THE COMPELLING ARGUMENT FOR HARASSMENT PREVENTION TRAINING: IMPLICATIONS FOR INSTRUCTIONAL DESIGNERS

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The purpose of this article is to inform instructional design and development specialists on the importance of harassment prevention training in organizations. The review includes a summary of relevant case law, a review of litigation costs associated with harassment litigation, and the value of return on investment for such instruction. Good-faith effort as a strategy to avoid litigation and punitive damages is emphasized. Recommendations for designing and implementing harassment prevention instruction are proposed.

TITLE VII OF THE CIVIL RIGHTS ACT of 1964 has always included prevention along with investigation, enforcement, and compliance as a responsibility of the Equal Employment Opportunity Commission (EEOC). Over time, the notion of prevention has become equated with education and instruction. In 1980, EEOC promulgated *Guidelines on Discrimination Because of Sex* (EEOC, 1980). Harassment prevention is accorded the status of "the best tool for the elimination of sexual harassment," including "developing methods to sensitize all concerned" (EEOC, 2001, p. 199).

Instructional designers have a unique opportunity to contribute their skills and abilities in the design of instruction that focuses on compliance-related topics. This includes not only equal employment opportunity and related compliance requirements, but also safety and health, intellectual property (copyright and trade secrets), security, and criminal activities attributed to executives and their businesses. The courts are providing incentives for businesses that demonstrate good-faith efforts to comply with harassment, discrimination, and retaliation prevention mandates.

LANDMARK COURT CASES: *FARAGHER, BURLINGTON INDUSTRIES,* AND *KOLSTAD*

Three landmark U.S. Supreme Court decisions have clarified the importance for establishing and communicating harassment prevention policies; instructing all employees, especially managers and supervisors; and providing discipline when necessary.

The U.S. Supreme Court held in *Faragher v. City of Boca Raton* (1998) that an employer is vicariously liable under the Civil Rights Act of 1964 for actionable discrimination caused by a supervisor. The Court also held that such liability is subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of the complainant. In *Burlington Industries, Inc. v. Ellerth,* (1998), the Supreme Court held that employers are vicariously liable for supervisors who create hostile working conditions for those over whom they have authority. In cases where a harassed employee suffers no job-related consequences, employers may raise an affir-

Performance Improvement, vol. 46, no. 7, August 2007
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Published online in Wiley InterScience (www.interscience.wiley.com) • DOI: 10.1002/pfi.145
WILEY InterScience

female participants adopted the role of harassers. Men "walking the gauntlet" were subjected to catcalls, butt slapping, and other uninvited touching. According to Judge Norgle, "Following the gauntlet, the directors conducted a discussion at which time Hartman [the complainant] and the other men were numerically rated with their names on a chart subscribed to drawings of male genitalia. The chart illustrated human penises in various stages of arousal. The participants rated Hartman the lowest." Testimony of record indicated that the men were embarrassed and uncomfortable participating in the exercise. Hartman declined to participate but finally acquiesced because of group pressure.

Instructional designers are cautioned not to break the law when designing and delivering compliance-related instruction. In this instance, the design of the exercise was clearly contrary to the intent of Title VII of the Civil Rights Act of 1964. Designs of this nature fall into the "What were they thinking!" category.

Stender v. Lucky Stores (1992)

Nancy Stender and five other women filed a complaint on behalf of themselves and a class of female, black, and Hispanic past, current, and future employees of Lucky Stores, a California minimart and grocery store conglomerate. They alleged discrimination based on sex, race, and national origin. The lawsuit was brought under Title VII of the 1964 Civil Rights Act and the California Fair Employment and Housing Act.

One of the most important facets of the *Stender* case involves punitive damages. The district court ruled that the plaintiffs had sufficiently established their claim for punitive damages, as provided for in the Civil Rights Act of 1991. The court based its conclusion on Lucky Stores's prior knowledge of problems with the underrepresentation of women in managerial positions and its repeated failure to implement appropriate recommendations. The court also relied on evidence of the discriminatory attitudes of some of the store managers and the company's abandonment of two affirmative action programs despite continued evidence of gross gender imbalance.

