This guide does not constitute legal advice. Organizations with concerns about employment litigation are urged to obtain independent legal advice. No one can guarantee the prevention of employment litigation. Better prepared organizations may have fewer employment-related claims made against them and will be better prepared to deal with them when they do occur.

TABLE OF CONTENTS

Part I: To the Trainer

- Background ................................................................. 7
- Course Description ...................................................... 9
- Preparing to Deliver This Training ............................... 13

Part II: Conducting the Session

- Introduction ................................................................. 17
- Agenda ........................................................................ 19
- Goals ........................................................................... 19
- Introducing the Video .................................................. 21
- Show Video / Debrief .................................................. 21
- Litigation Landmines: Review and Discussion ........... 21-45
- Recording Performance Problems and Misconduct
  - Elements of Strong Written Records .................. 47
  - Exercise / paragraph ............................................... 49
  - Exercise / video ....................................................... 49
- Procedures for Reporting Incidents to the Organization ... 51
- Conclusion ................................................................. 53

Appendix

- Biographical Information ........................................... 56-58
- Litigation Landmines: Agenda .................................... 60
- Sample Memo ............................................................ 61
- Litigation Landmines Transparencies .......................... 62-71
PART I: TO THE FACILITATOR
Employers throughout the United States are faced with rapid and increasing changes and developments in the area of employment law. Currently there are staggering numbers of employment-related claims being filed in state and federal courts, and with various administrative agencies. Such claims can often result in tremendous employer liability as well as substantial legal expense, causing employers to settle cases that may seem almost frivolous in order to avoid the risk and expense of employment litigation. For the managers involved, such claims can be extremely upsetting and embarrassing.

Obviously, because of the litigious society in which employers must operate, it is virtually impossible for any employer to eliminate all potential employment litigation. Unfortunately, a number of companies increase the risk of employment-related claims by committing mistakes that could easily have been prevented by training. We call them “Litigation Landmines.”

1. Failure to Document
2. Failure to Train
3. Failure to Keep Evidence
4. Grade Inflation
5. Failure to Consult Human Resources
6. Inappropriate Electronic Messages
7. Inconsistent Treatment
8. Inappropriate Talk about Ex-employees
9. Uncontrolled References

These “landmines” were identified by reviewing thousands of actual employment law cases and surveying over two hundred employment law attorneys. Repeatedly, the above “landmines” were singled out as conduct directly linked to problems encountered in litigation.

Currently, one in five team leaders or front-line managers can expect to be named in some form of employment-related charge or litigation. If each of these individuals avoided the above landmines, roughly half of the litigation would be eliminated. Moreover, each landmine is also an opportunity for a positive management practice that would improve employee performance.

This program provides an opportunity to become inoculated against those landmines and to become better prepared to meet the incredible and exciting challenges of the 21st century.
THE GOALS OF THIS TRAINING

This training program has five goals:

1. To make every organization aware of the biggest mistakes that increase the risk of employment-related claims.
2. To increase the ability of managers, team leaders, and supervisors to recognize the sometimes subtle parts of their jobs that can result in costly and embarrassing claims.
3. To show how each potential mistake is an opportunity to implement a positive management practice.
4. To show how to record — and in some cases how not to record— incidents of misconduct or poor performance.
5. To understand how human resources can be an ally in solving certain management problems.

ELEMENTS OF THIS COURSE

Video cassette: Running Time 27 minutes
Facilitator’s Guide (including transparencies)
Participant’s Guide

SAMPLE TRAINING FORMATS

1. CORE TRAINING 3-4 HOURS

- Setting the Stage 30-40 minutes
  - Explain the problem of employment-related claims for the company and the manager.
  - Post the agenda for the training.
  - Explain the five goals.
  - Introduce the video, discussing the four points on page 21.
- Show Video 27 minutes
NOTES:

COURSE DESCRIPTION (cont’d)

- Debrief Viewer Reaction 15 minutes
- Litigation Landmines 30-40 minutes
  - Review list and discuss (3-5 minutes each)
- Break
- Recording Performance Problems and Misconduct 40-50 minutes
  - Review transparency and discuss
  - Exercise / paragraph
  - Exercise / video
- Reporting Incidents to Human Resources 20-30 minutes
  - Present your organization’s procedures for documenting performance problems or misconduct.
  - Review other relevant procedures or policies, such as those used for filing grievances or attendance.
  - Lead discussion, airing concerns or stories people have about these issues.
- Close 10-15 minutes
  - Summary Observations

2. SHORTENED FORMAT 2 1/2 HOURS

- Setting the Stage 20 minutes
- Show Video 27 minutes
- Debrief Video 15 minutes
- Litigation Landmines (2-3 minutes each) 25 minutes
- Recording Performance Problems and Misconduct 25 minutes
- Reporting Incidents to Human Resources 20 minutes
- Close 10 minutes
THINGS TO DO WELL IN ADVANCE

☐ Talk with human resources to find out about any format or forms (including computerized forms) that they may be using for documenting performance and discipline problems. If your organization uses a numerical rating system in performance appraisals, ask for the written descriptions of these numerical ratings. Ask for good and bad examples of documentation to use in the training session.

