Risk Management:

Is Your Club Compliant or Complacent?

The top four legal issues every club needs to consider in 2006.

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As we usher in a new year, it is important to recognize the pressing need for all fitness facilities to remain compliant with established industry standards. Failure to achieve such compliance can expose you and/or your club to costly legal liability.

With so much on their plates each day, it is understandable that many fitness managers fall into a state of complacency, failing to take stock of potential legal risks. This article is intended to be a reminder that a fitness facility is a business like any other and must be operated with the utmost scrutiny to detail. Take a moment to examine whether your facility is in compliance with four issues that pose potential risk: the Americans with Disabilities Act; staff certification audits; emergency procedures; and protective documentation.

Although it is beyond the scope of this article to make explicit legal recommendations, the suggestions herein may help you uncover areas of risk in your club that you can discuss in detail with appropriate legal representation.

The Americans with Disabilities Act

Did you know that 1 in every 5 Americans has some sort of disability that limits his or her physical activity (Wallenfels 2005)? Unfortunately, the disabled population is a major market that the fitness industry too often overlooks. Yet individuals with physical limitations need guided fitness instruction and overall health improvements more than most.

Congress enacted the Americans with Disabilities Act (ADA) in 1990 as an incentive for businesses to embrace this population. Federal law requires companies, including fitness facilities, to take active steps to improve access and ensure equal opportunity for the disabled (the International Health, Racquet & Sportsclub Association [IHRSA 2005a]).

Defining Reasonable Accommodation

The primary goal of the ADA is to ensure that businesses do what is considered "reasonable" for the parties involved. In other words, health clubs are not expected to tear down walls and perform major renovations to accommodate disabled members. Such drastic steps could be considered unreasonable.

Instead, ADA compliance is readily achieved by making reasonable accommodations in the daily operations of your facility to assist people with disabilities (ADA 2005). Such accommodations might involve making minor adjustments in facility procedures or providing extra assistance for challenged members. For example, having a trainer escort a member who uses a walker to his or her vehicle is a reasonable accommodation, as is allowing a visually impaired member to bring in a Seeing Eye® dog.

On the other hand, allowing someone in a motorized scooter to drive erratically throughout the weight room and potentially hit other members would be an unreasonable accommodation. Put simply, a fitness facility is not required to make fundamental alterations to its standard operating procedures or to do anything that might compromise the safety of others (ADA 2005).

Removing Barriers

Complying with ADA policies is a simple matter when you are constructing a new building or renovating an old one. However, how does one comply when faced with an old, existing structure with limited space and dated fixtures? Many aging buildings have architectural features that are barriers for disabled people. Examples include curbs, steps, narrow doorways, crowded aisles, high-pile carpeting, and sink or drinking fountain placement that hinders wheelchair access. Health clubs in such buildings do need to consider these factors and make the necessary changes to achieve ADA compliance.

Your facility can comply with this duty by removing barriers where it is readily achievable to do so (ADA 2005). If a barrier can be eliminated with little expense, then you must remove it. If eliminating the barrier would be financially harmful to your facility, then you are not under a duty to make the improvement.

For example, say the equipment in your weight room is placed too closely together for disabled access. In this case, you should rearrange any pieces of equipment that are not attached to the floor or wall, in order to comply with the ADA's **clear floor space regulation** (IHRSA 2005a). In general, there should be a minimum of 30 inches by 48 inches of clear floor and ground space around each piece of equipment.

However, if compliance would call for the removal of physical barriers and require, for example, tearing out doorways, reframing, drywalling and painting, the cost in money, time, and disturbance to your normal club operations would likely be overly burdensome. In that case, you would be required only to rearrange the equipment to *the extent possible for your particular club's available space.* You would *not* be under any obligation to reduce the amount of equipment in the club, since such a requirement would be financially detrimental. Nevertheless, over time, your financial priorities to your club's overall maintenance might require such renovations.

In defining what is readily achievable, the ADA established the following priority system (ADA 2005):

- The primary goal is to remove barriers for current members of your facility; this amounts to widening spaces between aisles or repairing loose flooring.
- The next level is to ensure adequate entry-level access for new clientele, which includes having open reception areas and employees who monitor doorways and are readily available should someone need immediate assistance upon entering.
- The final priority involves ensuring that locker room and lavatory facilities are readily accessible and compliant with ADA specifications. This is considered part of your club's regular maintenance and will often require some expense.

