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Federal Mandate Compliance and How it Applies to Outdoor Recreation and Education Programs

Presented by: Christine Upton, Outdoor Adventures Coordinator & Daniela Cross, Coordinator of Risk Management and Special Projects

As outdoor recreation and education professionals, risk management is paramount. We want our programs to be able to mitigate as many risks as possible so that our employees and participants can enjoy the natural world in a positive and supportive manner. This poster will address several federal mandates as they apply directly to outdoor recreation and education programs, including the Clary Act, Title IX, the Family Educational Rights and Privacy Act (FERPA), the Health Insurance Portability and Accountability Act (HIPAA), the Child Abuse and Neglect Reporting Act (CANRA), and the Occupational Safety and Health Administration (OSHA) regulations. We will highlight the risks or implications of being non-compliant, as well as what steps you can take as a professional to better protect your participants, your employees, your organization, and yourself as an individual.

Health Insurance Portability and Accountability Act (HIPAA)

Brief history:
The Health Insurance Portability and Accountability Act (HIPAA) was first introduced in 1996.
It protects sensitive patient health information and records in both physical and electronic forms.
HIPAA amends an initial Internal Revenue Code which was passed in 1986 and allows for greater protections and accountability.
HIPAA is controlled, regulated, and enforced through the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR).

Who it protects and who needs to adhere to it?
HIPAA combats abuse and fraud in the health care and health insurance sector.
It simplifies administrative tasks and improves long-term patient access to health care services.
Any business or organization that collects sensitive information and/or health care related information needs to adhere to HIPAA standards.
Examples of sensitive and/or health related information can include but is not limited to: current medications, past medical history, current or past allergies, current illnesses, injuries, or conditions and their extent, and current physical limitations.

How to comply:
Those who collect sensitive, health-related information must take steps to protect this information.
If collected physically (i.e. paper forms), this information must be stored in a secured location that has limited access (i.e. a locked drawer that is behind a counter and is away from public access).
Electronic data, or any information that is collected electronically such as emails, online registration, or electronic forms, must be encrypted and stored in a secure manner.
Electronic data must also have restrictions in order to limit access to the information.
Data access policies should be in writing and all applicable employees must be trained on such policies.

Considerations for outdoor professionals:
Even though most outdoor recreation and education organizations do not strictly fall under the definitions set forth by HIPAA, such as covered entities or business associates, when collecting any sensitive, health related information, you should follow HIPAA protocols.
Adhere to your institution's electronic data policies and any other overarching protocols, mandates, or policies.
Have all staff members complete HIPAA training or a similar equivalent if they are working with sensitive or health-related information.

Risks of noncompliance:
Fines can occur if violations or breeches happen in direct correlation to noncompliance, regardless if it was knowingly or unknowingly done.
According to the Health and Human Services department, fines start from $100 and go up to $1.5 million.
Each violation is placed into one of the four categories depending on the quality of the violation: unknowing, reasonable cause, willful neglect but violation is corrected within the required time period, and willful neglect and is not corrected within the required time period.
Litigation could also take place if a person's private health-related information is breeched due to employee mishandling.

Occupational Safety and Health Administration (OSHA)

Brief history:
In 1970, the Occupational Safety and Health Act was passed by Congress and was the basis for the creation of the Occupational Safety and Health Administration (OSHA).
It protects workers by ensuring safe and healthy working conditions.
OSHA is nested within the U.S. Department of Labor.

Who it protects and who needs to adhere to it?
OSHA specifically protects most private sector workers and some public or state level workers.
Some states and U.S. territories have state level plans that have been adopted in place of Federal OSHA.
These occupational health and safety programs must be as effective as the Federal OSHA programs.
There are 22 states or territories that have an OSHA approved program which covers both private sector and public sector workers.
Five additional states and one U.S. territory have state level programs that cover public sector workers only.
Private sector workers in these states are covered under Federal OSHA.
Federal OSHA and state level occupational health and safety programs also cover young workers (those that are new to the workforce, up to age 24), those who are still minors (under 18, be mindful of child labor laws), workers who speak a primary language other than English, and temporary workers.
All employers who are identified and defined in OSHA regulations must comply with either the Federal regulations or the state level equivalent occupational health and safety program.
All employers must understand the set list of responsibilities they have to their employees as set forth by OSHA.
Volunteers, interns, independent contractors, and partners have different OSHA protections.
OSHA does not apply to those who are self-employed.

