responding.

MENTAL HEALTH SUPPORT

The death or serious injury of any worker, either your employee or otherwise, must be handled with great care. There are many practical and emotional issues to tackle, such as informing workers and possibly next of kin, dealing with any media attention, providing counselling and ongoing support, as well as covering the affected worker's responsibilities.

Often the practical elements are relatively easy to resolve, but it is important to give consideration to the emotional support that people may need. Bereavement and shock naturally cause high levels of stress, not only amongst those immediately involved in the incident and/or dealing with the aftermath, but also other colleagues in or external to the organisation. It is therefore essential to put a plan in place to handle it sensitively and to look after everyone's mental health.

People respond to traumatic events in different ways. Some may be able to cope without any specific need for support and may even be able to support others. Others may need the opportunity to talk to someone and may need longer term support to be able to cope with what has happened. You may have mental health first aiders who you can ask to help, and/or you may need to engage help from a professional organisation, who specialise in managing mental health following a traumatic event.

TIPS ON HOW YOU CAN PROVIDE SUPPORT

- Recognise that everyone deals with trauma differently – Whilst it is important to be open to people sharing their feelings, it is equally important not to pressure them if they are withdrawn.
- Encourage people to reach out for support – Ensure that they have access to professional services and inform them of any resources available. Assist them in taking that step if they need it.
- Help them to gain an objective perspective of the trauma – Feelings of overwhelm, grief, and depression can lead to irrational thoughts, such as notions of guilt, blame, or anxiety and a loss of control. Help your workers to regain a more objective perspective over the event, especially if they feel responsible or have been blamed.
- Give everyone adequate space and time to grieve – In the event of tragedy and traumatic loss, it is essential that those affected be given sufficient time and space to grieve, whilst knowing that support is on hand whenever needed. Expect that it will take time for their usual level of motivation to return.
- Ask them what they need – Rather than presuming and/or telling them what they need, ask them. Many times, additional stress is created by well-intentioned people trying too hard to help an individual move forwards, when what they need most is to feel heard and supported.

- Show your concern for their wellbeing – Instead of generically asking them how they are, ask them how they are doing today, how are they coping, or how work is going for them. Generally, show your concern by being fully present to what they share with you - offer compassion and solutions where needed, but mostly ensure that they feel heard and cared for.
- Check-in with them at regular intervals – When it comes to their healing progress and their access to professional support, etc. make sure to check in with them regularly to ensure that they are recovering as best as they can.

Spotting early signs of mental ill health and providing appropriate support plays a critical role in maintaining employee wellbeing. If people who are experiencing the early symptoms of mental ill health, such as stress, anxiety and depression, feel able to talk about them, particularly in the workplace, it can prevent these symptoms from developing into illness. The last thing anyone wants is for a workplace incident to lead to significant mental health challenges, so stay aware, check in with them regularly and ensure that they feel fully supported



REVIEW OF OVERALL MANAGEMENT OF HEALTH AND SAFETY

Whilst all this is going on, the company needs to be closely examining their entire health and safety management. Although this might be seen as a case of 'closing the stable door after the horse has bolted' it is important to look at the management of health and safety holistically rather than just related to the incident that instigated it all. Only then can you truly be confident that the risk of another serious incident is minimised. Also, acting responsibly after the event can help with culpability in the event of criminal proceedings.

A word of caution here, any documents produced by you or for you are liable to be

used in evidence. If engaging an external company or consultant to conduct a review, they should be under the instructions of your solicitor, and reporting to the solicitor, thus providing some small degree of legal privilege to the documentation created.

Another word of caution is, don't rush into actions you may later regret. Rushing in to carry out remedial or retrospective actions is not a good idea. All actions taken following an incident should be properly thought through.

Health & Safety is only 'common sense' and 'simple' if you know what you are doing. If you have any doubts about your systems, or would like an external review, seek professional advice from a competent source. NFU Mutual Risk Management Services can help you with this.



DECIDING ON WHEN TO SEEK LEGAL ADVICE

You may have already sought legal advice at any of the stages above, however, there are other health and safety incidents or issues that can arise where it isn't clear if you ought to seek advice or not. The below is a guide as to when legal advice might be appropriate:

- a fatality, or injury that could lead to a fatality, to either an employee, third party or a member of the public has taken place at your workplace or at a location under your control.
 - legal proceedings (criminal and/or civil) or an investigation by a regulator seem likely.
 - a 'specified injury' as defined by RIDDOR has occurred at your workplace or at a location under your control.
 - a 'reportable dangerous occurrence' as defined by RIDDOR has occurred at your workplace or at a location under your control.
 - any other significant health and safety or fire safety incident has occurred which may have the potential to give rise to civil or criminal proceedings.
 - you have been issued with a 'notice of contravention' by a regulator in relation to health and safety offences.
 - you have been issued with an enforcement notice, for example a prohibition or improvement notice.
 - you have been asked to provide documentation relevant to any incident to a regulator.
 - you have been invited to an interview under caution or to provide a written submission under caution.
- you, your employees or colleagues are invited by a regulator to provide a witness statement in relation to a health and safety incident at work.
 - you receive a court summons or prosecution papers indicating you or your company is to be prosecuted for health and safety offences.

These are not hard and fast rules, and the appropriateness of legal advice will be a matter of judgment in each situation.

Further Guidance:

- INDG 453 Reporting accidents and incidents at work: A brief guide to the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (RIDDOR)
www.hse.gov.uk/pubns/indg453.pdf
- RIDDOR (NI) 97 Booklet
www.hseni.gov.uk/riddor_booklet.pdf
- HSG 245 Investigating accidents and incidents www.hse.gov.uk/pubns/priced/hsg245.pdf
- Mental Health and Work:
www.mentalhealthatwork.org.uk/toolkit/helping-staff-to-cope-with-trauma/

QUICK SUMMARY: ACTIONS TO TAKE IMMEDIATELY FOLLOWING A SERIOUS INCIDENT



If you'd like help with your risk management NFU Mutual Risk Management Services Limited are on hand to provide you with cost-effective advice on reducing risks and accidents, together with practical support.

We offer a suite of Health & Safety options to suit a variety of needs, saving you time and making your business a safer environment for everyone. Our services include: Site and Task Based Risk Assessments, Health & Safety Audits and Hazard Spots, Control of Substances Hazardous to Health (COSHH) Assessments, Employee Handbook, Fire Risk Assessments and so much more.

To find out how NFU Mutual Risk Management Services Limited can help you, speak to your local agency or call **0800 132029**, or you can visit [nfumutual.co.uk/business/risk-management](https://www.nfumutual.co.uk/business/risk-management)

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VERSION 1-0822