☐ Talk with Corporate Counsel or the appropriate senior-level executive to find out what your organization spends on employment-related legal action annually — including lost work time for managers involved in the suit.

☐ Get a copy of the organization’s complaint procedures and attendance policy, as well as company policies on electronic mail, voice mail and references.

☐ If you have related training materials on conflict resolution, you may want to consider incorporating them into this training session, depending on the amount of time you have.

THINGS TO DO JUST BEFORE

☐ Study materials and preview the video.

☐ This Facilitator’s Guide contains information and exercises for a training session for team leaders and managers who directly supervise employees. You are invited to customize the session to suit your particular needs.

☐ One of the best ways for people to learn is by hearing stories of what others in their position have gone through or to see actual examples — both good and bad — of written reports that others have submitted. Be sure to ask participants to refrain from using actual names in recounting stories; blacken the names in any written reports. Avoid using any attorney-client privileged documents or reports.

☐ This video is 27 minutes long. You will want to preview the video at least once before you conduct the training.

☐ Prepare Overhead Transparencies.*

* See appendix for a complete list of transparencies.
PART II: CONDUCTING THE SESSION
A GROWING PROBLEM

Facilitator Directions: Use the following information to provide context for participants in the session.

Employers throughout the United States are faced with rapid and increasing changes and developments in the area of employment law. Currently there are staggering numbers of employment-related claims being filed in state and federal courts and with various administrative agencies. Such claims can often result in tremendous employer liability as well as substantial legal expense, causing employers to settle cases that may seem almost frivolous in order to avoid the risk and expense of employment litigation. For the manager involved, such claims can be extremely upsetting and embarrassing. Additionally, in many states, individual liability is possible.

Obviously, because of the litigious society in which employers must operate, it is virtually impossible for any employer to eliminate all potential employment litigation. Unfortunately, a number of companies increase the risk of employment-related claims by committing mistakes that could easily have been prevented by training. We call them “Litigation Landmines.”

ESTABLISHING CREDENTIALS

Facilitator Directions: Use the agenda in the appendix to create a transparency or create your own.

This video is based on the expertise of the national law firm of Littler Mendelson, Fastiff, Tichy & Mathiason. The firm is the largest in the United States specializing exclusively in the representation of management in employment and labor relations law. Garry Mathiason, Wendy Tice-Wallner, Jaffe Dickerson and Nancy Pritikin who are featured in this video, are shareholders (partners) in the law firm. The firm has over 300 employment attorneys in 26 offices throughout the United States.
AGENDA

Our session today should run approximately __ hours and will follow this outline.

GOALS:

This training program has five goals:

1. To make every organization aware of the biggest mistakes that increase the risk of employment related claims.

2. To increase the ability of managers, team leaders, and supervisors to recognize the sometimes subtle parts of their jobs that can result in costly and embarrassing claims.

3. To show how each potential mistake is an opportunity to implement a positive management practice.

4. To show how to record — and in some cases how not to record — incidents of misconduct or poor performance.

5. To understand how human resources can be an ally in solving certain management problems.
INTRODUCTION (cont’d)

INTRODUCING THE VIDEO

It is important to keep in mind a few points about the video while you are watching. A more thorough discussion of avoiding Litigation Landmines will follow the viewing.

1. This video shows how easy it is for people with good management qualities to overlook important managerial responsibilities. Notice how different things can sound later in court than they do at the time!

2. After watching the video, we will focus on actions the manager might have taken to avert some of these problems. Positive conduct is suggested throughout the video; however, awareness of the problem is the shortest road to avoiding the problem — stepping around the landmine.

3. If you have questions while you’re watching the video, write them down and we’ll discuss them after we’re done watching the video.

4. Don’t be surprised if every one of you has exploded at least one of these landmines.

SHOW THE VIDEO / DEBRIEF
NOTES:

LANDMINE #1: FAILURE TO DOCUMENT

PERFORMANCE DOCUMENTATION

• Do It Regularly
• Be Objective
• Give Examples
• Review with Employee

Background Notes for the Facilitator:

When an employee claim gets to court, the critical element is the ability to factually re-create what occurred. It is vital to be able to accurately provide a record of what occurred and when. Generalizations and gaps become litigation landmines.

