

Are You at **Risk?**

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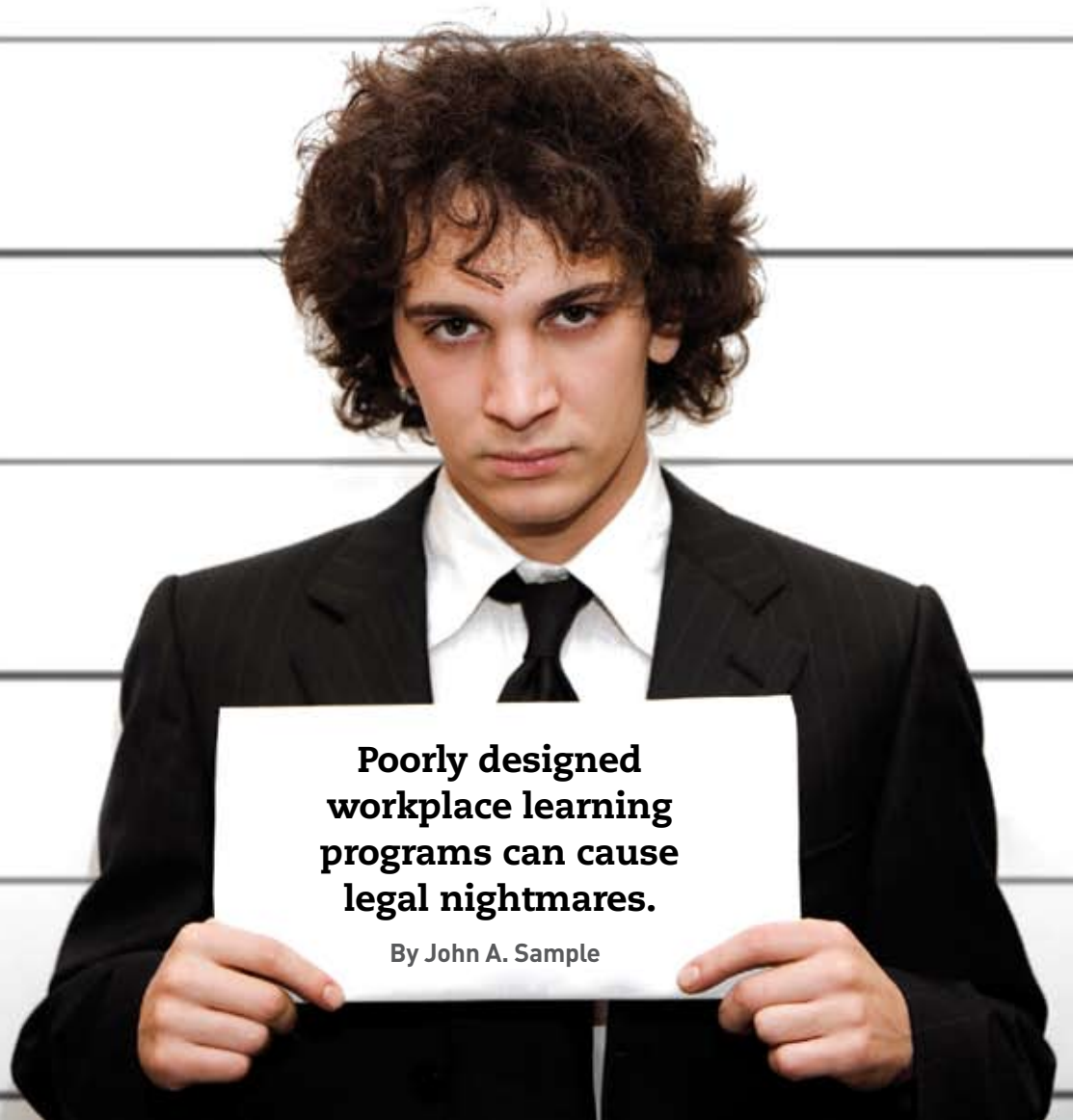
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**Poorly designed
workplace learning
programs can cause
legal nightmares.**

By John A. Sample

The latest legal **nightmare** for professionals in human resources and workplace learning is the liability associated with training.

According to the Third Annual Litigation Trends Survey by Fulbright and Jaworski, a law firm, labor and employment law disputes increased dramatically from 26 percent in 2005 to 48 percent in 2006. The Equal Employment Opportunity Commission (EEOC) reports that 75,768 discrimination complaints were filed in 2006, the highest increase since 2002. Complaints based on race continue to be the most common, followed by gender, retaliation, disability, age, and national origin. Additionally, a record-breaking 15 percent of harassment allegations were made by men in 2006.

