

# GIBBONS EMPLOYMENT PRACTICES TRAINING MANUAL

*An overview of training programs offered by  
attorneys in the Gibbons Employment & Labor  
Law Department*



# GIBBONS EMPLOYMENT PRACTICES TRAINING

## FREQUENTLY ASKED QUESTIONS ABOUT EMPLOYMENT PRACTICES TRAINING

### WHY IS EMPLOYMENT PRACTICES TRAINING ESSENTIAL?

Every year, there are more laws affecting employers and providing protections to employees. These create an endless stream of requirements for employers, as well as the potential for employment-related claims and litigation. Training educates all employees about their responsibilities and liabilities under the various laws and helps supervisory employees learn how to avoid and address improper workplace behavior and activities, while still effectively managing employee performance. Training can therefore help companies prevent employment-related claims.

Training also can act as a shield in the event litigation does occur. In a number of situations courts allow employers to raise as an affirmative defense the fact that they attempted to prevent unlawful conduct by training their employees.

Training is, simply, a win-win - it helps companies avoid claims and may offer a defense in the event claims do arise.

### WHAT KIND OF COMPANIES SHOULD CONDUCT EMPLOYMENT PRACTICES TRAINING FOR THEIR WORKFORCE?

As all companies with employees are vulnerable to lawsuits, all companies should train their employees. Different types of training are available for supervisory employees versus non-supervisory employees. At a minimum, all company employees should receive anti-harassment and discrimination training at least once every two years.

### WHAT ARE THE BENEFITS OF HAVING AN ATTORNEY CONDUCT THESE TRAINING PROGRAMS?

Our attorneys who conduct training are not only educated on state and federal laws and regulations, but also have actual experience litigating cases that interpret these laws. These real-life experiences allow us to provide training that is relevant and practical.

### WHAT IS INVOLVED IN A TRAINING PROGRAM?

Gibbons training programs include live, attorney-led classes, in which interactive discussion and questions are encouraged. All programs are tailored to your company's specific policies, practices and needs and use real case examples, as well as hypotheticals. We regularly present training for specific industries, such as financial services and higher education, and craft an industry specific presentation for each client. We also discuss and distribute pertinent company policies and require attendance acknowledgments.

# GIBBONS EMPLOYMENT PRACTICES TRAINING

We also offer training in packages for different types of employees. For example, for first time managers, we group our Employment Law Basics with our Compliance with Family, Medical and Disability-Related Laws and Hiring Practices for a full day seminar or presented in installments. Similarly, for Human Resources professionals we group our Investigating Workplace Harassment and Discrimination Complaints with Employment Law Basics; Compliance with Family, Medical and Disability-Related Laws; Hiring Practices; and Pay Equity and Compliance with Wage and Hour Laws, for a full day seminar or presentations in installments.

## WHAT TOPICS DO YOU TRAIN ON?

Gibbons attorneys train on all employment law topics, in any combination your business finds most helpful. We can craft programs specific to your company's policies and also have created a number of programs that we can tailor to your company's needs:

- Preventing Workplace Harassment and Discrimination
- Investigating Workplace Harassment and Discrimination Complaints
- Workplace Bullying
- Employment Law Basics
- Compliance with Family, Medical, and Disability-Related Laws
- Performance Management and Terminations
- Hiring Practices
- Wage and Hour and Pay Equity Laws
- The "Gig Economy"
- Union Avoidance
- The NLRB and Non-Union Workplaces
- Electronic Communications and Social Media Best Practices
- Electronic Information About Applicants and Employees
- Title IX Compliance
- Transgender Issues in the Workplace and Higher Education

## HOW DO YOU CHARGE FOR THESE TRAINING PROGRAMS?

Training programs are offered on an hourly or flat fee basis. The fees take into consideration the number and variety of programs your company requires. Often, Employment Practices Liability carriers offer a company reimbursement for proactive anti-harassment and discrimination training.

## ABOUT OUR ATTORNEYS

Attorneys in the Gibbons Employment & Labor Law Department bring years of experience to their work in providing employment counseling, litigation, and training services for clients.

