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## **Responding in a Crisis**

A Guide to Crisis  
Management

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# Today's Presenters



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Kate represents clients in litigation and provides counseling on federal and state labor and employment matters, including discrimination and harassment, leaves of absence, wage and hour disputes on an individual and class-wide basis, employee classification, wrongful termination, trade secret protection, and the enforcement of noncompetition and nondisclosure agreements.

Kate handles employment litigation before federal and state courts, arbitrators, and administrative agencies, including state fair employment and human rights agencies. She has also represented clients in cases pertaining to the False Claims Act, insider trading, and shareholder disputes. [Click here](#) to view her full bio.



**Dan Kaplan**  
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Dan is a partner and litigation attorney who counsels employers in all aspects of the employer-employee relationship, including wage and hour, employment contracts, confidentiality and non-compete agreements, worker's and unemployment compensation, family and medical leave, disability accommodations and compliance with the ADA, and all state, federal, and local discrimination laws.

In addition, Dan works with employers on employee and supervisor training and traditional labor matters, such as union organizing, collective bargaining, grievance processes and arbitration. Dan has defended employers in OSHA matters throughout the country and in over three dozen matters involving employee fatalities. [Click here](#) to view his full bio.



**Jeff Kopp**  
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Jeff is one of the country's leading prevailing wage counselors. A partner in the Detroit office, Jeff represents employers in federal and state cases around the country and in traditional labor grievance arbitrations. He focuses on trade secrets/noncompete cases, prevailing wage compliance, government contractor employment compliance, and leave and accommodation issues. Jeff also handles employment and commercial litigation matters for automotive clients. He is a member of the firm's Labor & Employment and Litigation Practices.

Jeff is an experienced advocate and has handled hundreds of labor arbitrations and unfair labor practice proceedings before the NLRB. [Click here](#) to view his full bio.



**Maureen Stewart**  
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Maureen focuses her practice on effectively managing crisis situations for clients, including those involving complex litigation and insider threat litigation and investigations. She handles and advises on both high-profile and highly confidential cases for clients across a variety of industries. Maureen has significant experience advising clients in all facets of crisis management situations, including media strategy and advising clients regarding potential risks of investigations and balancing those risks against pending and/or potential litigation or government disclosures. Her experience also includes successfully litigating high-stakes complex disputes at the trial and appellate levels. [Click here](#) to view her full bio.

# Agenda

**Overview**

**The Initial “To-Dos” to Effectively Manage a Client in Crisis**

**Crisis: Malicious Insider**

**Crisis: Vendor Wrongdoing**

**Crisis: OSHA Incident**

**Crisis: Labor Strikes**

**Crisis: Political, Religious, or Civil Rights Issues**

**Questions**

# Overview

- All manner of possible occurrences that can create a workplace “crisis”
  - Incidents/accidents
  - Regulatory agency visits
  - External and internal complaints/reports
- Approaches will depend on the “type” of occurrence giving rise to the crisis
- Approaches may also depend on type of company
  - Public or privately held organization



# Common Initial Considerations – To Dos and To Don'ts

- **Do Not Panic**
  - Slow everything down and think/triage the situation
- Identify audience and stakeholders
  - Shareholders? Public? Employees? Board of Directors? Others?
- What is the goal of the response/outcome desired
  - “Clean” report/closed investigation
  - PR control/tell your story
  - Take care of employees/emotionally/morale

# Common Initial Considerations – To Dos and To Don'ts

- Identify necessary members for the Response Team
  - Will depend on the type of crisis involved
- Consider privilege and confidentiality concerns
  - May call for a more limited Response Team
- Draft initial action plan
  - Keep in mind “goals” and desired outcomes
- Consider notification requirements
  - if any and to whom
  - Insurance providers
  - Regulatory agencies
  - Board of Directors
- Remember document preservation concerns and requirements
  - Cover up is ALWAYS worse than incident itself

# Crisis: Malicious Insider

- Examples:
  - Fraud/Embezzlement
  - FCPA
  - IP Theft
  - Regulatory Wrongdoing/Concealment
  - Executive-Level Harassment/Discrimination
- Action plan will differ depending on whether investigation is covert



