

# LEGAL ISSUES IN DISASTER PLANNING

## CPM 2008 WEST

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# NEED FOR LEGAL COUNSEL?

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- ❑ The need for legal counsel will vary depending on the nature of the event.
  - ❑ Better to err on the side of obtaining advice of counsel even if it is simply to verify your plan of action.
  - ❑ BCP best practice--counsel and insurance carrier get notice of event.
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# THE BEST DEFENSE IS A GOOD OFFENSE

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- ❑ There is no substitute for having in place well-written employment policies and good work practices prior to any emergency.
  - ❑ Good public relations is important.
  - ❑ Consider all potential scenarios and plan for worst-case.
  - ❑ Drill, drill, drill.
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# MISCELLANEOUS ISSUES

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- Have ready list of contractors to provide assistance—food, shelter, cleanup, document restoration, alternative work sites, employee counseling, etc.
  - Emergency evacuation routes should be posted.
  - Have number for employees to call in for status.
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# MISCELLANEOUS ISSUES

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- Compliance audits are good practice—be sure to address any issues identified in the audit(s).
  - Do not discuss confidential or sensitive information on non-secure (mobile phone) lines or radio channels.
  - Be knowledgeable of notice requirements (EPA, OSHA, etc.).
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# LAW 101

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- “Black letter law”—laws, codes, regulations, ordinances written by a governing body.
    - Can be federal, state or local.
  - “Common law”—also known as “judge-made law” or “case law.”
    - Frequently needed to clarify gaps, inconsistencies in black letter law.
    - Certain areas traditionally common law (negligence).
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# LAW 101

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- ❑ There is no federal law requiring all businesses to develop contingency plans.
  - ❑ The need for contingency planning can be required or inferred from regulations applicable to certain industries such as banking.
  - ❑ May be inferred by provisions in income tax or other codes, in contract language, in service level agreements and/or other written documents.
  - ❑ Common law or State law may require directly or by inference.
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# LAW 101

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- ❑ Courts will compare a company's behavior to those similarly situated.
  - ❑ Risk v. Benefit analysis.
  - ❑ Insurance that protects against realistic loss contingencies will likely be expected by a court.
  - ❑ Be certain to know the legal framework within which your company exists.
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# SCENARIO 1

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- Employee at a light manufacturing facility has a history of minor rule infractions (attendance issues, arguing with fellow workers).
  - In spite of his charming personality, he and his married supervisor begin a romantic relationship.
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# SCENARIO 1

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- Although upper managers have heard gossip, no one has taken steps to confirm or deny the gossip.
  - Husband of female worker shows up unannounced and enters shop floor through open side door.
  - Husband is discovered by Asst. Plant Mgr. and leaves peaceably.
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# SCENARIO 1

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- ❑ Asst. Plant Mgr. closes the side door after husband exits.
  - ❑ Husband waits in the parking lot and shoots wife and lover as they leave the building at shift's end. Stray bullet injures a third employee.
  - ❑ Husband drives off and police apprehend him a few hours later.
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# BUSINESS CONTINUITY PLANNING

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- Is workplace violence a realistic possibility?
  - Should the threat of workplace violence be contemplated when drafting a Business Continuity Plan?
  - Potential legal issues?
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# ISSUES-SCENARIO 1

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- ❑ Employee has history of minor rule infractions-anger issues.
  - ❑ Romance between supervisor and subordinate and inactivity on the part of management.
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# ISSUES-SCENARIO 1

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- ❑ Security breaches-open parking lot, open facility door, husband not escorted off premises, police not called prior to incident, no surveillance cameras at facility.
  - ❑ Employees injured on employer's premises and others witnessed co-workers being shot.
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# ISSUES-SCENARIO 1

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- Employee has a history of minor rule infractions-anger issues.
  - 1. Conduct pre-employment background searches:
    - Usually discretionary.
    - Required for certain industries (child care, trucking).
    - I-9 required to verify employability (INS).
    - Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681 *et seq.*
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# ISSUES (Background Searches- cont'd)

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- FCRA covers “consumer reports” which contain information on credit worthiness, character, reputation, personal characteristics and mode of living.
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# ISSUES-SCENARIO 1 (cont'd)

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- Employee has history of minor rule infractions-anger issues.
  - 2. Closely monitor “problem employees”:
    - Document and discipline for violations of employment policies.
    - Make certain all employees are treated equally.
    - Make anger counseling available.
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# ISSUES-SCENARIO 1 (cont'd)