Return-on-investment

The average settlement or judgment for a serious civil rights complaint is \$250,000, and that does not include attorneys' fees. Although some costs may be less, it is also possible that employers could be fined millions of dollars if a jury agrees with the victim. Given this trend toward increased litigation and costs to employers, workplace learning and performance professionals must understand the part they play in reducing litigation costs.

Improving job performance is not the only goal for workforce learning programs. Effectively designed, implemented, and documented training has the potential to reduce or prevent liability for an employer. This

translates into fewer workplace-related injuries and deaths attributed to negligent training and supervision, reduced worker's compensation claims and litigation costs, fewer complaints alleging civil rights violations, and a reduction of unethical conduct and financial mismanagement claims, including prosecution of businesses and their senior managers for criminal activities.

Jack Phillips, founder of the ROI Institute, says that "employers do not typically appreciate the added value of effective compliance training." He cites an example from a health-care company that commissioned a ROI evaluation of its harassment prevention program. The instruction resulted in a reduction of internal complaints by 36 percent, and the number of claims litigated dropped by 41 percent. Expenses attributed to legal fees and settlements fell by 49 percent, saving the company more than \$800,000 in one year. Additional benefits included a reduction in employee turnover attributed to harassment from 11 percent to 3 percent during the first year following the instruction.

What were they thinking?

The following examples of actual court cases exemplify what may occur when poorly designed instruction is implemented by an employer.

Each case teaches the importance of effective design and delivery of workforce learning programs.

Janet Orlando v. Alarm One (2006).

Imagine the design of a sales training program in which 18- to 22-year-old sales personnel were routinely spanked by managers with a metal sign from a competing business for failing to reach sales goals. The members of the losing sales teams, as part of a team building exercise, were forced to eat baby food, wear diapers, or get spanked. The plaintiff, Janet Orlando, claimed that being spanked in front of her colleagues, many of them young men who would taunt her and yell profanities, was so humiliating that she quit the home security company.

Alarm One, the defendant, was sued for violation of the California sexual harassment and gender discrimination laws, assault, battery, sexual battery, and intentional and negligent infliction of emotional distress. The problem was compounded by a lack of serious attention to these abuses by senior management. According to Nicholas Wagner, the attorney for Orlando, "These events were routinely observed by a vice president of the company who did nothing to stop these abuses; in fact he condoned the practice by laughing during the spankings." The

expert witness for Janet Orlando, Mark Keppler, a professor of human resource management at California State University, Fresno, reviewed more than 1,000 pages of documentation. He concluded that “Alarm One had a serious lack of fundamental policies and procedures, including training, in place.”

The director of human resources for Alarm One was a certified California attorney. She failed to monitor the sales training for civil rights abuses. She first recognized that a problem existed upon receiving a worker’s compensation claim for medical reimbursement from one of the injured sales employees. Company officials responded by sending out emails and phone calls to supervisors. The HR director later testified that if both men and women were spanked, it would not be considered sexual harassment. The plaintiff was awarded damages of \$500,000 plus punitive damages of \$1.2 million.

Hartman v. Pena (1995). A male air traffic controller employed by the Federal Aviation Administration (FAA) was required to attend a mandatory three-day cultural diversity workshop. One of the exercises included a simulation of the work area where two sets of chairs were arranged in rows so that the men would walk “the gauntlet” while female participants adopted the role of harassers. Men were subjected to cat calls, butt slapping, and other uninvited touching.

According to Judge Norgle, those who directed the exercise conducted a “discussion at which time Douglas Hartman and the other men were numerically rated with their names on a chart linked to drawings of male genitalia in various stages of arousal. The participants rated Hartman the lowest.” Witnesses testified that the men were embarrassed and uncomfortable participating in the exercise. Although Hartman lost his case on other grounds, designers of compliance-related training should refrain from breaking the law in order to explain the law.

Stender v. Lucky Stores (1991).

The retail grocery chain was sued by employees who alleged that manage-

ment was not promoting women to store management positions. At the trial, evidence was submitted that included instructional materials from the company’s diversity training program. During in-house diversity training, managers were required to list various stereotypes they heard about women and minorities in the workplace. Some of the stereotypes were recorded on flip charts and in the notes of participants, which mentioned women generally and African-American women in particular.

This evidence surfaced during the pre-trial discovery process. Evidence of bias on the part of managers derived from these instructional materials, along with other compelling evidence, contributed to the finding of widespread sex discrimination by Lucky Stores. The plaintiffs were awarded \$90 million in damages.

Liability reduction

Reducing the potential for liability begins with a needs assessment and a performance analysis, and concludes with effective documentation and evaluation. Officials responsible for design, development, and implementation must ensure a tight fit between instructional goals and practical application. The failure to anticipate foreseeable and reasonable consequences of business practices may result in several types of liability for an employer. Programs that address federal or state compliance or regulatory mandates must be based on an instructional design that guides the development of accurate content, realistic learning activities, and transfer of learning strategies for practical application. There are three best practices to connect instructional goals with practical application.

