

# **TRAINING EMPLOYEES ON EMPLOYMENT ISSUES: HAS IT BECOME MANDATORY FOR ALL EMPLOYEES?**

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# Agenda

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1. Reasons why you should train your employees
2. Items that should be included in the training

## Is it Mandatory?

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- California and some other states require certain types of training.

## Is it Mandatory?

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- Alabama and most of the states do not require training and no automatic penalty for failure to conduct training, but considering the benefits and the downside of failure to do training, many employment lawyers consider it now to be virtually mandatory.

# Excuses for Not Training

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- Too expensive
- Not productive work
- My CEO thinks it's stupid
- Nobody attends the meetings

## Why Train Your Employees (cont.)

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1. Prevents claims from originating in the first place particularly in areas of sexual and racial harassment. Employees sometimes forget that they are in the workplace not at home, at a bar or on the playground.

## Why Train Your Employees (cont.)

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### 2. Assist in defending harassment claims

- Best insurance is an effective anti-harrassment policy
- Must be effective and employees must be aware of it

# Why to Train Your Employees

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## 3. Defense to punitive claims

Colstat vs. Dental Association



## Importance of Training

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### 4. Plaintiff's lawyers are making this an issue in employment cases:

- If they can't prove discrimination, they will try to prove that you do not train your employees and therefore do not care about such issues.
- Plaintiff's lawyers are trying to create new cause of action based on training

## Potential Lawsuit

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77. Defendant failed to establish adequate policies against gender based discrimination, racial discrimination, and violations of the ADAAA; failed to implement such policies consistently; failed to clearly communicate such policies on a routine basis to its agents and employees; and failed to train and enforce its own policies to the detriment of Plaintiff and other female employees.

78. Defendant failed to educate and train managers, supervisors, and employees on gender based discrimination and racial discrimination in the workplace or on how to prevent violations of the ADAAA in the workplace.

## Importance of Training

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5. It's the right thing to do: Employees are one of your most important assets.
  - It's very expensive to replace employees.

# Why to Train Your Employees

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6. Failure to do so increases the chances of punitive damages

## Questions and Answers

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Q. Mr. Anderson, does your company have a Human Resources Director?

A. The Chief Operating Officer and I handle those functions.

Q. Mr. Anderson, does your company train its employees on employment issues such as discrimination and harassment?

A. Well, we have an employee handbook.

Q. I didn't ask you if you had an employee handbook Mr. Anderson, do you need me to repeat the question?

A. Yes, please do.

Q. Mr. Anderson, does your company train its employees on employment issues?

A. Well, we have monthly and sometimes weekly safety training classes.

Q. And in those meetings, you talk about issues such as employee safety, proper lifting techniques, correct?

A. Yes, that's what we talk about in those.

## Questions and Answers - Continued

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Q. But you do not normally talk about the companies policies and procedures dealing with discrimination or harassment in those, do you?

A. No.

Q. And, in fact, those are done by your Safety Coordinator and your Foremen, correct?

A. Yes, that's correct.

Q. Well, let me get back to my original question then Mr. Anderson. Does your company provide training on issues of discrimination and harassment?

A. Well, I guess not.

Q. You don't guess that you don't, you know that you don't, don't you Mr. Anderson? It is true that your company does not do any training of its employees on issues of discrimination and harassment.

A. No, we do not.

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**Don't let your answer be....**

**"No, we do not."**

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**THIS CAN BE THE  
RESULT**



## 7. Failure to train can lead to testimony like this...

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Q. Does [Name] have a policy that prohibits disability discrimination?

A. I'm trying to think what the policy would be. I know we have a handbook that deals with it, but I've never sat down and read the handbook so –

Q. So sitting here today, you don't know whether [Name] has a policy that prohibits disability discrimination?

[COUNSEL:] Object to the form.

A. I can't quote it, no.

Q. (BY COUNSEL:) I know you say you can't quote it. Is there a policy that prohibits disability discrimination?

A. I can't say that. I don't know.

## Failure to train can lead to testimony like this...

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Q. You have seen the [Name] Employee Handbook, haven't you?

