

Video Training Offerings During and After COVID-19 Leave Gym Operators and Trainers Open To These Liability Issues

Club Industry

June 14, 2020

By Michele Frisbie

During the country's shutdown due to the COVID-19 pandemic, many operators of health clubs, boutiques, YMCAs, university rec centers as well as trainers and group exercise instructors turned to providing exercise classes and training sessions remotely. Some offered these services livestreamed over social media outlets such as Facebook, Instagram and YouTube. Others elected to livestream over video platforms such as Zoom. Still others pre-recorded their classes or training sessions.

As various states release people—and the fitness industry—from these orders, it is clear that streamed offerings are here to stay whether because members are concerned about capacity limits in classes or discomfort about being in a gym until the virus is quelled. Additionally, members may continue to demand the ability to participate in the class of their choice, when and where they wish. Although pricey, equipment and services from Peloton, the Mirror and Tonal home virtual workouts offer anytime options that gym operators may wish to counter with remote/online offerings. Online training also allows gyms to be agile when other types of closures, such as those due to weather, occur. In other words, video is not going anywhere.

In the scramble to pivot, several liability issues emerged that will linger. Brick and mortar fitness operators, group exercise instructors, personal trainers and those who handle claims against them should be on the lookout for issues they will face in this new environment.

Club owners and their staff can take steps in seven areas to close the gaps created in the hurry to move online.

Intellectual property. Claims against gyms and instructors arising out of copyright infringement are not out of the question. Some fitness professionals have found their content blocked or taken down as bots-policing social media outlets, such as Facebook, found copyright-protected content and asked the service provider to block it or take it down. The music industry is keen to protect itself, as evidenced by the suit against Peloton over the interactive-fitness company's alleged use of 2,468 unlicensed songs. Defending these claims may be challenging because many gym owners and group exercise instructors had not thought about music licensing issues before they shifted to remote platforms. Gyms and studios may have paid their licensing fees to The American Society of Composers, Authors, and Publishers, Broadcast Music Inc. and SESAC, but they may not have expanded their

licenses to address the remote environment. Furloughed or laid-off instructors electing to offer services on their own may not realize that they no longer have the protection of the club's license. They may not be using royalty-free music. They may assume that they can use music services, such as Spotify, Apple Music or Pandora, without realizing potential violations. Fitness centers and professionals should reach out to the licensors to ensure that they have licensure and that it includes online and pre-recorded classes.

Personal injury. Claims or suits that arise out of occurrences in this remote arena may be more difficult to defend because protections against liability that are automatically in place in a traditional environment are overlooked in the move to remote training.

Waivers. Claims may be more difficult to defend due to the lack of a waiver (in states where they can be effective, like Pennsylvania). Although many gyms and studios have their members sign waivers, they may not have considered updating those waivers to expressly include online training. Similarly, furloughed or laid-off group exercise instructors and personal trainers who continue to offer classes (sometimes for free and sometimes for a fee) are now without the protection of their gym-employer's waiver. Those individuals may find themselves without the powerful tool of a good waiver should a participant or client injure themselves. Those presenting or posting content online should consider offering classes only to those from whom they have obtained a signed waiver. They may also gain some protection with a verbal statement upon entry that the client or participant is engaging in the activity at their own risk.

Risk management. Gyms and individuals offering online services may find defending themselves challenging if they do not take simple steps typical to a traditional environment: reminding clients to ensure their workout area is free and clear of obstructions; reminding them to check and wear proper foot gear, and looking out for the safety of the client or participant by making sure that the participant's camera is on so the instructor can see them. Instructors in the remote environment do not have the advantage of risk controls they take for granted in person, such as a proper temperature in the training room or natural limits on class size due to the size of the room. Additionally, the instructor may not have given consideration to having the participant's emergency contacts and address so that they can call 911 should they see or be told about something amiss.

Unexpected participants. Additionally, instructors and trainers might find themselves defending claims by individuals who were not even part of the class if they leave their videos up for future use. If the training session is not removed and is accessible to the general public, a "preprinted" exculpatory clause may be helpful in defending claims made by those who injured themselves doing the video on their own.

Scope of practice. Group exercise instructors and personal trainers became fitness coaches because they want to help people be healthy. Isolated participants and clients naturally turn to the instructors and trainers who kept relationships with them for advice on things such as nutrition, supplements and injuries. As a result, instructors and coaches may find themselves offering advice to participants in

areas outside of or beyond their scope of practice. It's best to avoid this practice.

Coverage issues. Many instructors faced with claims may be surprised to find themselves without coverage. Not every policy of insurance covers remote training. Many group exercise instructors and trainers may not be aware of whether their coverage is "occurrence" or "claims made." Employed instructors and trainers may drop their policies once they are back to work at their gyms because they are again covered under their employer's policy. When claims or suits are filed after they have dropped their coverage, they will be dismayed to learn that they had purchased claims-made coverage rather than occurrence coverage. When I was furloughed from the YMCA where I am a part-time group exercise instructor and personal trainer, I knew to ask for a policy sample to see if it was a claims-made or occurrence policy only because of my career as a lawyer. I also knew enough to ask about and look for exclusions for remote training. Not every instructor and personal trainer are

aware of these concerns and may find themselves without coverage.

Exercise is so important for one's physical and mental health, and online workout classes are helping thousands of people cope with the uncertainties of the current pandemic. As the online fitness class trend becomes our new normal, gym owners and instructors who heed basic risk management techniques discussed above will maintain and improve the health and security of their businesses.



<https://www.clubindustry.com/step-by-step/video-training-offerings-during-and-after-covid-19-leave-gym-operators-and-trainers>

***Michele P. Frisbie, Esq.** is special counsel in the Doylestown, Pennsylvania, office of Marshall Dennehey Warner Coleman & Goggin where she defends insurers and their insureds in a wide variety of casualty and professional liability litigation. She is also an ACE-certified group fitness instructor. She may be reached at mpfrisbie@mdwcg.com.*