10 Commandments of Workplace Emergency Training

Part 2

by Bo Mitchell

Sixth Commandment

Training shall occur in a classroom by a "qualified" trainer—qualified by dint of experience and/or training. On-screen training shall not substitute for classroom training.

Emergency training in a classroom springs not only from the innate logic regarding the training of complex skills, but is augmented by OSHA's insistence regarding "hands-on" training. OSHA's Definition of "hands-on" training:

> *Training in a simulated work environment that permits each student to have experience performing tasks, making decisions, or using equipment appropriate to the job assignment for which the training is being conducted.*
>
> Source: Training Curriculum Guidelines

Webster's (Merriam-Webster Online © 2005) definition of "hands on":

> *1. relating to, being, or providing direct practical experience in the operation or functioning of something (hands-on training); 2. characterized by active, personal involvement.*

Very often, employers wish it were so that any and all training can be successful and legal solely employing on-screen presentations. It is illegal for any employer to use on-screen training exclusively for the emergency team or for all employees. OSHA applauds any training by any means. However, nothing can substitute for annual and at-hire training in a classroom.

The Directorate of Compliance in Washington, D.C. enforces the regulations that apply to all employers. The OSHA Training Institute trains

OSHA Compliance Officers—the people who come to your facility "to hail you or nail you."

The Directorate's written interpretations of their training requirements are:

> *Use of computer-based training by itself would not be sufficient to meet the intent of most of OSHA's training requirements;*
>
> *Our position on this matter is essentially the same as our policy on the use of training videos, since the two approaches have similar shortcomings;*
>
> *OSHA urges employers to be wary of relying solely on generic, 'packaged' training programs in meeting their training requirements;*
>
> *In an effective training program, it is critical that trainees have the opportunity to ask questions where material is unfamiliar to them;*
>
> *OSHA believes that computer-based training programs can be used as part of an effective safety and health training program to satisfy OSHA training requirements, provided that the program is supplemented by the opportunity for trainees to ask questions of a qualified trainer, and provides trainees with sufficient hands-on experience;*
>
> *OSHA does not believe that the use of computer-based training will, in the majority of cases, enable trainees to achieve competency in substantially less time than the required minimum duration for training. Therefore, the use of computer-based training will not relieve employers of their obligation to ensure that employees receive the minimum required amount of training."*
>
> Source: OSHA letter to ENTERGY Gulf States Utilities of 22 November 1994 as corrected 2 June 2005.

> *I am saying that life safety is difficult if not impossible to train on screen; that employees better be able to answer the Compliance Officer's questions on emergencies.*
>
> —Art Buchanan, Director, Office of General Industry Enforcement, U.S. Department of Labor, OSHA, Washington, D.C. 20210, to Mr. Mitchell, 14 November 2006.

OSHA has taken this stance RE: on-screen training for decades:

> *Interactive computer-based training can serve as a valuable training tool in the context of an overall training program. However, use of computer-based training by itself would not be sufficient to meet the intent of most of OSHA's training requirements. Our position on this matter is essentially the same as our policy on the use of training videos, since the two approaches have similar shortcomings. OSHA urges employers to be wary of relying solely on generic "packaged" programs in meeting their training requirements...In an effective training program, it is critical that trainees have an opportunity to ask questions where material is unfamiliar to them.*
>
> Source: OSHA interpretation 11 June 1997

OSHA's stance is even "text book":

> *Exclusive use of screen-based training for emergency response is not acceptable. Screen-based training in all of its forms can never be the sole vehicle of training for emergencies. It can be used only as a supplement to the direct verbal interplay between experienced, highly-knowledgeable trainers and the trainees.*
>
> Source: Rick Kaletsky, Safety Consultant and Retired OSHA Compliance Officer of 20 years. He served as OSHA Area Director of both the Hartford, CT and Bridgeport, CT Areas. He is the author of OSHA Inspections: Preparation and Response, National Safety Council, 10th Printing.

Seventh Commandment

Training Shall Occur if the Plan Changes or If the People in the Plan Change.

OSHA 29 CFR 1910.38:

(F) An employer must review the emergency action plan with each employee covered by the plan:

1. When the plan is developed or the employee is assigned initially to a job;
2. When the employee's responsibilities under the plan change; and
3. When the plan is changed.