A. Yes, I have.

Q. Are you aware that there's an EEO policy that's in there that prohibits discrimination?

A. I have never sat down and completely read that.

Q. I understand, but you do know if there's an EEO policy of any sort that's in there?

A. No, I do not know.

## 8. Can Lead to Results like this...

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2.7 million dollar verdict in the  
Middle District of Alabama

# Items to be Included in Training

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- What is discrimination
- What does it cover
- What type of acts constitute harassment

# PROHIBITED DISCRIMINATION

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- ♦ Race
- ♦ Sex
- ♦ National Origin
- ♦ Age
- ♦ Bankruptcy
- ♦ Unlawful Retaliation (Opposition or Participation)
- ♦ Military Service Connection
- ♦ Genetic Information
- ♦ Color
- ♦ Religion
- ♦ Citizenship
- ♦ Disability

# ANTI-DISCRIMINATION LAWS APPLY TO:

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- ◆ Hiring
- ◆ Discharge
- ◆ Discipline
- ◆ Compensation
- ◆ Benefits
- ◆ Promotions
- ◆ Demotions
- ◆ Reductions in Force

## Items to be Included in Training (Cont.)

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- The Company absolutely prohibits any forms of discrimination or harassment and how to report harassment

# Ensuring a Workplace of Respect: Avoiding and Handling Harassment Claims





# Why?

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- **An increasingly diverse workforce**
- **High-profile cases**
- **EEOC initiatives**
- **Bad actors are still out there!**

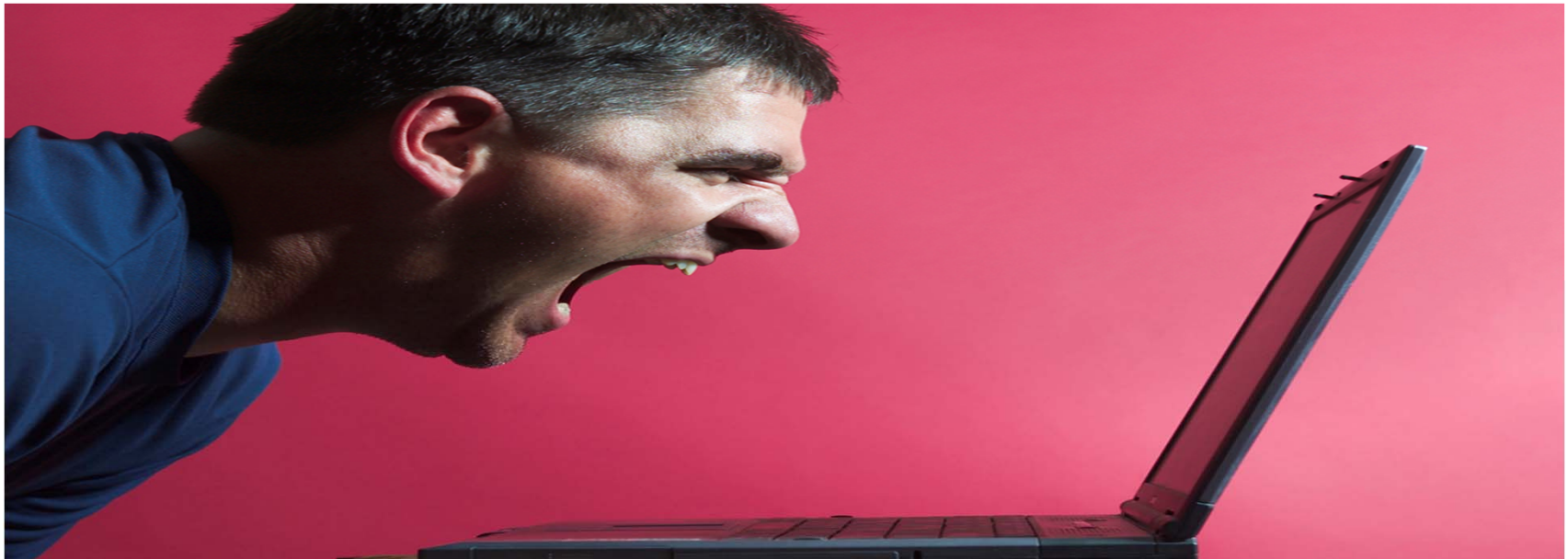
# QUID PRO QUO HARASSMENT

- By managers/supervisors
- “Something for something”
- Decision/expectation based on anything sexual
- May arise subtly
  - Unwelcome advances
  - Relationships gone bad
- Causal connection between conduct and tangible job benefit

# HOSTILE WORK ENVIRONMENT

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ANY CONDUCT THAT HAS THE **PURPOSE OR EFFECT**  
OF UNREASONABLY INTERFERING W/EMPLOYEE'S  
WORK PERFORMANCE OR CREATING  
**INTIMIDATING, HOSTILE, OR OFFENSIVE WORKING**  
**ENVIRONMENT**



# Examples of Conduct That May Amount to Sexual Harassment

- Asking an employee for a date
- Asking an employee for sexual favors
- Fondling, hugging or touching an employee
- Other physical conduct such as impeding or blocking movements
- Leering
- Making sexual gestures
- Verbal abuse of a sexual nature
- Graphic verbal commentaries about an individual's body
- Jokes
- Pictures



# RACIAL HARASSMENT

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- **Conduct based upon race that creates a hostile work environment.**
- **May include threats, physical contact, racial epithets, remarks, jokes or ridicule, pranks, vandalism, verbal, graphic, or written conduct directed at an individual or individuals because of his or her race.**
- **Hostile environment may be created even if language, actions or conduct is not directed at specific persons.**

