

Part 1: Contractor Liability Part 2: Crisis Management

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Discussion Facilitator

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Areas of Expertise:

- ✓ Heavy/Highway
- ✓ Commercial Building
- ✓ Specialty Trades
- ✓ Mining (Surface)
- ✓ General Industry/Manufacturing
- ✓ Fleet Operations



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Presentation Disclosure

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Part 1: Contractor Liability



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Learning Objectives

- ✓ Define contractor exposure to loss
- ✓ Compare liability and negligence
- ✓ Review construction risks that create liability
- ✓ Recognize how to manage your liabilities



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For our discussion

- ✓ We cannot cover every aspect of contractor liability
- ✓ The general liability insurance policy is very complex, with numerous exclusions
 - By knowing what your exposures are, you can potentially manage coverage gaps through other policies
- ✓ We will not be discussing
 - Construction defect (QA/QC)
 - Advertising injuries (copyright infringement, slander, or libel)
 - Professional liability (design/build)
- ✓ We will only briefly discuss contracts (risk transfer)



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Contractor's Exposures

- ✓ Exposure is the susceptibility (potential for loss) to various risks
- ✓ The exposures can result in either
 1. Bodily Injury
 2. Property Damage



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What is Liability?

- ✓ **A legal obligation to pay for damages/injuries to others.**
 - Damages or injuries as a result of your work or operations
 - Including products and completed operations
- ✓ **The primary basis for liability is negligence**



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What is Negligence?

- ✓ **Failure to use reasonable care, resulting in damage or injury to another person.**
- ✓ **Negligence can be:**
 - “Simple” – an honest mistake.
 - “Aggravated” – an intentional action.
 - Aggravated negligence can trigger punitive damages.



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How are you identifying your liability exposures?

- ✓ Bidding
- ✓ Project pre-planning
- ✓ Pre-task planning
- ✓ Inspections
- ✓ Investigations



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Common Liability Exposures

- | | |
|---------------------|-----------------------|
| ✓ Public protection | ✓ Pollution |
| ✓ Work Zones | ✓ Borrowing equipment |
| ✓ Lighting | ✓ Drones |
| ✓ Fleet/Drivers | ✓ Contracts |
| ✓ Utilities | |
| ✓ Vibration | |
| ✓ Noise | |



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Public Relations

- ✓ **Disruption and lack of information can lead to uncertainty, frustration, and hostility – and higher likelihood for claims**
- ✓ **Simple gestures can help manage expectations before the project starts**
 - Public hearings
 - Signs, notices, mailbox stuffers
 - Provide scope, schedule, impact
 - Be courteous
 - Keep area clean, safe, and unobtrusive



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Public Protection

- ✓ **Manage site access**
- ✓ **Delineate traffic**
- ✓ **Protect openings**
- ✓ **Maintain walking surfaces**
- ✓ **Store materials properly**
- ✓ **Control falling objects**
- ✓ **Visitors**



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Attractive Nuisance

- ✓ **An individual or entity may be liable for injuries to children who trespass on land if the injury results from a hazardous object or condition on the land that is likely to attract children who are unable to appreciate the risk posed by the object or condition.**
- ✓ **Conditions for liability:**
 - The contractor must/should know that children could trespass
 - The condition has potential to cause serious injury or death
 - The children are too young to not fully understand the danger
 - The cost to eliminate the hazard wouldn't be an excessive burden
 - The contractor doesn't take reasonable precautions to eliminate the hazard



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Attractive Nuisance

- ✓ Open excavations, manholes, confined spaces
- ✓ Access to heights – roofs, tower cranes
- ✓ Clear the building prior to demolition
- ✓ Equipment (and keys), tools, material storage areas



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Attractive Nuisance

**'He always had a smile on his face':
Boy, 8, crushed to death by concrete
blocks while he was playing on a
building site found by his elder brother
who was working nearby**

**Seven-year-old boy dies
on construction site**

**Family reels after death of youngster
8-year-old boy died in cave-in of trench at
construction site**

Child Dies in Fall at Construction Site



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Work Zones/Traffic Control

✓ Common causes:

