



# Mandated Training: Legal Dos and Don'ts

**I**nto each company some training must fall, and for many organizations, that training is legally mandated. Whether it is the exigencies of the Occupational Safety and Health Act or a new twist in labor law, at one point or another, HR professionals are charged with putting the training together.

Several questions arise: When can the training be held? Can employees be asked to pitch in for the costs? What are the legal risks of looking outside for the trainers?

**Paul Salvatore**, a partner in the labor and employment practice group in the New York City office of Proskauer Rose, offers HR some guidelines on training.

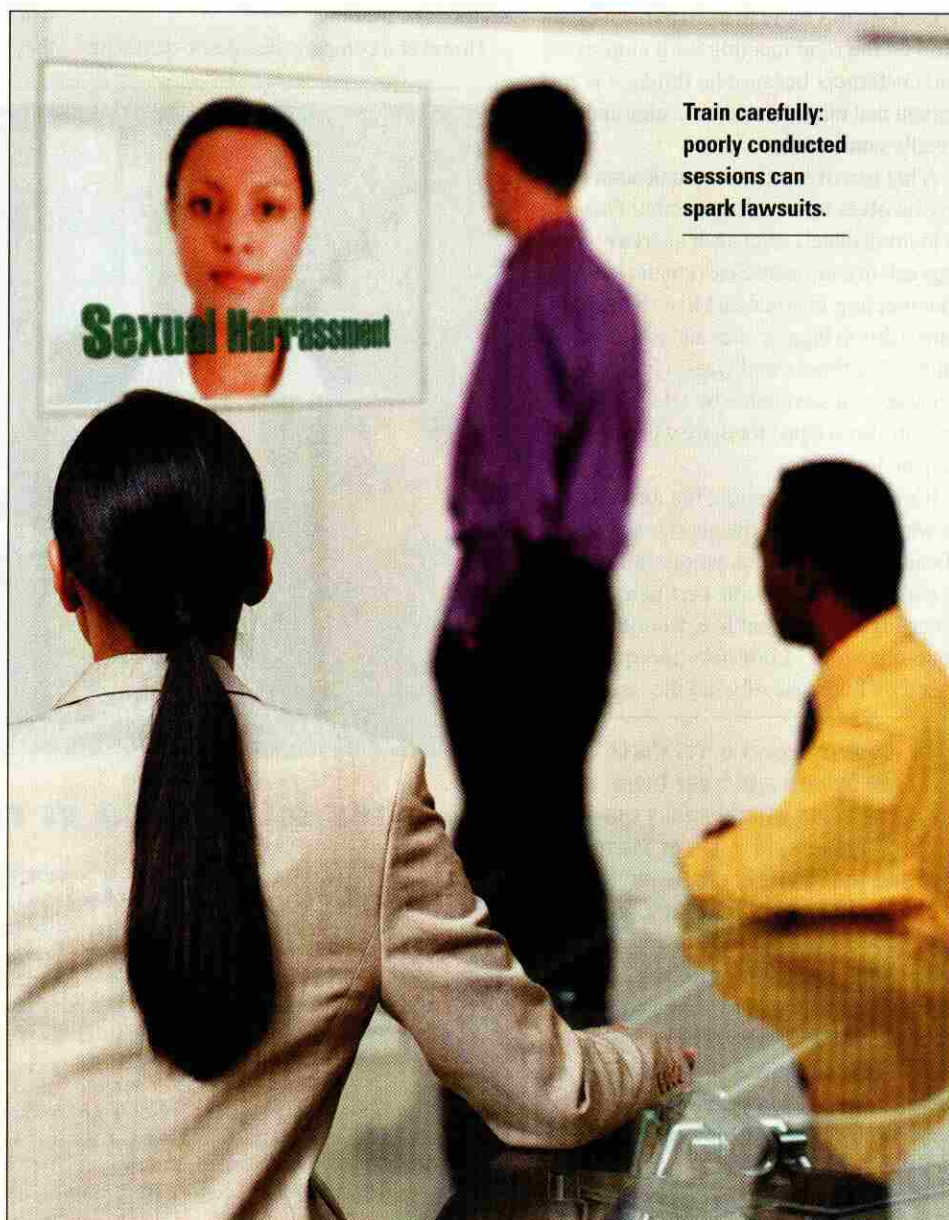
### What kind of training tends to be legally mandated?

There are certain areas, like in OSHA, where regulations require employers to do a certain kind of training—or at least ensure their employees have that kind of training before they put them to work.

