BEFORE THE LAWSUIT

A CONVERSATION WITH THE RISK MANAGEMENT EXPERT WHO EVALUATES WORKPLACE INCIDENTS FOR BOTH SIDES

"The facts that continue to surprise me are businesses and employers who fail to invest in their employees, their businesses, their products, their image, and their brands when it comes to assessing their risk exposures and climate. Businesses are failing to develop and effectively manage policies, procedures, standards, training with no objectively quantifiable performance management or reporting metrics to minimize foreseeable risks in their business and industries."

INTERVIEW WITH THE RISK MANAGEMENT EXPERT, STEVE GARVY – *ANTICIPATING QUESTIONS THE OPPOSING COUNSEL WILL ASK*

When a serious workplace incident occurs—a vehicle accident, employee injury, workplace violence event, or discrimination claim—organizations often focus on what happened that day.

In order to establish or avoid potential liability, there are three critical issues to be resolved:

1. *Was the company aware of foreseeable risk exposures or hazards?*

2. *Did the company have a duty to protect others from a known or foreseeable risk or hazard?*

3. *Is the company able to demonstrate a reasonable effort to reduce, minimize or prevent the risk or hazard; or did the defendant breach that duty?*

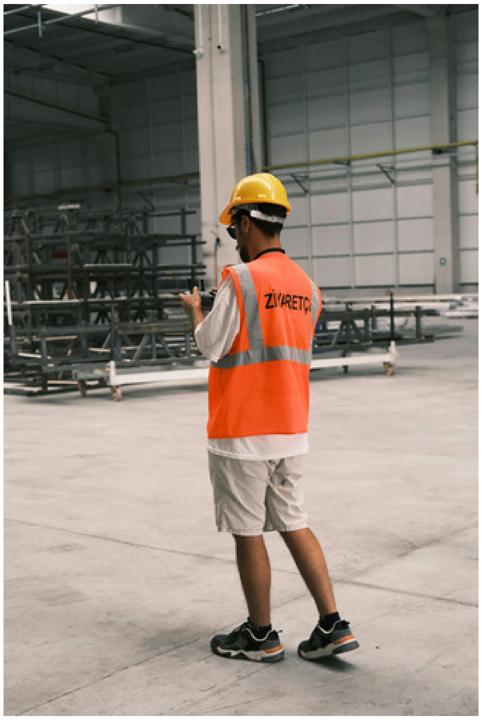
4. *Did such breach result in harm or injury?*

Steve Garvy has spent more than three decades helping organizations answer those questions. As Founder & Principal of The Garvy Group, Steve works closely with global hospitality, gaming, real estate, and insurance carriers and brokers regarding safety, security, and enterprise risk management issues. His experience includes property and corporate level operational security, safety, and risk management in the hospitality industry; risk consulting with and for global insurance carriers and brokers; and litigation support including expert witness testimony regarding matters of liability for both plaintiffs and defendants.

That multi-pronged experience and perspective gives him a unique experience and view of what separates organizations that successfully prevent and defend themselves from claims, from those that struggle during litigation.

We recently sat down with Steve to discuss how employers should be thinking about workplace impairment in today's legal environment.

Steve Garvy
Founder & Principal, The Garvy Group



1) Steve, you've worked on behalf of both plaintiffs and defendants. What perspective does that give you when evaluating a workplace incident?

One of the advantages of working on both sides of litigation is that I have an opportunity to see how liability exposures, controls, and the resulting incidents impact both sides of a case.

Simply stated, the plaintiff's objective is to establish the defendant's liability though either act or omission which led to the damages. On the other hand, the defendant's goal is to demonstrate that they acted reasonably in assessing, identifying, and trying to eliminate or substantially reduce their exposures and incidents through reasonable and responsible actions.

Whether working on behalf of a plaintiff or defendant, I consider the following general factors:

1. *Was the defendant aware of foreseeable risk exposures or hazards?*
2. *Did the defendant have a duty to protect others from a known or foreseeable risk or hazard?*
3. *Is the defendant able to demonstrate a reasonable effort to reduce, minimize or prevent the risk or hazard; or did the defendant breach that duty through an act or omission?*
4. *Did the breach result in harm or injury?*

Very generally, I view these at 'gateway' questions in attempting to determine and establish potential liability and/or the subsequent defensibility of an incident or claim.

2) **When you're evaluating an employer after a serious workplace incident involving an allegation of impairment, what are the first things you look for?**

One of the first things that I consider and look for is how the organization prepared itself for the exposure to that type of incident.

- Was the incident foreseeable in terms of the nature of the job, tasks, industry or employment climate in which the employee was performing?
- If it was not foreseeable, what was the employee doing that was so ‘out of the ordinary’ for the nature and scope of their job, tasks, industry or employment climate?
- If it was foreseeable, what policies, procedures, standards, training, and ongoing performance management and assessments are in place to minimize or prevent the type of incident that occurred?
- How were any company policies aligned with local, state, and federal employment laws and regulatory requirements such as OSHA, etc.
- If the incident involved an allegation of impairment, what policies does the employer have regarding reasonable suspicion testing and/or post-incident drug testing; how are line-level supervisors and managers trained to identify and respond; and how are the incidents documented.