Keep in mind that what is considered readily achievable for one club may not be for another. The definition of "readily achievable" will vary case by case, depending on your club's financial ability and risk factors (ADA 2005). Remember, too, that barriers do not have to be removed all at once. They can be removed over time, as resources become available. That said, facility managers should reassess the barrier situation on a yearly basis, since failure to comply with ADA provisions can result in a lawsuit. For a look at how your facility can defray some of the cost of space improvements, see "ADA Compliance Costs and Tax Incentives" on the next page.

Avoiding ADA Litigation

Lawsuits involving ADA violations can take various forms, but there are two general classifications: federal lawsuits and state lawsuits. The ADA gives people with disabilities the right to sue in federal court to obtain an order to stop a specific violation (ADA 2005). The outcome of this type of lawsuit is compliance within a certain time period and payment of the disabled party's

legal fees. Monetary damages are not awarded.

State lawsuits are filed by individuals under the guise of antidiscrimination laws, rather than as a direct violation of the ADA. The outcome of this type of case is monetary damages, including payment for the disabled party's pain, suffering and litigation costs.

If your facility is facing a lawsuit, seek immediate legal assistance. However, remember that the best defense is a good offense. Learn about the ADA. During monthly staff meetings, educate personnel on the need for compliance. Recognize the benefits of tapping into the disabled population as a means of generating revenue for your club. Most important, take ongoing actions to achieve full compliance with the ADA so you can inspire people from all walks of life to attain the benefits of fitness.

Staff Certification Audits

In addition to keeping your facility legally compliant, you must ensure that your staff are current with their fitness certifications. Failure to do so makes you and your facility vulnerable to allegations of what is known as **misrepresentation.**

Misrepresentation occurs when an individual makes a false claim as to his or her experience, qualifications, certifications or degrees (Wilson 1997). For example, many people bill themselves as an "exercise physiologist" or "fitness specialist" when, in fact, they are not. The truth is that you need to have earned a master's degree in exercise physiology to bill yourself as an exercise physiologist. Including misinformation about your fitness staff on your facility's advertisements potentiates legal liability.

Preventing Lapsed Certifications

Misrepresentation need not be intentional. Most violations result from careless oversights (i.e., negligence) and administrative complacency. Fitness managers and their staff have a shared responsibility to make sure all certifications are in good standing. If a client is injured, any lawsuit related to that injury will be factually scrutinized at the moment in time the injury occurred.

For example, if a personal fitness trainer's certification had expired at the time of the client's injury, then a case for misrepresentation can be made, even if the certification expired that very day. If your club posts a list of all your personal trainers and group fitness instructors, along with their respective qualifications, then any lapsed certification makes that list misleading. Moreover, every contract with the employee in question will be considered to have been breached, owing to misrepresentation.

False statements of fact are also actionable under breach-of-warranty claims. For instance, say that a health club advertises itself as hiring "only degreed and certified exercise specialists." Not all certifications or degrees would qualify an employee to be an exercise specialist. Such language is misleading and could constitute a breach of warranty/contract. Even if you have a signed waiver, your facility is still legally vulnerable if a member files a breach-of-warranty/contract lawsuit.

Preventing Lawsuits

Although responsibility for minimizing the threat of misrepresentation rests with the entire fitness staff, there are proactive steps that every facility manager should take to avoid such a lawsuit:

- Keep careful track of each employee's certification expiration date, and ensure that certifications are renewed in a timely manner.
- Use staff meetings to address the legal issues surrounding certifications.
- Distribute copies of professional literature on legal issues, such as misrepresentation, to increase staff awareness.
- Offer incentives to staff to keep their certifications current. Fine any employee who collects fees from members during periods of invalid certification.

Automated External Defibrillator Use

The diversity of populations using fitness centers is creating a slew of potential legalities in the realm of emergency care. Consequently, you need to be aware of the legal issues surrounding the administration of emergency care in a health club setting. One of the more controversial issues to arise recently is the use

ADA Compliance Costs and Tax Incentives

The U.S. Congress offers two tax incentives to encourage businesses to comply with the provisions of the Americans with Disabilities Act (ADA 2005). The first incentive is the Disabled Access Credit. This provision is available only to small businesses with 30 or fewer employees or with revenues of less than $1,000,000 annually. This provision is appropriate for those of you who own and operate private fitness centers.

The second incentive falls under Section 190 of the IRS tax code. This provision allows businesses of *any size* to take a maximum $15,000 annual deduction to cover the costs of removing physical barriers, which will inevitably involve some construction. This deduction is available to all fitness facilities.