# Crisis: Malicious Insider

- Prioritize investigation to identify potential co-conspirators
- Plan for critical business continuity with rapid-action Succession Plan
- Keep Board informed early and often with Action Plan
- Anticipate employee and third-party notification with talking points
- Consider company response and PR ramifications
- Reporting obligations?
  - Jan. 17, 2023 — CEP revisions to encourage self-reporting



# Crisis: Vendor Wrongdoing

- Examples:
  - Fraud/theft from company
  - Rogue IC
  - Labor violations (undocumented workers, child labor)
    - *Hyundai*
  - International law violations
  - Discrimination/harassment



# Crisis: Vendor Wrongdoing

- Review and analyze contract requirements, termination provisions, and cooperation obligations
- Analyze reporting obligations
  - Analyze Board notification requirements
    - **If yes, present to Board with initial action plan and response**
- Consider PR risks of response

# Crisis: Vendor Wrongdoing

- Loop in vendor relationship manager/point of contact
- Preserve emails/documents
- Investigate to identify potential internal wrongdoers/co-conspirators
- Consider litigation options/dispute resolution



# Crisis: Vendor Best Practices

1. Thorough Vetting
2. Restricted Access
3. Regular Audits
4. Robust Company-Friendly Contracts
5. Strong Reporting Culture



# Crisis: Incident / Accident / OSHA

- Examples:
  - Catastrophic event or fatal accident
  - Any incident where one or more persons were hospitalized, an amputation, injury to eye
  - Newsworthy accidents – e.g., major fire/explosion
  - Significant liability events – e.g., oil spills

# Crisis: Agency Visit / Inspection

- Visit from regulatory Agency (OSHA, EPA, etc.)
  - Gain control from the outset
  - Compliance officer should be put in conference room for opening conference
- Notify appropriate company personnel
  - EHS Manager, corporate safety, senior management and counsel
- Identify scope/parameters for inspection or inquiry
  - What brought the agency to your door?

# Crisis: Agency Inspection

- Consider impact on constituents/audience
- Designate a point person
- Follow company policy regarding information disclosure/review safety policies
- Do not make any admissions
- Consider privilege

# Crisis: Agency Inspection

- Do NOT
  - Invite Agency in to look around
    - Companies have 4<sup>th</sup> Amendment rights
  - Be afraid to discuss scope, parameters and limits for contemplated inspection
  - Be afraid to make them wait for a little, while you assemble your team and contact EHS Manager, etc./counsel





# Crisis: Agency Inspection



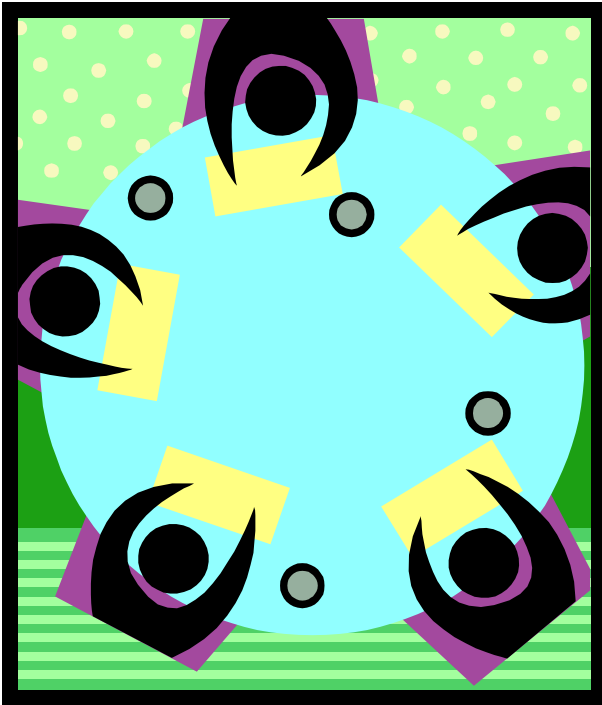
- Warrant or No Warrant considerations
  - You can require Agency to obtain a warrant before allowing them into the workplace
  - Determination based on discussion with counsel and internal stakeholders
  - Warrant may allow better control
- But, is it necessary? Always first try to work cooperatively

