

Safety: The Universal Language? **Literacy and Language Challenges in the Workplace**

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INTRODUCTION

As the American “melting pot” becomes increasingly diversified, employers face inevitable issues related to language in the workplace. Employers can no longer assume that qualified workers speak or write English. Employers who hire non-English speaking workers are obligated to ensure that *all* employees, regardless of their linguistic background, receive *and comprehend* safety-related training. For employers whose supervisors only speak English, OSHA’s requirements can present unique challenges. This article outlines OSHA’s policies with respect to training non-English speaking employees, discusses OSHA’s recent emphasis program on ensuring employees are provided training in their native language, analyzes potential discrimination issues that may arise by limiting a safety training program to English only, and offers recommendations for employers in assuring that all employees are adequately trained to work safely.

OSHA’S TRAINING REQUIREMENTS

Numerous OSHA standards, from Lockout/Tagout to forklift operation, and bloodborne pathogens to hazard communication, require employers to train or instruct employees in some

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way. OSHA generally treats its training requirements as “performance-based,” meaning that OSHA defers to each individual employer to fashion the most effective manner by which to accomplish the goal of the standard. For that reason, none of OSHA’s training standards require employers to use particular documents, teaching methods, or language to train employees. Instead, OSHA requires employees to present information in a manner that employees are capable of understanding.

For example, if an employee is not literate, the employer does not satisfy OSHA training requirements merely by telling the employee to read training materials or safety programs. Likewise, if an employee does not speak, read or understand English, training must be provided in a language the employee understands.

OSHA has tasked each of its inspectors with the duty to determine whether the training provided by an employer satisfies the intent of the Standard -- *i.e.* whether employees receiving the training have actually understood that training. Obviously, this is a highly subjective exercise. One way that an OSHA inspector will make this evaluation is to interview employees. These interviews may or may not take place in the presence of a management representative. During the interviews, OSHA inspectors may attempt to hold employees to high standards of knowledge, asking employees fact-specific questions regarding hazards, signs and symptoms of illness or injury, or specifics as to an employer’s program. In some cases, the OSHA inspector may use an employee’s inability to memorize specific facts to claim that training either did not occur or was too technical or complicated for an employee to understand.

Another issue involving employee interviews is whether the employee speaks English. Many OSHA inspectors are bilingual, particularly in Spanish, and those who are not may request another employee to act as an interpreter to translate during an employee interview. Translation issues can present potential bias problems during employee interviews, whether the interpreter is another employee, a management representative, or an OSHA official. For this reason, employers must ensure that employees understand their right to have a management representative present during the interview. Employers may also consider requesting that a neutral third-party act as interpreter during the employee interview, particularly if the interview is a critical one and accuracy is an important consideration.

Another way OSHA inspectors will evaluate the employer’s compliance with safety training standards is by determining how the employer communicates other workplace rules and policies to employees, particularly job instructions -- *i.e.* other non-safety policies or procedures. If these other job instructions are given in Spanish, for example, OSHA will likely view English-only safety training as insufficient.

Ultimately, the OSHA inspector will determine, based on a review of all of the gathered facts, whether a “reasonable person would conclude” that the employer has not conveyed training to employees in a manner they are capable of understanding. For example, in one case involving deficient safety training, a supervisor described the company’s training program as follows: “Basically, in the yard with the men making sure they got their vests, their shoring, their boards before they leave for the job. They are directed to not get in holes over four feet deep, when it’s unsafe to use the proper shoring.” *Sec. of Labor v. J. Mess Plumbing Co., Inc.*, 21 O.S.H. Cas. (BNA) 1100, O.S.H.R.C. Docket No. 04-0197 (A.L.J. Oct. 18, 2004). In that case,

most of the company's employees had immigrated from Bosnia and Albania and could not speak English. Where an employee could not speak English, another co-worker would translate the materials for him. The employer also did not maintain any documentary evidence of a training program. An Administrative Law Judge upheld OSHA's citation under a construction industry training standard, finding that the employer "hired workers who are not fluent in English, and then failed to ensure that they understood the minimal training they received." *Id.*

OSHA has also increased the potential liability and penalties that may be imposed for training violations. For instance, recent case law from the Occupational Safety and Health Review Commission validated OSHA's ability to issue citations under its training standards on a per-employee basis, meaning that OSHA can issue a separate citation and penalty **for each and every employee** who did not understand his or her required safety training. In *Sec. of Labor v. E. Smalis Painting Co.*, 22 O.S.H. Cas. (BNA) 1553, O.S.H.R.C. Docket No. 94-1979 (Apr. 11, 2009), OSHA issued a total of **seventy-one Willful citations** to Smalis for failure to train seventy-one employees as required in OSHA's lead in construction standard, 29 C.F.R. § 1926.62(l)(1)(ii). The Review Commission upheld **twenty-seven** of those Willful citations, **one for each of the twenty-seven employees** who had been exposed to lead at or above the action level and who had not received the training, and imposed a penalty of over \$1,000,000 in total.

The Review Commission's decision in *Smalis* was based on its finding that training requirement under OSHA's asbestos standard "imposes a duty that runs to each employee." While the *Smalis* decision is based on the employer's failure to train altogether, the Review Commission's reasoning may well be applied to situations involving the adequacy of an employer's training program as it relates to non-English speaking employees.

