911 Consulting®

Planning for Emergencies in Your Organization

Introduction

Emergency plans for your workplace are required legally, operationally and morally. Every management has a *duty of care* to keep personnel safe in any emergency.

Understanding the obligation of employers regarding creation of emergency plans is critical. These are the Ten Commandments of workplace emergency planning as required by law for every employer in the U.S. *without exception* for Emergency Action and Fire Prevention Plans.

Executive Summary
The 10 Commandments of Workplace Emergency Planning

1. All U.S. employers *without exception* shall create Emergency Action and Fire Prevention Plans.
2. All Emergency Action and Fire Prevention Plans shall be about personnel, not about data.
3. All U.S. employers shall create an emergency team manned by employees.
4. Emergency Action and Fire Prevention Plans shall standalone separate from Disaster Recovery and Business Continuity.
5. Planning shall be for all hazards.
6. All emergency planning shall be site specific. No plagiarizing. No HQ plan for all sites. No landlord plan can substitute for tenant's responsibilities under law.
7. Planning shall cover all personnel: employees, contractors, temps, part-timers, interns, volunteers, visitors, special needs personnel, etc.
8. Plans shall be updated to be current.
9. Plans shall include policies, procedures and protocols for training, drills and exercises.
10. The CEO is the responsible party civilly, personally and *criminally.*

To experts in workplace safety and security, the *The 10 Commandments of Workplace Emergency Planning* are self-evident truths. But, these experts also recognize that most senior managers in corporations, campuses and medical facilities are ignorant of even their core management responsibilities for personnel safety in the workplace. In fact, many employers' inside and outside lawyers are ignorant of these responsibilities. Workplace and worker law is a specialty unknown to most. But, once through this door, the documentation regarding the Ten Commandments is voluminous. Accordingly, we lay out here the legal rationale that proves these Ten Commandments.

This controlling documentation is manifested in federal, state and local statutes, regulations, codes and court decisions; plus administrative interpretations on part of authorities having jurisdiction—from your local Fire Marshal to OSHA regulators in Washington, D.C.

First Commandment
All U.S. employers without exception shall create Emergency Action and Fire Prevention Plans.

OSHA 29 CFR 1910.34:
"Every employer is covered. **Sections 1910.34 through 1910.39 apply to workplaces in general industry except mobile workplaces such as vehicles or vessels."**

"General Industry" refers to any employer who is not a construction company, shipyard, vessel, vehicle or other selected industry. The regulations for these are even stricter.

"OSHA is not a town in Wisconsin." Yet there are legions of employers who believe they are exempt. These regulations shall apply to corporation, campuses, medical facilities, non-profits, employers of any size or business model, federal agencies and, in most cases, state and local agencies. The only exceptions are some state and local facilities in some states.

29 CFR 1910.38 and 1910.39 cover Emergency Action Plans and Fire Prevention Plans, both required by federal law of every employer *without exception*. EAPs and FPPs are required in addition to what the state and local codes may require. All plans should be in concert.

Second Commandment
All Emergency Action and Fire Prevention Plans shall be about personnel, not about data.

Too many workplaces have emergency plans that are all about data. All agree that protecting data is critical. But, what about the personnel at your workplace? Most employers are not required by law to have emergency plans for data. Yet just about every employer has an emergency plan for *stats* but not for *staff*! Remember, data can't sue you. But and injured or dead person will always sue you.

Reporting to your board, government agencies, stockholders and families that, "Of course, we have emergency plans" and then presenting a data disaster plan is unprofessional and illegal. See First Commandment regarding the requirement for EAPs and FPPs for all workplaces.

Third Commandment
All U.S. employers shall create an emergency team manned by employees.

OSHA 29 CFR 1910.38

(c) *Minimum elements of an emergency action plan.* An emergency action plan must include at a minimum:

> **(3) Procedures to be followed by employees who remain to operate critical plant operations before they evacuate;**
> **(4) Procedures to account for all employees after evacuation;**
> **(5) Procedures to be followed by employees performing rescue or medical duties;**

OSHA interpretations—and simple logic—demand that someone take charge of on-site personnel during an emergency to search to ensure safety, account for everyone, rescue personnel and perform medical duties. This is about command, control and communications. During any emergency, your workplace needs someone in command, a team to control response and the ability to communicate orders, movements and the headcount. This is your emergency team manned by employees identified and organized in your EAP and FPP to take charge in any emergency.