Conduct a needs assessment and a performance analysis. Organizations should continually review compliance and regulatory statutes and court cases for mandated training requirements. As of 1999, the EEOC “strongly encourages” periodic harassment prevention training. Many states mandate some kind of harassment training. Michael Johnson, a former

U.S. Department of Justice attorney and co-CEO of Brightline Compliance, says that “court decisions, and not just statutes, must guide the content of compliance-related programs.” California has one of the strongest harassment prevention training laws in the country, including requirements for content and instructor expertise.

Training leaders need to identify and track internal business practices and industry trends that predict litigation—on-the-job accidents, insurance and workers compensation payouts, safety violations, complaints of harassment and violence in the workplace, union grievances, complaints of preferential treatment and retaliation—and participate in national forums, and professional and business associations that track and report litigation trends. The recent accounting and business scandals should not have been a surprise to anyone. The newest problem is “e-discovery,” the pre-trial discovery of evidence embedded in email and other forms of digital communication.

Design effective instruction. Use a proven approach to design training that systematically links analysis, design, development, implementation, and evaluation. Match the design of instruction to job-related requirements, and insist that instructional goals and objectives drive the design process.

Harassment prevention training should cover all types of illegal harassment, not just harassment based on race or gender. Certain forms of instruction may invite litigation, such as nontraditional, new age, and adventure-based training. Accommodate religious beliefs when using visualization techniques that may influence personal values. If not expertly designed and facilitated, certain types of role play and simulations may expose an employer to litigation.

Ensure that those who require mandated training are not denied opportunities to attend. Consider the legal effects of using English-language versions of instructional material with nonEnglish speaking employees, especially with safety and civil rights statutes. Provide training for those

who must make decisions based on the content of training, especially in the areas of safety, ethics, and compliance laws. Be aware that training may create a higher standard of care in the performance of tasks.

Document the transfer of learning.

Monitor compliance programs on a periodic basis to ensure conformity with learning objectives, lesson plans, and the employer's policies regarding compliance with statutes and court mandates. Inappropriate remarks or behaviors by instructors or participants during harassment prevention training may form the basis of future litigation. According to Wagner, the attorney for Janet Orlando in her case against Alarm One, monitoring the behavior of employees at multiple locations becomes problematic for businesses.

"It is established law that businesses can be liable for what they know and what they don't know, and not paying attention to what's happening in the branch offices invites liability," he says.

Organizations need to maintain accurate records of attendance, location, and state of the physical training premises. Master copies should be kept of all instructional objectives, lesson plans, and credentials of instructors. Ensure that records required by statute and administrative rules (OSHA, FAA, Nuclear Regulatory Commission) are maintained and accessible for review. Failure to document instruction may mean that, in the legal realm, the instruction never occurred. Shoddy documentation and incompetent instructors will eliminate any "good faith effort" argument by an employer who intends to avoid litigation and punitive damages in civil rights cases.

Compliance instruction must be memorable. Participants must remember the content for recall when necessary. Consider requiring managers and employees to sign a willingness and commitment statement to abide by their employer's compliance policies, and include a copy of the policy as part of the instruction. What would be the outcome if a plaintiff's attorney randomly deposed managers

Potential Liabilities in Workplace Learning

Equal Employment Opportunity (EEOC) and Related Liability

Federal and state equal employment agencies investigate discriminatory practices by employers in age, equal pay, pregnancy, harassment (based on national origin, race, color, religion, and gender) and retaliation, and disabilities.

As part of the Americans with Disabilities Act, trainers may be at risk for making discriminatory statements or engaging in harassment during training or failing to intervene when a participant discriminates against or harasses others. Instructional designers may be a risk for content and learning activities that promote stereotypes and other biases that are prohibited by state and federal laws. Employers who establish and enforce policies that prohibit harassment, discrimination, and retaliation can argue "good faith effort" when such policies are communicated to all employees through appropriate training.

Occupational Safety and Health (OSHA) Liability

A clause in the federal OSHA statute requires that employers provide a workplace free from recognized hazards likely to cause death or serious injury to employees, including "training employees as to the dangers and supervision of the work site." Specific training is required for blood-borne pathogens, violence in the workplace, and hazardous chemical exposure.

Training of general work safety practices includes knowledge of exits and evacuation procedures, ergonomic practices specific to jobs such as lifting or carpal tunnel syndrome prevention, use of protective equipment, fire protection and handling flammable or corrosive chemicals, and general first aid procedures. Specific instruction is required for hazards associated with specific job assignments, such as avoiding electrical shock, the use of safety glasses, and radiation-sensing equipment.

