



Feature: Training That Keeps Liability at Bay

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By Gillian Flynn

Training has been thought of as HR's great protector. It is commonly believed that if you train your employees, the company is safe from lawsuits. But if training is ineffective, the company may find itself in trouble. Even correct training doesn't completely safeguard a company from legal peril. **Paul Salvatore**, an employment-law attorney at the New York City office of Proskauer Rose, tells HR how best protect against lawsuits in the training arena.

First of all, does training help a company avoid liability for accidents and mistakes on the part of an employee?

The general rule is that employers are better off and better able to insulate themselves from liability if they provide proper training to employees in a whole variety of areas. For example: A bus driver who went through a training course made an error, and the question is whether an employer is liable. The fact that the company offered training is only going to be a positive factor -- as long as the training is appropriate.

What if it turns out that the training wasn't proper?

It's a negligence issue. It's going to fall in the doctrine of negligent hiring, or negligent retention, or negligent supervision. It's a negligence theory that's going to be brought against the employer. It will be based on the actions of the employee, and whether the employer contributed to the injury by failing to properly train in a way that would have prevented the accident.

So the training will be well scrutinized for correctness?

Yes, to determine to what degree the training was the cause of the accident or injury in question.

And if the employer is found guilty of negligence?

These are jury cases, so the jury could award damages. The more improper or incomplete the training is determined to be, the higher the degree of the employer's negligence.

Does it matter if the training is provided by an outside vendor versus being conducted internally by the company?

It matters to some degree, but the company will probably still be liable. In the end, the company is the one providing the training. It's delegating the task of training to an agent, which is representing it by doing the training. So it's very important that employers are careful about the vendors they choose.

How much culpability will the company have if a vendor's training is ineffective?

It will be very fact-specific. It's going to depend on exactly what is being alleged. So there may be

a situation in which the person who's injured is suing both the employer and the trainer together. The jury would then have to apportion liability between the two of them. In some cases, the injured person may just sue the employer, and the employer, if it feels that the training company was negligent, may bring them in as a third-party defendant.

What if the company can prove it did its best to find a good vendor? Does it have an advantage over a company that just hired the first vendor it found?

Absolutely. The level of care you exercise and are able to show that you exercised in all aspects of training employees is very important, and that includes the selection of the vendor.

Does that go for training on sexual harassment, an area that's more interpretive than how to drive a bus?

There are actual court cases where some trainer has gone crazy and has people calling each other racial epithets or has women imitating men's private parts -- in the training. There have been cases that have found actionable claims from such training. Or someone got terminated and they claim the training indicates a sexually charged, hostile environment that existed at the company. In this area particularly, you have to be very careful about who you hire and who your vendors are. It's a lot more subjective and touchy-feely, and there are a lot more sensitivities than in how you operate the clutch on your vehicle.

Back to basic training: How often does a company have to train?

It's often alleged by a plaintiff that the training wasn't frequent enough. How often you do it depends on the type of training. Some training is regulated by OSHA or mandated by the Department of Transportation. So certainly you want to do the minimum that's prescribed by any regulatory body, or is viewed as best practices in your industry.

What if there is no norm governing the frequency of training?

In areas where there are no norms, you want to make sure everyone is trained on a relatively consistent and periodic basis -- so that anytime someone is involved in an incident, they will have received the training. Training needs to be part of a routine that begins with orientation and continues on a relatively periodic basis. Many times, training isn't done often enough because it's a hassle. You need to get a lot of people together at the same time, you need to get them all coffee stuff like that. One of the great things employers can do today is utilize online learning. That enables employers to reach a whole bunch of people without them having to leave home or desktop. You don't have to worry about scheduling -- and they can provide their own coffee.

How does HR know for sure that its training works?

You test, and you record the results. That way, if there's trouble, you can say, we trained them -- and they passed! It's like: What's a mother to do? But you've done the right thing. In the employment-law area, there's a growing trend in the courts that protects employers that have done the right thing.

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