- Lack of Warning
- Sight Obstructions
- Poor or otherwise unclear guidance
- Uneven pavement and no warning provided
- Drop-off not protected
- Improper signing
- Poor maintenance of signs



Work Zones/Traffic Control

- ✓ Get permission – acquire the necessary permits
- ✓ Develop in accordance with MUTCD, state/local standards
- ✓ Use only approved devices (approved product lists?)
- ✓ Consider the perspectives of all that drive through it
- ✓ Do not modify the TCP without approval
- ✓ Maintain devices – ATSSA Quality Guidelines
- ✓ Minimize the duration and impact
- ✓ Remove unnecessary devices
- ✓ Train your employees
- ✓ Conduct regular, documented inspections



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Lighting

✓ **Drive the site and determine if lighting devices are creating blinding conditions for drivers**

- Impact of rain, snow, fog, dust
- Re-position lights
- Document your inspection
 - Date & time
 - Note any issues that needed attention & how corrected



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Fleet & Drivers

✓ **Greatest exposure (injury and liability) for any company**

✓ **Main elements of a sound fleet program:**

- Driver selection
- Driver training
- Inspection and maintenance

✓ **Do you have policies that address these items?**

- Company-owned vs non-owned
- Personal use
- Distracted driving
- Driver performance management
- Cargo securement
- Accident management



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Driver Behavior

- ✓ **How do you proactively manage driver behavior when you can't always observe them?**
 - Complaints from other motorists
 - How's My Driving? Programs
 - Telematics
 - Goal is to make safer, more efficient drivers
 - You must manage what is being measured/collected



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Utilities

- ✓ **Liability can include**
 - Utility damage (repairs)
 - Damage to equipment or property involved in incident
 - Injuries caused by the damage
 - Loss of use (fair rental value of similar utility x time to repair)
 - Business interruption to affected businesses (loss of income or product)
- ✓ **Even if no marks exist, contractor is on notice when there are indicators of underground utilities such as valves, pedestals, hydrants, etc.**



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Utilities

✓ Managing liability

- Comply with your state's one-call requirements
- Positively identify utility locations within the tolerance zone
- Provide support to utilities and obstacles to prevent damage
- Protect marks and have them refreshed
- Photograph marks before and after excavating is completed
- Establish an incident response plan if damage occurs



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Vibration

✓ Numerous construction activities create vibration and potential damage to existing or adjacent structures

✓ Controls

- Vehicle and equipment paths
- Select methods/equipment with least vibratory impact
- Phase demo, earth-moving, and ground-impacting operations at different times
- Conduct pre-construction visual survey
- Measure cracks with monitors, seismographs
- Use independent testing firm



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Noise

- ✓ Typically associated with vibration
- ✓ Can lead to stress-related illnesses, loss of productivity
- ✓ Managing noise on your sites:
 - Substitute processes/equipment
 - Modify equipment with dampening materials, silencers, mufflers, enclosures
 - Perform regular preventive maintenance
 - Reduce operating speeds and drop-heights
 - Erect noise blankets/panels
 - Schedule noisy activities at less sensitive time periods



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Pollution

- ✓ Stormwater runoff
- ✓ Contaminated soils
- ✓ Asbestos
- ✓ IAQ
- ✓ Dust/silica
- ✓ Mold
- ✓ Pipelines, ASTs, USTs
- ✓ Sewer backups
- ✓ Transportation and disposal



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Pollution Controls

- ✓ Erosion and sediment control plans
- ✓ Hazardous materials inventory, spill prevention, cleanup
- ✓ Handling, storage, disposal of solid waste
- ✓ Fuel storage locations and refueling practices
- ✓ Offsite vehicle tracking – dirt/mud removal, tarping, sweeping
- ✓ Dust suppression
- ✓ Employee and subcontractor training



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Borrowing Equipment

- ✓ Very common in construction
- ✓ Brings risk of equipment/property damage or injury
- ✓ Potential insurance coverage gaps
- ✓ Manage liability by
 - Knowing your coverage
 - Borrow/loan with an operator
 - Have a rental agreement



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UAS (Drones)

✓ Uses in construction

- Site surveys and mapping
- Progress and damage inspections/investigations
- Inventory management
- Marketing



✓ Liability exposures

- Crashing into people or property
- Privacy
- Trespassing



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UAS (Drones)

