



Introduction

As the frequency of employment-related lawsuits and costs of defense continue to rise, investing in effective training of supervisors and employees can generate substantial savings for employers. Adequate and effective training reduces the number of claims, and assists in lowering the risk of an adverse outcome for the employer as courts and juries respond more favorably to employers who invest in training. Moreover, training can enhance job satisfaction and increase productivity.

Legal Duty to Train

Sexual Harassment and Discrimination Prevention

Training has long been recognized by human resource (HR) professionals as an important activity. In 1998, the U.S. Supreme Court decided several landmark decisions, which caused training to take on a new, more important meaning. Although the Supreme Court's decisions simplified the employee's capacity to sue their employer for sexual harassment, the decisions also provided employers with insight as to methods in harassment avoidance and rectifying harassment before the illegal measures became an actionable offense.

The Supreme Court's decisions established the legal principle of tangible employment loss. Examples of tangible employment loss are firing, failure to promote, inappropriate reassignment with different responsibilities, and change of benefits.

Where the victim of sexual harassment has not suffered a tangible employment loss, an employer may successfully defend against a harassment lawsuit by proving that the employer took both of the following steps:

- Exercised reasonable care to prevent and promptly correct sexual harassment.
- Offered preventive or corrective opportunities and the employee unreasonably failed to take advantage of such opportunities.

The development of an employer's defense against a harassment claim requires planning and preparation. However, such planning and preparation should occur before any harassment claims are filed. Employers must take all necessary precautions and steps to fashion a work environment free from harassment.

For example, an employer may demonstrate the exercise of reasonable care to prevent and promptly correct sexual harassment by implementing the following steps, at a minimum:

- Developing both a policy that explains the types of behavior prohibited and a legally effective complaint procedure to address concerns.
- Timely distribution of the company policy to all supervisors and employees.
- Educating and training employees about their rights and responsibilities under the policy and complaint procedures.
- Educating and training supervisors about how they should respond to inappropriate behavior from others and their own responsibilities for complying with and enforcing the policy.
- Training those who are charged with receiving and investigating complaints on how to properly conduct investigations, document results, and take corrective action.

Moreover, the Supreme Court continued to emphasize the importance of training and essentially ruled in a 1999 decision that punitive damages cannot be awarded against an employer who has taken all the preventive steps in discrimination and harassment. Thus, harassment prevention training has become almost mandatory for employers to prevent the prohibited acts and avoid liability.

Oftentimes, in sexual harassment litigation, the plaintiff will try to demonstrate that the employer failed to provide the plaintiff with proper training on the employer's harassment policy and/or that the training was ineffective. Subsequently, HR directors and administrators may be subject to extensive questioning, in depositions and at trial, on the training issue. Additionally, courts have continued to expand an employer's legal duty to prevent and avoid harassment targeting any protected class, such as that based on race, national origin, or disability status.

Safety and Health

The employer's duty to train is an important element of several Occupational Safety and Health Administration (OSHA) safety and health regulations.

For example, OSHA requires that employers implement the following safety procedures:

- Every employer must either provide portable fire extinguishers throughout the workplace and train all employees on their use or implement an Emergency Action Plan and a Fire Prevention Plan that covers every employee who is not expected to fight fires.
- Any employees expected to use portable fire extinguishers to fight incipient fires must be trained pursuant to 29 C.F.R. 1910.157(g)(1) - (4).
- Where the employer has provided portable fire extinguishers for employee use in the workplace, the employer must also provide an educational program to familiarize employees with the general principles of fire extinguisher use and the hazards involved with incipient stage fire fighting. The education is required upon initial employment and at least annually thereafter.
- Employers must provide employees who have been designated to use fire-fighting equipment as part of an emergency action plan with training in the use of the appropriate equipment. Such training is required upon initial assignment to the designated group of employees and at least annually thereafter.
- Employers in the construction industry must provide safety training for each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to the work environment to control or eliminate any hazards or other exposure to illness or injury.

In addition to the training and information requirements, OSHA might require that housekeeping and/or sanitation employees be trained under the Bloodborne Pathogens (BBP) Standard and the Hazard Communication (HazComm) Standard. To require BBP training, OSHA presumes that those employees have "reasonably anticipated" occupational exposure to blood or other potentially infectious materials. To require HazComm training, OSHA assumes that the housekeeping/sanitation employees use hazardous consumer products (such as cleaners) in a manner that results in a duration and frequency of exposure which is greater than the range of exposures that could reasonably be experienced by consumers when the product is used for its intended purpose.

