



10 Fundamentals for Enhancing Corporate Safety Culture While Minimizing Future Litigation Exposure

By Matt Gatewood and Carter L. Williams

To quote Michael Jordan, “The minute you get away from fundamentals, whether it’s proper technique, work ethic, or mental preparation—the bottom can fall out of your game.” On the court, tireless adherence to fundamentals made Jordan the best ever. Off the court, the basketball legend’s words ring true with respect to workplace safety.

The majority of workplace incidents—including those that lead to significant verdicts and/or fines for safety violations—are caused by a breakdown in basic safety fundamentals. Fortunately, you do not have to wait for an incident to practice and reinforce fundamentals, but it is important to be cognizant of potential pitfalls when doing so to avoid needlessly increasing future litigation exposure. Based on our experience counseling companies on proactively assessing risk and navigating post-incident litigation, we have compiled 10 fundamentals that in-house counsel should consider implementing to enhance corporate safety culture while minimizing litigation exposure.

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1. Be Consistent. Inconsistencies in company policies and procedures, or the implementation thereof, are low-hanging fruit for plaintiffs’ attorneys following an incident. We have unfortunately seen many occasions where plaintiffs’ attorneys have been able to make considerable headway on policy inconsistencies that are not relevant to the issues that should be the focus of a case. Consider a privileged review to ensure that your policies and procedures on safety and injured workers do not contain any unexplainable inconsistencies and are being consistently applied. The near-term costs will be money well spent by preventing surprises down the road.

2. Know the Rules. Before you can comply with a particular set of rules, it is important to know what the rules are and understand how they will be applied. Depending on your industry, the rules and their application can change frequently, so we suggest having a system in place to track developments. Events that can easily fly under the radar, such as a court on the other side of the country applying a safety regulation in an unexpected way, could have significant implications for your company. Some companies are fortunate to have sufficient compliance personnel and resources to fully track developments in safety compliance and litigation. For the rest of the world, Sutherland recently launched safetylitigation.com as a resource for lawyers and compliance professionals to keep track of litigation and regulatory developments that offer guidance on how to approach safety issues.

3. Inspect, Re-Inspect and Inspect Again. We all know someone who checks, and then double checks and triple checks, to make sure he has turned off the oven or collected all of his belongings before leaving a particular location. Although this habit can be an annoyance, it is not surprising that he does not cause fires and rarely leaves anything behind. Conducting safety inspections for workplace hazards and safety violations (both of government regulations as well as a company's own safety rules) similarly pays dividends. This is not rocket science—there is a corresponding relationship between the thoroughness and frequency of safety inspections and the occurrence of incidents. More often than not, safety violations uncovered in government incident investigations following workplace injuries could have been discovered by the company had it conducted a meaningful, thorough safety investigation that engaged all workers.

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4. Provide the Right Tools and Training. Providing the right safety equipment, whether it be goggles, hearing protection, safety shoes, gloves or other personal protective equipment required for a job, is fundamental to a safer workplace. But simply providing this equipment is not enough—it must be accompanied by training on effective use. In order to minimize litigation exposure on this front, we suggest ensuring that workers who fail to abide by rules for wearing appropriate safety equipment are consistently held accountable.

5. Constantly Evaluate Training. In almost every case brought against a company following a workplace incident, the substance and frequency of the company's training comes under close scrutiny. This should be expected given that a company can only be as safe as its workers, and the company must make sure the workers know how to do their jobs safely. We suggest periodically reviewing the substance of the company's training to identify any gaps or weaknesses that need to be improved. One of the most overlooked sources for identifying training gaps is simply talking to your workforce and asking them to identify aspects of their jobs in which they would like to receive additional training. When conducting any review of policies or procedures to identify areas for improvement, it is important to consider the necessary steps to ensure that such a review would be privileged in any future litigation. For example, conducting a policy review through legal counsel for the purpose of obtaining legal advice on how to minimize future litigation exposure helps to protect the review's confidentiality.

6. Investigate Protectively. One of the first statements a company usually makes to the public following an incident is that the company has already launched an investigation into what happened. Internal investigations are important for a number of reasons, but they can bring many pitfalls if hastily undertaken. Any kinks in investigation policies and procedures should be worked out before an incident so the company does not have to scramble to pull an investigation together on the fly. Documenting that the investigation is being pursued for the purpose of obtaining legal advice and that the company is under counsel is necessary if the ability to protect disclosure in subsequent litigation is important.

7. Prepare Preserve. If an incident or injury does occur in your workplace, you will want to have a plan in place for preserving and securing evidence, both physical and documentary, that may be relevant. Preserving this information will not only be required in connection with any government investigation and likely in anticipation of litigation, but it will also assist the company's defense to any litigation or government penalties. Of course, having a preservation plan is useless unless the individuals responsible for carrying out the plan fully understand their obligations, which is why pre-incident preparation and education are critical.

8. Do Not Ignore Prior Incidents. Government investigators and plaintiffs' attorneys looking for easy targets love repeat violators. To avoid their crosshairs, we suggest reviewing any prior incidents to understand how to avoid similar events and to ensure that any recommendations for improvement made in response to an investigation into a prior event have been implemented. Knowing that the press, the government and plaintiffs' attorneys will seize upon your prior

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events immediately following a workplace incident or operational failure, we also suggest educating the company's management and spokespersons on how to strategically communicate about those incidents.

9. Understand Exposure. In today's world, it is rare for a company to employ all workers on site. Instead, a typical workforce includes various contractors, subcontractors, third parties, servicing companies and others, as well as multiple companies with involved economic interests. Whenever new contracts are signed, we suggest identifying any indemnification obligations to understand

your company's exposure should any incidents occur, including any notification requirements that may require quick action following an incident. Before litigation exposure can be minimized, it has to be understood.

10. Practice. The time period immediately following a workplace incident is hectic and often requires companies to focus on ensuring that injuries and damages are mitigated—all while being barraged with inquiries and requests from regulators, press and the public. Response plans, lines of communication and appropriate protocols for reporting an incident to company management, appropriate government agencies or shareholders are difficult to craft during a crisis. Instead, those reporting rules, incident response plans, and identification of alternate backup procedures should be fine-tuned and practiced before incidents occur. Emergency drill and tabletop exercises, coordinated by legal counsel, can help ensure that everyone understands their obligations in a workplace incident. Such drills should cover both routine injury events and more catastrophic emergencies so that the key players are ready if and when the unexpected occurs. Like dribbling and shooting layups, practicing the fundamentals is the only way to perfect them. **SI**



Matt Gatewood (Washington, DC) and **Carter Williams** (Houston) recently co-founded safetylitigation.com to analyze key developments in safety-related litigation and regulatory activity for in-house counsel and compliance professionals. Gatewood and Williams created the site following their experiences as members of the trial team defending an international drilling contractor in the Gulf of Mexico oil spill litigation. Contact Matt at matt.gatewood@sutherland.com and Carter at carter.williams@sutherland.com.