✓ Managing liability

- Consult with your insurance agent/broker for proper insurance
- Register drone with FAA
- Operators (Pilot in Command) must have FAA Part 107 Remote Pilot Certificate
- Know the rules governing use of drones
- Develop corporate and site specific drone safety plans
- Communicate terms of use and obtain written permission through formal agreements



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Contracts

- ✓ **A construction project contract establishes the parties' agreement, their expectations, and their respective risks and obligations including**
 - Price, terms and conditions, changes, time of performance, delays, warranties, insurance, dispute handling, allowances, termination, etc.
- ✓ **The two methods for transferring accident risk and completed operations risk are**
 - Indemnification (lower tier protects higher tier)
 - Additional insured status (lower tier's liability policy responds on behalf of higher tier)
- ✓ **Parties to a contract**
 - Owner or developer
 - Builder (GC)
 - Subcontractors
- ✓ **A clear, well-crafted, written contract leads to more efficient and less costly dispute resolution since there are fewer issues to dispute.**



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Your Role in Transferring Risk

General Contractor

- ✓ **Require written contracts with each sub**
- ✓ **Include broadest form of indemnification allowed in your favor**
- ✓ **Include a provision naming your firm as additional insured as primary and non-contributory**

Subcontractor

- ✓ **Review indemnification agreements and try to negotiate terms**
- ✓ **Improve knowledge of statutes and case law related to indemnification agreements in your role as lower tier**
- ✓ **Try to limit scope of your additional insured coverage provided to higher tier**



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In Summary: **How do we limit liability?**

- ✓ Know the laws
- ✓ Anticipate exposures
- ✓ Develop pre-job plans
- ✓ Control access to your sites
- ✓ Warn against and protect hazards
- ✓ Pre-qualify subcontractors
- ✓ Use contracts
- ✓ Conduct daily site inspections
- ✓ Document corrective actions



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Part 2: Crisis Management



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Learning Objectives

- ✓ Discuss what constitutes a crisis
- ✓ Understand the importance of having a written crisis management plan
- ✓ Review the key elements of a Crisis Response Plan
- ✓ Demonstrate how to handle news and social media



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Crisis Explained

- ✓ “A crisis is any incident that can focus negative attention on a company and have an adverse effect on its overall financial condition, its relationship with its audiences, and/or its reputation within the marketplace.” - *Janine Reid*
- ✓ You know it is a crisis when there are victims
 - Victims can take all forms
 - Poorly managed responses to victims will almost certainly damage your reputation



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Crisis Examples

- ✓ Critical injury/fatality
- ✓ Company vehicle accident
- ✓ Structural collapse
- ✓ Major equipment damage
- ✓ Fire, explosion
- ✓ Natural disaster
- ✓ Utility damage
- ✓ Environmental impact
- ✓ Public opposition
- ✓ Design errors
- ✓ Work quality, defects
- ✓ Project delays/over-runs
- ✓ Workplace violence
- ✓ Discrimination, harassment
- ✓ Fraud, embezzlement
- ✓ Cashflow
- ✓ Death of owner/key employee
- ✓ Key employee starts competing company
- ✓ Labor relations
- ✓ Negative publicity



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Why have a Crisis Management Plan?

- ✓ The first hour following the event is critical.
- ✓ The handling of a Crisis often has more impact than the Crisis itself.
- ✓ Provides an organized response, deploys critical resources quickly, and minimizes disruption.
- ✓ Designed to maintain the Company's reputation in the face of adversity.
- ✓ Personnel that are trained and prepared will perform better under stressful situations.