Employers who fail to provide adequate training may be fined and required to comply with federal and state regulatory mandates. Employees who are injured due to the negligence of an employer will receive remedies under state worker's compensation laws.

Negligence may be intentional (deliberate indifference) or non-intentional (careless or reckless disregard for the safety of others). A cause of action for negligence consists of three essential elements: a legal duty owed by the employer to an employee; a breach of that duty; and damages proximately caused by the breach. Complaints of negligence are litigated as personal actions against those responsible for the injury. Under certain circumstances, an employer may be tried and convicted for criminal negligence in the workplace.

Supervisors and managers are the frontline trainers in most businesses, yet they are often the least informed when it comes to employment law. Negligent selection, supervision, retention, and training are topics that instructional designers should consider for development and implementation.

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and employees about your employer's compliance policies and training? What would they remember?

A transfer of learning plan identifies what managers, instructors, and participants will do before, during, and after compliance instruction. These plans address the extent to which managers and supervisors support on-the-job performance of employees once they have been instructed.

Evaluate all program assessments. Consider the legal implications when evaluating harassment prevention and other compliance instruction. Remember that the attorney for the plaintiff may demand copies of all documentation reasonably related to pending litigation, and this includes copies of course evaluations, flip charts, and participant's notes.

Given the nature of compliance training, participants may make negative comments about perfectly adequate instruction on reaction evaluation forms. Reaction evaluations may also result in an admission of liability such as discrimination or unsafe work practices by a participant. Employers are advised to follow up with an immediate and thorough investigation.

According to Johnson of Brightline Compliance, pass-fail tests in compliance courses can create major legal headaches.

"At what level do you set the pass rate?" he asks. "If an employee fails the test, what do you do? Do you train him again? What if two months later he harasses a co-worker? Have you just given the plaintiff's attorney evidence that you knew that the employee did not understand the harassment laws or your policy but you did nothing?"

Given the trend toward increasing litigation, employers should hire competent instructional designers, trainers, and program evaluators. We must all be aware that state legislatures are encroaching into those areas where employers demonstrate weaknesses. It is not in our best interest to have state and federal lawmakers script content and instructor qualifications. **T+D**

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Adventure-based liability

Certain forms of experiential learning may place employers at risk. Employees may be seriously injured or die from poorly designed and implemented adventure-based programs. White water rafting, high-ropes courses, or other forms of physically strenuous outdoor activity may result in serious injuries to employees, especially those who are physically unfit to participate. Experiential learning exercises that attempt to alter an employee's values and beliefs may tread on religious freedoms and privacy rights. Such programming should be voluntary, and alternatives for professional development should be offered. There is little empirical research to support claims that these types of programs increase productivity, improve team cohesiveness, or increase employee morale.

Intellectual property

Employees who ignore federal copyright statutes by making unauthorized copies of book chapters, articles from journals, website copy, or computer software place their employers at risk. Employees must recognize that the "work for hire" provision of the federal copyright law which means that the employer owns the rights to any works produced by the employees.

Employers should protect innovative instructional materials and programs with a copyright notice. Information considered proprietary or that provides a competitive advantage is protected, and this includes instructional materials and programs. Employees may be required to sign confidentiality agreements.

Corporate ethics

Corporate scandals involving fraudulent manipulation of financial resources by Adelphia, Enron, WorldCom, Tyco International, and other businesses large and small, led to federal and state legislation that stiffens regulations and penalties for a variety of corporate crimes. The Sarbanes-Oxley law makes public auditing firms more accountable for reporting irregularities in financial business practices. Executives and senior level managers have received prison sentences for financial crimes, and their businesses may be investigated and prosecuted for criminal acts by the U.S. Department of Justice, and if convicted, fined huge sums. Businesses that develop a comprehensive ethics, compliance, and training program, and cooperate through self-disclosure of criminal acts with the Justice Department, may receive lesser fines than those that do not cooperate.

Email abuse

Employers should be aware that misuse of email places an employer at risk. Email may be used as evidence in allegations of defamation, invasion of privacy rights, discrimination, harassment (race, gender, religion, and age), and retaliation, violence in the workplace, criminal acts by executives and other employees, and copyright infringement. Additionally, businesses run the risk of security breaches regarding trade secrets, proprietary businesses operations, and highly sensitive communications regarding mergers, acquisitions, and layoffs.

Recent changes in the Federal Rules of Civil Procedure require the disclosure of all emails pertinent to pending litigation. Given that emails may be stored on multiple servers over previous years, the search and retrieval of emails relevant to litigation can be extremely time consuming and costly. Training supervisors and employees on policies relating to email usage is an effective way to reduce the potential for litigation.



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