During the trial, evidence was submitted that included instructional materials from an in-house diversity program for all store managers. One of the exercises required the managers to list stereotypes that they had heard about women and minorities in the workplace. As is typical in the pretrial discovery process, participant notes and instructional materials, including flip charts, were made available to attorneys representing the plaintiffs. Included in these materials were notes and flip charts that explicitly illustrated the flagrant stereotypical comments and attitudes held by male managers.

The *Stender* case is instructive because of the evidentiary potential for instructional materials, including flip charts and other media, that may be saved in print or stored electronically. Instructional designers are advised to consult with the human resource management unit of their organization regarding the acquisition, storing, retrieval, and purging of instructional-related documents. Pretrial discovery process may require the production of all documents relating to litigation, including emails, faxes, memos, and letters. Although it is illegal to destroy evidence germane to litigation, it may be possible to establish reasonable business policies that require purging documents after a stated period of time. The exception to a documents purge policy would be the retention of any documentation or records required by the various state and federal compliance laws.

RETURN ON INVESTMENT FOR HARASSMENT PREVENTION INSTRUCTION

Instructional designers should embrace harassment prevention programs for reasons other than compliance with federal and state civil rights laws. Effective instruction may result in reduced legal costs for the employer.

A recent survey by Cannon, Kruse, Owen, Simkin, and Wood (2006) determined that employment law litigation in the United States increased from 26 percent in 2005 to 48 percent in 2006. This increase is of significant concern to businesses, shareholders, and the consumer. According to this survey, "The average litigation expenditure for United States companies surveyed has increased by 50% from last year to $12 million—a figure that does not include ultimate case settlement or judgment payments" (p. 13).

One study found that large corporations average $6.7 million per year dealing with harassment claims in addition to the costs of litigation (Hicks, 2001). The average cost of a jury verdict or settlement in a civil rights case ranges from $153,000 (Zink & Gutman, 2005) to $250,000 (Employment Law Learning Technologies & Littler Mendelson, 2002), depending on the quoted source. These figures do not cover attorneys' fees and business costs associated with investigating such claims.

Instruction that is focused on reducing claims and litigation associated with harassment-related incidents has demonstrated a return on investment (ROI) to organizations. Chapman (2003) argues the point forcefully by comparing the benefits, detriments, and costs associated with proactive instruction and reactive approaches to resolving harassment related litigation. Table 1 compares

mative defense by proving two elements: (1) that the employer took reasonable care to promptly prevent or correct any sexually harassing behavior and (2) that the employee unreasonably failed to take advantage of corrective or preventative opportunities or otherwise failed to avoid harm. Finally in 1999, the Supreme Court ruled in *Kolstad v. American Dental Association* (1999) that if an employer maliciously or recklessly violates a federal antidiscrimination law, regardless of the severity of the discriminatory acts, then punitive damages may be imposed. Punitive damages are assessed beyond actual losses due to the complaining party and are designed to make an example of or punish the defendant organization for outrageous conduct.

Shortly after these Court decisions, the EEOC published new guidelines that explicitly informed employers of the necessity of harassment prevention instruction. According to the EEOC guidelines, if feasible, every employer "should provide training to all employees to ensure they understand their rights and responsibilities [relating to workplace harassment]. . . . An employer should ensure that its supervisors and managers understand their responsibilities under the organization's anti-harassment policy and complaint procedures. Periodic training can help achieve that result" (EEOC 1999).

CASE EXAMPLES RELATED TO HARASSMENT PREVENTION

The following three court cases make explicit the requirement for effective design and development of instructional methods for harassment prevention instruction. Each case raises issues relevant for HPT professionals charged with the instructional design process.

Janet Orlando v. Alarm One, Inc. (2006)

A multistate security business conducted a sales training program after which the employer was sued by previous employees for violation of California sexual harassment and gender discrimination laws, assault, battery, sexual battery, and intentional and negligent infliction of emotional distress. Both men and women sales personnel were routinely spanked for arriving late (and various other reasons) by sales managers who conducted the training. These spankings were administered with a metal sign from a competing security alarm sales business. These actions caused bruising, bleeding, and tissue damage to several employees. Vulgar and sexist language was used by both managers and participants during the spankings. Sales employees were required to attend these training programs on a daily basis during the workweek over a period of months.