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Crisis Plan Elements

- Crisis audit
- Crisis team
- Initial site response checklist
- Critical injury/fatality
- Notification procedures
- Resources
- News/social media response
- Integration of emergency procedures
- Coordination with partners



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Crisis Team

- ✓ Senior Person On Site
- ✓ Crisis Team Lead
- ✓ Safety/Risk Manager
- ✓ Executive Management
- ✓ Company Spokesperson
- ✓ Human Resources/Administrative Support Staff
- ✓ Client
- ✓ GC
- ✓ Subcontractors



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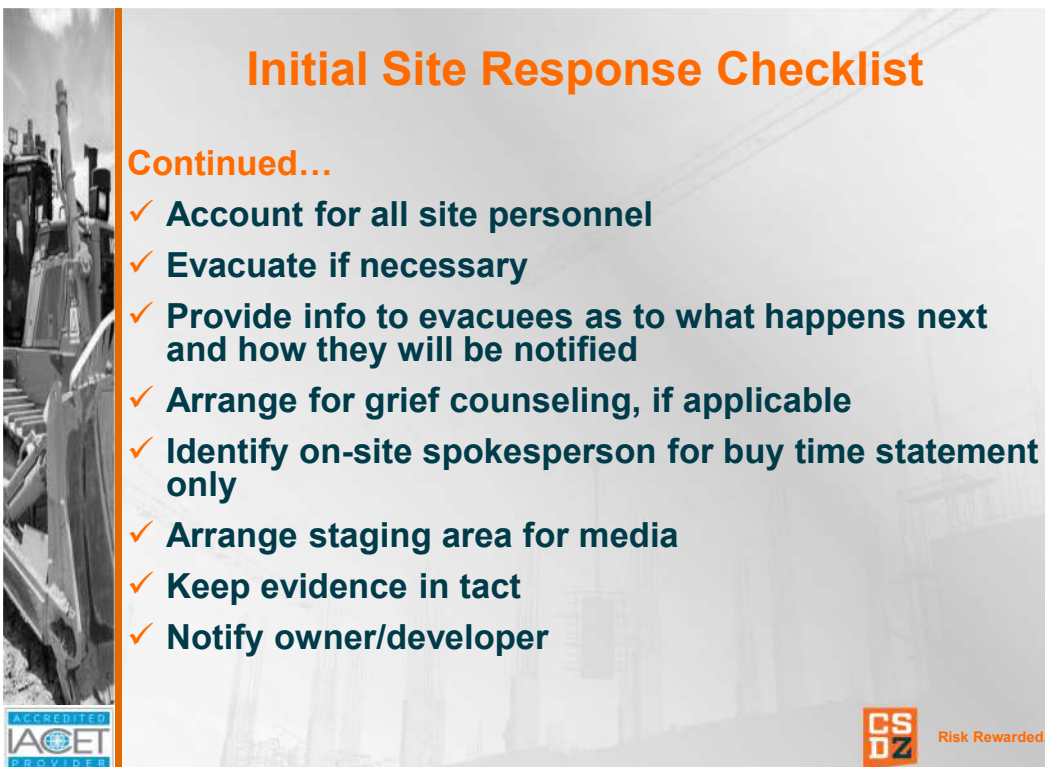


Initial Site Response Checklist

- ✓ Secure scene
- ✓ Attend to injured personnel
- ✓ Call 911
- ✓ Initiate internal notification protocol
- ✓ Establish a Command Center
- ✓ Clear path and escort of emergency personnel
- ✓ Restrict access to site

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Initial Site Response Checklist

Continued...

- ✓ Account for all site personnel
- ✓ Evacuate if necessary
- ✓ Provide info to evacuees as to what happens next and how they will be notified
- ✓ Arrange for grief counseling, if applicable
- ✓ Identify on-site spokesperson for buy time statement only
- ✓ Arrange staging area for media
- ✓ Keep evidence in tact
- ✓ Notify owner/developer

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Initial Site Response Checklist

Continued...

- ✓ Gather contact info for all witnesses
- ✓ Identify the company spokesperson
- ✓ Notify client and GC
- ✓ Notify regulatory agencies as required
- ✓ Conduct accident investigation



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Resources

- ✓ Company background and safety information
- ✓ Insurance brokerage/agency and carrier partners
- ✓ Attorneys
 - General liability
 - Osha
- ✓ Structural, mechanical, equipment engineers
- ✓ Accident reconstruction experts
- ✓ Public relations firms
- ✓ Employee assistance counselors