Remember, police, fire and EMTs are ***not*** the First Responders…they are the *official* responders who will come to your workplace in four minutes or 14 minutes. *Your employees are the First Responders* by dint of physics. When you go down, the nearest employee is your First Responder. Your plan shall recognize this by organizing your emergency response team of employees.

Fourth Commandment
Emergency Action and Fire Prevention Plans shall standalone separate from Disaster Recovery and Business Continuity Plans.

While EAPs and FPPs are required by law, DR and BC plans are not for the majority of employers. That said, DR and BC plans are smart *best practices* for any employer. Emergencies often require a long recovery period—from one day to many months—that could require employee counseling, facility repair, reconstruction and moving to a second site. This requires the DR and BC plans necessary to recover once the "hot" tactical trauma to personnel and facility are concluded.

The importance of DR and BC plans is recognized by the national standard, NFPA 1600. Here's how the standard defines these different plans:

The standard demands different plans for different stages of emergency response.

Accordingly, when asked to present your emergency plan, a DR or BC plans does not cut it. Nor does a DR with a fire or tornado thrown in for good measure. The standard defines how each of these stand-alone plans should be constructed and implemented for your workplace.

Fifth Commandment
Planning shall be for all hazards.

All-hazards planning has been mandated for decades by national law and standards:

1. Stafford Act, Public Law 93-288
2. National Incident Management System (NIMS by Department of Homeland Security)
3. Incident Management System (ICS by DHS)
4. National Response Framework (NRF by DHS)
5. Public Law 110-53 (PS-Prep by DHS)
6. Standard & Poor's (S&P)
7. NFPA 1600 *Standard on Disaster/Emergency Management & Business Continuity* (National Fire Protection Association).

All of these standards mandate all-hazards planning for the workplace.

This is not your father's Fire Plan. The standards mandate that planning for your workplace incorporate a long list of emergencies including all man- and nature-made crises. Any emergency that is a *foreseeable circumstance* shall be planned for your workplace. Since terrorists crashed planes into high-rise office buildings, there is no such thing as a workplace emergency that can't be foreseen. Google any "what-if" scenario in your industry and you will find just that emergency has happened to a workplace like yours.

The most clear and authoritative standard regarding the need for all-hazards planning for any employer's workplace is NFPA 1600.

NFPA 1600 all-hazards planning is:

1. Recognized in law twice by the U.S. Congress in the wake of the 9/11 Commission's reports.
2. S&P, the folks who set your credit rating, have changed their audit standards over several years to include examination of Emergency Action, Disaster Recovery and Business Continuity Plans. Their battle cry is "resiliency." If an employer's readiness is poor because of a lack of planning, then the employer's ability to return to full operations and pay invoices and payroll is compromised. This, says S&P, should be recognized in setting your credit rating. Their standard is NFPA 1600.

3. FDNY (Fire Department of the City of New York) administers the most robust planning law in the world. Their inspiration is NFPA 1600.
4. California, Florida and Connecticut have mandated NFPA 1600 in their fire codes. California and Florida have had the most robust emergency planning in the U.S. since WWII because every kind of emergency is experienced in these two states. 56 million Americans live in California and Florida—one out of six Americans. Courts recognize these states and their authority.
5. NFPA has been writing standards since 1896. Every state's fire code is constituted almost entirely by NFPA standards. State and federal courts love NFPA including the Supreme Court of the United States.

Page 14 of the 2013 edition of NFPA 1600 lists the emergencies for which your workplace shall plan. Here's a list of those emergencies that your EAP and FPP must address:

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This list is for a company. Campuses, medical facilities and other business models will have different emergencies that might be added to this list.

Sixth Commandment
All emergency planning shall be site specific. No plagiarizing. No HQ plan for all sites. No landlord plan can substitute for tenant's responsibilities under law.

