

LARGE LOSS PREPAREDNESS FOR PRIVATE INDUSTRY

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Legal Disclaimer

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Summary of Topics

- Why are we listening to this guy?
- Getting Started
- Historical Industrial Disasters in the United States
- Elements of Preparedness
- Response Planning
 - Internal Preparation and Mitigation
- Response Management
- Large Loss Legal Response
- Case Study

Why Are We Listening to This Guy?

- Has the mic.
- Served in the U.S. Army for more than 7 years.
 - Airborne Ranger qualified.
 - Extensive disaster and mass casualty response training.
 - Combat tour in Afghanistan.
- Is licensed to practice law in California.
 - Works extensively with agricultural entities.



What is a Workplace Emergency?

- A workplace emergency is a situation that threatens workers, customers, or the public; disrupts or shuts down operations; or causes physical or environmental damage. Emergencies may be natural or man-made, and may include hurricanes, tornadoes, earthquakes, floods, wildfires, winter weather, chemical spills or releases, disease outbreaks, releases of biological agents, explosions involving nuclear or radiological sources, and many other hazards.
- In this presentation, we will focus on industrial emergencies faced by industry.
- Many types of emergencies can be anticipated in the planning process, which can help employers and workers plan for other unpredictable situations.

Large Industrial Losses

- **T. A. Gillespie Company Shell Loading Plant explosion (1918)**
 - ~100 est. dead.
 - No cause ever determined.
 - Lack of adequate fire suppression infrastructure prevented responders from managing the explosion.



Large Industrial Losses

■ Westwego Continental Grain Elevator Explosion (1977)

- 36 dead.
- Grain dust conflagration.
- Led to studies of causes of grain elevator explosions and new regulations.



Large Industrial Losses

■ 101 California Street (1993)

- 8 dead.
- Generalized grudge against lawyers.



Chronicle / Vince Maggiora

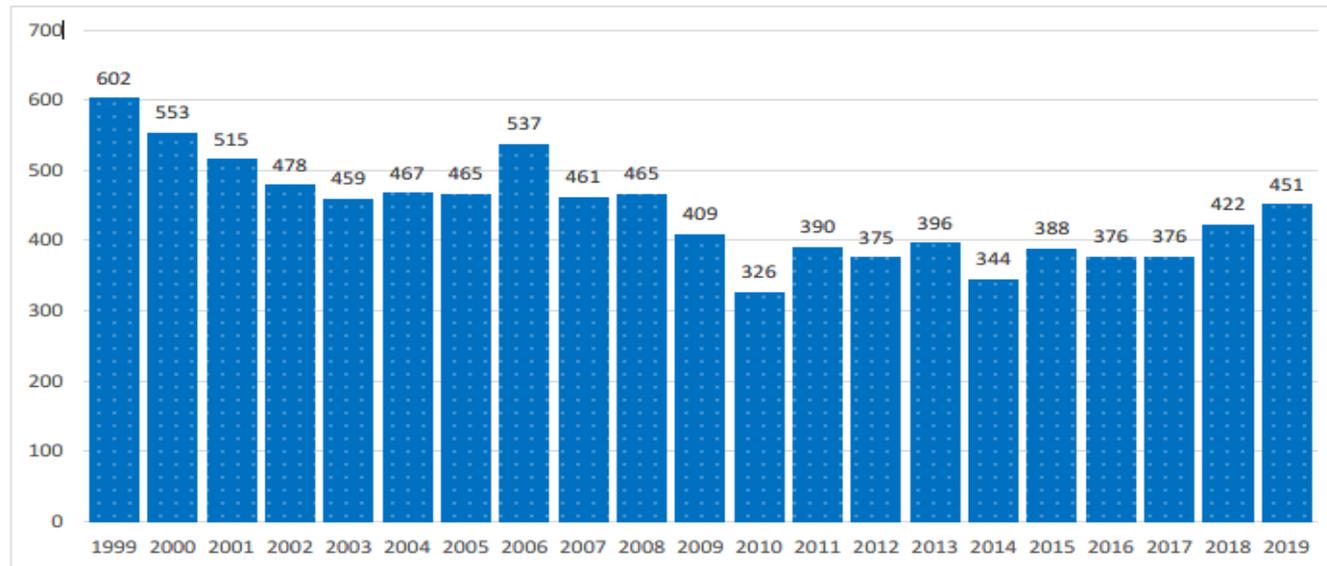
Large Industrial Losses

- A large industrial loss can involve just one person.
- **Death of Maria Isabel Vasquez Jimenez (2008)**
 - Death due to heat stroke.
 - No water in fields, no shade, did not take lunch or rest breaks.
- **Death of Fernando Santiesteban (2011)**
 - Will discuss case study in another section of this talk.