The Occupational Safety and Health Review Commission has also provided guidance on other suggested training programs, such as guidelines for preventing workplace violence. Failure to comply with OSHA's regulations covering training may create liability for the employer.

Tort Claims

Plaintiffs may also file lawsuits claiming that during employment they were personally injured as a

result of the employer's failure to properly train co-workers or supervisors on proper techniques to accomplish job duties and responsibilities. For example, inadequacy of police training may serve as a basis for a municipality being liable for a constitutional violation when the failure to adequately train a police officer results in injury to a citizen.

Effective Training Characteristics

Effective training requires thorough planning and preparation. Planning requires that employers establish both training goals and strategies as the foundation to the training program. The following are critical elements of effective programs:

- Training classes should be conducted by qualified instructors. The qualification of the instructor not only extends to training ability, but also to the subject matter and the employer's industry and policies.
- Training should be accomplished in a reasonable amount of time and sessions should be tailored to accommodate the employee's attention span and concentration levels. Employees should not be required to endure lengthy hours of instruction but rather reasonable sessions of intricately planned education that is easily retainable.
- Trainers should employ effective teaching methods so as to maintain the audience's attention and interest, such as the following:
 - Use humor, war stories, and examples to teach.
 - Use hands-on problem solving techniques to get participants to be actively involved in the class.
 - Use visual aids.
- Training should be evaluated for effectiveness and usefulness in the targeted employment area.

The training of a large workforce on a subject such as harassment can be expensive, and some large employers are using computer programs to accomplish the task. The use of computer programs may be efficient, but should also be reviewed by counsel to ensure that the training material is legally current and defensible.

A collective approach to training can involve any combination of classroom training, self-paced instruction accessed via the Internet, live classroom training, CD-ROMs, or printed material. Importantly, the content of the training material may be the subject of a challenge in subsequent litigation. Trainers should customize the educational content of each training session to the employer's culture, ensuring that the employer's policies are being taught. Regardless of the training format, careful documentation must be kept of those who attended the sessions and the curriculum material that was used during the sessions. If an employee misses a particular session, management should provide for make-up training at a later date.

Suggestions for Training Topics

Each employer's training needs differ based on the company's area of employment. For example, depending on the size, industry, and organizational structure of the entity, the training topics will differ. The following sets forth a description of suggested topics applicable to most employers.

Orientation

Training begins with new employee orientation. New employee orientation training is crucial because it sets the tone for an employee's career with the employer. Orientation serves as an excellent time to introduce the organization to the employee in terms of culture, values, and goals, as well as to outline expectations and policies.

While some employers wait until they have a group of new employees before running an orientation session, such an approach may be a mistake, as delays can result in misconceptions and lack of productivity. Therefore, it is generally recognized that orientation should be conducted as soon as possible and on a personal level.

The following is a list of topics an employer may want to address in a new employee orientation program:

- Company history, philosophy, and an overview of the company's purpose.
- Organizational charts.
- Industry overview.
- Review of benefits package, including health insurance, vacation time, sick leave, Family and Medical Leave Act (FMLA) leave, tuition reimbursement, and retirement.
- Summary of performance appraisal system such as how, when, and by whom employees are evaluated.
- Review of compensation procedures, including pay periods, direct deposit, and how and where to punch timecards or complete time sheets.
- How to schedule and what to expect during an employee physical, if required.
- Career development information, such as an overview of possible career paths and resource library offerings.
- Distribution of employee handbook, policies and procedures, medical provider books, company newsletter, and credit union brochures.
- Information on confidentiality and security.
- How and where to obtain required items, such as identification badge, email account, computer password, pager, telephone, office supplies, and parking pass.
- A tour of the facility and an introduction to supervisor and co-workers.
- Technical and job-specific training, or how to schedule such training with appropriate supervisor.

As with all training, the orientation session should be well documented. For example, a checklist may be used to indicate what was addressed during the session. The checklist should be dated and signed by the individual responsible for the training, as well as the employees in attendance.

Workplace Safety/Risk Management

Training is one of the key elements in reducing workplace accidents and the costs associated with such accidents.

Examples of the costs associated with workplace accidents include, but are not limited to, the following:

- Increasing workers' compensation rates.
- Heavy fines levied by OSHA for failure to comply with training requirements.
- Indirect costs related to turnover and loss of productivity.