There is no surprise that all emergency planning shall be site specific. All regulations from OSHA, EPA, other federal and state agencies are focused on the employer's site.

That said, there are legions of employers that take other sites' emergency plans and apply this paperwork to their site. This plagiarism often comes from an employer's headquarters or an multi-facility safety or security group; often, it will be a colleague or a downloaded template that is plagiarized. This "emergency planning by cut-and-paste" leads to planning that is generic, not site specific and thus illegal.

Many employers have a wide variety of facilities from high rises to low rises; in cities with widely divergent regulations and procedures. Planning that might work in a low rise is silly—no, dangerous—for a NYC high rise. What works in a San Francisco high rise does not work for a Chicago high rise.

If the planning is plagiarized, then the planning is not site specific and thus illegal.

The landlord's plan is not your plan. There is nothing promoted or implied in any federal, any state or any local law, regulation or code that permits any tenant employer to substitute the landlord's plan for the tenant's plan. If the landlord does have a plan, it's often part of a tenant manual rather than stand-alone plan. Landlord's plans are almost always out of date. With the exception of New York City, almost all landlord's plans are incompetent. Even in NYC, landlord's plans are often out of date and incomplete in their all-hazards approach.

Landlords are uniformly bad at emergency planning. They hate this stuff. It promotes work and time investment thereby subtracting from their profitability.

Any tenant that purports their landlord's plan is their plan is negligent and in violation of federal law regarding planning of EAPs and FPPs.

This illegal planning is transparent to any compliance officer or expert examining this substitution and/or plagiarism.

Seventh Commandment
Planning shall cover all personnel: employees, contractors, temps, part-timers, interns, volunteers, visitors, special needs personnel, etc.

Employees? OSHA regulations cover employees. Compliance here is straightforward.

Part-timers, interns, volunteers? They're still employees under the regulations whether paid or unpaid.

Contractors? OSHA names the workplace employing those contractors as the "host employer" who shall ensure that Emergency Action and Fire Prevention planning cover any contractor—embedded for months or here of the day.

Just hired? Temps? OSHA never defined "at hire." Many employers interpreted this to mean training your plans within 30 or 60 or 90 days of hire. Then, in February 2013, after the death of a just-hired worker, OSHA's Director, Assistant Secretary of Labor for Occupational Safety and Health Dr. David Michaels, ruled:

"A worker's first day at work shouldn't be his last day on earth. Employers are responsible for ensuring the safe conditions of all their employees, including those who are temporary. Employers must train all employees, including temporary workers, on the hazards specific to that workplace – before they start working."

(https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_ RELEASES &p_id=23640).

Visitors? Every state's premises liability laws require that visitors of any description are the responsibility of the employer while on site.

Special Needs Personnel? ADA, NFPA, DHS and state and local fire codes all require that employers shall take responsibility for all SNPs during emergencies. Under ADA, SNPs are pregnant women, anyone on crutches, non-English speakers—anyone mobility-challenged. All are SNPs for whom you as the employer shall plan during any emergency.

Eighth Commandment
Plans shall be updated to be current.

The word “current” is used 23 times in NFPA 1600. The word “update” is used 11 times. A plan out of date is a plan that:

1. Does not keep current with new threats, procedures and best practices.
2. Does not recognize the addition of new equipment.
3. Does not recognize the change in the design or layout of the facility because of renovation or restacking.
4. Does not recognize the change or introduction of new processes.

All of these are triggers requiring the updating of the plans to keep current.

Ninth Commandment
Plans shall include policies, procedures and protocols for training, drills and exercises

Training: OSHA requires every employer to train all employees annually, at hire, when the plan changes, or when the people in the plan change or their responsibilities change, or when the physical facility is changed by renovation, etc. Training shall reflect the planning. Thus, training shall be for all hazards.

Drills: Every state’s fire code requires drills of some sort for every workplace. At minimum, annual drills are always recommended. More is better for ensuring personnel respond properly. Fire drills should be augmented by drills for Shelter in Place, In-Building Relocation, Active Shooter and the long list of foreseeable emergencies. Drills are not training, by law. Training is not a drill, by law.

