

WORKPLACE TRAINING: THE IMPORTANCE OF EMPLOYEE EDUCATION AS A PREVENTATIVE MEASURE

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I. OVERVIEW

- A. Understanding the Purpose and Benefits of Employee Training.
- B. Mandated Training Versus Recommended Training: Understanding Federal, State, and Local Law Requirements, As Well As Industry Standards and Best Practices.
- C. Setting and Understanding Training Goals and Implementing Proper Training Protocol.
- D. Tailoring Training to Your Audience: Training for Employees, Managers, and Executives.
- E. Best Practices for Documenting Employee Training.
- F. The Importance of Revisiting Training as an Ongoing and Evolving Process.

II. EMPLOYEE TRAINING: WHY BOTHER?

- A. Prevention of Claims Brought Against the Company.
 - 1. Review of company policies, including Anti-Harassment and Discrimination Policies, to educate employees regarding lawful and unlawful conduct. By educating employees regarding acceptable/unacceptable behavior and the perceptions of others, you can prevent unlawful behavior in the future.
 - 2. In a recent survey regarding sexual harassment, 70% of the people surveyed said they wished it was easier to understand what is and is not sexual harassment.

- B. Minimizing Employer Liability: Establishing an Affirmative Defense Against Claims.
1. EEOC , MDCR, MIOSHA, and DOL Investigations
 - a. Two of the first questions asked in most investigations are (1) does the employer have an anti-harassment/discrimination policy? and (2) were the employees trained regarding their rights and responsibilities?
 - b. The EEOC outlines the components of an effective anti-harassment/discrimination policy in Notice No 915.002, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999) and specifically calls for employee training.
 - i. "It generally is necessary for employers to establish, publicize, and enforce anti-harassment policies and complaint procedures . . . An employer should provide every employee with a copy of the policy and complaint procedure, and redistribute it periodically. The policy and complaint procedure should be written in a way that will be understood by all employees in the employer's workforce. Other measures to ensure effective dissemination of the policy and complaint procedure include posting them in central locations and incorporating them into employee handbooks. If feasible, the employer should provide training to all employees to ensure that they understand their rights and responsibilities."
 - ii. "An employer should ensure that its supervisors and managers understand their responsibilities under the organization's anti-harassment policy and complaint procedure. Periodic training of those individuals can help

achieve that result. Such training should explain the types of conduct that violate the employer's anti-harassment policy; the seriousness of the policy; the responsibilities of supervisors and managers when they learn of alleged harassment; and the prohibition against retaliation."

- c. Training is also becoming a common requirement of settlement agreements with these agencies.

2. Lawsuits.

- a. Under *Faragher v City of Boca Raton*, 524 US 775 (1998), and *Burlington Indus v Ellerth*, 524 US 742 (1998), an employer can assert an affirmative defense to avoid liability for hostile environment harassment by a supervisor so long as the harassment has not led to an adverse employment action such as termination or demotion. *Ellerth*, 524 US at 765.
 - i. The defense involves proving two elements: (1) the employer exercised reasonable care to prevent and promptly correct the harassing behavior, and (2) the employee unreasonably failed to avail themselves of the employer's preventative or remedial apparatus. *Id.*
 - ii. Employee training can be used as evidence for both of these elements. Discrimination and harassment training can be used to show that the employer took steps to prevent the harassment and it can be evidence that the employee knew of the employer's preventative or remedial apparatuses (such as a complaint procedure). The Court in *Faragher* went so far as to state "the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, ***train*** them, and monitor their

performance." *Faragher*, 118 S. Ct. at 2291.

C. Understanding Concerns and Sharing Perspectives.

1. By allowing for group discussion, Q & A, and interaction, employers can uncover concerns they would not otherwise know about.
2. Implementing hypotheticals that are specifically tailored to the theme of the training will often reveal varying perspectives on the same situation and foster sensitivity for others.
3. This also provides an opportunity for employees to feel acknowledged and heard by being able to voice their concerns, experiences, and perspectives.
4. Group discussion and Q & A Basics:
 - a. Who should be present? The pros and cons of including the "bosses."
 - ii. Training can uncover unknown systemic issues if employees feel "safe" in speaking up.
 - iii. However, by having all parties present, concerns may be addressed more "directly."
 - b. Use the experiences and knowledge that individual employees have as a resource.
 - c. Ensure group discussions are conducted in a mutually respectful manner.
 - d. Follow up on issues raised or questions left unanswered; make note of issues raised for future training.