Employers can alleviate the burden of such costs, fees, and fines by implementing training programs. However, employers must assess the areas of employment that require training before creating a program. In assessing training needs, it is recommended that employers conduct a safety training needs analysis. For example, employers should determine the types of workers' compensation losses the organization has experienced in the past, and what types of losses should have been expected based on industry norms. To help with the assessment employers may examine company insurance carrier records, OSHA records, and internal accounts payable records. In addition, employers should be cognizant of any OSHA training requirement for the organization's specific industry. OSHA

identifies its training requirements in OSHA Publication 2254, entitled *Training Requirements in OSHA Standards and Training Guidelines*.

Workplace safety training also includes courses that teach an employee how to recognize and respond to potential workplace violence situations. This training should include a review of the company policies that provide supervisors with the necessary tools to address volatile circumstances, including, but not limited to, policies on the following topics:

- Performance management.
- Substance abuse, weapons, and other dangerous devices.
- Workplace searches.
- Termination.

Workplace violence training should also emphasize the resources available to employees in seeking a nonviolent solution to problems, such as the following:

- Internal agreements or complaint resolution processes.
- Employee assistance programs (EAPs).
- Counseling services available through the group health coverage.

Equal Employment Opportunity and Diversity

A well-developed equal employment opportunity and diversity training program is important for all employers. Such training is seen by civil rights agencies as a benchmark for the employer's equal employment opportunity compliance. It also is essential to effectively communicate the company's commitment to equal opportunity because every workforce is built on people from varied racial, ethnic, religious, cultural, social, and political backgrounds. Supervisor training in how to effectively motivate a diverse workforce to cooperate and collaborate is essential to meet all business goals, as well as reduce legal risks.

Harassment

The Supreme Court's emphasis on prevention and prompt corrective action indicates that in order to manage workplace harassment, employers must:

- Develop a policy prohibiting harassment (based on sex, national origin, age, and all other protected characteristics).
- Broadly distribute and communicate the policy among the entire workforce.
- Educate the entire workforce regarding the policy.

The fact that an employee may receive a copy of the policy does not mean that the employee understands the policy or knows how to comply with the procedures set forth in the policy. Thus, it becomes critical that employers not only distribute procedures, but that they also educate their workforce. Education should go beyond the hourly employee, and most importantly should ensure that supervisors understand the policies and procedures and know how to react to complaints of harassment when they occur. Employers should develop and provide regular training to managers and employees, and carefully document the training.

Elements of Harassment Policy and Training

Education of employees usually focuses on somewhat different points than that of supervisors. Before reviewing the elements of effective harassment training, the employer should ensure that the

company harassment policy adequately addresses the issue. The following list contains the prominent elements of an effective harassment policy:

- Design the policy to specifically target the issue of sexual harassment and other kinds of unlawful harassment (such as race, ethnicity, age, or disability).
- Include practical examples (as opposed to legal descriptions).
- Focus on inappropriateness, not illegality.
- Clarify the policy's application to electronic mail (email) and Internet usage.
- Provide a clear complaint procedure, ensuring its application to all types of unlawful harassment and discrimination, and that the procedure addresses conduct by employees and nonemployees alike.
- Specify the people or departments who represent points of contact where an employee may file a complaint. Ensure the procedure includes a by-pass provision where the employee is not required to directly contact a supervisor who was a party to the harassment. Moreover, the employee should be offered diverse options for points of contact.
- Include a nonretaliation provision for complainants and witnesses.
- Include a provision that a complainant's identification will not be disclosed to those who do not have a need to know.
- Provide reference information as to the discipline procedures for inappropriate (as opposed to illegal) behavior and violation of company policy.

Employee training should focus on the following:

- Review of the company policy, including complaint procedure.
- Provide a description of behavior that employees must avoid.
- Emphasize the employee's responsibility to use the complaint procedure if the employee feels uncomfortable or offended.
- With regard to responding to inappropriate behavior, explain that direct confrontation of the perpetrator is an option but not a requirement, and offer strategies.
- Stress the nonretaliation portion of policy.
- Discuss forms of corrective actions and steps that may be taken to remedy claims of harassment.

Managers and supervisors are the keys to preventing harassment, so they must be trained to understand their legal obligations. In addition to the points covered in employee training, the training of managers and supervisors should:

- Emphasize the following legal obligations:
 - Managers and supervisors must refrain from engaging in quid pro quo or hostile environment harassment. Explain how the manager or supervisor's behavior may create strict liability for the employer and how their authority in the workplace affects how their behaviors are perceived by others.
 - Managers and supervisors must respond proactively when witnessing inappropriate behavior, regardless of whether a complaint was filed.
 - Managers and supervisors must ensure that no employee engages in prohibited retaliation.
- Provide the following information:
 - Dissuade supervisory/subordinate dating.
 - Offer guidance on how to respond to complaints of harassment. All complaints should be reported to management, whether or not the employee requests action.
 - Offer an overview of how management will investigate a claim and how inappropriate behavior may be remedied by management.