Exercises: While not required by law in most states, exercises are an outstanding way to audit your planning, training and drilling. Exercises are simulated scenarios whether presented in a tabletop; or a live simulation with employees and actors walking through their response. Exercises measure whether your people understand the plans; have absorbed their training; and remember their drill experience. *What gets measured gets done right.* Exercises are management’s audit tool to ensure their *duty of care* has been actually implemented.

Tenth Commandment
The CEO Is the Responsible Party Civilly, Personally *& Criminally.*

Quoting regulations is easy enough. But, someone at the employer has to have responsibility for implementing health and safety regulations. Who at your workplace is the responsible party?

Regarding all the responsibilities in our commandments, there is no surprise that the CEO is the responsible party civilly. The Supreme Court of the United States has gone further by making the CEO's responsibility not only civil but also personal and *criminal.* In two cases, SCOTUS listened to all the excuses. "I'm busy." "I'm not 'personally concerned' with these regulations," "I have 'dependable subordinates' in whom I have 'great confidence.'" "We're too big and spread out for me to be responsible."

SCOTUS listened to all these arguments then ruled that the CEO has a "responsible relationship" to the application and implementation of federal regulations.

When it comes to public health and safety, more stringent regulations are applied and often upheld in court. "The only way a corporation can act is through the individuals who act on its behalf," said SCOTUS. CEOs have "supervisory responsibility reposed in them by a business organization not only a positive duty to seek out and remedy violations but also, and primarily, a duty to implement measures that will insure that violations will not occur."

A corporate agent (and his managers), through whom the corporation committed a crime, was himself guilty individually of that crime. SCOTUS ruled the jury was given the proper instruction to find guilt not solely on the basis of respondent's position in the corporation, but by "responsible relation to the situation" and "by virtue of his position…authority and responsibility."

The CEO is the responsible party *civilly, personally and criminally*. The SCOTUS decisions don't let all other senior managers and line supervisors off the hook. They too can be held responsible at court civilly and criminally. Like the captain of a ship, however, the CEO is the ultimate responsible party at your workplace.

Does your CEO know this? Shouldn't s/he? Wouldn't you?

See UNITED STATES v. PARK, 421 U.S. 658 (1975) and
UNITED STATES v. DOTTERWEICH, 320 U.S. 277 (1943)

Conclusion

All employers shall have EAPs and FPPs in addition to their local plan requirements. Planning and training all employees in all-hazards emergency plans for that specific site is the law for every employer without exception. The CEO is the party responsible to ensure all this happens.

Overall, the OSH Act's *General Duty Clause* embraces all employers' and all employees' obligations under law:

29 USC 654

Each employer:

> **(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;**
>
> **(2) shall comply with occupational safety and health standards promulgated under this Act.**

Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

There is an 11th Commandment that too many employers want to be true.

"No authority cares about this. I can ignore the law."

There are two easy examples of how this negligence will come back to nail any employer. First, if your workplace has an emergency that injures or kills an employee, contractor or visitor, then compliance officers, litigators, judges, juries, directors and employees will all deem the CEO and the employer liable. Second, one CEO in a big city with 800 employees in a professional services setting just got a letter from OSHA. The letter was two short paragraphs. "We have had a complaint that you do not have a compliant EAP and FPP. Please send us your written EAP and FPP and your employee training records for the last three years in the next 10 days. Sincerely…" Using a 46¢ stamp, the CEO got called out for documentation that can't be plagiarized in a few days.

Stunningly effective, simple and cheap.

Plus—and no surprise—SCOTUS has already addressed this:

"There are precautions so imperative that even their universal disregard will not excuse omission."

See *T.J. Hooper*, 60 F2d 737 (2d Cir. 1932)

There are those at many employers itching to find the loop hole that can be threaded to wiggle them out of all-hazards planning and training. Almost always, this itch and wiggle is about saving money and staff time.

This is a fool's errand.

This kind of squirming and whining will look transparently petty and unprofessional to any compliance officer, litigator, judge, jury and family after an incident that injures or kills one of your people.

The CEO is the responsible party under federal law.

You can run, but you can't hide.

About the Expert

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