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- Employee has history of minor rule infractions-anger issues.
    - Be certain that behavioral (and other) issues are reflected in performance evaluations.
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# ISSUES-SCENARIO 1

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- Romance between supervisor and subordinate.
  - Inactivity on the part of management.
1. Generally workplace romances do not cause problems.
  2. Supervisor/subordinate romances should not be allowed/tolerated.
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# ISSUES–SCENARIO 1 (cont'd)

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- Romance between supervisor and subordinate.
  - Inactivity on the part of management.
  - 3. Other workers may make complaints of preferential treatment, bias.
  - 4. Could lead to sexual harassment claim by subordinate.
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# ISSUES-SCENARIO 1 (cont'd)

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- Romance between supervisor and subordinate.
  - Inactivity on the part of management.
5. If no policy, consider having another supervisor conduct performance reviews, make raise/promotion decisions, and get involved in any disciplinary actions involving subordinate.
  6. Interview both to ensure consensual relationship.
  7. Inform workers to keep displays of affection out of workplace.
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# ISSUES-SCENARIO 1 (cont'd)

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- Romance between supervisor and subordinate.
  - Inactivity on the part of management.
8. Take all reports of harassment seriously.
  9. Discipline or adverse employment decisions should be backed up with solid documentation.
  10. Keep alert to signs that relationship is going sour.
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# ISSUES-SCENARIO 1

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- Security breaches.
    1. Employer should have zero-tolerance workplace violence policy.
    2. Provide safety education for employees and managers.
    3. Secure workplace-install video surveillance, extra lighting, alarm systems, minimizing access by outsiders.
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# ISSUES-SCENARIO 1 (cont'd)

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- Security breaches.
  - 4. Report all incidents or near-misses to local police.
  - 5. Investigate all incidents and institute changes as needed.
  - 6. Offer stress debriefing.
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# ISSUES-SCENARIO 1

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- Employees injured on employer's premises and others witnessed co-workers being shot.
    1. Will likely be workers' compensation claims filed by all three physically-injured workers.
    2. Workers' compensation laws vary state-to-state.
    3. Witnesses may file workers' compensation claims for psychiatric damages.
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# ISSUES-SCENARIO 1 (cont'd)

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- Employees injured on employer's premises and others witnessed co-workers being shot.
  - 4. Could be claim against employer for negligence, intentional tort, negligent hiring, depending upon the jurisdiction.
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# SCENARIO 2

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- ❑ Manager at a small payroll management firm is confident in the company's anti-virus software.
  - ❑ Information is backed up off-site once per week. He considers this adequate based on past history of flawless operations and advice from friends on his bowling team.
  - ❑ At month's end, the computer system is infected prohibiting the company from properly processing the payroll of essentially all of its customers.
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# BUSINESS CONTINUITY PLANNING

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- Is computer system failure a realistic possibility?
  - Should the threat of computer system failure be contemplated when drafting a Business Continuity Plan?
  - Potential legal issues?
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# ISSUES-SCENARIO 2

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- Confidence in anti-virus software.
  - Information backed-up weekly.
  - Virus prevents company from fulfilling contractual obligations.
  - Others?
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# ISSUES-SCENARIO 2

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## □ Confidence in anti-virus software.

1. Company should have realistic knowledge of anti-virus software capabilities.
  2. Courts will likely view behavior against others in same or similar industry to determine reasonableness.
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# ISSUES-SCENARIO 2 (cont'd)

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3. If a company doesn't have expertise in-house, it should consult with a capable entity.

# ISSUES-SCENARIO 2

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- Information backed up weekly.
  - 1. Determine whether entity is “financial institution” subject to rules promulgated by Federal Financial Institutions Examination Counsel or some other rule-making body.
  - 2. More prudent to understand standard of care prior to an incident.
  - 3. Most likely weekly backup violates “standard of care” in industry.
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# ISSUES-SCENARIO 2 (cont'd)

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- Information backed up weekly.
  - 4. Look to others in industry or educated professionals to determine appropriate standard of care.
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# ISSUES-SCENARIO 2

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- Virus prevents company from fulfilling contractual obligations.