How to comply:
Identify if your organization is either in the private or public sector.
Identify if your state has adopted their own occupational health and safety program.
Identify if any specialized industry regulations apply to your organization.
Examine each "General Industry" regulation to see if it applies to your organization.
Utilize tools and resources provided by OSHA, such as the "Compliance Assistance Quick Start", the compliance hotline, or the free on-site consultation program.
Seek professional guidance, either directly from OSHA or your state's occupational health and safety program

Considerations for outdoor professionals:
Pay special attention to the following considerations and identify if the corresponding regulations apply to your organization: hazardous chemicals, hazard communication, ladder safety, flammable materials, rope decent systems, fall protection, personal protective equipment, medical and first aid, sanitation, and utilizing hand-held power tools.
Be thorough in your research as there may be a regulation not listed above that also directly applies to your organization or institution.
Remember: OSHA exists to help protect you and your employees. It may seem daunting at first, but they are here to help. Take advantage of their tools and resources.

Risks of noncompliance:
Fines of $12,934 per violation, up to $129,336 per violation according to Federal OSHA.
Violations are placed in one of three categories: serious other-than-serious posting requirements, failure to abate, and willful or repeated.
States with their own occupational health and safety programs may have their own penalty levels.
Severe violators will be subject to the Severe Violator Enforcement Program, which could lead to court enforced compliance measures.
Most importantly, a major illness or injury, or fatality could occur to one or more of your employees.

Americans with Disabilities Act (ADA)

Brief History:
Enacted in 1990, and amended in 2008
Civil rights law intended to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities
Several federal agencies have a role in enforcing or investigating claims: US Department of Labor, US Equal Employment Opportunities Commission, US Department of Transportation, Federal Communications Commission, US Department of Justice, US Department of Education, and the US Department of Health and Human Services

Who it protects and who needs to adhere to it?
Individuals with a disability are defines as those who have a physical or mental impairment that substantially limits one or more major life activity(s); has a record of such an impairment; or is regarded as having such an impairment.
Entities who must adhere to ADA are: private employers with 15 or more employees; businesses operating for the benefit of the public; all state and local government agencies; and all types of public facilities
Religious organizations and private clubs are exempt

How to comply:
Follow ADA provisions and allow individuals with disabilities mainstream access to programs. Reasonable modifications can be made as necessary.
New construction or alterations to existing facilities by covered entities must follow ADA standards
Access (including reasonable modifications) is not required if it would result in an undue burden (e.g., "significant" cost, training, etc.) on the entity; fundamentally alter the nature of the program or activity (for the individual and others); or compromise the safety of other participants in the program or activity.

Considerations for outdoor professionals:
ADA standards and accessibility guidelines include provisions for various types of recreation facilities, including recreation boating facilities; fishing piers and platforms; swimming pools, wading pools and spas; trails; and camping facilities.
Under Title III, entities are not prohibited from asking applicants to programs or activities questions about whether or not they can participate in the program or activities, but entities cannot ask questions that screen out individuals with disabilities, unless such criteria are necessary to provide their service.
Development of essential eligibility criteria that focus on the physical and cognitive requirements for participation in programs and activities

Risks of noncompliance:
Lawsuits can be brought against entities by individuals with a disability who believe they have been discriminated against by being denied access to their program
The US Attorney General can be notified and may choose to file suit against the entity
Entities proven to have discriminated against individuals with disabilities are subject to civil penalties of $75,000 for the first violation and $150,000 for subsequent violations

