

Assistance in Independent Incident Investigation

Getting it “Right”: The Benefits of Engaging External Investigators for Workplace Investigations.

We are Specialists:

Incident investigation is one of our specialist services. We provide a full investigation service, starting from in-loco inspections of incident scenes, through the data collection, incident root cause analysis and recommendation of provision of corrective and preventive action. Our consultants regularly perform industrial investigations with high and severe consequences like fires and explosions, and fatalities.

We bring current industry knowledge collected over a range of industries and organisations to your company, thus accelerating your acquisition of knowledge and increasing the effectiveness of your risk management programs. Our recent work includes incident investigation in heavy manufacturing, energy, oil and gas, petrochemical, smelting industry, construction, hard rock mining (blasting, fall of ground, mobile and trackless equipment)

We are experts in the use of a wide variety of investigative and analytical tools, including ICAM, SCAT/RCAT/ MORT, Fault Tree analysis, and Taproot and can base our investigation report on any of these to suit your incident database. We also have our own specially developed analysis tools that are applied to your benefit and can be used if you do not already have one of the above tools in use.

Our reports are unbiased, complete, and confidential and form a critical part of preventing further incidents.

The reports are also essential in court cases to assist legal counsel in preventing undue legal prosecution. We have a strong track record in dealing with both serious and fatal incidents in the Minerals and Energy Sector and are thus able to produce relevant reports.

Our Expertise:

We are a Risk Management Consulting and Service Company in the SHERQ domain. Risk has different meanings to different people, but for most of our clients, risk implies that things don't go the way they are intended. When things go better than expected, it is a great opportunity. When things turn sour, it spells danger. We help you take a balanced look at both.

Our Commitment:

Our commitment is to address your concerns. We work with you to set expectations and measure outcomes. We do not represent insurance companies. We don't stop after telling you how bad things are. We work with you in finding ways to manage your risk to an expectable level.

Assembling the Investigation Team:

The investigation team is multidisciplinary and may include members from the

- Client,
- Workers,
- Union Loss Adjuster,
- Insurance,
- Legal.
- Original Equipment Suppliers Contactors,
- Local Community, and
- Governmental authorities.

iSTEC normally assigns subject matter experts (SMEs) to ensure that they are included, depending on the particular needs of each investigation. The investigation team members are selected by senior leadership in consultation with the iSTEC Chair. Selection is critical to the success of the root cause analysis investigation. The ideal candidate is a person with prior experience in leading root cause investigations, has technical credibility, and has demonstrated the ability to bring a diverse group of people to closure on a technical issue. The root cause chair must be given the authority to operate independently of program management for root cause identification but be held accountable for appointing and completing task assignments. This is ideally a person who actively listens to the investigation team members' points of view, adopts a questioning attitude, and has the ability to communicate well with the team members and program management. Above all, the person must be able to objectively evaluate data and guide the team members to an understanding of the failure mechanism or scenario.

The investigation team will be charged with completion of a final summary report and most likely an out-briefing presentation. If other priorities interfere with performing investigation responsibilities in a timely manner, it is their responsibility to address this with their management and report the issue and resolution to the investigation chairperson. At the discretion of the investigation chair, the investigation team membership may be modified during the course of the investigation depending on the resource needs of the investigation and personalities who may derail the investigation process.

Benefits:

There are certain situations in which the hiring of an independent investigator should be given serious consideration. These include:

- Allegations of serious misconduct by high-level corporate officers
- Multi party involvement with conflicting interests
- Particularly sensitive or egregious complaints
- Multiple complaints involving numerous employees
- Exposure to significant financial liability
- Exposure to unwanted, adverse publicity

The primary benefit of an independent investigation is **objectivity**. When the complaint involves a high-level corporate officer, or when allegations of widespread misconduct are involved, it is often difficult for internal investigators to maintain the level of objectivity required.

A second benefit is **credibility**. In incident lawsuits, a successful defence often turns on the adequacy of the investigation. Was the investigator neutral? Was the investigation thorough, or a mere sham? It is critical that the company bases its response on an investigation which was conducted in good faith and which provides a true picture of events.

The qualifications and credibility of the investigator are pivotal in the defence.

A word of caution: Although the company's general or litigation counsel may play a pivotal role in the selection of the investigator, the investigator should not be the person who would represent the employer in the event a lawsuit is filed, since the investigator might be called as a witness in the lawsuit. In addition, the company's regular lawyer is not likely to be perceived by others as "independent."

The credibility of the investigator is also important for internal audiences. A sensitive investigation must be "fair." Members of the workforce, including interested parties, watch closely to gauge the firm's response. Corporate officers and directors may be required to make tough choices based on the results of the investigation. It is important to all concerned that any investigation was conducted by someone whose qualifications and credibility will enhance and not detract from the validity of the investigation.

By their nature, discrimination claims can pose serious risks to an organization if not handled properly. An outside or independent investigator can help minimize that risk. If you decide to use an independent investigator, choose one with care and circumspection.