The problem was compounded by a lack of serious attention by management to the complaints of employees. The director of human resources for the employer, a certified California attorney, testified that if both men and women were spanked, it would not be considered sexual harassment! She was slow to accept complaints from battered employees over several months and even slower to notify her superiors. Investigation of the complaints amounted to sending some emails and making a few telephone calls by senior management. The plaintiff recovered damages of $500,000 plus punitive damages of $1.2 million.

There is no record from court documentation that Alarm One used any semblance of a standard method to design, develop, deliver, and evaluate sales training for its personnel. This is an extreme example of what might occur when managers are left to their own devices to design and implement training. In this instance, inaccurate assumptions about the training audience and brutal and illegal motivational methods were employed by the sales managers on a daily basis. Over time, the customary way of "doing sales training" became embedded in the culture of Alarm One, Inc.

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Hartman v. Pena (1995)

A male air traffic controller employed by the Federal Aviation Administration was required to attend a mandatory three-day cultural diversity workshop. One of the exercises designed for the workshop used a role-reversal exercise designed to simulate the work area in the Chicago Control Center. Two sets of chairs in rows were arranged so that the men would walk between the chairs while

TABLE 1 COMPARISON OF PROACTIVE AND REACTIVE COSTS FOR LITIGATING A SEXUAL HARASSMENT CLAIM

COMPANY A WITH 500 EMPLOYEES (POTENTIAL COSTS OF TAKING A SEXUAL HARASSMENT CHARGE TO TRIAL)				COMPANY B WITH 20,000 EMPLOYEES (POTENTIAL COSTS OF SETTLING A CLASS ACTION RACIAL HARASSMENT LAWSUIT PRIOR TO TRIAL)			
PROACTIVE	COSTS	REACTIVE	COSTS	PROACTIVE	COSTS	REACTIVE	COSTS
Cost of training	$15,000 (500 × $30)	Cost of training after trial	$15,000 (500 × $30)	Cost of training	$600,000 (20,000 × $30)	Cost of training per court mandated consent decree	$600,000 (20,000 × $30)
None other	$0	Jury verdict: $500,000 compensatory, $1.5 punitive	$2 million	None other	$0	Settlement with class	$10 million
None other	$0	Defense attorneys' fees and expenses	$400,000	None other	$0	Defense attorneys' fees and expenses	$500,000
None other	$0	Plaintiff's attorneys' fees and costs	$200,000	None other	$0	Plaintiff's attorneys' fees and costs	$1 million
None other	$0	Investigation of incident	$8,000	None other	$0	Investigation of incident	$50,000
None other	$0	Hiring public relations firm (to improve company image)	$25,000	None other	$0	Hiring public relations firm (to improve company image)	$200,000
None other	$0	Expert witnesses ($10,000 per witness)	$20,000	None other	$0	Falling stock prices after publicity	$$[1]
None other	$0	Depositions ($5,000 per witness)	$40,000	None other	$0	Revamping HR department	$$[1]
None other	$0	Cost of appeal	$25,000	None other	$0	Hiring consultants	$$[1]
Total	$15,000 ($30 per employee)	vs.	$2.73 million ($5,456 per employee)	Total	$600,000 ($30 per employee)	vs.	$12.35 million ($617.50 per employee)

Note: This chart is based on typical verdicts and class action figures and is based on training cost of $30 per employee.

[1]*Variable dollar amount.*

Source: Chapman. Compensation and Benefits Review, 35(1), p 35, copyright 2003 by Sage Publications. Reprinted by permission of Sage Publications, Inc.

costs using two examples: company A with 500 employees using costs associated with taking a claim to trial and company B with 20,000 employees using costs to settle a claim prior to trial. Costs are based on estimates using current jury verdict and settlement amounts.

Chapman (2003) states that there are "other priceless benefits associated with creating a respectful environment, including greater productivity, better understanding of and adherence to company policies, less risk of future complaints, improved morale, and reduced EPLI [employer practices liability insurance] premiums" (p. 36).

In an ROI case study published by Hill and Phillips (1997), a health care company concluded that harassment prevention 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 settlement expenses fell by 49 percent, saving the company over $800,000 in one year. Additional benefits included a reduction in turnovers attributed to harassment from 11 percent to 3 percent in the year of implementing the prevention instruction program.