Discrimination and harassment is nearly mandatory. What we've seen since the Clarence Thomas-Anita Hill standoff in the early 1990s is a movement—and Supreme Court rulings in the past few years have propelled that movement—toward training as an almost essential function for companies. Some states, like Connecticut and Maine, require training in the sexual-harassment area for managers. It's a growing trend.

### So sexual-harassment and discrimination-prevention training is almost mandatory in practice?

The Supreme Court has essentially ruled that punitive damages cannot be available against an employer who has taken all the



preventative steps in discrimination and harassment. So this training has become almost mandatory for corporations in order to prevent the problems from happening, and to avoid liability.

### Say your company is required to conduct training. How much does the company

### have to pay for?

You have to shoulder the cost of the training as the employer. As far as I know, there's no government grant for doing harassment training, although there may be for some kinds of safety training.

### Does it matter if the training is conducted

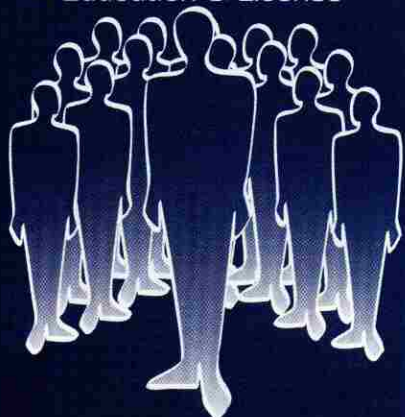


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## Legal Insight

### live rather than online?

Live training is the traditional way of presenting material in an interactive way. Sometimes people use theatrical actors to role-play, or movie clips, case scenarios, or lecture formats. The trainers customize their content to the company's culture, making sure they're teaching the policy of the company, whatever that policy may be. The problem with that kind of training is if you have 50,000 employees. How do you get to all of them?

### So you can use the Internet?

The Web has created a dramatic delivery mechanism.

### With legal wrinkles so rapidly developing in the online arena, is such training legally viable?

I'm unaware of any case that talks to the delivery mechanism of training.

The critical factor is the quality of the material you're presenting. You must make sure it's customized enough to cover the company. You also have to have a record to show that the person has gone through the training. Most good training programs have a quiz at the end. Once you've completed the program, an e-mail goes to HR for a permanent record of the accomplished training.

### What if the employee fails the legally mandated training?

Then the employee brushes up, does some remedial reading, and takes the quiz again to show that the problem has been dealt with.

### Can you demand that employees go through their training on the weekend or after work hours?

Sure, but this training is considered work, so under the wage and hour laws you're going to pay the employees if they're non-exempt. If they're managers, they're exempt, so then they're on a salary. But a regular worker would get overtime.

### What if it turns out that the training itself is simply ineffective? Where's the liability then?

With sexual-harassment law, for example, the plaintiff's attorney often challenges the efficiency of the training and the quality of the training. It's very common that the training content and delivery becomes an issue.

### What if the training itself causes a legal issue—an employee is hurt, or, in harassment training, the discussion reveals something ugly or illegal?

There have been cases where the training is not done well—especially in the area of diversity training. There are situations where people are encouraged by their trainers to act out as part of their methodology. Things said and done in these training sessions have come back to haunt the company. There are cases where companies have been found liable because of things said or done, or retaliatory actions, triggered by improperly conducted training sessions. That is another reason why you want to understand what you're buying when you're outsourcing training.

### And in such cases, who would be sued: the company that hired out or the trainers?

I think the company is going to be sued by the employee. Whether the employer can look to recover from the third party is an interesting legal question. But usually these third parties aren't real deep pockets. The company is the deep pocket. Usually it's not so much malpractice in the training as, "My manager Sam revealed he's a member of the Ku Klux Klan and loves to put up nooses. Two weeks later I found a noose in my cubicle, and when I confronted him about it, he denied it, and three weeks later he fired me for poor performance." It's not so much the training as what's revealed in the training.

### What should HR do then, if something like that is revealed in training?

I've had many training sessions where people say things and do things that even the group knew were wrong in terms of the group's mores. Then you have to engage in a very sensitive but tactful kind of Socratic exchange with that individual to try to have him or her understand why they're an outlier in terms of what they've expressed.

In a group session, sometimes you can achieve that and sometimes you can't. But it's a job you'll follow up with human resources. Because you can't just let that go. Anytime you're dealing with workplace issues, you're dealing with sensitive personnel issues. And it's hard unless you're utilizing people who know what they're doing. ■