OSHA'S EMPHASIS ON TRAINING PRESENTED IN A MANNER EMPLOYEES CAN UNDERSTAND

On April 28, 2010, OSHA issued a policy statement reiterating its position that employee training "must be presented in a manner that employees can understand" <https://www.osha.gov/dep/standards-policy-statement-memo-04-28-10.html>. In the policy statement, OSHA states that "an employer must instruct its employees using both a language and vocabulary that the employees can understand." *Id.* Accordingly, OSHA believes that employers must take into account employees' language capabilities and educational levels, and adjust their training programs accordingly. For instance, if an employer has a workforce who speaks predominantly Spanish or Polish, OSHA will require the employer to provide training in those languages. Further, if an employer has an uneducated and/or illiterate workforce, OSHA will expect the employer to provide the training in very simple terms and use pictograms or visual training materials, as opposed to written materials.

THE ISSUES OF ENGLISH-ONLY EMPLOYMENT POLICIES FOR SAFETY-SENSITIVE AREAS

Employers may be tempted to avoid OSHA's onerous and subjective training policies by employing only English-speaking workers. Employers must proceed with extreme caution in fashioning these types of policies so as not to run afoul of federal and state anti-discrimination laws.

Employers who fashion “English-only” policies prohibiting employees from speaking languages other than English at all times in the workplace are presumed to be discriminating on the basis of an employee’s national origin. The federal regulations implementing Title VII of the Civil Rights Act call such policies “a burdensome term and condition of an employment,” and provide that prohibiting non-English languages in the workplace at all times “disadvantages an individual’s employment opportunities on the basis of national origin” and creates “an atmosphere of inferiority, isolation and intimidation based on national origin.” 29 C.F.R. § 1606.7(a).

These same regulations do recognize, however, that when applied only at certain times, an English-only policy in the workplace may be appropriate and non-discriminatory. To avoid liability for discrimination, the employer must establish that the rule is justified by a “business necessity.” 29 C.F.R. § 1606.7(b). In its Compliance Manual, the Equal Employment Opportunity Commission (EEOC) has recognized that the need for the safe operation of an employer’s business is considered a “business necessity” that can justify an English-only rule that is tailored to specific circumstances. The EEOC also recognizes that the need for supervisors who only speak English to communicate with employees is also a “business necessity” that can justify an appropriately narrow English-only policy.

The EEOC cites the following scenario as an appropriate use of an English-only rule to address safety concerns:

XYZ Petroleum Corp. operates an oil refinery and has a rule requiring all employees to speak only English during an emergency. The rule also requires that employees speak in English while performing job duties in laboratories and processing areas where there is the danger of fire or explosion. The rule does not apply to casual conversations between employees in the laboratory or processing areas when they are *not* performing a job duty. The English-only rule does not violate Title VII because it is narrowly tailored to safety requirements.

EEOC Compliance Manual, Section 13: National Origin Discrimination (Dec. 2, 2002), <http://www.eeoc.gov/policy/docs/national-origin.html>. According to this example, an employer would not run afoul of federal non-discrimination laws by requiring employees to speak only English while performing specific job functions, during emergency situations, or while working in particular areas of a facility that implicate workplace safety issues.

Employers must also take care in making hiring decisions based on a candidate’s ability to speak English. A narrowly-tailored and appropriately used English-only policy is relevant to hiring decisions. If, for example, an employer has an English-only policy like XYZ Corporation’s in the above example, it would need to consider that policy in hiring employees to work in the laboratories and processing areas. Candidates who speak no English would not be able to adhere to the policy and would therefore not be qualified for hire into a position that includes work in those areas. Similarly, even in the absence of an English-only policy, an

employer does not violate federal anti-discrimination laws by rejecting a non-English speaking candidate whose inability to speak or understand English would materially affect his or her ability to perform job duties. If, for example, a candidate's job duties would require forklift operation, and the candidate could not read or understand warning signs, operating manuals, or safety placards required for the safe operation of a forklift, then the employer would have a good faith, non-discriminatory reason for rejecting that candidate.

CONCLUSIONS AND RECOMMENDATIONS

It is recommended that all employers who employ workers with limited or no ability to speak or understand English carefully evaluate their safety training programs to ensure those employees have received and understood required safety training, including the following:

- Review the means by which work instructions are communicated to employees. If work instructions are communicated in languages other than English, consider providing safety training in those languages as well.
- Incorporate practical “tests” into required safety training, allowing employees to demonstrate their understanding (or lack thereof) of core concepts.
- Consider incorporating visual, as opposed to written, materials in the safety training program to account for illiterate or lesser-educated individuals.
- Maintain meticulous documentation of employee training, including any practical tests included in training. Include a signed statement from each employee that he/she has received *and understood* specific safety training provided.
- In the event of an OSHA inspection, advise all employees of their right to have a management representative present during any interviews. Designate a qualified and reliable person (whether management or non-management) to act as the “go to” interpreter to facilitate interviews with non-English speaking employees.
- Evaluate employee duties on a job-by-job basis to determine whether critical job- or safety-related functions require fluency in English.

NOTE: If you wish to receive complimentary copies of this article and future articles on OSHA and employment law related topics, please contact Mark A. Lies, II at mlies@sevfarth.com to be added to the address list.