HARASSMENT PREVENTION INSTRUCTION AND DIVERSITY TRAINING—ARE THEY DIFFERENT?

Harassment prevention instruction and diversity training are very different. Harassment prevention instruction is designed to provide an employer with a potential safe harbor regarding litigation and damages if certain conditions are met. The incentive to do the right thing encourages organizations to write and communicate effective antiharassment policies, train employees and managers to those policies, and provide progressive discipline when necessary. In the event of civil rights litigation, the employer is in a position to argue a good-faith effort, which is especially welcome if punitive damages are asserted by the complainant's attorney. The goal of harassment prevention instruction is to reduce the costs associated with civil rights litigation (settlements, judgments, and legal expenses) (Sample, 2007).

Harassment prevention instruction typically consists of one to two hours of instruction by a qualified human resource management specialist, and it is not unusual for an attorney to deliver the legal portion of the instruction. The emphasis of the instruction is on the employer's antiharassment prevention policy; responsibilities of managers and employees in terms of the employer's policy, including reporting incidents of harassment; and the resolution process. It is not unusual for all participants to sign a commitment and willingness statement to abide by the employer's harassment, discrimination, and retaliation policy (Johnson, 2004; Jenero & Galligano, 2003).

The goal of diversity training is to change perceptions, behaviors, and attitudes of employees and may or may not include instruction on harassment prevention instruction (Hemphill & Haines, 1997). Diversity training programs take a variety of forms and may be of shorter or longer duration (a half-day to three or more days). Instructional processes may include some combination of information presentation, large and small group discussions, role-playing, and personal and team goal setting. Instructors, who may be internal or external to the organization, are expected to be effective facilitators who are able to promote and respond to moderate levels of confrontation as part of the change process.

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Diversity training continues to receive mixed and controversial reviews, resulting in confusion for human resource, management, and instructional development professionals (Hemphill & Haines, 1997; Sanchez & Medkik, 2004; Von Bergen, Soper, & Foster, 2002). Bisom-Rapp (2001) raises a provocative question regarding judicially condoned diversity training and its intended purpose. Her argument stems from an observed incremental movement by the appellate courts to position instruction as an affirmative defense on behalf of a business. If the business establishes a proactive policy and then communicates and trains to the policy and discipline as necessary, it will reduce or prevent potential liability. The final linchpin in her argument is that diversity program initiatives have not been shown empirically to have long-term effects in reducing discrimination in the workplace (see also Sanchez & Medik, 2004, and Hayles & Russell, 1997).

RECOMMENDATIONS FOR INSTRUCTIONAL DESIGNERS

The following recommendations are designed to assist in the development of harassment, discrimination, and retaliation prevention programs. Professionally trained and experienced instructional designers are well advised to incorporate these recommendations into their repertoire of knowledge and skills:

1. Position harassment prevention instruction, and for that matter all other compliance and regulatory instruction, as part of the employer's commitment to continuing education of the workforce. Do not send a message that the organization is providing this training solely because of its compliance and regulatory obligations. A broader message consistent with good corporate citizenship will help integrate compliance-related instruction into the mission and culture of the organization (Paskoff, 2006). Consider the importance to a business's reputation that it promotes a harassment-free and safe working environment. The escalating cost of litigation and negative media relations for harassment and other illegal business practices will weaken consumer and shareholder confidence.

2. Develop a creditable and disseminated antiharassment policy. Harassment prevention instruction should include not only a review of state and federal statutes but must also supply a copy of the employer's relevant human resource management policies that (1) prohibit illegal employment practices, (2) state the organization's method for communicating policies (such as posting policies and mandatory instruction for employees and managers), (3) provide several avenues for making complaints of harassment (other than the employee's direct supervisor), (4) establish sanctions for behavior inconsistent with policies, including progressive discipline and possible termination, (5) state guidelines for investigating complaints, and (6) provide internal review and an appeal mechanism for ensuring due diligence, compliance, and fairness (Sample, in press). Instructional designers should consult with their employer's human resource management unit for access to these policies.