1. Possible legal challenges from:

- Customers/clients
  - Employees of customers
  - Banking institutions
  - Insurance carriers
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# ISSUES-SCENARIO 2 (cont'd)

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- Virus prevents company from fulfilling contractual obligations
  - 2. Insurance policies should cover damages from loss of computer data (theft, virus, negligence, force majeure, power surge).
  - 3. Court will likely rule against company when performing risk/benefit analysis.
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# SCENARIO 3

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- ❑ Operator and trainee worked for industrial peroxide manufacturer.
  - ❑ A few minutes after midnight they complete adding ingredients for a 3,000 gallon batch.
  - ❑ While batch is mixing, trainee mentions that a pump sounds odd. Operator says "its nothing."
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# SCENARIO 3

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- ❑ Both leave to go on break while batch mixes.
  - ❑ On their way out of the building, one explosion occurs followed by another explosion a few seconds later.
  - ❑ Two, two-story production buildings are leveled.
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# SCENARIO 3

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- ❑ Both buildings are engulfed in flames.
  - ❑ A forklift operator at a neighboring business is so frightened he falls while getting off his forklift shattering four vertebrae. He is the father of 4.
  - ❑ Houses in the surrounding neighborhood sustain broken windows and cracks in walls and foundations.
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# SCENARIO 3

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- Noxious smoke, dust and ash are released causing hundreds of people to cough and experience watery eyes and runny noses.
  - Residents within a half-mile radius are evacuated by police to local schools and churches. Many can't return home for several days.
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# SCENARIO 3

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- ❑ Local businesses are told by police to shut down operations and evacuate employees. No one is allowed to return for two days.
  - ❑ The railroad tracks adjacent to the facility are impassable for 12 hours.
  - ❑ Media personnel arrive on scene while fire is still burning.
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# SCENARIO 3

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- Next morning, Occupational Safety and Health Administration (OSHA) compliance officers and US Environmental Protection Agency (EPA) inspectors are on scene.
  - Three class action lawsuits are filed in the local state court. The class will eventually number 17,000 plaintiffs.
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# SCENARIO 3

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- The facility cannot make certain products and is unable to fill many customer orders.
  - Many employees are profoundly affected emotionally, but none are injured physically.
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# SCENARIO 3

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- Is this a realistic scenario?
  - Should near destruction of facility and “parade of horrors” be contemplated when developing continuity plan?
  - Potential legal issues?
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# ISSUES-SCENARIO 3

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- Industrial peroxide manufacturer.
  - Employee ignores potential equipment issue.
  - Employees leave building during operating cycle.
  - Massive destruction of workplace.
  - Psychological trauma for employees.
  - Personal injuries to individuals at neighboring businesses and residences.
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# ISSUES-SCENARIO 3

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- Property damage/loss of use of neighboring businesses and residences.
  - Media-reputation issues.
  - Occupational Safety and Health Administration.
  - Environmental Protection Agency.
  - Class action litigation.
  - Unable to fill customer orders.
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# ISSUES-SCENARIO 3

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- Industrial peroxide manufacturer.
    1. What legal standard applies? Is this an “inherently dangerous process”?
    2. Business Continuity Plan should take into account legal standard applicable to operation.
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# ISSUES-SCENARIO 3

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- Employee ignores potential equipment issue.
  - 1. Well-trained employees are a company's best asset.
  - 2. Whether a workforce is well-trained may have impact on whether incident occurs and how well/soon it recovers.
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# ISSUES-SCENARIO 3 (cont'd)

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- Employee ignores potential equipment issue.
  - 3. OSHA standards frequently require training--OSHA will cite employer if training is perceived inadequate.
  - 4. Potential for punitive damages (punishment) in litigation if jury believes employer's behavior fell well below standard of care in industry.
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# ISSUES-SCENARIO 3 (cont'd)

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- Employee ignores potential equipment issue.
  - 5. Employee statements about sequence of events are important to determine root cause.
  - 6. Attorney should be involved very early in process especially for taking statements and participating in investigation.
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# ISSUES-SCENARIO 3 (cont'd)

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- Employee ignores potential equipment issue.

## 7. **Attorney-client privilege:**

Designed “[T]o encourage full and frank communication between attorneys and their clients and promote broader public interests in the observance of law and the administration of justice.”

- *Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).*
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# ISSUES-SCENARIO 3 (cont'd)

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- Employee ignores potential equipment issue.

## 8. **Work-Product Doctrine:**

Protects from disclosure material prepared by an attorney in anticipation of litigation, including private memoranda, written statements of witnesses and mental impressions of personal recollections prepared or performed by an attorney in anticipation of litigation or for trial.

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# ISSUES-SCENARIO 3 (cont'd)

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Employee ignores potential equipment issue.