California Workplace Fatalities

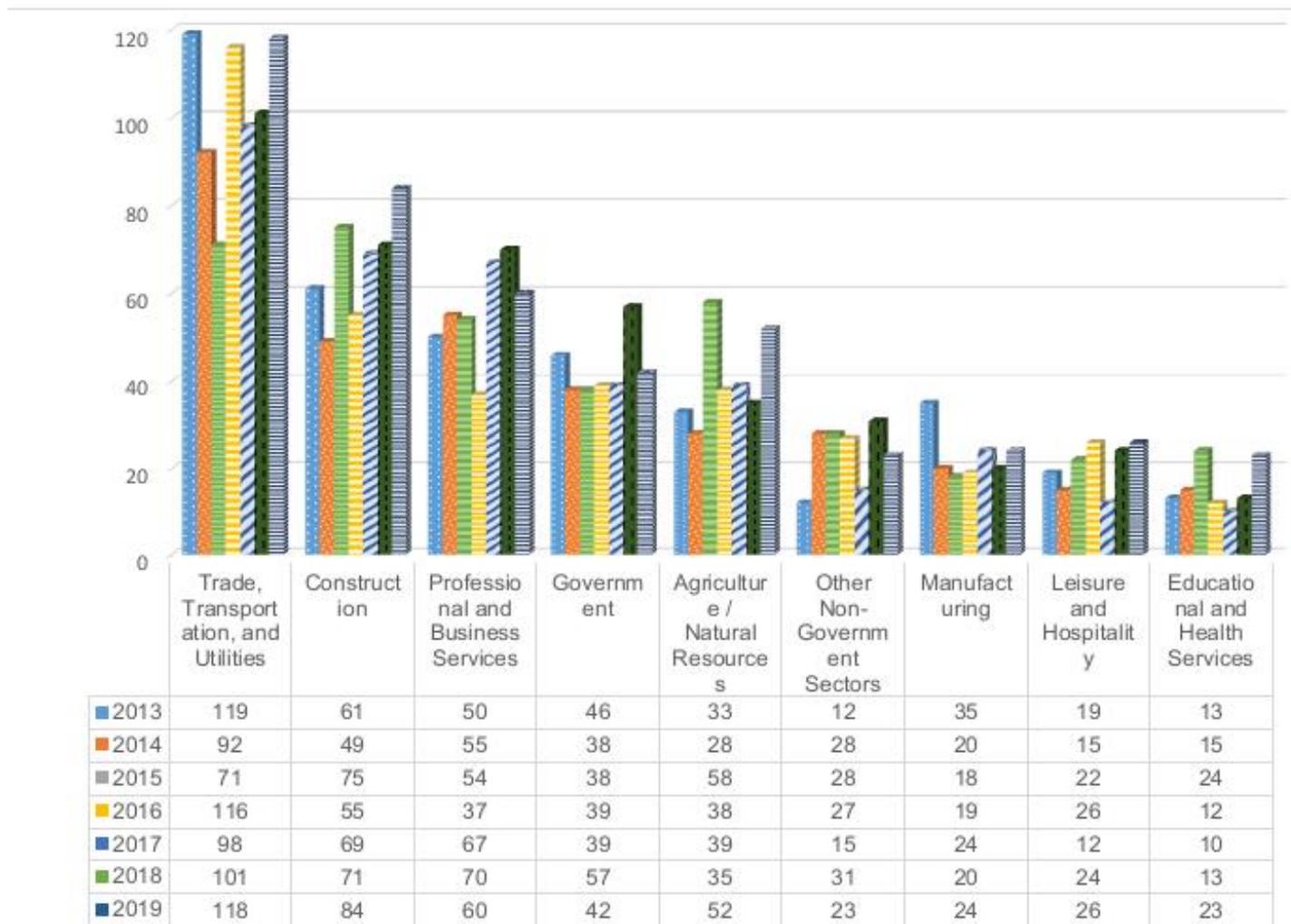
Figure 1. California Fatal Occupational Injuries (1999–2019)



The rate of fatal occupational injuries per 100,000 California workers had been falling over time through 2017. From 2006 to 2014, the rate fell by over a third from 3.2 to two, and then remained at 2.2 per 100,000 workers from 2015 to 2017. In 2018, the rate rose to 2.3. It rose again to nearly 2.5 per 100,000 workers in 2019. While not completely comparable because of differences in industrial mix, the California fatality rate has been consistently lower than U.S. national rates throughout the recent period. (Figure. 2) Rates for the U.S. as a whole have stabilized around 3.5 per 100,000 workers throughout the last half decade, while California's fatality rate has risen to 2.5 in 2019.