Managers increasingly have other duties and responsibilities that demand attention during the day. The team leader is responsible for all types of direct customer service and product-related activities. In this context, documenting someone’s arrival at the office 15 minutes or a half an hour late or other relatively minor acts of misconduct loses its importance in comparison with the day’s major events. The team leader often does not see the serious impact of the problem that could develop later on when a full picture of the employee’s activity cannot be recreated.

Documentation does not have to be especially time consuming or immediately follow each event. An excellent system is for a manager to make notes on a calendar regarding a minor problem and then on the second or third occasion, when it re-occurs, provide complete documentation that references the earlier events. If this is done in manageable increments, it not only meets the needs of providing specificity, but has more impact in the litigation process, because it does not appear that the manager is simply looking for excuses every day to generate yet another memo regarding the employee.
Some managers fail to document an incident when a plausible excuse is given for the misconduct or late arrival. There is often an advantage in documenting what occurred and the explanation provided by the employee. Later in litigation these explanations may become refined and sound much more reasonable than they do at the time they are initially given. Additionally, being able to document that car trouble on nine different occasions resulted in the employee being late to work seems less credible than car trouble on one or two occasions. Also, a legitimate excuse that might be appropriate on one or two occasions is not appropriate on several occasions because it demonstrates no action being taken by the employee to correct the problem (e.g., make alternative transportation arrangements or fix the car).

If an employee disciplinary action leads to termination and that, in turn, converts into litigation, it is reasonable to associate $500,000 with the processing cost of that event. This would include management time, attorney time and potential settlement costs. Given this kind of financial exposure, it becomes eminently more reasonable that misconduct and performance problems would be documented to avoid this kind of liability. Clearly, if a business contract had a penalty clause of $500,000, it is likely that the manager would regard it as a primary responsibility to document any production or performance problems that could trigger this clause to ensure that liability did not occur.

The team leader or front-line manager represents the eyes and ears of the organization. If no record is made regarding what is seen and observed, then the team leader has failed in a principal mission that will provide the necessary input to human resources or other support functions within the organization to make good recommendations on appropriate action to be taken.

**DISCUSSION QUESTIONS**

- What has to be in your notes or report?
  - For more detail, see page 47, “Recording Performance Problems.”

- What other actions should the manager in this film have taken besides filling out an incident report?
  - She should have done performance improvement planning with scheduled follow-up.
  - She should have clarified performance criteria in writing.
  - She should have involved human resources earlier.
**NOTES:**

---

**LITIGATION LANDMINES: REVIEW AND DISCUSSION (cont’d)**

- What is objective documentation versus subjective documentation?
  - Bill was insubordinate (subjective).
  - Bill called me a “f---ing ba-----” and said he “had no intention of working on the Williams file.”

**Landmine #2: Failure to Train**

**Employee Training**
- Provide Opportunities
- Confirm Training Occurred
- Evaluate Training
- Review with Employee

**Background Notes for the Facilitator:**

One of the fastest growing areas of employment law is legal exposure due to a failure to train. Several statutory and regulatory requirements mandate training on the part of the employer, especially in health and safety areas. In other areas, such training is indirectly mandated by legal liability created from an absence of training. For example, if managers are given no training regarding sexual harassment and sexual harassment occurs, the company may be held liable for its failure to train.

Training includes the concept of some ability to measure whether that training has occurred and is successful. If formal training is missed by an employee and the employee indicates that he or she will make it up on his or her own, several issues become apparent. First, in some circumstances, home study can generate wage and hour obligations on the part of the employer. Second, home study may not provide the type of training that will meet the company’s needs. Third, certain types of materials are not susceptible to home study or independent study in the office. Fourth, what follow-up exists to ensure that the employee actually learned the information? Fifth, are makeup classes available? Sixth, when training is organized, can the training be structured in such a way as to anticipate that some employees may need to make up the training at a later point?
LITIGATION LANDMINES: REVIEW AND DISCUSSION (cont’d)

DISCUSSION QUESTIONS

☐ What can you do / should you do when employees miss a required training session?

☐ How can you document that an employee has done required training at home on his or her own time?

☐ Are you currently facing any problems in getting your employees to do required training?

☐ Have you documented that an employee had the opportunity for training but declined?

