

# HRD Liability Update

Courtesy of Sample & Associatesã



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## The Special Case For Training Supervisors and Managers

By John Sample, Ph.D. SPHR

The EEO and ADA requirements are representative of only a small portion of the laws and regulations impacting corporations and their management. In this edition of the *HRD Liability Update*, a special case is made for training supervisors to comply with these requirements for the following reasons:

- First of all, supervisors are the first line of prevention and defense of a legal problem for any organization.
- Secondly, most all jurisdictions will hold employers and their supervisors liable for what they know, and sometimes for what they don't know.

Take for example harassment, which we all know comes in many forms - sex, age, race, religion, national origin, handicap, etc. If a supervisor knew of a situation involving sexual harassment that was contrary to law and company policy, and he or she failed to intervene properly, then a court could likely hold the harasser, supervisor, and the employer liable to some degree. (*Meritor Savings Bank v Vinson*, 1986; Carbonell, Higginbotham & Sample, 1990). But what if the supervisor did not know of the harassment, you say?

Some jurisdictions will hold supervisors accountable for what they did not know! If a supervisor "should have known, but did not know" of harassment, (or other areas of liability for that matter) he or she could be held liable in certain jurisdictions. The rationale for this tough position is that supervisors will not be allowed to look the other way in the performing the scope of their duties.

Training supervisors and managers in technical environments have a responsibility to train supervisors on applicable laws and regulations impacting the scope of work of the company and its managers, supervisors, and employees. In some industries, a general overview of employment law would be sufficient, whereas a different technology base or business context might require training in several areas of the law. Since ignorance of the law is no

defense for the employer, reasonable training efforts should be incorporated into supervisor and management development curriculum.

The following are examples of varied legal requirements impacting many jurisdictions for which managers may have a "need to know:"

*Negligent hiring and retention, and failure to supervise to standard.* Not only must supervisors be aware of EEO and ADA requirements for selection, they must also know that selecting employees without adequate background checks could result in negligent hiring. For example, if a newly hired employee were to become violent in the work place, resulting in injury or death of others, and if a reasonable background check would have revealed such violent patterns in previous employment, then negligent hiring could be alleged. If the employer were to continue the employment of someone with consistent violent behaviors at work, then negligent retention could be alleged. Finally, failure to supervise an employee to standard resulting in injury or death to the employee, or to others, then negligence could be alleged. (Henszey, et al., 1991)

*Appraising employee performance.* Conducting employee performance appraisals is one of the most important requirements of supervisors and managers. The resulting documentation from employee appraisals is used throughout the human resource cycle. According to Cascio (1991, p. 33), "If the ratings produce an adverse impact and are used as bases for personnel decisions (e.g., regarding promotions), they must be shown to be job related." In *Watson v. Fort Worth Bank and Trust* (1988), the court addressed such issues as the subjective nature of appraisal interviews, and concluded that such processes are subject to the same types of applied research analysis as are applied to objective techniques, such as standardized tests. A review of major court cases involving employee performance appraisal. Industrial psychologists who research the legal aspects of performance appraisal continuously advocate the following requirements (Holley & Feild, 1975; Kleiman & Durham, 1981; Schmitt & Lippin, 1980; Feild & Holley, 1982; Barrett & Kernann, 1987):

1. use of job analysis to determine relevant characteristics necessary for successful job performance that are incorporated into the evaluation instrument,
2. evaluating job factors that are measurable and observable, resulting in documentation of job performance on a regular basis,
3. providing specific written instructions and training on how to conduct employee appraisals, and
4. the provision of corrective guidance for poor or marginal performers.

*Smoking in the workplace.* Although there is presently no federal law regulating smoking in the workplace, some states have enacted such legislation. In Florida, the Department of Health and Rehabilitation enforces the state's Clean Air Act. Employers and their supervisors who allow smoking in smoke-free designated areas could put their company at risk of a fine.

*AIDS in the workplace.* Many states have enacted comprehensive laws encompassing a wide range of AIDS and health related topics. Florida's AIDS Act includes informed consent for HIV testing, confidentiality of test results and a prohibition of discrimination against those infected with the AIDS virus. An employer may not require an individual to take an HIV-

related test as a condition of hiring or continued employment unless the absence of the HIV virus is a bona fide occupational qualification for the job in question. The ADA recognizes AIDS as a qualified disability. OSHA has extensive regulations on the AIDS virus and other bloodborne viruses. The Handicap-Rehabilitation Act of 1973 prohibits federal agencies and employers doing business with the federal government from discriminating against the handicapped. AIDS, AIDS related complex, or HIV positive status are protected as handicapped persons under this Act.

*Pay for overtime for training, travel, or homework.* The question of overtime turns on the status of an employee. The U. S. Department of Labor enforces the Fair Labor Standards Act which requires that non-exempt employees must be compensated for work that exceeds 40 hours per week with overtime pay of 1 1/2 regular pay. Exempt employees in the private sector (managers and professionals) are not subject to this requirement. Non-exempt employees required to attend training and/or to complete homework that exceeds their normal 40 hour work week must be compensated. Travel to off-site training that cuts across a non-exempt employee's work hour is compensable.

*Manager's personal liability.* Managers are agents of their employers, and when acting within the scope of their job responsibilities, they are generally immune from personal liability. Acting outside the scope of their job responsibilities could result in personal liability, including a payment of a percentage of awarded damages. For example, a manager who intentionally discriminate against an applicant or employee who comes under the Age Discrimination in Employment Act (ADEA) could be personally held liable for damages.

These are just of the few areas that supervisors must be trained and documented. by corporate HRM and HRD areas of responsibility . Failure to do adequately will place the business, its stakeholders, and assets in jeopardy if training and documentation does not occur.

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### **Statute and Court Case Citations**

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