

SAFE AND SOUND HEALTH AND SAFETY >> UPDATE

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Keeping investigation reports confidential

When there is a workplace incident causing serious harm you are required to report it to the Department of Labour. Often, there will then be an investigation by a Department of Labour inspector into the circumstances of the incident and any relevant behaviour in your business, in an effort to establish what went wrong and whether anyone is liable.

Inspectors have the power to call for documents from any business involved in an incident, so internal notes or reports will often be seen by the inspector. This causes obvious problems if the documents are critical of internal behaviour, or if they record damaging admissions from interviews with staff or others.

Legal privilege

Legal privilege is an important tool in protecting the confidentiality of documents an inspector may want to see. Privilege protects the confidentiality of certain communications made between lawyer and client in the course of giving and receiving of legal advice, or created when litigation is reasonably contemplated. The rationale behind privilege is to allow clients to provide full and frank disclosure of their affairs to their lawyer without the fear that these communications will later be disclosed to their detriment.

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FOR MORE INFORMATION

A recent case in New South Wales, *WorkCover Authority of NSW v Waco Kwikform Ltd*, considered whether internal investigation materials and reports produced by the company being prosecuted after a fatality were privileged. The four documents in question were prepared by external lawyers on instructions from an in-house lawyer for the company.

WorkCover NSW (the equivalent of our Department of Labour) argued that the documents were created to achieve compliance with a company policy that all accidents be recorded and reported, and that the documents were accordingly not privileged. Waco disagreed, and said that the documents were protected legal advice. Pleasingly for Waco, WorkCover's argument was rejected as the court held the documents were created for the dominant purpose of obtaining legal advice. The documents were intended to be kept confidential and privilege applied.

There has yet to be a case of this type brought in New Zealand but it may happen soon, as the Department of Labour doesn't like legal privilege frustrating its investigations. The privilege sections in the Evidence Act 2006 are likely to be construed in the same manner as the equivalent Australian legislation, so the risk to businesses should be low.

How can your business manage risk following a workplace incident?

If your business suffers an incident, you need to be proactive in thinking about disclosure and liability issues straight away. It is sensible to create a policy in advance, based on the potential seriousness of incidents, so everyone knows what to do and how to respond. Particular care should be taken in deciding the right person, and the right process, to

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investigate and report on the incident. You should consider involving lawyers at the outset for the most serious cases in order to legitimately invoke privilege over documents created during the investigation.

Incidents that are notifiable to the Department of Labour are particularly likely to give rise to an investigation and a reasonable anticipation of future litigation. Therefore, involving lawyers immediately after an incident will assist in helping to establish privilege.

Start a conversation

If you have any questions about what to do when your business responds to a serious incident, contact one of our health and safety experts to discuss them.