In many cases, the answers to these questions can provide a great deal of information regarding the root cause of the incident and begin to establish potential assignments of accountability and opportunities for improvements.

3) Cannabis legalization has created new challenges for employers. Where do you see organizations struggling the most?

One of the inherent challenges is aligned with employers’ desire and obligation to provide a safe workplace for their employees, notwithstanding the introduction of any potential impairments related to drug and/or alcohol use.

Another potential challenge is policies that prohibit drug and alcohol use by an employee on company premises; conducting or performing company business; operating or responsible for the operation, custody, or care of company equipment or other property; or responsible for the safety of others in connection with, or while performing, company-related business. The challenge can be how employers determine if an employee may be under the influence of THC whether it was obtained and used legally; and whether it was used in the workplace.

As a result, many companies implement reasonable suspicion and/or post-incident drug testing policies.

A challenge here is that there is no universally agreed-upon THC level to determine a standardized level of impairment. With alcohol for instance, the general standard for determining levels of intoxication is a blood alcohol level of 0.08% and above.Not having a standardized level of impairment for THC leads to the challenge of determining whether an employee may be impaired and/or whether an impairment may have been a factor in an injury.Therefore, the presence of THC in an employee's blood may not be indicative of impairment or even on-the-job use.

In addition, many states now prohibit employers from taking adverse action solely because an employee lawfully consumed cannabis outside of work.

As a result, it is critical that those assessing and attempting to make determinations regarding levels of potential impairment in the workplace must be given effective and accurate tools and methods to recognize and document actual workplace impairment.

The ability of an organization to demonstrate that employees have received training, tools, and resources regarding identifying, assessing, and reporting incidents of potential impairment is a much more defensible position of relying solely on a drug test or no effective training at all.

4**) What separates organizations that successfully defend these cases from those that struggle?**

I am a firm believer that if it is not written down, it did not happen.

Many organizations will say that safety is the most important thing. Ironically, very few are able to demonstrate that it is even a marginally important thing in an objectively quantifiable manner.

Those that are able to demonstrate that safety is important in their organization and are able to effectively defend themselves, have the following characteristics at the company leadership, senior management, and operational levels of the organization.

1. *A commitment to proactive due diligence and assessment regarding the evolving risk exposures in their industry and operations.*
2. *Recognition of the risk exposures in their industry and operations.*
3. *Commitment of financial and operational resources to develop, implement, and effectively manage and update policies, procedures, standards, training, and performance metrics at all levels of the organization.*
4. *Documentation of the policies, procedures, standards, training, and objectively quantifiable performance metrics and outcomes that demonstrate a consistent application throughout the organization.*

Claim resolutions and legal matters are not determined by what a company intended to do. They are based on whether a company can demonstrate that they acted reasonably and responsibly to reduce exposures and incidents.

5) If you could give executive leadership one piece of advice before—not after—an incident occurs, what would it be?

When it comes to risk management, and specifically matters of liability, do not just consider how you are going to address the risk exposures in your business. You must consider the risk exposures in the climate within which you do business and how you will manage those. At a minimum, it includes your industry, geographic location, employment market, regulatory requirements, and the civil and criminal legal climate in the country.

Effective risk management is just that. Managing risk that you are unable to effectively transfer or eliminate.

Every organization will experience incidents, some of which may be significant and even catastrophic.

A key factor in reducing these exposures and incidents, and protecting a company's product, image, and brand is whether the leadership in that organization can demonstrate their commitment to staying in front of the foreseeable risk exposures in a meaningful, reasonable, and responsible manner.

Organizations that invest in supervisor training, clear procedures, and consistent documentation are not only reducing potential risk exposures – they are putting themselves in a much stronger position to protect their employees, defend their decisions, and ultimately reduce the financial and reputational costs that can follow serious incidents."

Steve Garvy
Founder & Principal, The Garvy Group

The legal landscape surrounding workplace impairment continues to evolve. Employers today are expected to maintain a safe workplace while respecting employee rights under an increasingly complex patchwork of state and federal laws. (include footnotes to OSH Act Section 5 as federal law example and NJ CREAMM Act as example of state laws)

As Steve Garvy's experience demonstrates, the organizations best positioned to navigate that complexity are not those that react after an incident—they are the ones that prepare beforehand.

That preparation starts with knowledgeable supervisors, objective impairment recognition, consistent documentation, and defensible workplace processes.

WIRE Certified™ Workplace Impairment Recognition & Evaluation Training was developed to help employers build that foundation—equipping supervisors with the training and documentation tools needed to establish a reasonable basis for action, support workplace safety, and reduce organizational risk.

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Solutions@AdvancedTrainingProducts.com

http://www.AdvancedTrainingProducts.com/

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