All organizations and institutions should research and consult with their attorneys and risk managers on direct applicability of the laws included in this presentation, as well as any applicable state-specific mandates and laws

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Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act)

Brief History:
Named after Jeanne Clery, a Lehigh University student who was killed in her dorm room in 1986
Enacted in 1990
Requires colleges and universities to maintain and disclose campus crime statistics and security information and alert campus of imminent dangers
Enforced by the US Department of Education

Who it protects and who needs to adhere to it?
Current and prospective students and employees
Required for colleges and universities participating in federal financial aid programs

How to comply:
Institutions must do the following: (1) publish an annual security report; (2) disclose crime statistics for incidents that occur on campus, in unobstructed public areas immediately adjacent to or running through the campus and at certain non-campus facilities; (3) issue timely warnings about Clery Act crimes which pose a serious or ongoing threat to students and employees; and (4) devise an emergency response, notification and testing policy
Documentation of Clery records must be maintained for seven years
No statute of limitations to file complaints

Considerations for outdoor professionals:
If utilizing on-campus facilities, those statistics would be included
If utilizing off-campus facilities, statistics may be included. Off campus is defined as "property outside the contiguous border of the campus that is 'owned or controlled' by the university."
Programs should work with their university's Campus Security Authority (CSA) in regards to inclusion of statistics for off-campus activities

Risks of noncompliance:
Heavy fines up to $56,906 per violation
Risk of institutional suspension from participating in federal student financial aid programs
Recently fined campuses include:
Virginia Tech $32,500
Eastern Michigan University $350k
Penn State $2.4M

Title IX of the Education Amendments of 1972 to the Civil Rights Act of 1964

Brief History:
Enforced by the US Department of Education Office of Civil Rights
States that: "No person in the US shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."

Who it protects and who needs to adhere to it?
Protects students, faculty, and staff from discrimination based on sex in all education programs or activities that receive federal financial assistance
Title IX applies to all elementary and secondary schools, colleges and universities. It also applies to programs and activities affiliated with schools that receive federal funds (such as internships or School-to-Work programs) and to federally funded education programs run by other entities such as correctional facilities, health care entities, unions and businesses.

How to comply:
Key areas in which educational programs have Title IX obligations include: recruitment, admissions, and counseling; financial assistance; athletics; sex-based harassment; treatment of pregnant and parenting students; discipline; single-sex education; and employment.
Educational programs may not retaliate against any person for opposing an unlawful education practice or policy, or made charges, testified or participated in any complaint action under Title IX
To hold an educational institution liable for damages for harassment under Title IX, the complainant must show than an official with authority to address harassment had actual knowledge of, and was deliberately indifferent to, harassment that deprived the victim of access to the educational benefits or opportunities provided by the school.

Considerations for outdoor professionals:
On-campus v. off-campus: geography does not limit Title IX liability
Off-campus outdoor education activity is high risk because it involves both agents of the educational institution and school-supervised programs - and thus an institution could have substantial control over the harasser and the environment the harassment occurs in
Employee education and training on Title IX and institutional procedures for reporting claims of harassment

Risks of noncompliance:
There is the potential to lose federal funds for violating Title IX - however no institutions have lost funds due to violations
Institutions have had to pay substantial damages and attorney fees in cases brought to court

Family Educational Rights and Privacy Act (FERPA)

Brief History:
Enacted in 1974, and amended 9 times
Federal law that protects the privacy of student education records
Enforced by the US Department of Education, with complaints reviewed by the Family Policy Compliance Office
"Education records" include virtually all records maintained by an educational institution, in any format, that identify a student on its face or from which a student's identity could be deduced from descriptive or other information contained in the record, either alone or in combination with other publicly available information. They are not limited to registrar's office records, transcripts, papers, exams and such, but also non-academic student information database systems, class schedules, financial aid records, financial account records, disability accommodation records, disciplinary records, and even "unofficial" files, such as photographs, e-mail, voicemail messages, resumes, correspondence, and hand-written Post-it notes.