Managing Risk When Using an AED

The American Heart Association encourages the use of defibrillators, provided that stringent procedures are met (AHA 2002). Here is a look at what should be included in your facility emergency plan if you provide and use an AED:

- **Maintain written emergency policies and procedures, and practice them at least every 3 months.**
- **Designate staff members trained in CPR to function as first responders in your fitness facility during all hours of operation.**
- **Train your staff to recognize the signs and symptoms of sudden cardiac arrest.**
- **Ensure that staff members are periodically trained in how to use the AED, and be sure the device is part of the facility's equipment maintenance plan.**
- **Have a medical physician or liaison review your emergency plan.**

In an emergency:

- **Contact 911, and assign staff to meet the emergency response team at the entrance to your facility so that they can be promptly guided to the victim.**
- **Administer CPR.**
- **Attach/operate the AED according to the detailed descriptions supplied by the manufacturer.**
- **Never use an AED on infants or children under the age of 8 years.**

of **automatic external defibrillators (AEDs).** AEDs are portable devices that deliver an electric shock to the heart, halting sudden cardiac arrest and restoring normal heart rhythms (American Red Cross 2005). The timely use of an AED by your staff could be a key intervention to significantly increase a member's chances of surviving sudden cardiac arrest (American Heart Association [AHA] 2002).

Clarifying Your Legal Responsibility

Some businesses, such as airports and casinos, are required to use AEDs as a mandatory part of their emergency plan. As of this writing, there is no national legal standard requiring all fitness facilities to maintain an AED. Nevertheless, the American College of Sports Medicine (ACSM) and the AHA do encourage the use of AEDs in health clubs as a means of minimizing the time between recognition of cardiac arrest and successful defibrillation (ACSM & AHA 2002).

In a 2002 joint Position Paper, the ACSM and the AHA recommended the placement and use of AEDs in fitness facilities that meet the following specifications:

- have more than 2,500 members
- offer clinical programs for diseased and/or increased risk populations
- are located in an area in which the typical emergency response time is greater than 5 minutes (ACSM & AHA 2002)

Some states—Rhode Island, Louisiana, New York, Illinois, New Jersey and Maryland—have passed legislation mandating AED use in the fitness setting (IHRSA 2005b).

Avoiding Legal Risks of AED Use

If your club voluntarily decides to maintain an AED as a part of its emergency arsenal, be advised that certain mandatory legal duties will arise. These include strict training, certification, and maintenance of the devices (Gmelich 2000). For example, California's Health and Safety Code requires that any potential AED administrator complete a course of training in both cardiopulmonary resuscitation (CPR) and AED use that meets the regulations adopted by the Emergency Medical Services (EMS) Authority, the AHA and the American Red Cross (Gmelich 2000). A licensed physician must be involved in the design of your club's emergency plan if it includes the use of defibrillators.

Certain state health and safety codes also require that AEDs be properly maintained (Gmelich 2000). Regular maintenance schedules include periodic inspections and testing every 30 days. Furthermore, any actual use of the device must be reported to a licensed physician and/or to the local EMS station (Gmelich 2000).

Although you can minimize your club's legal liability by complying with the provisions of your state's health and safety code on AED use, keep in mind that human errors can still result in a negligence lawsuit. In adjudicating such allegations, the first step is to determine whether your facility has complied with the requirements of your state's health and safety code, including those rules that apply to training and maintenance (Gmelich 2000). A finding of noncompliance will expose you, your staff and your facility to legal liability.

If your club elects to use AEDs, you may be increasing your susceptibility to liability under a negligence claim, because the standard of care owed to members will increase. Clubs utilizing AEDs owe a higher standard of care to their members because a higher level of skill and training is required of employees (Gmelich 2000).

Even the medical nature of the AED itself can increase the required standard of care, in that it creates an environment that is more "medical" than recreational. The medical nature of the device can also invalidate a signed waiver since waivers are not enforceable in a medical setting (Gmelich 2000). That means your club would be liable for any damages awarded by a court.

Negligent conduct by your staff related to exercise prescriptions may continue to be protected by waivers, since the act of personal training itself is deemed recreational. However, negligent misuse of AEDs by employees on members is unlikely to be protected by waivers, since the act of using defibrillators may be deemed medical (Gmelich 2000).

How to Legally Protect Your Fitness Facility

What can you do to protect your club and employees from legal disaster?

- **Have a competent legal professional review your legal documents (e.g., waivers) to ensure they are properly worded and thus more likely to be enforced.**
- **Be sure to give your members ample time to fully read the documents, and then take the time to verbally review the documents with them.**
- **Store all legal documents securely for as long as required by the applicable statute of limitations in your state.**
- **To achieve the ultimate protection against legal liability, you must not only have your members sign the appropriate legal documentation but you must also carry sufficient liability insurance.**
- **At a minimum, use a commercially available (but often inadequate) standardized waiver form and then modify the verbiage as needed.**

Source: Eickhoff-Shemek 2001.