LANDMINE #3: FAILURE TO KEEP EVIDENCE

EVIDENCE

• Recognize It as Evidence
• Make a Copy
• Share with Employee
• Use as a Teaching Tool

Background Notes for the Facilitator:

A team leader’s ability to produce a document or a physical example of an employee’s failed performance is overwhelmingly powerful in the litigation process. Failure to recognize the importance of this potential future evidence can lead to problems far greater than merely being unable to rely upon the evidence in a later legal proceeding. The manager can be cross-examined regarding why the evidence wasn’t maintained and the suggestion can be made that it may have been intentionally not kept or destroyed.

If a four-page report is physical evidence that establishes that an employee has not performed his or her job adequately and that this would be critical in the determination of a wrongful termination case later, the value of that paper could exceed the value of gold by a factor of 100!
DISCUSSION QUESTIONS

❏ What kinds of evidence are there for performance problems?
  • Written correspondence such as reports, memos, notes, and letters
  • Time cards
  • Meeting agendas
  • Electronic or telephonic correspondence such as electronic mail or voice mail
  • Photographic / video

❏ What methods could you use to keep notes about performance issues that would assure the likelihood that you have them later if you should need them?
  • Make notes on a calendar if a problem is too new to justify writing a special incident report.

❏ How do you preserve copies of this evidence and how long should it be retained?

LITIGATION LANDMINES: REVIEW AND DISCUSSION (cont’d)

LANDMINE #4: GRADE INFLATION

EMPLOYEE EVALUATIONS

• Be Timely
• Be Honest
• Consider Full Evaluation Cycle
• Review with Employee

Transparency

Background Notes for the Facilitator:

This is extremely common no matter how much effort is made to guard against it, in that psychologically it is very difficult for managers to candidly evaluate employees. It is uncomfortable, and it is assumed that these negative messages will harm the working relationship. Dozens of subsequent studies show that accurate evaluations which demonstrate deficiencies are the Number One most effective tool for improving performance.
Be truthful in the evaluation process and guard against the tendency to inflate the evaluation. This often results from concentrating on events very recent to the time of the evaluation as opposed to looking at the full behavior of the employee. Also, as the vignette in this video shows, some employees are master manipulators immediately prior to the evaluation.

In conducting evaluations, it is critical that the evaluator present an objective and accurate analysis of an employee’s performance and resist the tendency to give false praise. Inflated evaluations will come back to haunt an employer who has terminated an employee on the grounds of poor performance when the employee can produce a series of strong evaluations. However, neither should evaluations contain insulting, defamatory or inflammatory language. Instead, managers should make evaluations fact oriented and not overly conclusive. For example, an employee is not just a “bad employee,” but, rather, “the employee fails to arrive at work on time and is less productive than other employees working in the same position on the same shift.”

The results of an employee evaluation should not be a surprise. If a manager has adequately documented employee performance, and if there is sufficient communication between the manager and employees, the results of a periodic employment review, based upon employee evaluations, should not be a surprise to either the company or the employee.

**DISCUSSION QUESTIONS**

- What’s the best way to prevent grade inflation in a performance review?
  - Keep performance notes on an ongoing basis so you have a record of an employee’s performance over the entire evaluation period, not just the last few days.
  - Refer to your notes for the entire review period when you are preparing an evaluation.
- What kinds of evidence reduce the subjectivity of an evaluation?
  - Use facts, rather than opinions, as much as possible — not “Jake is a poor employee,” but “Jake has been late an average of five times a month over the past six months.”
  - Provide frequent examples.
LANDMINE #5: FAILURE TO CONSULT HUMAN RESOURCES

Human resources is not your enemy. They are an essential resource in solving problems. It is not possible in today’s environment to know all of the answers. Using special expertise is essential. In some organizations, human resources is outsourced, but the principle remains the same — that this is a resource available to team leaders and managers to provide suggestions on solving difficult human resource problems and to provide technical information and guidance.

It is much more likely that problems will be created by failure to involve the human resource function as opposed to having them involved and allowing for early detection and correction of problems. What may seem like a very difficult problem to a front-line manager may in fact be quite solvable with the assistance of a skilled human resource person.

If a problem arises, it is better to communicate it to human resources and find out that it is minor than to make that judgment independently and learn that it is in fact a major problem. Also, communication of problems to human resources provides a tool for consistency within the organization. It is a learning experience for human resources as well as for the team leaders.