D. Reviewing Company Culture and Policies.

1. Training can be a tool for reviewing and reinforcing existing company policies.
2. Training can be a tool for "rolling out" new company policies, such as a

revised Employee Handbook.

3. Use the opportunity to discuss the company's vision, mission and core values. This can help to foster a sense of community and loyalty among employees.

E. Employee Retention/Performance.

1. Training employees is a cost-effective way to reduce employee turnover. Poor performance may simply be the result of employees not knowing what is expected of them.
2. Job satisfaction increases when employees better understand the policies and culture of the company. One recent survey indicated that as much as 40% of employees who receive poor job training leave their job within the one year.
3. Training allows employees to feel like "part" of the company, which in turn increases loyalty to the company.

F. Societal Expectations.

1. For companies in the public eye, it has simply become unacceptable to fail to properly train employees.
2. In particular, failure to train employees regarding discrimination, harassment, sexual harassment, and implicit bias has brought negative attention to many well-known companies.
3. For example, see recent developments pertaining to Starbucks.
 - a. On April 12, 2018, a Philadelphia Starbucks store manager called the police on two black men. The men were waiting for a business associate and asked to use the bathroom prior to placing an order when the manger choose to call the police. The store protocol for such a situation was to ask the non-paying patrons to leave—not to call the police and have them forcibly removed from the store.

- b. The public outcry was swift and Starbucks acknowledged its fault. The CEO stated “You can and should expect more from us,” and “We will learn from this and be better.”
- c. In order to “be better,” Starbucks initiated a massive employee training initiative. On May 29, more than 8,000 Starbucks across the country closed for mandatory “racial-bias education.” The four hours training reached approximately 175,000 employees, who watched videos about the history of workplace discrimination and engaged in interactive group discussions and Q & A concerning race, privilege, and implicit bias.

G. Required Under Law?

- 1. Know your federal, state, and local requirements.
- 2. Training may be dependent on industry.

III. MANDATED TRAINING VERSUS RECOMMENDED TRAINING

A. Mandated Training.

- 1. Federal Requirements. No federal training regulation applies to all employers, however certain federal laws and agency regulations may explicitly require training for specific industries or employers. Additionally, training might be implicitly required as the only way to achieve compliance obligations under certain laws and regulations.

a. Safety Training Examples

- i. Emergency Action Plan. Certain employers are required by OSHA to have an “emergency action plan” and must train a sufficient number of employees to assist emergency situations and evacuations (see 29 CFR 1910.38).
- ii. Hazard Training. Employers with hazardous chemicals in the workplace must provide employees with effective training at the time of their initial assignment and again

whenever a new chemical hazard is presented into their work area (see 29 CFR 1910.1200).

- b. Compliance Programs.
 - i. Foreign Corrupt Practices Act and the Sarbanes-Oxley Act. Under certain circumstances, companies can be held responsible for criminal misconduct by employees. Training can be a strong defense to show efforts at compliance. The training should cover the company's policies, procedures, and systems designed to prevent, deter, uncover, and address non-compliance.
 - ii. Health Insurance Portability and Accountability Act (HIPAA). Under HIPAA, health care providers must train their employees on proper procedures for handling protected health information.
2. Michigan Requirements. No state training regulation applies to all employers, however certain state laws and agency regulations may explicitly require training for specific industries or employers. It is important to research your particular industry against state requirements.
 - a. MIOSHA. "Employers are required to hold employee training sessions during which employees receive information and have questions answered regarding the chemical hazards they may be exposed to, how to read and interpret labels and SDSs, how to locate a specific SDS, ways to protect themselves from chemical hazards, and the details of the hazard communication program."¹

¹ https://www.michigan.gov/documents/cis_wsh_cet0101_119296_7.htm.