# Crisis: OSHA Inspection

- **Attempt to gain agreement on scope (parameters) of inspection**
  - Speak first with Compliance Officer (CSHO), but do not be afraid to approach the Area Director
- **Often depends on type of inspection**
  - Complaint = limit to areas of complaint
  - Report = limit to areas included in report
  - Program = addressed by type of program (but may also include a wall-to-wall)



# Crisis: OSHA Inspection



- **Opening Conference**
  - Should have site Safety, HR, and Operations in conference
  - CSHO outlines basis for inspection, scope, parameters
  - May ask for various policies and records
- Will always ask to review OSHA 300 Log
- Be prepared to produce these items — but **know** that you can produce most later

# Crisis: OSHA Inspection

- Be prepared to “parallel” OSHA inspection
  - Onsite team should have camera, video (if OSHA has video), etc.
  - Document everything — designated observer and note keeper
    - Capture where and what CSHO does
    - Copy all documents provided to OSHA
  - Monitor/test if CSHO conducts monitoring/tests
- Do not offer information that is not requested
- Fix items identified by inspector immediately where possible
- Items in controversy – indicate will review



# Crisis: OSHA Inspection

## OSHA will typically ask to speak to employees and management

- Non-Management Employees
  - Right to have management present
  - Right not to be interviewed
  - Explain rights to employees *before* request to interview
- Management Employees
  - OSHA must allow other management (or an attorney) to be present
  - Management should **NEVER** sign any statement or notes
- Maintain notes of who CSHO interviews



# Crisis: OSHA Inspection

- **Document/information requests**
- **You have time when producing information**
  - Only document required to provide immediately is OSHA injury and illness logs (3-5 years)
  - Advise CSHO that materials requested will be emailed if possible
  - All materials should be reviewed with EHS Manager and legal before sending
  - Don't fear supplementing materials if helpful
- **Always keep a separate copy for your working file**



# Crisis: OSHA Inspection



## Closing Conference

- OSHA will hold a closing conference at conclusion of inspection (same day, weeks or months later)
  - Will identify anticipated violations
- Citation **must** be issued within six (6) months of start of inspection
- As soon as citation is received, send an email to Regional EHS Manager, Safety Director, and Legal

# Crisis: Labor Strikes – Employee Section 7 Rights

- The cornerstone of all labor law is NLRA, Section 7: “**Employees shall have the right** to self-organization, to bargain collectively through representatives of their choosing, and **to engage in concerted activities for the purpose** of collective bargaining or other **mutual aid or protection.**”
  - Forming a union among co-employees
  - Joining a union, whether recognized by the employer or not
  - Assisting a union to organize employees
  - **Going out on strike to secure better working conditions**
  - Refraining from activity on behalf of a union



# Crisis: Labor Strikes

- “Lawful” = for a lawful object; two types:
  - **Economic Strike** = strike for economic concession from the employer (wages/hours/conditions)
    - Strikers can be replaced, but not discharged; can seek reinstatement when openings occur
  - **ULP Strike** = strike to protest an unfair labor practice, or strikes prolonged by an employer’s ULP
    - Strikers cannot be replaced or discharged; entitled to reinstatement (even if temporary replacements have to be fired)
    - Only the NLRB can decide if a strike is a ULP strike

# Crisis: Labor Strikes

- “Unlawful” strikes: employees **can be discharged** and lose reinstatement rights
  - **Purpose:** strike in support of a union ULP, or which would cause an employer’s ULP
  - **Object:** strike to compel Employer A to cease doing business with Employer B
  - **Timing:** during contract with a no strike clause
    - But not all refusals to work are strikes; e.g., walkout on abnormally dangerous conditions

# Crisis: Labor Strikes – Non-Union Employers

- Risks for non-unionized workforces, too
  - Retaliation ULPs
  - Publicity risks with crossing a picket line
- “Secondary boycotts”
  - Union can only picket the employer with whom it has a dispute
  - Dickey in construction situations