Good Samaritan Legislation

Fortunately, providers of emergency care may enjoy various levels of immunity from legal liability under the umbrella of "Good Samaritan" legislation. However, any immunity provided under Good Samaritan law is limited to ordinary negligence; reckless or grossly negligent conduct is excluded (Premack 1996).

Immunity under Good Samaritan law has two requirements. First, the aid must be given at the scene of the emergency (Premack 1996). For example, you would be judged immune from liability if an employee provided CPR on the premises of your health club. If, however, you administered CPR and got in an accident while driving the victim to the hospital, any subsequent injuries to the victim would not be protected.

The second requirement under Good Samaritan law is known as the **good-faith rendering of aid,** which presumes that you intended to help the victim (Premack 1996). If other motives are evident, such as monetary rewards or 15 minutes of fame on the local news, then immunity may be denied.

Because Good Samaritan laws vary from state to state, it is essential that facility managers understand the legal aspects of emergency care administration—and know how to apply those concepts. This is achieved in two ways. First, purchase adequate indemnity insurance. Second, use what is known as **good practice** (Resuscitation Council 2000). Good practice is achieved by educating yourself, becoming familiar with potential legal risks and identifying what steps should be taken to minimize those risks. For more tips on protecting your facility, see "Managing Risk When Using an AED" on the previous page.

Protective Legal Documentation

It is not uncommon for members to suffer injuries in a fitness club setting. Without documented legal protection, clubs would soon go out of business if they were sued for every minor ache and pain. Thus, it is imperative that all fitness professionals understand the importance of a validly written waiver.

Waivers—also known as prospective releases—protect clubs and their employees against claims of negligence (Eickhoff-Shemek 2001). However, such waivers do not protect against reckless, intentional, wanton or grossly negligent conduct or against

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inherent risks. Therefore, in addition to the waiver itself, all members should sign a separate contract containing a provision that identifies and protects against inherent risks (see "Content of the Waiver" for more on this and other recommended provisions).

If a suit is filed against your facility and you can produce a validly signed waiver, you are entitled to seek what is known as **summary judgment** (Eickhoff-Shemek 2001). Summary judgment is a motion to dismiss a case because there is no issue to be tried. Since the client has waived his or her right to sue for negligence, there is no longer a justifiable cause of action for negligence. Hence, there is no issue (i.e., negligence) to be litigated. The judge would then dismiss the suit, and you would be freed from any legal liability for that case. That's why it is essential that your facility waiver should contain the appropriate provisions and verbiage.

Content of the Waiver

All waivers contain what is known as an **exculpatory clause,** which expressly states that the member releases the fitness facility from any liability linked to negligence on the part of its employees (Eickhoff-Shemek 2001). This clause is evidence that the member has given up (i.e., "waived") the right to sue you. Therefore, waivers act as a complete bar to a lawsuit!

Fitness managers should ensure that the waivers used by their clubs contain an exculpatory clause that is very carefully written and contains appropriate wording. Here are some essential elements to consider when writing such a clause (Eickhoff-Shemek 2001):

- Always include the term *release from liability* in the clause. Certain courts also require the term *negligence* for the waiver to be enforced.
- Use the specific phrase *any negligent act or omission,* since a negligence claim can arise from a certain action (referred to as a "commission") or from a failure to act (known as an "omission") (Cotten 1996).
- Identify the proper legal names of the club, corporation, trainers/instructors and employees within the clause.

Keep in mind, however, that not every state will require all of these provisions. In fact, some states do not recognize the validity of waivers in fitness settings (e.g., Louisiana, Montana, New Mexico and Virginia).

Uncertainties often arise when discussing the correct format for waivers. Most commonly, the waiver is included as a part or provision of some larger contract, such as the health club membership form. Regrettably, this approach can be problematic, as there is typically insufficient space for the essential contractual terms outlined above. First, it is vital that the exculpatory clause be conspicuous and in a large enough font for the average person to notice it. Second, there must be a place for the member's signature or initials in close proximity to the exculpatory clause. Third, the limited space for adequate details as to the parties, legalities, duration and risks covered by the waiver may render the provision inadequate (Cotten 1996). Waivers that are part of a larger contract are more likely to be found invalid than standalone waivers (Cotten 1996). The most effective waiver contract is one that stands alone.

Better Safe Than Sorry

When it comes to protecting your facility from legal vulnerability, it's all in the details. Make it an ongoing practice to check your compliance with applicable federal regulations, staff training certifications, facility emergency procedures and legal documentation. For more ideas on staying current and compliant, see "How to Legally Protect Your Fitness Facility" sidebar.

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