Requiring English *Proficiency* for Health, Safety and Environmental Procedures
By Philip M. Landry C.S.P.

- Overcoming Communication Errors
- Harmonizing the Civil Rights Act with the Occupational Safety and Health [OSH] Act
- Avoiding Litigation in training employees who have difficulty understanding English
- Dealing with English proficiency issues

The communication dilemma

Written and spoken words are one invention that we humans like to use as proof of supremacy in differentiating ourselves from the lower evolutionary creatures that roam our planet. While many other species use specific sounds and intonations to communicate danger or other fairly basic instinctive and communal thoughts, we have devised many complicated sets of scratchings and symbols that translate into sound in order to communicate our lofty and complex world. But the systems are not without flaws; just trying to get another human to understand the location of your office can be a half-hour, two-diagram event that gets them lost for a day! It's these complex little flaws that are the basis of most communication errors.

As receivers of messages, we interpret, judge, infer, and bumble our way into misunderstanding the intent of the messages daily. Even worse, the sender of the message uses the wrong word(s) or order of words to send his or her message so it's doomed from the start! Bottom line, communication in one language is a very difficult task; but if done well, it can help to unite us around common goals, ideals and thoughts.

When considering this as a health and safety professional, the very complex legal text of Title VII of the 1964 Civil Rights Act and all the specific language that is the OSH Act and codified regulations of 29 Code of Federal Regulations [CFR] 1910 obscures our understanding of the requirements of health and safety training. No wonder we as health and safety professionals may be confused about how training must be imparted to employees so they understand how to work safely.

While there is definitely more than one point of view on this subject, I will attempt to provide what I consider the most efficient and beneficial one for business and Health, Safety and the Environment [HSE] efforts. I will also take a quick look at the basic parts of this complex issue to clarify the simple logic behind my thought process. As a standard disclaimer I want to caution you that while this article has been peer-reviewed by professionals in the legal and human resources field, it obviously does not excuse you or your company from standard legal due-diligence. I advise you to check your company's various policies often for changes.

Responsibilities designated by the OSH Act

The intent of the OSH Act and the codified regulations of 29 CFR 1910 is to specify what employers must do to keep employees safe in the workplace. It is hugely specific and complex while at the same time being an elegantly simple prescription that we must teach our employees to protect them from themselves, faulty equipment or processes, and other workers. Employers are responsible for instructing employees about these regulations and explaining how these rules specifically affect them in the workplace.

The key part when considering this is to understand what "trained" or "instructed" means in the eye of the Occupational Safety and Health Administration [OSHA]. According to the policy statement sent out

by Edwin G. Foulke Jr., then Assistant secretary of labor for OSHA, on April 17, 2007: "It is the Agency's position that, regardless of the precise regulatory language, the terms "train" and "instruct," as well as other synonyms, mean to present information in a manner that employees receiving it are capable of understanding." It is a performance-based policy which gives no prescriptive details in order to comply with the intent of the administration. However, the administration does go on in later years to specify that training be provided in other languages or in appropriate reading levels if your audience is non-English speaking or limited in reading skills. So the basic stance of OSHA is that if you have people who are not at least proficient in English, then you are responsible for training them in languages that they can understand. This may also affect other important areas such as signage and standard operating procedures.

OSH Act and the Civil Rights Act of 1964

The intent of the Civil Rights Act established in 1964 was to prevent discrimination against persons solely due to their race, color, religion, sex, and national origin. The Act has been enhanced in some states to include other categories, perhaps originally missed. However, it is fair to say that the intent was to make it illegal to prevent access to services, employment and the pursuit of happiness due to characteristics which people inherited genetically, socially, from parents or "God." It was a huge step in helping to change our country's attitudes toward immigrant populations within America while making us a better nation.

The area we are specifically concerned with today when we consider communication, health, and safety of employees is that of national origin. Because a person's national origin may define the way they look and how they speak, the Act intended to prevent discrimination based on language, accent, looks and other traits common to those actively being discriminated against. Like many other well-intentioned laws, there are always interpretations and adjustments considered as the laws become exposed to the vast combination of intricacies that evolve. The national origin part of this act is no exception. It has been refined, redefined or interpreted to include that "Generally, a fluency requirement is permissible only if required for the effective performance of the position for which it is imposed. Because the degree of fluency that may be lawfully required varies from one position to the next, employers should avoid fluency requirements that apply uniformly to a broad range of dissimilar positions."[1] So this Equal Employment Opportunity Commission [EEOC] guidance of the Civil Rights Act suggests that a business avoid "blanket" fluency requirements when making hiring decisions.