B. Recommended Training.

1. FMLA/ADA and Michigan Persons with Disabilities Civil Rights Act Training. Training management and HR on leave of absence procedures and disability accommodation to ensure that they respond lawfully to requests for leave and accommodation. Training should provide an overview of applicable leave laws, how to handle accommodation and leave requests, notice requirements and employee rights, and job restoration requirements upon the employee's return. Mishandling is very common and can result in DOL citations and penalties, along with EEOC charges (disability discrimination is the second most frequent claim in Michigan, accounting for 33.4% of all claims).
 - a. Qualified individuals with a disability may request a reasonable accommodation that would permit them to perform the essential functions of their job. Managers must know how to engage in an *interactive process* in evaluating whether an accommodation would pose an *undue hardship* on the company.²
 - b. Managers need to understand how rights under the FMLA and the ADA work in conjunction.
 - c. The Michigan Persons with Disabilities Civil Rights Act requires the employee to provide written notice of any need for an accommodation within 182 days of when the employee knew or should have known about the need.³
2. Fair Labor Standards Act (FLSA) Training. Training management and HR on employee versus independent contractor status, exempt versus non-exempt status, timekeeping requirements, meals and breaks,

² 42 U.S.C. § 12112(b)(5)(A).

³ Michigan's Persons with Disabilities Civil Rights Act (PWDCRA).

travel time as hours worked, and overtime rules in order to ensure FLSA compliance. Mishandling is very common and can result in DOL citations and penalties and charges being filed.

a. Non-compliance is costly: if employees can establish that they were not paid as required by the FLSA, they can recover unpaid wages going back two years. If the employer's violation is "willful," the back-pay period is 3 years and the recovery is doubled as "liquidated damages."

i. Managers need to understand how to properly enforce overtime policies.

ii. Human Resources needs to understand even if overtime was worked without authority, overtime still must be paid.

iii. A concern raised by one individual employee can turn into a DOL audit that affects all employees.

3. Discrimination, Harassment, and Retaliation Training. Training management and HR on requirements under Title VII of the Civil Rights Act of 1964 and the Michigan Elliott-Larsen Civil Rights Act. Training should provide an overview of protected classes under federal, state, and local law; focus on the importance of diversity and sensitivity in the workplace; emphasize the notion of perception as reality; review real life examples of acceptable and unacceptable behavior; and cover best practices and procedures for handling complaints.

a. Mishandling is very common and can result in EEOC and MDCR charges being filed.

b. In 2017, there were 84,254 EEOC charges of discrimination in

the US.⁴ There were 2,489 claims in Michigan alone, making Michigan 12th in the US for EEOC filings.⁵ Handling EEOC and Michigan Department of Civil Rights claims are costly and can lead to drawn-out investigations and litigation.

- i. Training for managers should focus on the difference between disparate treatment and disparate impact discrimination; the difference between quid pro quo and hostile work environment harassment; review investigation procedures; and emphasize importance of protection against retaliation.
 - ii. Training for employees should emphasize complaint procedures and alternative avenues for reporting concerns.
4. Sexual Harassment Training. While this type of training is often included in Discrimination and Harassment training, in light of the #MeToo movement and trends associated with the movement, it is often worth its own session. Training should focus on the types of conduct involved (verbal, non-verbal, physical, and visual); the difference between quid pro quo and hostile work environment harassment; the impact of sexual harassment on the company, managers, and employees; and review complaint procedures for employees.
- a. A recent study found that at least 30% of women have encountered unwanted advances from male co-workers.
 - b. According to the EEOC, 75% of those who experience sexual harassment at work never report, typically because they fear

⁴ <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

⁵ https://www1.eeoc.gov/eeoc/statistics/enforcement/state_17.cfm.

blame, inaction, or retaliation.

- i. Training can be for men, women, or both in order to encourage an openness and dialogue between genders.
- ii. Training should emphasize that sexual harassment happens to both men and women.
- iii. Such training often leaves participants empowered to speak up and increases sensitivity regarding how to respond when a concern is articulated.