Planning and executing the independent investigation:

Although the techniques needed to conduct a quality external incident investigation vary with the circumstances, a quality/independent investigation generally follows these practices and it:

1. Remains fair and objective. Do not prejudge the outcome, but consider the investigation a fact-finding operation. Follow the facts where they lead and weigh the evidence impartially. Conduct all interviews and review all relevant documents before arriving at conclusions.
2. Maintains sensitivity to actual or perceived conflicts of interest. A good investigation avoids the appearance of bias and partiality.
3. Responsibly records and documents critical evidence. Upon learning of a potential policy or legal violation, compile an interview plan that includes all key witnesses and the collection of all relevant documents for review. Immediacy is critical in order to collect testimonies while memories are fresh.
4. Protects confidentiality and attorney-client privilege. Confidentiality protects employee and company reputation. Preservation of the attorney-client privilege is key but can be a legal minefield. Outside counsel with investigatory experience is needed to accurately identify these issues.
5. Considers the broader implications of the investigation. How will the investigation affect the company? The board? The industry? Will it have business consequences? Is there a risk of civil or criminal exposure to the company or its officers? These considerations and many more should be assessed.

When a company becomes aware of a government inquiry or an internal problem necessitating an investigation, it should perform an external independent investigation with the help of experienced outside counsel.

If done poorly, the investigation may be costly and disruptive to the business, privileges may be inadvertently waived, and public image may be compromised. However, a well-managed investigation may lend credibility to the company's position, assist in fact development, mitigate financial or criminal penalties and function as a public relations response.

What are the advantages of an external investigation?

While external investigations can involve an upfront cost for an organisation (in terms of engaging an investigator to conduct the investigation and provide a report), this needs to be weighed up against the significant costs involved in upskilling internal personnel sufficiently to conduct appropriate workplace investigations, the potentially greater risk of having to defend the internal process in any subsequent legal proceedings and the payment of any compensation that may be ordered.

Confidence - One of the benefits of engaging an external investigator to conduct workplace investigations is that it may provide all participants in the investigation process with greater confidence in the process and its outcomes.

While it is acknowledged that there are advantages in having internal personnel understand the investigation process and managing investigations into minor or “everyday” workplace issues, employers ought to consider whether it may be a better investment to engage an experienced external investigator in relation to issues that have potentially significant consequences for their organisation.

In engaging an external investigator to conduct workplace investigations an employer is also “buying” access to the benefit of the external investigator’s skills and experience, not only in terms of ensuring that the investigation process is conducted in an appropriate way, but also in terms of any recommendations that are made as to what may be appropriate action by the employer in response to the investigation findings (assuming that the investigator is also requested to provide recommendations following the investigation).

Confidentiality - A further benefit of engaging an external investigator to conduct workplace investigations is the additional confidentiality, or perception of confidentiality, attaching to an external investigator’s involvement in that process. This, too, may also enhance the perceived (but real) integrity of the investigation process with the investigation participants, in turn reducing the risk of disputes in relation to the investigation outcomes.

The use of an external investigator may enhance the perception that the matter will be investigated at “arm’s length” and it is more likely that the subject matter of the investigation (and the investigation itself) will remain confidential. Further, an external investigation is less likely to impact upon ongoing workplace relationships (to the extent that the investigator will not remain in the workplace on completion of the investigation process), which is particularly important if the investigation relates to personal or sensitive matters.

Additional benefits in respect of confidentiality can also be achieved if an employer engages a lawyer as an external investigator, to the extent that the employer may be able to claim legal professional privilege in respect of the workplace investigation. This privilege protects certain oral and written communications between lawyers and their clients which are prepared for the dominant purpose of providing legal advice or services relating to litigation (actual or contemplated). This facilitates a free exchange of information between the lawyer and client, so that the client can be properly advised, without fear of potentially prejudicial information being disclosed later.

While legal professional privilege will not automatically attach to an investigation report prepared by a legal practitioner, it can be of significant benefit to an organisation if it is established. The obvious benefit of legal professional privilege is that communications and documents attracting privilege retain their confidentiality and need not be disclosed, unless privilege is waived. This is particularly important in circumstances where documents contain information about matters that could bring the organisation into disrepute, or if information is of a highly sensitive nature - such as corruption, fraud and sexual harassment.

In Summary: Key Performances and outcomes.

- Mistakes in investigations can be very costly for employers and employees. There is a need to consider what the best approach is to conducting workplace investigations taking into account the needs of the business.
- One of the most significant considerations for employers is whether to engage an external investigator.
- While not appropriate in every circumstance, there are a variety of benefits attaching to engaging an external investigator to conduct workplace investigations, including that participants in the investigation process are likely to be more confident that the findings of an external investigator are unbiased, and accordingly may be less likely to challenge them.
- iSTEC signs a Non-Disclosure Agreement with the client and conducts the External Investigation on behalf of the client.