DISCUSSION QUESTIONS

- What would make you hesitant to call human resources about a particular performance problem you’re having with an employee?
- Reflecting on the vignette in the video, when do you think human resources should have been called in?
- Should you have confidential discussions with employees which would not be shared with human resources? What problems could this create?
LITIGATION LANDMINES: REVIEW AND DISCUSSION (cont’d)

Transparency

Landmine #6: Inappropriate Electronic Messages

Electronic Messages
- Use as Though Public
- Assume It Can Be Retrieved
- Consider How You Say It
- View as Evidence

Background Notes for the Facilitator:

This is a litigation issue in almost every employment law case now coming through the legal system. Cyber-chat has replaced verbal speech as a method of communication. Plaintiff attorneys accordingly scour electronic-mail records in an effort to discover smoking guns concerning intent in employment-related cases. Recognize that any electronic-mail message may be viewed by a court or put on the 6 o’clock news and, consequently, it is essential that team leaders operate with this recognition.

Many organizations have developed electronic-mail and voice-mail policies which should be studied and understood and followed, for it should be assumed that confidentiality regarding electronic-mail messages may not be fully maintained. They are discoverable in litigation. They are not easy to erase from the system, and it is easy for the recipient to make a file copy of the message and preserve it far beyond what would normally be expected. Additionally, electronic mail messages that are remotely recorded in laptops often do not go through a disposal cycle and remain in large memory storage areas open for discovery in litigation.

Avoid statements that could have potential negative inferences regarding the full range of topics subject to discrimination such as age, race, creed, sex, national origin, color.

Do not write anything that you would be embarrassed having read by your spouse, son, or daughter or put on a large electronic bulletin board in front of a jury in litigation.
Landmine #7: Inconsistent Treatment

**CONSISTENT TREATMENT**
- Be Objective
- Treat Like Situations Alike
- Justify Exceptions

**Background Notes for the Facilitator:**
The definition of “fairness” is arrived at by comparing like situations. If like treatment is to be enforced, the team leader or manager should have an excellent business reason for the difference in treatment. Allowing one employee to arrive late, while disciplining another employee for minor infractions of the attendance and tardy policy will generally not be redeemed by a later contention that one employee was so competent that attendance did not matter. If the rule is to be applied, it should be applied in a uniform manner.

**DISCUSSION QUESTIONS**
- Why is it hard to be absolutely fair and objective in the treatment of the different employees who work for you?
  - As the film points out, each situation is different. An employee who is exceptionally reliable or creative may, in a manager’s mind, compensate in this way for being occasionally late or tardy. Nevertheless, unequal treatment leaves the manager exposed to claims of unfair treatment.
How can you check yourself on this when you are doing performance appraisals or creating an incident report?

- Before you conduct a performance appraisal or file an incident report, stop to assess this employee in light of others on your staff. Pay special attention to critical comments and negative assessments you are making.

**LANDMINE #8: INAPPROPRIATE TALK ABOUT EX-EMPLOYEES**

**WHEN AN EMPLOYEE LEAVES**

- Keep Situation Confidential
- Even with Peers
- Respect Privacy
- Refer Questions to Human Resources

**Background Notes for the Facilitator:**

Managers must be aware that their statements about disciplinary actions to other team members or managers could be introduced in litigation. Personnel matters such as this require confidentiality within the organization. When in doubt, consult with human resources.

**DISCUSSION QUESTIONS**

- Is there anyone with whom you can discuss a termination?
  - In most cases, any conversation about a termination should be restricted to your manager or human resources.

- What if you don’t use the person’s name? Can you discuss the termination by simply describing the situation, but omitting the person’s name?
  - Better not. The description of the situation may be enough to let people know whom you’re talking about. Then you might as well have used the name.
LANDMINE #9: UNCONTROLLED REFERENCES

**ORAL & WRITTEN REFERENCES**

- Follow Company Policy
- You Speak for the Company
- Assume Remarks Are Public
- Consult with Human Resources

Background Notes for the Facilitator:

A favorable reference regarding an employee terminated for performance problems can become a litigation landmine. Meanwhile, a highly derogatory reference can potentially open the door to a defamation action that otherwise would not occur because of privileges which may be attached to such statements within the workplace. In any event, the determination of what should be communicated needs to be channeled through a central source.

References are not limited to formal letters. Verbal statements can have great impact in litigation. A national group of investigators exists who check references for potential litigants. They call managers and use court-certified stenographers to take down verbal statements. They call multiple times and claim a 70% success rate in getting managers to talk. This is a growing problem in employment litigation throughout the nation.

If information is provided that is favorable, while the company knows of unfavorable information that it elects not to include in the favorable report, it may well be liable for negligent misrepresentation.
DISCUSSION QUESTIONS

- What if you write a letter of reference without using company letterhead or your title. Is it OK to write it on a personal basis and not reference the organization?
  - Better not. If it can be demonstrated that you were an employee of the organization at the time the letter was written, it can be just as big a problem as if you had written it on company letterhead.