5. **Accountability Training for Managers.** This type of specific leadership training should focus on company values and future goals; the role of management within the company and the notion of leading by example; how to handle performance evaluations; responding to complaints and anti-retaliation.
 - a. Having strong leaders who implement best practices and understand procedures is often the best means of avoiding claims.
 - b. Retaliation claims are the most common type of EEOC charge in Michigan, accounting for 39.6% of all claims.

IV. SETTING TRAINING GOALS AND IMPLEMENTING PROPER PROTOCOL

A. Understanding Training Goals.

1. **Be Realistic.**
 - a. Training should not be based on unattainable goals. Employers won't be able to change long-held beliefs and attitudes in a single one-hour session.
 - b. Focus instead on smaller changes, such as increasing awareness, which can eventually work to shift thinking and the culture of the company.

2. Don't Make Unilateral Asks of Employees.
 - a. While training can certainly focus on employee expectations, it should also involve a component showing what the company is doing to achieve its goals (or how the company supports its employees in doing so).
 3. Educational Component.
 - a. Understand what knowledge you want employees to take with them from the training session.
 - b. Reinforce this information throughout and test the employee's knowledge where possible.
 4. Conveying a Message to Employees.
 - a. Understand what message the training is designed to convey to employees. For example, if the training is based on discrimination and harassment, the message might be to convey the employer's commitment to non-discrimination. If so, the training should reinforce this message throughout.
 5. Compliance/Minimizing Liability.
 - a. Be sure to cover required elements of a compliance program or touch on necessary issues so that training can be used as an affirmative defense.
 6. Know Your Audience.
 - a. Training should have content designed to educate the workforce and not leave them feeling confused or overwhelmed.
- B. Implementing Training Protocol.
1. Create an informal, safe and supportive environment (may be adjusted based upon audience).
 2. Ensure that ground rules are set concerning mutual respect and confidentiality.

3. Set clear goals and learning objectives and communicate them to the audience. Reinforce each objective as you address it in the presentation.
4. Include numerous opportunities for employee participation.
5. Use a problem-centered approach and examples to foster group brainstorming.
6. Connect new policies and material with the employee's past learning and work experience
7. Provide employees with an opportunity to reinforce what they have learned.
8. Ensure that training is designed to promote positive self-esteem and not point to failures.

V. UNDERSTANDING YOUR AUDIENCE: TRAINING FOR EMPLOYEES, MANAGERS, AND EXECUTIVES.

A. General Employee Training.

1. An opportunity to create an inclusive and supportive environment and to bolster loyalty.
2. A review of company goals and values, procedures and expectations, and employee rights (but not a roadmap for bringing false claims against the company).
3. Review of company complaint procedures.

B. Management Training.

1. Review best practices for preventing claims.
 - a. Managers should be trained regarding consistency in enforcement to prevent disparate treatment of employees.
 - i. In a race discrimination case, employer asserted that the employee violated multiple policies in the employee handbook. Although this was sufficient to establish a

legitimate, non-discriminatory business reason for disciplining the employee, pretext was established by showing that other similarly situated employees were exempted from enforcement of these handbook policies.⁶

- b. Managers should be trained regarding employee performance issues.
 - i. Be sure that company procedures are being consistently followed (Performance Improvement Plans, disciplinary action, positive feedback, etc.) and familiarize managers with necessary forms.
2. Review protocol for responding to claims—"the 6 R's."
- a. Respect: Listen to various perspectives to learn the facts with an open mind
 - b. Restraint: Prevent any unlawful conduct from continuing and disclose information on a need-to-know basis to maintain confidentiality to the extent possible
 - c. Rules: Evaluate application of the handbook policies (be sure these are being applied consistently to all employees).
 - d. Respond: Be swift in investigation and taking appropriate remedial action, if necessary. "The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified." *Collette v. Stein-Mart, Inc.*, 126 Fed.Appx. 678, 686 (6th Cir. 2005) (quoting *Swenson v. Potter*, 271 F.3d 1184, 1193 (9th Cir. 2001)).
 - e. Record: Document, document, document.