California Workplace Fatalities

Figure 9b. California Fatal Occupational Injuries, by Industry Group by Year (2013–2019)



California Workplace Fatalities

Figure 10a. California Average Fatality Rate, by Industry (2013–2019, per 100,000 workers)

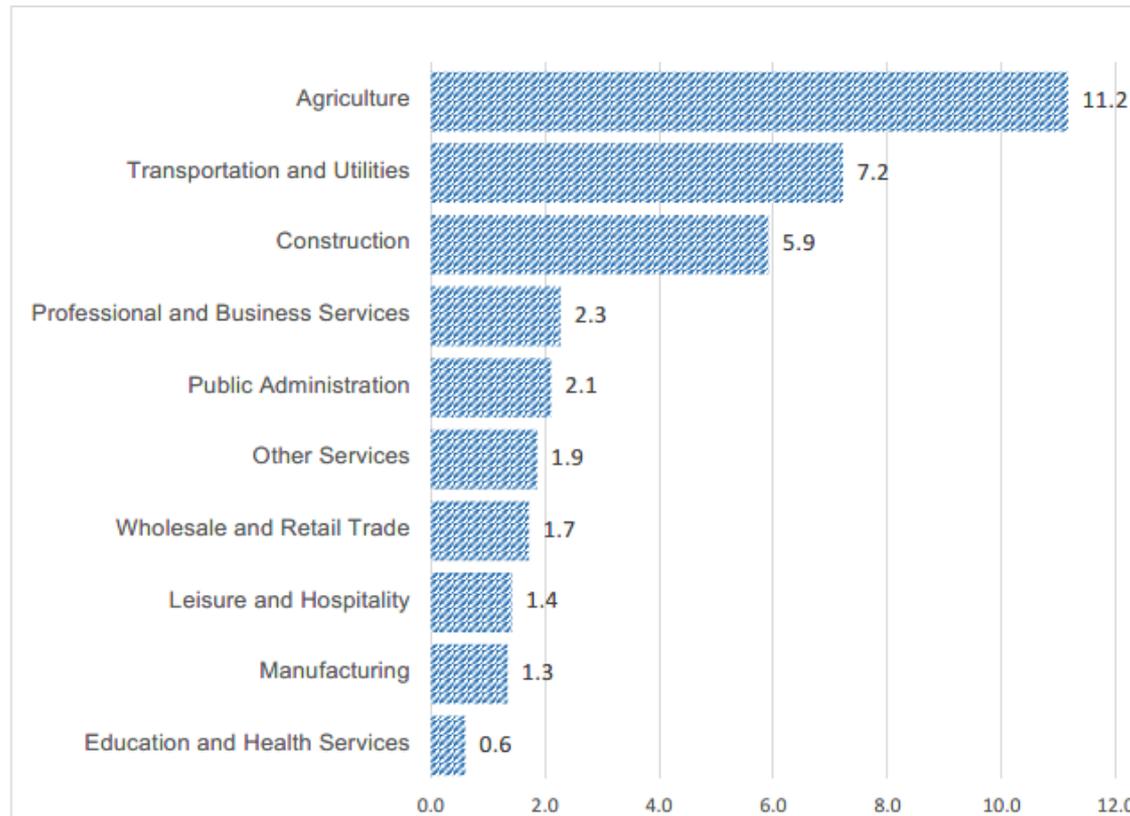


Figure 10b shows the fatality rate by industry for the years 2013- 2019.

Four Phases of Emergency Management

- ***PREVENTION and MITIGATION***: This phase includes actions taken to prevent or reduce the cause, impact, and consequences of disasters.
- ***PREPAREDNESS***: This phase includes planning, training, and educational activities for events that cannot be mitigated.
- ***RESPONSE***: The response phase occurs in the immediate aftermath of a disaster. During the response phase, business and other operations do not function normally. Personal safety and wellbeing in an emergency and the duration of the response phase depend on the level of preparedness.
- ***RECOVERY***: During the recovery period, restoration efforts occur concurrently with regular operations and activities. The recovery period from a disaster can be prolonged.