- What do you say to a faithful employee who asks for references on leaving a job — especially if he or she is leaving because of a downsizing or reorganization and you regret losing the employee?
  - Still no. As hard hearted as it may seem, you must tell the employee the organization simply doesn’t allow references. Check with your human resources department for any possible exceptions.

- Are there any circumstances under which you should write a letter of reference for a terminated employee?
  - No — without a careful review by human resources or legal counsel.

- Is it safer to talk on the phone, but refuse to write a letter?
  - No. Commercial organizations exist specifically to stenographically record reference calls to be later used in litigation.
RECORDING PERFORMANCE PROBLEMS AND MISCONDUCT

Facilitator Directions: Review the background information below. Open a discussion about how your organization likes to have performance problems documented. Use sample forms or actual incident reports with names omitted if you have them.

BACKGROUND NOTES FOR FACILITATOR TO LEAD DISCUSSION

The first time a problem arises, most team leaders or managers will simply make a note on a calendar or slip a piece of paper with the basic information into a file. Once they begin to see a recurrence of the problem, however, they need to record the incident for future reference. Organizations with consistent practices for recording, for example, quality initiatives and performance appraisals, will find the recording of a performance incident to be a normal extension of their current activities. As the facilitator, you will want to assess how natural this process of recording is to your organization. Based on your assessment, you may want to emphasize or de-emphasize exercises that practice recording.

ELEMENTS OF STRONG WRITTEN RECORDS

The best documentation, like a good news story, will include the four “W’s”: Who, What, When and Where.

- **Who**
  Who was the perpetrator of the incident and who else was present as a witness to the incident? This may become important later if there is a need to corroborate testimony where it’s one person’s word against another.

- **What**
  Exactly what happened? The “what” of a report includes all of the facts and may also include your assessment of those facts. It will help if you are aware of which things are facts and which are your assessments or opinions about those facts.

- **When**
  When did the incident occur? If there were smaller events leading up to the main incident you are describing, when did those events occur?

- **Where**
  Where did this incident happen?
EXERCISE

Facilitator Directions: Read the following paragraph to participants in the room. (You can have them read along in their workbook.) Ask participants to write a short report recording what happened.

Scene

You have begun to wonder about the behavior of a woman who works in your department. On two different occasions, you were unable to locate her for about an hour and fifteen minutes in the afternoon. Today she was missing again — this time for about 45 minutes. When she reappeared in her office, you confronted her about her absence. She said she had been meeting with another employee. But you happened to know that this isn’t true as that employee had called in sick to you early this morning.

You ask her if she is having any problems at home. She says, no, that everything is fine.

Facilitator Directions: Ask volunteers to read their documentation. Listen to a few, asking if anything’s missing in their reporting.

EXERCISE

Facilitator Directions: Ask participants to write a report based on an incident in the video that they have just watched. After they are done writing, ask them to share what they have written. Note how thorough the reports are and what additional details might be included.

Using a flip chart or white board, draw a line down the middle of the page, dividing the page into two halves. At the top of one side, write “facts:” at the top of the other write “opinions.” Ask a few more people to read their documentation. List their observations in one of the two columns. Note that both of these kinds of observations are relevant, but that it is important to be able to distinguish between them.
To the facilitator: This section of the training will require customization by you. If your organization has standard procedures for reporting misconduct or performance problems, you will want to incorporate all of part of this policy here. You may want to invite presenters to address the group for this portion of the training. Some possibilities are a director of human resources, an in-house attorney, or outside counsel experienced in employment law issues.

**DISCUSSION**

Managers have many concerns about handling misconduct and performance problems. Their private, internal conversations may include such thoughts as

- "Maybe the employee is just having a rough period."
- "I may create more of a performance problem if I start building a file on this."
- "He / she is really trying."
- "Maybe I’ll get involved in a grievance or even a lawsuit."

These internal conversations can prevent managers and team leaders from reporting an incident or a problematic situation that is building to a crescendo. The best way to counter these kinds of concerns may be to offer another kind of internal conversation, which can be equally compelling: "I should have done something."

Most people can remember a time when they regretted not taking action. Invite participants to consider or even to share stories about times when they regretted not taking action.
NOTES:


CONCLUSION

In a culture as litigious as ours, the likelihood of a team leader or manager becoming involved in an employment law claim is higher than it has ever been. The best way to minimize the likelihood of embarrassment and loss to the company and the manager or team leader is to follow the procedures we’ve outlined here.