# DANGER ZONES!

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- Comments on personal appearance
- Work-related off-premises conduct
- Nicknames
- Stereotypes
- Touching
- Retaliating
- Cartoons, posters, pictures, apparel, t-shirts
- Email/Internet
- Jokes, sarcasm, or innuendo
- Cliques and gossip
- Bullying or razzing



## **Items to be Included in Training Discrimination**

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4. The company prohibits retaliation against anyone who engages in discrimination or harassment

# ANTI-RETALIATION LAWS APPLY TO:

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- ◆ Hiring
- ◆ Discharge
- ◆ Discipline
- ◆ Compensation
- ◆ Benefits
- ◆ Promotions
- ◆ Demotions
- ◆ Reductions in Force
- ◆ Actions Materially Adverse to Reasonable Employee or Applicant



## TIPS FOR AVOIDING RELATED CLAIMS

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- Apply your policies consistently.
- Monitor complainants' reviews and attendance.
- Ensure personnel decisions are well understood.

## Items to be Included in Training (continued)

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- GINA
  - Its applications in all workplaces
  - What managers should and should not be doing

## Scope of Information Protected Under GINA is Broad

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Putting together the definitions of “Genetic Information” and “Family Member” under GINA makes the scope of information protected under the Act extremely broad.

- Reaches information of virtually all relatives of an individual;
- GINA does not limit liability for the manner in which information is acquired, other than when acquired “inadvertently or through the “publically available” exception;
- This makes employers potentially liable for acquisition of information in many contexts

# Confidentiality of Information

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- All genetic information must be maintained on separate forms and kept in separate medical files
- Compliance is presumed when genetic information is treated the same way medical information is treated under the ADA (42 U.S.C. § 12112(d)(3)(B))

# Disclosure of Information is Prohibited

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An employer may *not* disclose any genetic information *except*:

1. To the employee;
2. To certain occupational health researchers conducted in compliance with federal law;
3. In response to an order of a court (provided the employee is notified);
4. To government officials investigating compliance with GINA;
5. Pursuant to certification requirements under FMLA;
6. To a health agency concerning a contagious disease that presents an imminent hazard of death or a life-threatening illness

# Compliance Issues

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What should employers do to comply with GINA?

1. Obtain and post a copy of the EEOC's revised "Equal Opportunity is the Law" Poster
2. Review your employee policies and employee handbook – update them to include protection for genetic information
3. Review and update any HR policies regarding handling of genetic information to make sure it is treated the same as medical information under the ADA
4. Communicate the nondiscrimination, acquisition limitations, and confidentiality requirements of GINA to supervisors and individuals who may have any genetic testing responsibilities at your company or facility (HR staff, nurses, medical officers, etc.)

## Compliance Issues

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5. Employers should make sure their policies communicate that family medical history is confidential and should be treated accordingly.
6. Managers and supervisors should be made aware not to unnecessarily inquire about employees' family medical histories.

## Items to be Included in Training (continued)

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- The ADAAA
  - How managers should respond to a request for accommodation
  - The expanded concept of disability retaliation
  - How to avoid employees feeling that they have been subject to retaliation



## 3 Prongs to ADA's Definition of Disability

1<sup>st</sup> prong of definition of disability:

A physical or mental impairment that **substantially limits** one or more **major life activities**

2<sup>nd</sup> prong: A **record** of such an impairment

3<sup>rd</sup> prong: **Being regarded as** having such an impairment



ADAAA clarifies meanings intended for each prong of the definition and overturns Sutton & Williams and their companion cases and progeny.

## Bottom Line for Employers

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- Like the ADAAA, the regulations emphasize that the determination of whether an individual is disabled **should not** be the primary focus of ADA cases.
  - Instead, the focus should be on whether prohibited discrimination has occurred.
- Thus, from a practical standpoint, employers in most situations will be better able to defend an ADA lawsuit by showing that they made a **good faith effort** to **accommodate** the employee, rather than by challenging the employee's disability.

# Major Life Activities

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- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Standing
- Sitting
- Reaching
- Lifting
- Bending
- Speaking
- Breathing
- Learning
- Reading
- Concentrating
- Thinking
- Communicating
- Interacting with others
- Working

# The Process

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- Identify essential functions of the job
- Identify what the employee can and cannot do (either in total or partially)
- Identify all potential accommodations
- Explore effectiveness of various accommodations
- Conduct undue hardship analysis
- Select an effective accommodation/Advise employee no effective accommodations are available absent undue hardship

# Equal Pay Act

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- Overview
- EPA's framework

# I. OVERVIEW

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- No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. 29 U.S.C. § 206(d)(1).