Who it protects and who needs to adhere to it?
FERPA gives parents certain rights with respect to their children's education records. These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Such students are referred to as "eligible students." Students enrolled in post-secondary schools/programs are considered eligible students.
FERPA applies to all schools that receive funding under an applicable program of the US Department of Education.

How to comply:
FERPA requires parents and eligible students be able to: review education records; correct inaccurate, misleading, or privacy-violating information in their education records; consent to disclosure of a student's personally identifiable information; and file a complaint concerning a schools failure to comply with FERPA requirements
Schools must have written permission from the parent or eligible student in order to release any information from a student's education record, and are required to maintain a list of individuals or orgs that have requested or obtained a student's education records.
FERPA does allow schools to disclose those records, without consent, to certain parties or under certain conditions, including: school officials with legitimate educational interest; other schools to which a student is transferring; appropriate officials in cases of health and safety emergencies; and state and local authorities, within a juvenile justice system, pursuant to specific State law.
Schools may disclose, without consent, "directory" information such as a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance. School must give parents and eligible students a reasonable amount of time to inform the school if they wish to opt out of some or all of the information to be disclosed.

Considerations for outdoor professionals:
If records kept by institution's recreation programs are covered by FERPA
Record keeping, access and staff training
Community based organizations who partner with schools to provide recreation programs to students and whom receive FERPA covered records in which to do so, are subject FERPA's use and redisclosure requirements

Risks of noncompliance:
If a school is found to have violated FERPA, and does not comply with steps required they take in order to be in compliance, the Secretary of the Department of Education may withhold payments to the school under any applicable federal program, issue a complaint to compel compliance through a cease and desist order, or terminate the school's eligibility to receive federal funding
No schools have yet to lose eligibility to receive federal funding, but defending accusations of FERPA violations could be costly

Child Abuse and Neglect Reporting Act (CANRA)*

*Many states have their own version of this mandate, but for the purposes of this presentation, we are using a California specific mandates, CANRA, as an example. All organizations and institutions should research their own states' laws and mandates on reporting suspected child abuse and/or neglect.

Brief history:
The Child Abuse and Neglect Reporting Act (CANRA) was passed in California in 1953 and amended in 2014.
It defines who is or is not a mandated reporter, as well as details the reporting structure that mandated reporters are obligated to follow.

Who it protects and who needs to adhere to it?
CANRA protects children and minors who are younger than 18 years of age.
The mandate clearly defines who is a mandated reporter, including but not limited to: teachers, public school employees, camp administrators, child care employees, social workers, firefighters, medical professionals, therapists, clergy members, counselors, computer technicians, coaches, and emergency medical technicians or paramedics.
Mandated reporters are those who regularly come into contact with minors as a part of their job.

How to comply :
Seek out proper training if you are considered a mandated reporter according to your state and your organization/institution, especially if your programming involves minors.
If you are considered a mandated reporter, save the proper reporting paperwork in an easy access file.
Know the proper reporting structure and have a physical copy of it on hand.

Considerations for outdoor professionals:
After researching and examining the child abuse and neglect reporting mandate for your specific state, remember to pay attention to the following items:
- How are mandated reporters defined?
- What is the reporting structure or reporting obligations for mandated reporters?
- Does the mandate apply to volunteers?

What additional policies does your organization or institution have in place in regards to this mandate?
Be aware of state specific penal codes that may also further define mandated reporting (i.e. anyone is a mandated reporter in California if they suspect inappropriate behavior happening between an adult and a child younger than 14 years).

Risks of noncompliance
Under CANRA, a mandated reporter who willfully and knowingly fails to report suspected child abuse or neglect could face up to a year in jail and/or a fine of no more than $5,000.
Each state has their own fines, penalties, and/or punishments for those who fail to properly report suspected child abuse and neglect.

All organizations and institutions should research and consult with their attorneys and risk managers on direct applicability of the laws included in this presentation, as well as any applicable state-specific mandates and laws