Eighth Commandment

Training Shall Be for All Hazards.

All-hazards planning and training has been mandated for decades by national law and standards:

1. Stafford Act, Public Law 93-288
2. National Incident Management System (NIMS by Department of Homeland Security)
3. Incident Management System (ICS by DHS)
4. National Response Framework (NRF by DHS)
5. Public Law 110-53 (PS-Prep by DHS)
6. Standard & Poor's (S&P)
7. NFPA 1600 Standard on Disaster/Emergency Management & Business Continuity (National Fire Protection Association).

All of these standards mandate all-hazards planning and training for the workplace.

This is not your father's Fire Plan. The standards mandate that planning and training for the workplace incorporate a long list of emergencies including all man- and nature-made crises. Any emergency that is a foreseeable circumstance shall be planned and trained in the workplace. Since terrorists crashed planes into high-rise office buildings, there is no such thing as a workplace emergency that can't be foreseen. Google any "what-if" scenario in your industry and you will find just that emergency has happened to a workplace like yours.

The most clear and authoritative standard regarding the need for all-hazards planning and training for any employer's workplace is NFPA 1600.

NFPA 1600 all-hazards planning is:

1. Recognized in law twice by the U.S. Congress in the wake of the 9/11 Commission's reports.
2. S&P, the folks who set your credit rating, have changed their audit standards over several years to include examination of Emergency Action, Disaster Recovery and Business Continuity Plans. Their battle cry is "resiliency." If an employer's readiness is poor because of a lack of planning and training, then the employer's ability to return to full operations and pay invoices and payroll is compromised. This, says S&P, should be recognized in setting your credit rating. Their standard is NFPA 1600.
3. FDNY (Fire Department of the City of New York) administers the most robust planning law in the world. Their inspiration is NFPA 1600.
4. California, Florida and Connecticut have mandated NFPA 1600 in their fire codes. California and Florida have had the most robust

emergency planning in the U.S. since WWII because every kind of emergency is experienced in these two states. 56 million Americans live in California and Florida—one out of six Americans. Courts recognize these states and their authority.

5. NFPA has been writing standards since 1896. Every state's fire code is constituted almost entirely by NFPA standards. State and federal courts love NFPA including the Supreme Court of the United States.

Ninth Commandment

All emergency planning and training shall be site specific. No plagiarizing. No landlord plan can substitute for tenant's responsibilities under law.

There is no surprise that all emergency planning and training shall be site specific. All regulations from OSHA, EPA, other federal and state agencies are focused on the employer's site.

That said, there are legions of employers that take other sites' emergency plans and apply this paperwork to their site. This plagiarism often comes from an employer's headquarters or an multi-facility safety or security group; often, it will be a colleague or a downloaded template that is plagiarized. This "emergency planning by cut-and-paste" leads to training that is generic, not site specific and thus illegal. This also rules out any and all stand-alone, off-the-shelf, third-party programs and videos that the employer might make available on its intranet or rack up as a conference room video.

Many employers have a wide variety of facilities from high rises to low rises; in cities with widely divergent regulations and procedures. What training might work in a low rise is silly—no, dangerous—for a NYC high rise. What works in a San Francisco high rise does not work for a Chicago high rise.

If the planning is plagiarized, then the training is not site specific and thus illegal.

The landlord's plan is not your plan. There is nothing promoted or implied in any federal, any state or any local law, regulation or code that permits any tenant employer to substitute the landlord's plan for the tenant's plan. If the landlord does have a plan, it's often part of a tenant manual rather than stand-alone plan. Landlord's plans are almost always out of date. With the exception of New York City, almost all landlord's plans are incompetent. Even in NYC, landlord's plans are often out of date and incomplete in their all-hazards approach.

Landlords are uniformly bad at emergency planning. They hate this stuff. It promotes work and time investment thereby subtracting from their profitability.

Landlord training—if there is any—almost always focuses on drills (which are not training under any state's fire code) or focused exclusively on fires and stairwell familiarization. These efforts are not policed with sign-in sheets and compulsory attendance. Any tenant that purports their landlord's plan is their plan is negligent and in violation of federal law regarding planning and training of EAPs and FPPs.