Facilitator Directions: Display the Goals transparency, and review with participants.
**BIOGRAPHICAL INFORMATION**

**GARRY MATHIASON**

Mr. Mathiason is a senior partner (shareholder) in the national law firm of Littler, Mendelson, Fastiff, Tichy & Mathiason. The firm is the largest in the United States specializing exclusively in representing management in employment and labor relations law. It has over 300 employment law attorneys and 26 offices throughout the country.

Mr. Mathiason is a graduate of the Stanford Law School and the Northwestern University School of Speech. He served as an editor on the Stanford Law Review. He commenced his career as a litigation attorney with the National Labor Relations Board.

During Mr. Mathiason’s twenty-five years with the Littler firm, he has concentrated on representing employers in discrimination litigation, wrongful discharge, unfair labor practice and representation proceedings. This litigation includes claims of sexual harassment, age discrimination, breach of the covenant of good faith and fair dealing, privacy violations and disability discrimination. In the course of his practice, Mr. Mathiason routinely counsels employers on preventive employment law policies and trends. Through his law firm, he has authored/edited 16 books on employment law and written over 50 articles on how employers can reduce their legal liabilities.

In 1994, Mr. Mathiason was co-chair of the American Bar Association’s Video Law Review program on “Conflict Resolution in the Workplace.” He is the former chair of the Labor Law Division of the American Bar Association’s Forum Committee on the Construction Industry and serves as a frequent lecturer and writer for the American Law Institute, Practicing Law Institute, Federal Publication, and American Management Associations and several other state and national organizations.

Mr. Mathiason is the founder of the firm’s prevention law products company. This organization markets “Winning Through Prevention,” a game used by managers to learn key employment law lessons. Mr. Mathiason routinely conducts preventive employment law programs for Fortune 500 companies.

**WENDY L. TICE-WALLNER**

Wendy L. Tice-Wallner is a shareholder of Littler, Mendelson, Fastiff, Tichy & Mathiason, resident in the San Francisco office. Ms. Tice-Wallner’s practice focuses primarily on equal employment opportunity law and wrongful termination litigation. She has advised or represented clients in various areas of employment law including wrongful termination, sexual harassment, discrimination, employee privacy and preventative measures such as drug and alcohol policies. Ms. Tice-Wallner has briefed and argued several cases before the California courts of appeal, including precedential cases interpreting the state constitutional right to privacy and the right of California employees to expanded remedies under the California Unemployment Insurance Code.

She has received the highest available rating by Martindale-Hubbell for legal ability and professional ethics and conduct.

Ms. Tice-Wallner has spoken extensively on wrongful termination, equal employment opportunity law and the law of individual rights in the workplace to professional associations, trade groups and attorney organizations. She has been a contributing editor to publications on age discrimination for the Practicing Law Institute and has written on numerous workplace legal issues, including AIDS, alcohol and drugs, privacy and preventing and defending of wrongful termination and employment discrimination suits in state and federal courts. Ms. Tice-Wallner has been recognized by the National Law Journal as one of the nation’s “Best Litigators in Employment Law.”

Ms. Tice-Wallner has spoken extensively on wrongful termination, equal employment opportunity law and the law of individual rights in the workplace to professional associations, trade groups and attorney organizations. She has been a contributing editor to publications on age discrimination for the Practicing Law Institute and has written on numerous workplace legal issues, including AIDS, alcohol and drugs, privacy and preventing and defending of wrongful termination and employment discrimination suits in state and federal courts. Ms. Tice-Wallner has been recognized by the National Law Journal as one of the nation’s “Best Litigators in Employment Law.”

Ms. Tice-Wallner has served as appellate counsel in employment discrimination cases before the United States Courts of Appeal for the Second, Third and Ninth Circuits and has litigated before courts in Alaska, Washington, Oregon, Nevada, New York and Utah.

After foreign study at the London School of Economics and Political Science, Ms. Tice-Wallner received her undergraduate B.A. degree from Tulane University in New Orleans, Louisiana, and her law degree, magna cum laude, from the Villanova University School of Law in Pennsylvania. She served on the editorial board of the Villanova Law Review and is enrolled in the Phi Beta Kappa Honor Society. Ms. Tice-Wallner has been a member of the California Bar since 1979 and is an active member of the Labor and Employment Law and Litigation Sections of the American Bar Association.
BIOGRAPHICAL INFORMATION (cont’d)

**JAFFE D. DICKERSON**

Jaffe D. Dickerson is the managing shareholder (partner) of the Los Angeles office of Littler Mendelson, Fastiff, Tichy & Mathiason. Mr. Dickerson joined the firm in 1988 after 11 successful years as University Counsel for the California State University (CSU). A graduate of the College of the Holy Cross in Worcester, Massachusetts, and Boston College Law School, Mr. Dickerson is a member of the State Bar of California, including its labor law and public law sections, the Beverly Hills Bar Association, the National Bar Association, the American Bar Association and the National Association of College and University Attorneys. Mr. Dickerson served as member, Chair and Advisor to the Public Law section from 1989 to 1993. Mr. Dickerson currently serves on the California State Bar Labor and Employment Law Executive Committee, and recently as Secretary of the Labor Law Section of the National Bar Association.