Prevention and Mitigation

- **Conduct a Risk Assessment**
 - Identify areas of potential risk and catastrophic loss. What are your worst case scenarios?
 - Review hazard or threat scenarios identified during a risk assessment.

- **Develop and Implement Safety program:**
 - Target identified and likely risks.
 - Establish a culture of safety.
 - Conduct safety training ... and document it!
 - Supervisor and employee engagement and feedback. ASSESS!

Prevention and Mitigation

■ Enforcement:

- Managers and safety officers ensure that the safety program is being followed.
- Counsel, discipline (when necessary), and document.

■ Program-Evaluation:

- Manager and Safety officer walkthroughs of workspaces.
- Track safety statistics.
- Supervisor and employee engagement and feedback. ASSESS!

Preparedness and Planning

- **Preparedness Plan:**
 - Developing disaster preparedness plans for who's in charge of what, what to do, and who to call for help in a disaster, emergency, or loss.
- **Business Impact Analysis:**
 - Not all business activities can be continued following a disaster. The business must determine what is required for the survival of the organization.
- **Practice:**
 - Exercising plans through drills, tabletop exercises, and full-scale exercises.

Preparedness and Planning

- **Identify Objectives:** Review preparedness and response planning performance objectives for your company or site's program. Objectives may include regulatory compliance, hazard prevention/deterrence, risk mitigation, emergency response and business continuity.
- **Establish Incident Management Team:**
 - Response plan knowledge
 - Role specific training
 - Effective synergy between team members and external responders.
- **Identify and Establish Roles and Responsibilities:**
 - First responder contact and liaison
 - Employee care and follow up (hospital visit, family contact, grief and trauma counseling)
 - Media response and Public Relations
 - Regulatory reporting, interface and response
 - Insurance tender of claims, adjuster contact, interface and oversight.
 - Return to work follow up and management.
- ***Legal counsel***
 - Point of contact needed to collect and organize evidence and information.
 - Also must manage the roles of various legal counsel and understand the role of each

Preparedness and Planning

- **Identify Response Resources:**
 - Identify the availability and capabilities of resources to help stabilize the situation including people, systems and equipment within your facility, as well as external sources, such as loss control, legal counsel, and external consulting.
- **Ensure Adequate Physical Resources:**
 - Inventory the equipment and supplies you may need in an emergency. Do you have a working fire extinguisher, and what is the expiration date? How much potable water do you have on-site? What medical supplies are available? Don't get caught searching for equipment or supplies as an emergency unfolds - know what you have and procure what you need in advance.

Preparedness and Planning

■ Financial Considerations:

- As you plan for the most likely emergencies that will befall you, be sure you understand what coverages, protections and deductibles would be involved. Developing an emergency preparedness plan might uncover shortages or overages in your policies.

- In the worst case, emergencies can cost lives. But even in the best case, they will likely cost money. Be sure to have contingency funds available in reserve to mitigate damage and disruption - it could be the best investment you ever make.

- Business owners rightfully keep their focus on the bottom line. However, when it comes to an emergency situation, the only bottom line is whether you are prepared or not.

Preparedness and Planning

- **Evaluate Applicable Regulations:**
 - Determine which response planning regulations pertain to your facility and how you can ensure compliance within your site-specific plan.
 - Workplace violence prevention, hazardous material controls, OSHA and environmental controls.
- **Develop Protective Action Response Procedures:**
 - Evaluate and include life protective action procedures such as evacuation, shelter, shelter-in-place, lockdown.
 - Process for accessing first responder assistance.
- **Establish Hazard-Specific Response Procedures:**
 - Depending upon the response planning structure and required content, hazard-specific information may be either included within the response plan or created as a separate stand-alone plan.

Preparedness and Planning

- **Coordinate with public emergency services:**
 - Establish contact and relationships BEFORE an incident.
 - Work with public emergency services such as fire, police, HAZMAT teams and emergency medical services to share knowledge of your facility and its hazards, understand their capabilities to stabilize an emergency, and determine their response time to your facility that would be needed to stabilize incidents at your facility.