⁶ *Hecht v. National Heritage Academies, Inc.*, 499 Mich 586, 617 (2016).

- f. (No) Retaliation: Do not take adverse action against complainant (who makes claim in good faith) or witness participating in investigation. “An employee may not be retaliated against (or discriminated against) for opposing a violation of Michigan's Elliott-Larsen Civil Rights Act, or for making a charge, filing a complaint, or participating in a proceeding/investigation under that statute.” Mich. Comp. Laws § 37.2701.

C. Executive Training.

1. Approximately 50%–60% of executives fail within the first 18 months of being promoted or hired. The turnover costs for executives can be as much as 213% of annual salary. In order to retain, shape, and maximize company executives, specialized training should be implemented that is designed to:
 - a. Help executives connect to their company and understand its inner-workings. In 2016, “it was estimated that 67% of well-formulated [executive] strategies failed due to poor execution.”⁷
 - b. Understanding leadership styles and their impact on employee performance.
 - c. Learning effective communication.
 - d. When to be involved in HR and employment issues.

VI. BEST PRACTICES FOR DOCUMENTING EMPLOYEE TRAINING.

The Importance of Keeping Training Records.

1. Defense against claims. If the EEOC is investigating a claim, being able to provide tangible evidence of employee training can be strong

⁷ <https://hbr.org/2017/11/executives-fail-to-execute-strategy-because-theyre-too-internally-focused>.

support for the employer's position.

2. Demonstrate compliance. For training that is required under law, periodic reviews may require proof that training took place as required.
 3. Support for employment actions. In the case of violations of law or company policy, employers can point to training records to demonstrate that the employee should have known their conduct was a violation.
 4. Employee recognition. This is a great opportunity to boost employee morale by recognizing the employee's participation and mastery of the training concepts.
- B. Required Documentation?
1. Mandatory training may require particular documentation. For example, some OSHA standards require training be certified with the following information:
 - a. Employee name
 - b. Date of training
 - c. Content of training
 - d. Evaluation results
 - e. Name and title of trainer
- C. Suggested Documentation: Protect Yourself with a Paper Trail.
1. Certificate of Completion.
 - a. Although this is the most basic form of documentation, it does provide an opportunity to praise/acknowledge employees for their participation.
 - b. This can also be given to employees in conjunction with other documentation.

- c. If this is the only form of documentation used, be sure that at a minimum: (1) it adequately describes the training, (2) includes employee name, (3) is dated, and (4) employer retains a copy for their records.
 2. Signed acknowledgement.
 - a. A signed acknowledgement is a tool for the employer. It should at a minimum: (1) adequately describe the type of training, (2) require that the employees acknowledge that they were given an opportunity to ask any questions they had, (3) require that the employee acknowledge that they understood the material covered and know their responsibilities moving forward, and (4) is signed and dated.
 3. Quiz testing knowledge and understanding.
 - a. At a minimum, a quiz should include the following identifying information in order to be a useful training record: (1) description of the type of training, (2) employee name and date, and (3) signature.
 - b. To be effective, a quiz should test substantive information covered in the training.
 - c. The quiz should be designed to reinforce the learning objectives of the training.
 - d. Aim to give employees positive reinforcement as opposed to setting them up to fail (acknowledge high scores and do not create an impossibly hard quiz).
- D. How Long Should Documentation Be Kept?
 1. Length of employment plus a minimum of three to five years.
 2. However, federal, state and local laws may have other record retention requirements, so it is important to know your industry standards and applicable laws (e.g. OSHA).

VII. EMPLOYEE TRAINING - AN ONGOING PROCESS

- A. Training is not a one-time, one-size-fits-all occurrence. It must be an ongoing process.
1. Included for new employees (recorded training during orientation for all employees).
 2. New training based on updates in the law and social movements such as #MeToo.
 3. Regular “maintenance” training throughout the year to review key employer policies and changes, cover applicable laws and updates, and provide an opportunity to gather employees together and foster group discussion.