Fluency and Proficiency

Notice that the guidance speaks about fluency, not proficiency; and the two terms are vastly different. This EEOC guidance can and has been wrongly extrapolated to mean that it is unlawful to require English proficiency by some well-intentioned but perhaps politically skewed or legally timid Human Resource [HR] Managers or Directors. To be clear, requiring English proficiency is not the same as requiring all employees to be fluent in or speak only English at work. So the take away from this is that the Civil Rights Act and subsequent EEOC guidance suggests avoiding blanket *fluency* requirements which may be taken as discriminatory for possible candidates of different national origins. The law and guidance, however, does not say that blanket *proficiency* requirements are to be avoided.

Blending OSH and Civil Rights

Bringing the two sets of regulations and practices together so that they work in harmony with each other is really a matter of sequence, policy and practice when considering Health and Safety training

1. EEOC Compliance Manual 915.003 Dec. 2, 2002 Section V. Language Issues

implications. Like all things Health and Safety however, you can't do it alone. From a sequencing standpoint, a company's Management, Human Resources and Legal Departments first need to implement job descriptions and requirements which state that spoken and read English *proficiency* is required for all positions.

Extrapolating for a second, it can be further stated that the predominant language of the country of location should be the "language of proficiency;" in other words "when in Rome do as the Romans." Returning to the U.S. now; since you are not requiring English fluency, this will not be tested as a violation of civil rights and it can certainly be proven that a basic understanding of the English language is required for speaking with coworkers and reading all safety signs, directions and standard operating procedures. This is true even for manufacturing positions that require little reading/writing and customer contact. It certainly will help encourage potential new candidates to consider learning our language before they come to work here or shortly thereafter.

Determining and encouraging proficiency

With this requirement on the job descriptions, which is fully justified and has only honorable intentions, the next step is to ensure that a measurement tool is equally and evenly used to measure this proficiency. The best solution here in my opinion, is to use third-party assessment tools which can be self-administered. While there are many specifics about how, when, and where this is done, a policy can be administered fairly simply and cost effectively.

The following step then becomes working with the current population of employees who may or may not be proficient in English due to past policy vacuum or past hiring desperation. The first step is testing of all employees and the second is English proficiency training to bring the skills of the "grandfathered" (but not proficient) employees up to proficient levels. After all, no company wants to retroactively penalize an employee who was perhaps hired without the best scrutiny, but met the hiring standards of the past. There are many ways to implement proficiency training and there are many grants and various agencies that can help with this.

The last sequence of the process is for health and safety and operations folk to ensure that all signs, training and standard operating procedures are clearly communicated at a fairly simple English comprehension level, including pictograms when possible. Training will need to include comprehension testing to reinforce and ensure understanding of topics, as is best practice anyway.

Inclusion efforts actually creating discrimination

As an aside to this conversation, one could argue that if a company made an effort to add Spanish directions and signage to all of their safety process and training manuals, this action could be interpreted as discrimination. They would be discriminating against other future job applicants who might not be proficient in either English or Spanish, such as those of various African, Indian or Asian dissents. I would strongly advise against such signage or translational efforts, as you may be creating more cause for discrimination charges than preventing such charges. In addition, you certainly are not doing anything efficient for the bottom line as these services and multilingual devices are very time consuming and expensive. Lastly, these efforts prevent our new immigrants from fully assimilating into the U.S. workforce.

Effective Communication

As our systems and machines become more complicated, and our workforce becomes more diverse, effective communication will continue to be a huge challenge for all companies and people. Over 55 million homes in the U.S. (17.5%) now use another language besides English at home according to a U.S. Census report from 2007. Many executives who work for multinational companies chose to learn the home office language to stay informed, connected and show initiative in their careers. Other multinational firms use Anglo English/American as a default language for business to better understand the majority of people and unite teams.

Even our Hazard Communication standard has attempted to make communication more clear and become more harmonized to the world by incorporating common pictograms and labeling formats found in G.H.S. One thing I think we can all agree upon is that a commonly understood communication system is very important for Health and Safety. We all want to make sure that employees work safely and are able to maintain a healthy life with their families and friends. After all, our employees are essential to helping our companies prosper.

We can't let current political trends or lack of understanding create a vacuum of leadership in this regard, at least in the United States. Companies that exist today with no policy on minimum language proficiency requirement leave themselves wide open for violations of both the OSHA law and civil rights discrimination law. Taking a "we are the world" approach by adding in many language types and sign translations will add cost, divide instead of unite workers, and open firms up to discrimination battles instead of focusing on safety. Let's all unite I say.