This illegal planning is transparent to any compliance officer or expert examining this substitution and/or plagiarism.

The CEO Is the Responsible Party Civilly, Personally & Criminally.

Quoting regulations is easy enough. But, someone at the employer has to have responsibility for implementing health and safety regulations. Who at your workplace is the responsible party?

Regarding all the responsibilities in our commandments, there is no surprise that the CEO is the responsible party civilly. The Supreme Court of the United States has gone further by making the CEO's responsibility not only civil but also personal and criminal. In two cases, SCOTUS listened to all the excuses. "I'm busy." "I'm not 'personally concerned' with these regulations" "I have 'dependable subordinates' in whom I have 'great confidence.'" "We're too big and spread out for me to be responsible."

SCOTUS listened to all these arguments then ruled that the CEO has a "responsible relationship" to the application and implementation of federal regulations.

When it comes to public health and safety, more stringent regulations are applied and often upheld in court. "The only way a corporation can act is through the individuals who act on its behalf," said SCOTUS. CEOs have "supervisory responsibility reposed in them by a business organization not only a positive duty to seek out and remedy violations but also, and primarily, a duty to implement measures that will insure that violations will not occur."

A corporate agent (and his managers), through whom the corporation committed a crime, was himself guilty individually of that crime. SCOTUS ruled the jury was given the proper instruction to find guilt not solely on the basis of respondent's position in the corporation, but by "responsible relation to the situation" and "by virtue of his position... authority and responsibility."

The CEO is the responsible party civilly, personally and criminally. The SCOTUS decisions don't let all other senior managers and line supervisors off the hook. They too can be held responsible at court civilly and criminally. Like the captain of a ship, however, the CEO is the ultimate responsible party at your workplace.

Does your CEO know this? Shouldn't s/he? Wouldn't you?

See UNITED STATES v. PARK, 421 U.S. 658 (1975) and UNITED STATES v. DOTTERWEICH, 320 U.S. 277 (1943)

Conclusion

All employers shall have EAPs and FPPs in addition to their local plan requirements. Training all employees in all-hazards emergency response for that specific site at least annually and at hire, in a classroom employing a qualified trainer is the law for every employer without exception. The CEO is the party responsible to ensure all this happens.

Overall, the OSH Act's General Duty Clause embraces all employers' and all employees' obligations under law:

29 USC 654

Each employer:

1. **Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;**

2. **Shall comply with occupational safety and health standards promulgated under this Act.**

Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

There is an 11th Commandment that too many employers want to be true:

"No authority cares about this. I can ignore the law."

There are two easy examples of how this negligence will come back to nail any employer. First, if your workplace has an emergency that injures or kills an employee, contractor or visitor, then compliance officers, litigators, judges, juries, directors and employees will all deem the CEO and the employer liable. Second, one CEO in a big city with 800 employees in a professional services setting just got a letter from OSHA. The letter was two short paragraphs. "We have had a complaint that you do not have a compliant EAP and FPP. Please send us your written EAP and FPP and your employee training records for the last three years in the next 10 days. Sincerely..." Using a 46¢ stamp, the CEO got called out for documentation that can't be plagiarized in a few days.

Stunningly effective, simple and cheap.

Plus—and no surprise—SCOTUS has already addressed this:

> *There are precautions so imperative that even their universal disregard will not excuse omission.*

See T.J. Hooper, 60 F2d 737 (2d Cir. 1932)

There are those at many employers itching to find the loophole that can be threaded to wiggle them out of all-hazards training, or annual training, or classroom training, or training at hire. Almost always, this itch and wiggle is about saving money and staff time.

This is a fool's errand.

This kind of squirming and whining will look transparently petty and unprofessional to any compliance officer, litigator, judge, jury and family after an incident that injures or kills one of your people.

The CEO is the responsible party under federal law. You can run, but you can't hide.

Don't delay. Take action. Develop a plan with the aid of qualified professionals, and TRAIN YOUR PEOPLE. Then drill them. Conduct exercises, and review lessons learned afterwards. Hope isn't a strategy - and hoping that an active shooter won't disrupt the lives of everyone you're responsible for isn't just irresponsible, it's illegal. You can't stop crazy - but you can ensure that your people are as prepared as possible to deal with these complicated and challenging situations.