Those who are charged with investigating and resolving claims of harassment should also be well trained. Investigatory guidelines should address, among other issues, the following:

- When to investigate.
- Who should investigate.
- To whom questions should be addressed, such as the following individuals:
 - Complainant.
 - Accused.
 - Witnesses.
- How to document the investigation, focusing on inappropriateness of conduct in violation of policy, not illegality of conduct.
- How to take decisive disciplinary and other corrective actions, if applicable.
- Importance of follow-up and documentation.

Overview of Employment Laws

Supervisors should be required to attend a course that provides a general overview of the many and varied laws and principles applicable to employment relationships. An overview class is a good opening session as part of a series of classes, or it can be a stand-alone fundamental class. An overview course may also be an effective means of highlighting the legal issues of HR in working with supervisors to manage the company's legal compliance and limit exposure to employment claims. Such classes should, at a minimum, cover the following federal laws:

- Title VII of the Civil Rights Act.
- The Americans with Disabilities Act (ADA).
- The Age Discrimination in Employment Act (ADEA).
- The Pregnancy Disability Act.
- The Equal Pay Act (EPA).
- The Fair Labor Standards Act (FLSA).
- The Family and Medical Leave Act (FMLA) — if applicable.
- Applicable state civil rights statutes.
- Applicable whistleblower statutes.
- Workers' compensation retaliation provisions.
- Common law torts of assault, battery, and invasion of privacy, as well as negligent hiring, supervision, and retention.

Hiring and Promoting

All supervisors and employees who are involved in making hiring decisions or in interviewing applicants should be provided with fundamental rules of hiring. For example, the fundamental rules and applicable training would provide the individual responsible for conducting an interview with the following:

- Examples of impermissible questions that must be avoided in the interview process.
- A list of questions that can and should be asked in an interview.
- How to ask questions aimed at assessing the applicant's reliability, interpersonal skills, and teamwork skills, not just technical skills.
- The benefits of having a uniform list of job-related questions for each applicant.
- Role-playing examples, including proper listening techniques and follow-up questioning.
- How to manage voluntary disclosures of past, current, or prospective medical or emotional conditions.
- Pluses and minuses of note taking during the interview.
- Emphasis on considering only job-related, nondiscriminatory factors when making hiring and promotion decisions.
- The employer's policy on providing the unsuccessful applicant with a reason for the employment

choice.

Performance Evaluations

Providing training to every person who is responsible for conducting performance appraisals is critical. Such training must provide instruction as to the proper procedure for performance evaluations and the potential consequences to the employer if the appraisals are inflated. Courts have commented positively on workplace evaluation systems where evaluators received training to avoid common mistakes and/or biases in evaluations. Conversely, courts have criticized workplace evaluation systems where training of evaluators is not provided. From a practical perspective, training should include a discussion of the evaluation instrument, the employer's policy behind the characteristics reviewed, and evaluation grading system. In providing training for performance appraisals, points to stress from a legal perspective include recording factual observations, not conclusory judgments, and the following:

- Addressing performance problems when they occur, not months later in the annual review.
- Providing the employee with an opportunity for both self-evaluation and to respond to the supervisor's evaluation.
- Providing regular follow-up on areas for performance improvement.

Supervisor Training

New Supervisors

Many employers promote employees based on their technical expertise — not on their leadership skills — and do not teach the promoted employees how to adapt to their new supervisory role. Similar to new employee orientation, new supervisors should receive training that eases and facilitates the transition from employee to management. In fact, a study by Hewitt Associates found a commonality in top companies (based on factors such as net income and reputation) was that the companies all executed formal leadership development programs for employees. In addition to other training topics (previously addressed), new manager training may include effective coaching and negotiating skills, conflict resolution, and effective delegation. Generally, training for new supervisors should be gradual so that the training does not overwhelm the newly-promoted employee.

Discipline and Termination

Supervisor training programs should unquestionably emphasize guidelines for appropriate discipline and termination actions. While an employer may operate in an at-will employment state, the number of exceptions to the legal principle of at-will employment is sizable. Supervisors need to understand how to adequately frame corrective action for unsatisfactory performance or unacceptable behavior so that the supervisor can credibly testify that the employee was warned about the problem and that despite such warning the employee finally left the supervisor no other alternative but termination.

Training Guidelines

Providing supervisors with guidelines for taking disciplinary action, including terminations, must consist of practical and legal information.