## **8. Work-Product Doctrine:**

- May protect from disclosure investigation reports, witness statements; may not protect investigation conclusions/summary and data.
  - Incident investigation reports should be prepared at the direction of counsel and should involve those from outside the subject facility, if possible.
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# ISSUES-SCENARIO 3 (cont'd)

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- Employee ignores potential equipment issue.
  - 8. Work Product Doctrine:
  - Sensitive documents should be distributed only on an "as needed" basis.
  - If trade secrets an issue, stamp all documents provided to government agencies "privileged and confidential."
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# ISSUES-SCENARIO 3

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- Employees leave site during operating cycle.
    1. May be okay—will likely be judged by standard in industry.
    2. May be standards that apply: American National Standards Institute; National Fire Protection Association, etc. but not have force of law.
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# ISSUES-SCENARIO 3

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- Massive destruction of worksite.
    1. Anticipate lay offs and employment issues such as unemployment compensation, WARN Act, wage and hour issues.
    2. Employees subject to injuries when doing unfamiliar or clean-up work.
    3. Be alert to terms of collective bargaining agreement.
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# ISSUES-SCENARIO 3 (cont'd)

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- Massive destruction of worksite.
  - 4. Preserve all arguably relevant evidence.
  - 5. Be certain that photos are marked "confidential" or "proprietary" depending on nature of business.
  - 6. May be charged with "spoliation of evidence" claim if items of evidence lost or destroyed.
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# ISSUES-SCENARIO 3 (cont'd)

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- Massive destruction of worksite.
  - 7. Chain-of-custody may need to be established for items of evidence—legal “quality control.”
  - 8. If air/water/dirt samples need to be drawn, should hire outside consultant. Obtain two samples of same substance, if possible.
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# ISSUES-SCENARIO 3 (cont'd)

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- Massive destruction of worksite.
  - 9. Any outside consultants should be retained by counsel. Attorneys can review/edit reports before they're put in final form.
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# ISSUES-SCENARIO 3

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- Injuries to individuals at neighboring businesses and residences.
    1. Carrier will likely set up immediate claims processing.
    2. Get receipts and full release if pay out on damage claims.
    3. Prompt response helpful.
    4. Can expect claims for reimbursement from employer of injured workers.
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# ISSUES-SCENARIO 3

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## Property damage/loss of use.

1. Will need to work through insurance carrier.
  2. Keep track of payments made.
  3. Expect business interruption suits or claims and diminution of value suits or claims.
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# ISSUES-SCENARIO 3

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## □ Media.

1. Hire firm with crisis communication focus.
  2. Reputation built prior to incident.
  3. Being pro-active in community is very helpful (sponsor little league teams, offer scholarships, Rotary, etc.).
  4. May need to deal with local activist groups.
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# ISSUES-SCENARIO 3

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- Occupational Safety and Health.
  - 1. Expect lengthy investigation with multiple citations-State or Federal.
  - 2. “Willful” citations frequently issued for catastrophic incidents.
  - 3. Can cite for emergency response issues as well as original incident.
  - 4. Prior history usually effects investigation.
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# ISSUES-SCENARIO 3

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## Environmental Protection.

1. State or Federal.
  2. Can cite for releases to air, water, land.
  3. Release from incident may violate permit(s).
  4. May identify prior lack of compliance (EPCRA, CWA, etc.).
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# ISSUES-SCENARIO 3

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## □ **Government agents:**

1. Have right to enter on land.
  2. Employer can require search warrant-probably not good practice.
  3. Be complaint before incident.
  4. Keep copy/record of all documents given to government agent.
  5. Can issue criminal sanctions.
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# ISSUES-SCENARIO 3

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- Class action litigation.
    1. Frequently filed when multiple parties allege harm.
    2. Takes years and \$\$\$ to resolve.
    3. If no class, expect many individual suits.
    4. Expect fraudulent claims.
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# ISSUES-SCENARIO 3

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- Unable to fill customer orders.
    1. Anticipate customer claims.
    2. Review customer contracts and relationships, including force majeure clauses.
    3. Evaluate ability to meet customer orders (inventory and production ability).
    4. Consider whether allocation of product to customers is appropriate.
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# ISSUES-SCENARIO 3

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- Psychological trauma to employees.
    1. Offer post-incident stress debriefing.
    2. Should make mandatory if fatalities.
    3. Expect “dirty laundry” to be aired—related or unrelated to incident.
    4. Whether psychiatric claims are compensable will vary depending upon the state.
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