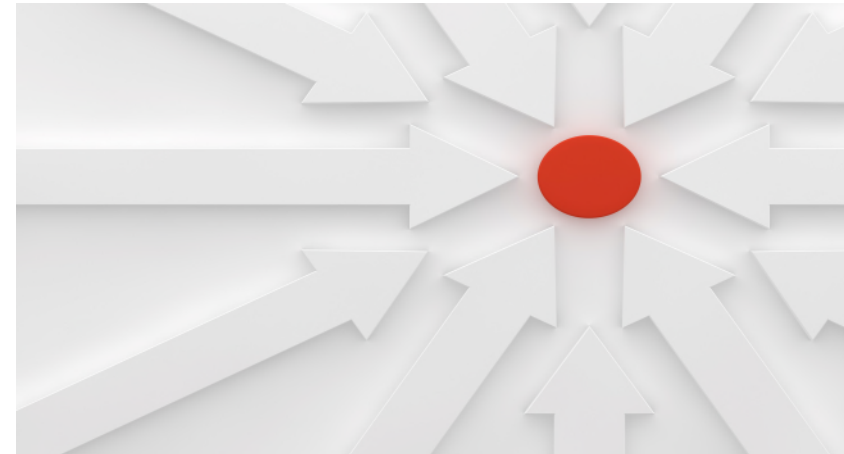


# Crisis: Labor Strikes

- Strikers are not entitled to wages or benefits (except COBRA) or unemployment compensation (usually)
- During strikes, employer may continue normal operations using supervisors and replacements and may move work to subcontractors or other facilities

# Crisis: Labor Strikes – Employer Guidance

- Crisis Management Team/Strike Response Team (HR/Legal/Ops)
- Safety strategy – protect workers and company
- Communications Strategy
  - Internal
  - External
- Operations Strategy – plan



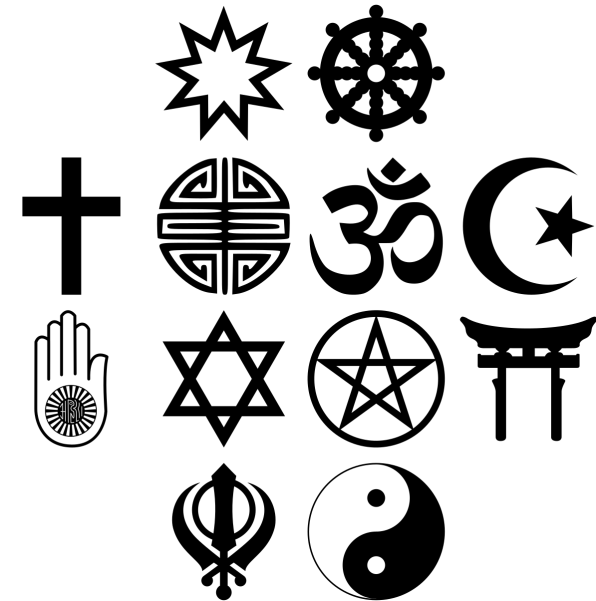
# Crisis: Politically Charged Speech

- Examples:
  - Middle East? George Floyd?
  - Employees posting on social media
  - Employees commenting on issues in the workplace
  - Employees wearing politically charged items
- There is NO freedom of speech in a private workplace
  - But beware of NLRA protections
  - What about poor publicity?
- Best Practice: be consistent in all applications
  - Be tempered/think before acting



# Crisis: Religious Intolerance / Speech

- Examples:
  - Hair style/coverings (Hijab)
  - COVID vaccinations
  - Saturday work accommodation requests
- Remember – *Goff v. DeJoy*
  - employers must make reasonable accommodations for an employee's religious beliefs or practices
- Religious opinion must be respected but do not need to tolerate intolerance or creation of a hostile work environment



# Crisis: High Profile Discrimination Claim

- Examples:
  - C-suite claim of discrimination/harassment
  - EEOC class investigation
  - Challenges to DEI (lawsuits, letters to Board)
- 3<sup>rd</sup> party investigations?
- DEI is **STILL** legal/*SFFA* did not make DEI illegal — but **MUST** be done properly







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**Questions?**

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