Such training may include the following:

- Understanding why pretermination notice and corresponding documentation is important — emotionally and legally.

- Steps to take for pretermination notice, as follows:
 - Progressive discipline.
 - Exceptions to progressive discipline for new hires and summary offenses.
- Focusing on workplace behavior or performance.
- Appropriate responses to a voluntary disclosure of physical or emotional conditions, such as the following:
 - Possible duty to accommodate.
 - Report to management (without trying to resolve).
- Ensuring consistency, including the following:
 - How inconsistency happens, such as favoritism or avoidance of difference.
 - Documenting basis for exceptions in consistency.
- Timing, veracity, and dignity to use during disciplinary proceedings.
- Avoiding delays.
- Compliance to ensure true and legitimate reasons for termination.
- Learning the principles of confidentiality and impartiality.

Documentation

Included in a discipline and termination course should be a thorough discussion on documentation. While supervisors should be instructed on the importance and elements of proper documentation for good and bad behavior, training should also remind supervisors that there is such a thing as too much documentation and that consistency is critical. Training should include what and how to document.

Managing Leave

One of the most complicated areas (and biggest frustrations) for supervisors is managing attendance problems. Often, HR is the last department to know the reason for an employee's absence because the supervisor did not understand the inter-relationship of workers' compensation, FMLA, and routine illnesses. It is imperative that HR train supervisors on the overlap in conflict in these areas of the law, and the need to keep HR abreast of the reasons employees take a leave of absence.

Union Organizing Efforts and Contract Administration

Employers who do not have a unionized workforce must remain vigilant to sophisticated union organizing efforts. Indeed, employers cannot afford to wait until the first signs of an organizing campaign appear before training supervisors in the area of unions and contract administration.

Supervisors should receive expert guidance on how to recognize signs of union organizing, when and where to report such activity, and the fundamental rules of campaigning.

Training on contract administration should include the following:

- Analysis of the grievance and arbitration procedures.
- Any rights and restitutions union stewards or representatives have to appear and address grievances or conduct business.
- The rights employees have to union representation at a disciplinary meeting.
- Management rights provisions of the agreements.

Supervisors must have a working knowledge of their authority to manage in a union environment and how collective-bargaining agreements affect the supervisory relationships with bargaining-unit employees.

Additional Information

Training should be initiated for a variety of reasons, including performance improvement, overall professional development, succession planning, and risk management. HR's role in contributing to the success of the business must include leading the way in fostering a trained workforce.

Efforts in this regard will prove lucrative, not only by serving as the defense to employment-related lawsuits, but most importantly by ensuring a motivational and healthy employment practices environment.

Compensability of Training Time

Independent School and Training Programs

According to federal regulations, if an employee attended an independent school, college, or trade school after normal working hours (on the employee's own initiative and not due to the employer's prompting), the time while in school **does not** constitute hours worked and is not compensable. Moreover, the hours are **not** compensable regardless of whether the schooling was directly related to the employee's job.

Employment Related Training Programs

Employer-Sponsored Training Programs

Generally, time spent attending employer-sponsored training programs is compensable for nonexempt employees.

However, when the activity meets all of the following four criteria, an exception applies to required compensation:

- Attendance is outside of the employee's regular working hours.
- Attendance is voluntary.
- The course, lecture, or meeting is not directly related to the employee's job.
- The employee does not perform any productive work during such attendance.

According to the U.S. Department of Labor, attendance at training programs is **involuntary** if any of the following apply:

- The employer requires attendance.
- It is the employee's understanding, or the employee is lead to believe, that present working conditions or continuance of employment would be adversely affected by nonattendance.

Training is directly related to an employee's job if it is designed to make the employee more effective in their current position in the workplace, as distinguished from training that an employee receives for another job or for a new or additional skill.

For example, when a training program is designed to prepare an employee for advancement or promotion, rather than make the employee more effective in their current position, the training is **not** considered to be directly related to the employee's job.

First-Day Training Programs

Hours spent by employees attending a first-day training program (new employee orientation) have been held to be compensable by the Wage and Hour Division of the Department of Labor.

Note: In most cases, the time an employee spends in the training suggested in this chapter would be compensable by the employer.

Discriminatory Training Claims

Many lawsuits are filed each year contending that employers unlawfully discriminated against workers in protected classifications by refusing to provide the workers with training opportunities while simultaneously providing training to nonminorities.

Failure-to-train cases can be avoided through a policy of consistently training employees without respect to age, race, national origin, sex, or other protected characteristics, and careful documentation of all training opportunities.