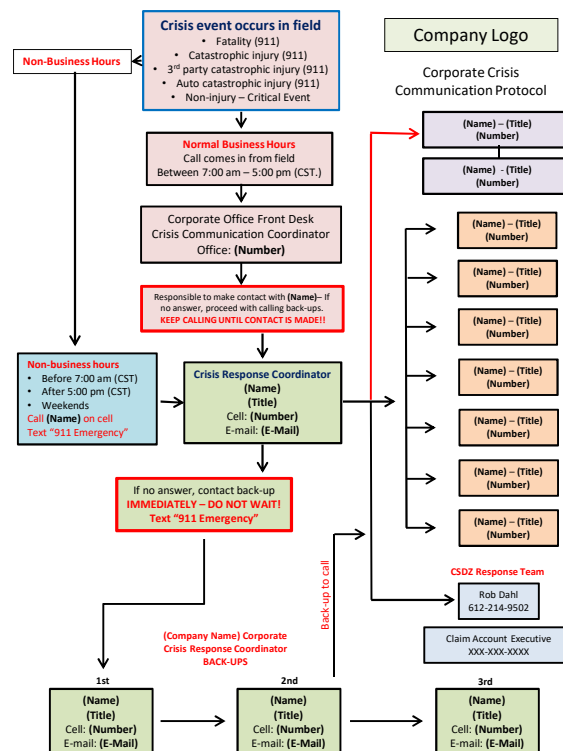
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Notification Procedures

- ✓ How do you want the incident notification process to flow within your organization?
 - Who is the first person you call?
 - What if they don't answer?
 - Are you making multiple calls or do you have a mass communication system?
- ✓ Procedure for notifying/transporting family members of victim(s)
- ✓ Regulatory agency notification requirements



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News Media

- ✓ **The media will find out and they will tell a story**
 - What version do you want the world to hear?
- ✓ **Expect reporters to be**
 - Aggressive
 - Resourceful
 - Non-discriminatory
 - Seeking blame
 - Inaccurate
 - Relentless



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News Media Response

- ✓ **Take control**
 - If you don't, a mic or recorder makes anyone your spokesperson
- ✓ **Establish a Media Area**
 - On site, at office
- ✓ **Gather media contact information and keep a log**
- ✓ **Have your spokesperson and buy time statement ready**
 - Might get away with two of these – beyond that, be prepared to give a more detailed statement



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News Media Response

✓ Do

- Think before talking
- Be truthful
- Verify accuracy of info
- Be brief
- Emphasize positive measures
- Share steps being taken
- Identify spokesperson
- Indicate how often updates will come
- Share where updates will be given

✓ Don't

- Avoid the media
- Say "no comment"
- Speculate
- Admit wrong-doing
- Make excuses
- Make accusations
- Estimate damages/costs
- Provide names
- Provide extent of injuries



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Sample Buy Time Statement

My name is (____) and I am the (title) with XYZ Construction. We can confirm that there has been an incident, but we don't have details. (Give minimal details, if confirmed, including time, location and nature of incident.) We are not able to take any questions at this time as we are working very hard to attend to this situation and gather additional information. Our spokesperson will be back to provide updates as verifiable information is obtained. Until then, we have your contact information or you are welcome to stay in this safe area. We will also post updates at XYZConst.com and on Twitter @xyzconst.



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Social Media

- ✓ Makes reporters out of anyone
- ✓ More likely to be used for voicing negative opinions
- ✓ Spreads info to a massive audience in a few key strokes
- ✓ Easily searchable
- ✓ Is real-time
- ✓ Has no rules
- ✓ What's your policy?



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Social Media

- ✓ Can be useful in managing a crisis
- ✓ Become the source of verified information and updates
- ✓ Communicate directly with your audience
- ✓ May reduce the need for a spokesperson
- ✓ Allows you to monitor and respond to false or inaccurate info



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Handouts

- ✓ Sample Crisis Plan
- ✓ Sample Buy Time Statements
- ✓ Helpful hints for Company Spokesperson
- ✓ Working with OSHA Employee Interviews



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In Closing

- ✓ Not all incidents or emergencies will become a crisis, but they may if poorly managed
- ✓ You cannot always plan for every aspect of a crisis situation, but having a plan in place will help you navigate through it
- ✓ Review your plan annually and provide training
- ✓ Practice your plan – familiarity breeds confidence
- ✓ Conduct an in-depth post-crisis review
- ✓ Learn from others' successes and failures



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