Response Training

■ Emergency Response Training:

- Training is essential so that **everyone on site** knows what to do in an emergency or disruption of business operations. Training should include:
 - Response plan familiarization
 - Individual roles and responsibilities
- Plan review training whenever a substantial change or revision is made to the plan that affects organization, procedures, roles and responsibilities, or response capability.
- Refresher courses, as necessary

■ Response Drills and Exercises:

- Corporate preparedness drills and exercises, which may include fire and evacuation drills, or even active shooter response, should be designed to test response plan components and participants' knowledge of expectations and required duties to deploy response strategies and tactics, and restore operations.

Response Management

- **Activate Your Response Plan:**
- **Establish Workplace Leadership:**
 - People must know who to look to.
 - Cool heads save lives and protect resources.
 - Evaluate and establish roles....and support them.
 - Someone has to take centralized charge....this is not the time or place for democracy.
- **Crisis Reaction:**
 - Communication with and between Incident Management Team.
 - Coordination of roles and sharing of critical information.
 - Forms and documentation – checklists are important.
 - Investigation, preservation of evidence, and documentation.
 - Point of contact for medical and emotional support.
 - Understand the aftermath.

Large Loss Legal Response

■ Legal Mechanisms:

- Workers' compensation: Exclusive Remedy
- Tort: Liability to non-employees and punitive damages
- OSHA: Civil penalties, criminal and civil prosecution
- Employment law: Leaves of absence and disability discrimination

■ Insurance:

- Workers' compensation
- Liability tender

■ Understanding legal counsel:

- Workers' compensation counsel
- OSHA defense
- Insurance Defense counsel
- General counsel
- Specialized counsel
- Attorneys exist to work for a defined purpose – take charge!

Legal Preparation and Contracts

■ Exclusive Remedy:

- Workers' compensation is a risk, but it is also a shield.
- Understand the scope of the exclusive remedy.
- Limited exceptions
 - Active concealment
 - Intentional act
 - Outside AOE/COE
 - Products liability

■ Use of contracts as protection:

- Special employment/multi-employer worksites
- Multiple entities – who owns what?
- Ensure coverage for all entities
- Ensure leases and appropriate contracts to establish privacy between them.

Critical Response

- **Preservation of evidence:**
 - Secure the scene.
 - Identify witnesses.
 - Immediate investigation and interviews.
 - Document, preserve and photograph.
- **Media and PR:**
 - Evaluate necessary response
 - News and social media monitoring
 - Know when to show restraint
 - PR firms?
- **Employee and community support and assistance:**
 - Medical care – instruct, don't ask.
 - Emotional and spiritual support.
 - Be creative...and do not be cheap.

Aftermath Response

- **Community relations:**
 - Employees and the public.
 - What can you do to promote healing?
- **Evaluation and Self-Critical Analysis:**
 - How do we avoid future similar events?
- **Be visible:**
 - Hospital visits
 - Employee and public communication.
- **Implement and document change:**
 - Do not go back to business as before – there are always steps to implement...and document.

Santiesteban Case Study

- In 2011, an employee of a Terra Bella nut grower and processing facility was killed while repairing an industrial auger. The investigation indicated that the employee had not engaged the manual power shut-off and that while he was repairing the auger, the auger turned on causing the employee's death.
- Just prior to the accident, the company had undergone a management change and had yet to implement an incident response plan.
- The company called its attorneys, Raimondo & Associates shortly after the accident.

Santiesteban Case Study

- Immediate response to the scene.
- Notified OSHA with 8 hours per statute.
- Began witness interviews and scene preservation.
- Interface with Sherriff's office and OSHA.
- Coordinate community resources for affected employees.
- Plan family notification.
- Prepare for inevitable OSHA investigation, OSHA citations for Serious and willful safety violations, workers' compensation claim, tort lawsuits, and potential criminal charges.
- Facilitated outside entity investigations.
- Managed public relations.
- Was able to negotiate an eventual settlement with OSHA which involved the settlement funds being reinvested into the local community, including a local park in the employee's name.
- Defended the civil lawsuit.
- Allowed company management to focus on their company.

Additional Resources

- Federal Emergency Management Agency
- United States Department of Labor - OSHA
- California Environmental Protection Agency
- California Office of Emergency Services
- California Department of Industrial Relations

failing = prepare
to prepare = to fail



Conclusion

- Prevention is always the best way to prevent risk and legal liability.
- Call your attorney if you get into hot water.
- Document everything!

Questions?