Corporate disasters, by definition, are unexpected and overwhelming. Their impact can be devastating to a business for years to come, but the right response can minimize the trauma and stress for the people involved.

In the wake of a catastrophic event, it is imperative to take an integrated approach to identifying and understanding the variety of legal implications that present themselves over the course of your recovery. While today’s legal questions might focus on crisis communications and insurance coverage, tomorrow’s legal issues might require more attention to environmental impact, construction, and tax consequences. Understanding these issues holistically better prepares you for when and how to respond to them.

Because decisions made in the short term might have consequences on future legal issues, Perkins Coie has developed a series of pragmatic checklists covering the areas that we have seen most frequently addressed in the wake of a corporate disaster.

Our goal is to help you identify immediate and long-term legal concerns and provide you with practical insight so you can mitigate any existing and future risk.
COMMUNICATIONS STRATEGY

☐ IMMEDIATELY RETAIN A CRISIS COMMUNICATION TEAM.
  • Your messaging will last months or even years and must be consistent and forthright.

☐ USE A PROACTIVE, AUTHENTIC EXPRESSION OF YOUR COMPANY’S HUMANITY.
  • Always speak with empathy and immediacy.
  • The public is moved by expressions of emotion: “We are very upset about the events that just occurred and will not rest until we find the cause.”

☐ MATCH THE TONE OF YOUR MESSAGING TO THE DEGREE OF THE CRISIS.
  • Nothing sounds more “corporate” than a lukewarm message when the crisis feels serious to the public.

☐ DETERMINE WHETHER THE PUBLIC NEEDS DIFFERENT INFORMATION.
  • Convene focus groups if time allows or conduct quick online research to find “hot button” issues or misinformation that your company needs to correct.

☐ DISCUSS WITH YOUR CRISIS COMMUNICATION AND LEGAL TEAMS WHETHER AN APOLOGY IS APPROPRIATE GIVEN THE CIRCUMSTANCES AND CONSEQUENCES ON FUTURE CLAIMS, INCLUDING DETERMINATIONS OF LIABILITY AND DAMAGES.
INSURANCE COVERAGE

☐ GIVE NOTICE TO CARRIERS.
   • Maintain records of all communications with carriers, including the notice to, response from, and instructions from the carrier or its agents regarding property damage, remediation, alternative business operations, and mitigating expenses.

☐ CONFIRM THAT YOUR POLICIES COVER YOUR PREFERRED VENDORS.
   • Some policies require that cleanup or other work be performed by the carrier’s approved vendors—or that the carrier approve your vendors before work begins.

☐ DETERMINE WHETHER PROFESSIONALS SHOULD PREPARE YOUR CLAIMS.
   • Preparing the claims in-house has drawbacks, including your employees’ lack of experience with the process and the profound time commitment involved.

   • Consider engaging an independent adjuster to assist with property damage and a separate professional to prepare the business interruption claim to ensure maximum recovery.

☐ DOCUMENT EVERY COST.
   • Keep careful records regarding all forms of damages, costs, and losses, including first- and third-party property damages, costs to avert or reduce losses, lost opportunities, and business interruption.

☐ UNDERSTAND YOUR SUBLIMITS.
   • Many policies have sublimits for certain categories of losses that are substantially lower than the policy’s limits.

   • This can impact the remediation effort or how you characterize a loss.
ENVIRONMENTAL IMPACT

☐ TAKE IMMEDIATE ACTION TO PROTECT WORKERS, THE COMMUNITY, AND PROPERTY.
  • Have a plan to account for and safely evacuate employees, notify the community if there is an imminent threat, and shut down the facility to prevent further exposure and minimize risk.

☐ NOTIFY FEDERAL, STATE, AND LOCAL AUTHORITIES.
  • Alert the appropriate governmental authorities and be aware that those parties will conduct their own civil, administrative, and potentially criminal investigations.

☐ PREPARE FOR AGENCY INSPECTIONS AND PRESS COVERAGE.
  • Have a plan to address governmental inspections and resulting press coverage.
  • Select a contact person who can interact with the authorities.
  • Direct the media to your crisis communications team.

☐ DETERMINE THE ROOT CAUSE.
  • Investigate operational and communications issues that led to the crisis.
  • This analysis will help you anticipate the scope of potential governmental investigations, reduce penalties, determine whether to disclose your analysis, and implement corrective measures to prevent a reoccurrence.

☐ PRESERVE EVIDENCE TO AVOID SPOILATION CLAIMS.
  • Although immediate action may be necessary to contain or stop the problem, be sure to photograph the physical evidence extensively and preserve as much data as possible for subsequent lawsuits.
CONSTRUCTION

☐ SECURE THE PROPERTY.
  • The safety of persons and property is the top priority following any incident.
  • Identify alternative facilities for use during the period of repairs.

☐ CREATE THE RIGHT TEAM TO ADDRESS ALL THE ANGLES.
  • Establish an internal team and engage consultants for damage assessment, design, construction, claims, and pricing assistance.

☐ PROVIDE NOTICE TO KEY THIRD PARTIES.
  • In addition to notifying insurance carriers and governmental authorities, alert prior contractors, designers, and other parties that might be asked to contribute financially to the resolution and give them an opportunity to inspect your site.

☐ OBTAIN COMPETITIVE PRICING.
  • Document the competitive bids for all major expenditures to justify the reasonableness of the costs incurred.

☐ REVIEW INDEMNIFICATION OBLIGATIONS.
  • Identify what indemnification obligations are owed by and to your company.
  • Confer with insurance counsel to determine how these obligations interact with your insurance program.
TAX CONSEQUENCES

☐ ASSESS THE IMPACT OF ANY AVAILABLE TAX LOSSES.
  • Claiming a tax loss could have a positive financial impact, which can be particularly important if insurance proceeds are not immediately available.

☐ DETERMINE WHETHER YOU CAN RECEIVE INSURANCE PROCEEDS TAX-FREE.
  • When preparing claims, take into account the tax requirements—and advantages—relating to insurance proceeds for property that has been destroyed in whole or in part.

☐ CONSIDER THE POTENTIAL APPLICATION OF ANY SPECIAL TAX RULES.
  • A number of relief provisions apply to losses arising from a federally declared disaster.

☐ UNDERSTAND THE TAX TREATMENT OF LEGAL EXPENSES RELATING TO THE EVENT.
  • If substantial legal expenses are likely, classifying them appropriately from a tax perspective may have a favorable impact on your financial position.

☐ CONSIDER TAX DOCUMENTATION REQUIREMENTS.
  • Separate documentation may be necessary or helpful to support any tax benefits to be claimed or the treatment of expenses incurred.