



Michelle Pockey

Q&A

Q: Organizations can be exposed to significant liability and costs from unexpected events such as environmental spills, power outages and security breaches. As the economy forces businesses to be more fiscally prudent, what can they do to protect themselves from these risks?

ASK A LAWYER

A: Organizations face potential disruption from a host of probable causes for which they may be held liable, whether the cause is within or beyond their control. Further, personal liability can attract to their directors, officers and employees. Interruptions, even temporary, can impede delivery on financial, production, supply and other contractual obligations. Workplace accidents causing environmental spills or death typically lead to charges, often criminal in nature. Interruptions can also compromise the security of confidential information and ultimately weaken investor confidence and the value of shareholdings.

Businesses can protect themselves by implementing a "Due Diligence Program" or "Business Continuity Plan". Either is designed to prevent harm from business disruption and facilitate a prompt and effective response when disruption occurs. A competent program can offer a complete defence to regulatory liability, often mitigate contractual and civil liability, and save an organization from incurring significant expenses (e.g. clean-up costs, human resources and insurance costs, and legal fees). To be practically and legally effective, the program must be customized and comprehensive. Critical components include:

- Identifying and prioritizing risks
- Implementing specific steps to prevent the risks from materializing
- Planning response measures to mitigate harm
- Frequent and repetitive training of personnel on program compliance
- Appropriate documentation of and within the program
- Regular monitoring and auditing of the program to ensure effectiveness
- Correcting identified deficiencies

Ensure that wherever possible and feasible, risks are also covered by insurance policies and through contractual arrangements (e.g. representations, warranties, covenants, indemnities, contractual limitations of liability). Documents generated for and within the program should also be managed appropriately since they will likely contain sensitive information that, while helpful in mitigating liability, can also expose the organization and its personnel to liability. Have a lawyer with appropriate expertise assist in the development and review of your program for overall efficacy.

Instituting an effective prevention and response program will provide your organization with liability protection; demonstrate your commitment to being proactive, accountable and responsible, thereby strengthening your brand; and - importantly in this economy - afford real cost savings.

Michelle Pockey, a partner in Fasken Martineau's Energy, Environmental, Climate Change and Regulatory practice group, provides strategic business advice in relation to due diligence and business continuity planning.