A frequent author and lecturer, Mr. Dickerson has made numerous presentations on specialized areas of labor, employment and education law, including collective bargaining, workplace violence prevention, alternative dispute resolution, drugs in the workplace, employee personnel evaluation, sexual harassment, employment discrimination, wrongful termination and the Americans with Disabilities Act of 1990. Mr. Dickerson regularly represents public education employers and other public agencies before the California State Personnel Board, the Office of Administrative Hearings, the Public Employment Relations Board and the California courts. He currently serves as general counsel for three educational entities.

Mr. Dickerson’s community activities have included pro bono services for the Constitutional Rights Foundation and its “Lawyer in the Classroom” program, the Corporate Board of United Way of Greater Los Angeles, and the California State Bar. Mr. Dickerson also teaches law-related courses for UCLA Extension and California State, Los Angeles Continuing Education.

**NANCY E. PRITIKIN**

Nancy E. Pritikin is a shareholder of Littler, Mendelson, Fastiff, Tichy & Mathiason, resident in the San Francisco office. Ms. Pritikin has extensive courtroom experience and specializes in employment discrimination, wrongful termination and sexual harassment matters. Her litigation experience includes high-profile cases and dealing with the media. Ms. Pritikin has represented employers in both state and federal courts in lawsuits involving issues such as age discrimination, sexual harassment, sex discrimination, investigation of employee conduct and wrongful termination. Her clients include financial institutions, airlines, real estate brokerage firms, food service organization and construction material companies.

Ms. Pritikin has counseled employers in aspects of the employment relationship, including avoidance of litigation, disability issues, drug testing, background investigations, sexual harassment investigations, reductions in force and the development of personnel policies and procedures.

Ms. Pritikin received her law degree with honors from the University of Florida College of Law in 1978. She is admitted to practice in California, Florida, and Georgia. Ms. Pritikin’s background includes work as an attorney for the National Labor Relations Board (Region 10) and the Federal Labor Relations Authority. Prior to joining Littler Mendelson, she was a partner in the law firm of Lilllick & Charles in San Francisco, specializing in labor and employment law.
“On three prior occasions, I verbally brought to your attention your failure to complete a work assignment. This occurred on Monday, January 14, and involved the XYZ account; February 18, involving the Sally Larson project; and again on February 24, concerning the McClain order. In each instance, you had miscalculated the number of units necessary for manufacturing and failed to include the proper account codes. Following each of these situations, we discussed the problem and you agreed that corrective action would be taken. Today, a fourth incident occurred on the Comdex account. You failed to include shipping costs or the proper coding. Accordingly, I have no choice but to provide you with this written warning that such conduct is not acceptable, and unless it is corrected immediately, it could result in disciplinary action up to and including termination.”
GOALS

1. To make every organization aware of the biggest mistakes that increase the risk of employment related claims.
2. To increase the ability of managers, top leaders, and supervisors to recognize the sometimes subtle parts of their jobs that can result in costly and embarrassing claims.
3. To show how each potential mistake is an opportunity to implement a positive management practice.
4. To show how to record — and in some cases how not to record — incidents of misconduct or poor performance.
5. To understand how human resources can be an ally in solving certain management problems.

Landmine #1: Failure to Document

Performance Documentation

- Do It Regularly
- Be Objective
- Give Examples
- Review with Employee
Landmine #2: Failure to Train

- Provide Opportunities
- Confirm Training Occurred
- Evaluate Training
- Review with Employee

Landmine #3: Failure to Keep Evidence

**Evidence**

- Recognize It as Evidence
- Make a Copy
- Share with Employee
- Use as a Teaching Tool
Landmine #5: Failure to Consult Human Resources

**Human Resources**

- View as an Ally
- Consult Early On
- Use Their Expertise
Landmine #6: Inappropriate Electronic-mail
- Use as Though Public
- Assume It Can Be Retrieved
- Consider How You Say It
- View as Evidence

Landmine #7: Inconsistent Treatment
- Be Objective
- Treat Like Situations Alike
- Justify Exceptions
Landmine #9: Uncontrolled Statements of Reference

**Oral & Written References**

- Follow Company Policy
- You Speak for the Company
- Assume Remarks Are Public
- Consult with Human Resources