

Article for Continuity Central
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**Assessing Your Legal Vulnerability:
A Tool for Evaluation and Contingency Planning**

I had the benefit of reading Continuity Central Feature Article #0427 entitled *The Business Benefits of Business Continuity*.

It made me realize that there has been very little focus on the LEGAL benefits implications/aspects of Business Continuity Planning.

Businesses know what they know about the Business benefits of Business Continuity, but the large percentage of Businesses don't know what they don't know about the Legal benefits of Business Continuity Planning.

By being aware of their legal vulnerability and the Legal Risks, Business will be in a better position to protect their Assets better, whether those Assets be People, Revenue or Resources.

There Are Legal Risks

The first thing to be aware of is that there ARE legal risks to your Business related to Disruptions and Disasters. Those risks impact not only the Business itself, but also its Directors and Senior Management. It's all about Legal Vulnerability (mostly due to the real possibility of lawsuits and its related costs).

The second thing to be aware of is that there are legal tools to utilize in order to manage and minimize those risks and vulnerabilities, with a goal of finding a proper defence to these risk. The major defence to these risks is 'Due Diligence'.

Mitigation, Prevention, Preparation, Response And Recovery

You have to manage and mitigate yours risks by taking control. The approach required in order to accomplish this goal of management and minimization of risk is by Assessing Your Legal Vulnerability through a process of Legal Evaluation, Safeguarding and Contingency Planning by an experienced legal practitioner. This entails a proper review of the critical legal issues in your specific Business that require attention. By implementing this Process, you will be able to accomplish many or all of the Business Continuity principles: mitigation, prevention, preparation, response and recovery.

The critical legal issues requiring attention

1. Contracts
2. Negligence
3. Employment
4. Workplace Health & Safety

5. Security, and
6. Regulatory Compliance.

Contracts

The main concerns related to Contracts revolve around lawsuits and risks related to breach of contract, and contract fulfillment.

Businesses have to be concerned with their Supply Chain Management. Just In Time delivery and Outsourcing, whether it be regional or global, is now a norm, but how many Businesses carefully review their Supply Chain Management contracts, especially as they relate to contract fulfillment in the event of a disaster. How many Businesses ensure that their Suppliers and Sub-Suppliers down the chain have effective and tested Business Continuity Plans in place. How many Businesses have provisions in their contracts to ensure that a Supplier is required to fulfill the terms of its contract due to a disruption or disaster occurring at its plant. Has the Business reviewed its insurance policy coverages and especially the exclusions in its insurance policies. What happens when a subcontractor goes up in smoke? What about actually setting up contracts for contingencies?

Negligence

Negligence involves a failure to do what a reasonably careful and reasonably prudent person would do in the given circumstances. Simply put, it is a situation that produces a risk of foreseeable harm, creating a duty of care, and the degree of care is not taken. As the law develops, there is an increasing duty to prepare for a disruption or disaster. The failure to do so makes a Business vulnerable to lawsuits for negligence. The result is a great deal of hard and soft costs to the Business. Due diligence will allow you to manage and mitigate these costs.

With all the man-made and natural disasters experienced by Businesses over even the past 5 years, there is a duty and obligation to implement Business Continuity and Disaster Recovery Plans. The failure to do so is negligence.

Employment

Your Employees are your biggest resource, but also your biggest risk.

Businesses have to be able to protect their Employees from the impact of disruptions and disasters. These obligations come not only from Court actions related to breach of contract and acts of negligence, but also from Regulatory Compliance issues. Other related issues relate to security and safety.

On the other hand, Businesses have to protect themselves from their Employees and their acts that can cause disruptions and disasters to those Businesses. How long could a Business carry on if a key employee/manager sells critical Intellectual Property to a competitor; e.g. critical reports, data, information. What would the impact be if that Employee left and took with him or her the customer lists, employees, or clients of the Business.

Have you ever considered the legal issues related to teleworking during a disruption or disaster. What about contracts with you temporary workers?

Workplace Health & Safety and Regulatory Compliance

As Businesses are aware, there is an abundance of laws and regulations that impact them and require compliance. They relate to Occupational Health and Safety, Privacy, Intellectual Property and Financial Statement integrity just to mention a few.

During a disruption or disaster there is a very large risk that Regulatory Compliance will not be possible. There is an obligation on Businesses to plan ahead and ensure that they are compliant, even during a disaster.

Security

As indicated earlier, employee security is one of the many obligations of a Business to its employees.

Add to that the requirement for plant and inventory security and the protection of critical technology infrastructure, and you have a growing list of concerns related to security during a disruption and disaster.

What, Me Worry?

You don't have to look any further than any of the following list of almost 'usual' disruptions and risks faced by Businesses:

1. power outages;
2. floods;
3. hurricanes and tornados;
4. I.T. disruptions;
5. tsunamis;
6. terrorist events.

To check your Legal Vulnerability satisfactorily, you should consider involving a lawyer, preferably one that has experience not only with business law, but more importantly, with risk management and disaster control issues. Most Businesses are not able to carry out a proper evaluation of their Legal Vulnerabilities without such assistance. If you weigh the costs of this legal assistance against the cost of not implementing such an evaluation, the answer is clear. Remember, the costs are not just related to money – there are also the costs of all your resources including your all important Goodwill.

If you own or manage a business you have a choice: ***Worry and spend a bit now, or don't worry and spend a whole lot later.***

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Jay is a Business Lawyer at the Law Firm Simpson Wigle LLP, with a focus on counselling Business on how to manage and mitigate legal risks related to emergency preparedness by way of Legal Vulnerability Assessment through proper Evaluation and Contingency Planning.

Jay regularly addresses these issues at International Conferences and also delivers corporate lunch and learn sessions on this newly developed Legal Tool.

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