3. Base harassment prevention instruction on needs assessment and performance analysis tailored to the industry and the organization's workplace environment. Identify applicable laws that require instruction as set forth in federal, state, and local statutes; regulations and ordinances, including laws that are specific to the particular industry; and applicable case law. Identify the level of instruction needed by executives, human resource management professionals, managers, and nonsupervisory employees. Identify hidden or implied instructional requirements, workplace harassment prevention programs, workplace violence prevention instruction, and occupational safety and health instruction. Identify industry best practices regarding additional instruction. Audit claims and litigation experience in the areas of workers' compensation, equal employment opportunity, occupational safety and health, all forms of harassment, wrongful discipline, wrongful discharge, negligent hiring, training and supervision, and workplace violence. Survey supervisors and employees to determine areas in which they believe instruction is required (Sample, in press).

4. Ensure that effective harassment prevention programs meet the good-faith effort requirement promulgated in *Kolstad*. Punitive damages may be recovered under the Civil Rights Act of 1991 if the complaining party establishes that the employer "engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights" of an employee (Title VII, 42 USC §1981a (b) (1). Under the U.S. Supreme Court's ruling in *Kolstad*, an employer may raise an affirmative defense to avoid or limit punitive damages by demonstrating a good-faith effort. Proof of such an effort consists of adopting antiharassment, discrimination, and retaliation policies; communicating and instructing managers and employees on these policies; and providing progressive discipline when necessary (Johnson, 2004).

5. Design, implement, and evaluate harassment prevention training systematically (Dick, Carey, & Carey, 2004; Piskurich, 2000; Rothwell & Kazanas, 2003). Avoid a one-size-fits-all or cookie-cutter approach to designing this type of instruction. Design instruction that fits the context of the employer and the industry. Give serious consideration to the goals, scope, and approach in designing instruction. The choice of goals will influence the scope and approach of the program. Goals focus the direction of the instructional effort, scope determines the breadth of the effort, and approach represents the type of program selected. Goals may focus on one or more of the following: (1) the prevention of litigation, including knowledge about laws and policies regarding employees; (2) awareness of the impact of discrimination on productivity and interpersonal relationships; and (3) changing behaviors, values, and beliefs of those most likely to harass others. Include in the design process a transfer-of-learning plan that prescribes what managers, instructors, and participants will do before, during, and after the instruction (Broad & Newstrom, 1992; Sample, in press). A well-developed transfer-of-learning plan that is followed will strengthen the employer's good-faith argument if litigation becomes inevitable.

6. Provide all employees with harassment prevention instruction that covers all forms of legally defined harassment: race, religion, ethnicity, national origin, disability, age, sex (gender and sexual), as well as retaliation, whistle-blowing, and hate and stalking crimes

(Johnson, 2004). According to EEOC guidelines employers should "provide training to all employees to ensure they understand their rights and responsibilities" (EEOC, 1999).

Mixing managers and employees in the same program is ill advised. The challenge for instructional designers is to ensure that the program content informs both groups without encouraging employees to initiate lawsuits (Littler & Mendelson, 2005). Each group requires a separate and distinct focus. Managers and supervisors must understand the risk to the employer for illegal or prohibited behavior in terms of discrimination, harassment, and retaliation. These forms of illegal behavior permeate the human resource cycle, beginning with recruitment and selection, and include supervision and training, and personnel actions, such as terminations and reassignments, that bear on a tangible employment outcome (term, conditions, and privileges of employment). Workplaces that are pervasive with sexually charged and inappropriate language, touching, and staring (ogling and leering) at members of the opposite sex may be evidence of a hostile work environment (Landy, 2005; Stokes, Stewart-Hill, & Barnes, 2000).

Instruction for employees should avoid emotionally charged terminology such as *quid pro quo, lawsuits, claimants, suing, litigation,* and *damages,* all of which provide the wrong focus for the employee and may unnecessarily encourage lawsuits. According to Littler and Mendelson (2005), focusing the attention of the employee on conduct expectations, the duty to report harassment, and the mechanism by which the reporting should occur should be the essence of instruction. Avoid opportunities for employees to use the content of the instruction as a means of encouraging or instigating litigation.

7. Document harassment prevention instruction, including follow-up audits. Consider having each participant sign a form at the end of the program certifying that he or she (1) understands the content of the harassment prevention program, (2) agrees to abide by the principles set forth in the program, and (3) acknowledges receipt and acceptance of any workplace policies that are part of the program (Sample, 2007). Given the problems encountered in *Stender* v. *Lucky Stores,* consider researching and developing a records retention and purging policy. Check with the employer's human resource management policy for guidance on determining what paper-based and electronically stored information should be saved. Remember that flip charts, participant notes, and participant evaluations are subject to pretrial discovery.

