

Risk Management Today

From crisis to crisis: planning for the legal aftermath — (2006) 16(10/11) ARM 148

Risk Management Today (newsletter)

Darren Gardner MADDOCKS WORKPLACE SERVICES

From crisis to crisis: planning for the legal aftermath

Darren Gardner MADDOCKS WORKPLACE SERVICES

Although crisis management is more often focused on information technology infrastructure, the protection of physical security and financial resources or communication plans, here Darren Gardner considers crisis management from a human resources perspective — examining the broad duties that employers owe to their employees in the face of a major crisis and how risks may be managed within a strategic crisis management framework.

The World Bank has estimated a global economic impact of US\$1 trillion for a human influenza ***pandemic***. To put this in perspective, the 2003 SARS crisis cost the Asia Pacific economies US\$40 billion and reduced air traffic in the region by 45 per cent, yet only 8000 people were affected.

Despite these figures, the results of Mercer Consulting's *Avian Flu ***Pandemic*** Preparedness Survey Report* indicate that most businesses are not well-equipped to deal with a major crisis.

It is important to bear in mind that legal obligations and duties are not suspended during a crisis. If a company can respond to, and ultimately overcome, the 'worst case scenario', it can deal with other less serious issues as well. Most employers simply are not prepared to deal with a catastrophic event. However, the time to plan for disaster contingency is well before the disaster strikes.

There are four broad areas that should be covered in a crisis management plan: prevention; preparedness; and response and recovery. The following briefly explore each area, identifying issues of potential legal liability should each element not be properly addressed.

Prevention

Obviously, there is little an employer can do to prevent a catastrophic event from occurring in the first place. However, an employer can identify the potential risks that a catastrophic event may cause within an organisation and can make plans to prevent those risks from eventuating.

The legal consequences of not taking the time to identify and eradicate risks (to the greatest extent possible) are numerous, potentially extremely costly and should not be disregarded — for example, those imposed under OH&S legislation and employer common law duties.

An employer must take reasonable care to identify any foreseeable health or safety hazards which could harm employees or other people in their workplace. These hazards may involve work practices, systems, people, equipment, materials and environment.

Once the hazards have been listed and identified, it is important to determine the factors that could potentially contribute to each particular hazard, and the persons most likely to be exposed to the hazard. This information can then be drawn on to develop a safety plan to incorporate into the crisis management plan.

Under OH&S legislation, employers are required to eliminate risks to the health and safety of employees and other persons at the workplace. If it is not reasonably practicable to eliminate the risk, employers are required to control the risk. These duties cannot be delegated to others (even to experts engaged by the employer to conduct a risk assessment). Ultimately, the employer is responsible for ensuring that risks are eliminated or controlled and that the method of risk elimination or control is working.

Preparedness

Whether it is man-made or natural, a disaster affecting business operations exhibits many of the same impacts and outcomes, and requires the same essential operations. In order to ensure that an organisation can continue to deliver its critical business processes, some planning and preparation will be required.

One of the key considerations for all businesses, regardless of their size, is how to cope with high rates of employee absenteeism during a crisis. To give some context, the World Health Organisation (WHO) predicts that should a human influenza **pandemic** break out, absenteeism rates can be expected to be as high as 50 per cent of the workforce.

An organisation that fails to take reasonable steps to prepare for everything from a terrorist attack to a natural disaster will not only suffer greater immediate physical and financial impact from the event, but may also be legally liable for losses incurred by employees, relatives and investors.

Issues that should be considered include leave entitlements (for example, sick leave); contracts of employment (Did you realise that most current 'stand down' clauses will be ineffective in a **pandemic** situation?); and discrimination issues (Will you be inadvertently discriminatory against affected staff?).

We would certainly recommend involving employees in preparedness planning. One of the best methods of assuring a business's survival is to provide for its employees' well-being. Communicate regularly with employees before, during and after a crisis.

Response

In the face of a crisis, it is how a company responds that will have the greatest impact on how it survives the incident. Decisions will need to be made, often on the spot and under extreme pressure. Actions taken in response need to be grounded in the steps planned in the preparedness stage. In the response stage, all employees need to know what their role is once a crisis strikes and, importantly, what they need to do to fulfil that role. Response plans should address the following issues.

Communication

Communication throughout each stage of a crisis is paramount. A post-SARS survey by the Canadian Department of Health and Human Services indicated that 58 per cent of affected people relied on information gained from their employer in relation to what they should or should not do in the face of the epidemic.

Regular health checks

Regular health checks in the workplace during a pandemic threat should be conducted by trained first-aid staff. At the first sign of a temperature or illness, the affected staff member should be removed from the office and placed on sick report. Staff that may have come into contact with the affected person should be closely monitored.

Crisis counselling

Consider crisis counselling. In an environment of heightened stress, employees may welcome the opportunity to talk to a professional in an attempt to alleviate any fears they may have.

Media liaison

It is imperative that organisations have dedicated media personnel. One wrong comment or misinterpreted remark to the media can have catastrophic legal consequences down the track.

Recovery

It is highly important not only to manage the crisis, but also to have the business and staff recover from it successfully. When the 'dust has settled', employees who have been affected through a pandemic may consider their legal position. They will ask the following questions.

- Did my employer do enough?
- Could more have been done?
- How did the organisation's crisis management rate in relation to similar employers?

In the aftermath of a serious event, discussing with a legal adviser the effect your plan did or did not have can only assist in the recovery process. Lawyers will be able to provide an independent assessment of the situation. Further, it should not be forgotten that these discussions and the documents provided may be protected from disclosure through the doctrine of legal professional privilege.

Audit and assessment

In the case of a ***pandemic***, the recovery stage will also be an opportunity to correct or readdress your initial plan and how it was enacted. Some considerations will include how key staff performed under pressure. Did they adhere to the plan, and what could be done differently next time?

Communication

Communication is also going to be a very significant factor in an organisation's recovery process. Apart from the psychiatric and counselling needs of employees, it will be important that representatives from the organisation spend time talking with their employees. This process may uncover potential litigation issues, or give a more holistic view on how the management of the crisis was perceived.

Independent investigators

Independent investigators will also be a useful tool in assessing just how the organisation performed during the disaster. Any internal investigation may be tainted with biased views of staff members or attempts by individuals to downplay the negatives and focus only on the positives.

Conclusion

In today's ever-changing and increasingly global business environment, it is clear that Australia is not an island sanctuary and is now not only a major terrorist target, but also is as susceptible to major ***pandemics*** and biochemical threats as any other country.

The time to plan for a crisis is now. Once a crisis has begun, it is unlikely that people will have the time, capabilities or resources to undertake the detailed risk assessment and preparation that is required.

As the assistant director of communicable diseases at the WHO has stated: 'The future looks very bright for microbes.'

Darren Gardner is a partner in Maddocks Workplace Services group.

Risk Management

Today

ISSN 1448-3009 Print Post Approved: PP 349181/00244.

This newsletter is intended to keep readers abreast of current developments in the field of risk management. It is not, however, to be used or relied upon as a substitute for professional advice. Before acting on any matter in the area, readers should discuss matters with their own professional advisers. This publication is copyright. Except as permitted under the Copyright Act 1968 (Cth), no part of this publication may be reproduced by any process, electronic or otherwise, without the specific written permission of the copyright owner. Neither may information be stored electronically in any form whatsoever without such permission. Inquiries should be addressed to the publishers.

**Printed in Australia © 2020 Reed International Books Australia Pty Limited trading as LexisNexis
ABN: 70 001 002357**