   Document the design and implementation of harassment prevention instruction. Maintain a master file of the design of the harassment prevention program, including instructional goals and objectives, instructor guides and lesson plans, and participant learning materials. Evidence of attendance in the form of original signatures on an attendance form for each date of instruction is recommended.

8. Rely on qualified instructors with expertise in facilitation and who understand the employer's harassment prevention policy to conduct harassment prevention instruction. Instructors and participants are cautioned against drawing legal conclusions during instruction. Littler and Mendelson (2005) argue that "if the trainer says 'this conduct is sexual harassment'—he or she is drawing a legal conclusion that could compromise future legal defenses" (p. 917). It is better to describe such conduct as "potentially inappropriate and not consistent with HR policy" rather than label a hypothetical example as sexual harassment. Do not allow participants to say, "What is said here stays here." This guideline should not be allowed, as most (if not all) employees may be compelled by policy to report instances of harassment.

9. Make harassment-prevention instruction memorable. This means simply that managers and employees must remember the content of harassment prevention instruction for recall when necessary. For example, if an attorney for a complainant were to randomly depose managers and employees about their employer's harassment prevention instruction, could they uniformly and accurately recall key information from the instruction (McLaughlin & Mershasin, 2001)? Attorneys for complainants are becoming more adroit at uncovering inadequacies in the employer's use of instruction as part of the good-faith affirmative defense.

An instructional designer can test the assumption that harassment prevention instruction will be memorable by "stapling" himself or herself to the participant after the instruction has been completed (Wick, Pollock, Jefferson, & Flannagan, 2006). The following questions will assist in determining the effectiveness of transfer of learning: What social norms and organizational practices will encourage (or inhibit) compliance to the employer's harassment prevention instruction? How important is it to the participant's manager that compliance is expected and encouraged? Will the participant be ostracized for reporting harassment? Is compliance really important to senior management, or is this just an act of litigation prevention designed to protect the employer's financial assets and reputation?

10. Consider the legal implications when evaluating harassment prevention and other compliance-related instruction. Avoid the temptation to use participant reaction surveys at the end of instruction. Remember that anything in writing (or maintained in an electronic format) is subject to pretrial discovery. This means that the attorney for the complainant may demand copies of all documentation reasonably related to pending litigation, and this includes copies of course evaluations, flip charts, and participants' notes (see the previous discussion of *Stender* v. *Lucky Stores*). Given the nature of compliance-related instruction, participants may make negative and disparaging comments about perfectly adequate instruction on reaction evaluation forms, and these comments will be used against the employer by attorneys who represent a disgruntled employee. Worse still would be an admission of liability (discrimination or unsafe work practices, for example) by an anonymous participant on an evaluation form.

    The use of posttests is also ill advised. What will be the procedure if an employee (or the president of the company) fails a posttest? Will he or she be remediated immediately or at some future time? Will the posttests be maintained and archived? An alternative evaluation strategy is to have an experienced instructional designer or program evaluator observe the harassment prevention program. The observer should determine the extent to which the instructor followed the prescribed lesson plan and instructional materials, as well as appropriate instructional behaviors and skills.

SUMMARY

The U.S. Supreme Court and the Equal Employment Opportunity Commission have mandated that employers provide policies and instruction on the prevention of harassment, discrimination, and retaliation in the workplace. Employers who in good faith follow the procedures outlined by the EEOC are in a position to argue an affirmative defense if litigation were to occur.

Instructional designers are in a unique position to assist employers with the task of designing effective instruction that will both meet state and federal compliance requirements and reduce the number of complaints and costs associated with harassment-related claims. The essence of a documented good-faith effort is the systematic design and delivery of instruction.

NOTE: This article provides descriptive and illustrative material on general legal concepts as they may apply to human resource management, training, and instructional development programs in the private and public sectors. Although the information in this document is accurate and timely, it does not constitute legal advice. Consult legal counsel for specific advice on legal questions involving instances related to matters discussed in this article.

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