The attorneys who frequently provide training programs include:

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## CONTACT US

For information on training you may contact any member of the Gibbons Employment & Labor Law Department or Dawn Afanador, Chief Marketing Officer, at (973) 596-4555 or [dafanador@gibbonslaw.com](mailto:dafanador@gibbonslaw.com).

*This communication provides general information and is not intended to provide legal advice. Should you require legal advice, you should seek the assistance of counsel.*

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# GIBBONS EMPLOYMENT PRACTICES TRAINING

## PREVENTING WORKPLACE HARASSMENT AND DISCRIMINATION

### *Training for All Employees*

This training program is tailored to the specific needs of each company and various levels of employees, as detailed below. In addition, our approach has been updated in light of #MeToo and Time's Up, as well as our national conversation on harassment in the workplace.

Non-Supervisory Employees receive a program, generally lasting 1 hour, focusing on:

- What is and what is not considered harassment and discrimination under the law
- Overview of company policies and procedures
- How and to whom to make a complaint

Mid and Lower Management Employees receive a program, generally lasting 1-1/2 hours, focusing on the above topics, plus:

- Duties of supervising staff members
- Guidelines for prevention
- How to report and address complaints

Upper Management Employees receive a program, generally lasting 2 hours, focusing on the above topics, plus:

- Realities of the risks and repercussions to the company and individuals
- How discrimination and harassment are proven
- Procedures for investigating claims

California Managers and Supervisors receive an interactive program, lasting 2 hours, covering the above topics, with a strong focus on harassment, plus:

- Interactive discussions on various "hypothetical" case studies
- How to handle employee complaints of harassment and discrimination
- Bullying in the workplace

### **THE COURTS REWARD GOOD FAITH EFFORTS**

"A company that develops policies reflecting a lack of tolerance for harassment will have less concern about hostile work environment or punitive damages claims if its good-faith attempts include periodic publication to workers of the employer's anti-harassment policy; an effective and practical grievance process; and training sessions for workers, supervisors, and managers about how to recognize and eradicate unlawful harassment."

*Aguas v. State*, 220 N.J. 494, 516-17 (2015) (quoting *Cavuoti v. N.J. Transit Corp.*, 161 N.J. 107, 121 (1999))

## INVESTIGATING WORKPLACE HARASSMENT AND DISCRIMINATION COMPLAINTS

### *Training for Managers and Human Resources Personnel*

#### **This training program includes:**

- Overview of investigation requirements
- How to determine if an investigation and/or interim action is necessary
- How to conduct an investigation, including:
  - Determining the scope and objectives of the investigation
  - Outlining the interview process, including whom should be interviewed and when
  - Deciding who should conduct the investigation
  - Identifying and obtaining relevant documents
  - Conducting interviews
  - Documenting the investigation
  - Guidelines for recommendations and proposed actions
  - Preparation of the investigation summary
- Legal issues implicated during an investigation
- Possible claims by the accused individual

**Details:** Session generally lasting 2 hours

An employee who quits her job can still sue for “constructive discharge” if her employer fails to investigate her claims of sex harassment.

*Dunkley v. S. Coraluzzo Petroleum Transporters*, 441 N.J. Super. 322, 339 (App. Div. 2015), *cert. denied* 2016 N.J. LEXIS 78 (Jan. 26, 2016)

## WORKPLACE BULLYING

### *Training for Supervisory Employees and Human Resources Personnel*

**This training program includes:**

- Statistics related to workplace bullying
- What bullying is and is not
- How bullying impacts the workplace and employees
- Status of bullying laws: The Healthy Workplace Act
- The difference between bullying and discrimination and harassment
- Legal ramifications of bullying
- Best practices for handling complaints of bullying

**Details:** Session generally lasting 1.5 hours

27% of Americans have suffered abusive conduct at work; another 21% have witnessed it; and 72% are aware that workplace bullying happens.

**Source:** The Workplace Bullying Institute,  
*The WBI U.S. Workplace Bullying Survey (2014)*

## EMPLOYMENT LAW BASICS

### *Training for Managers and Human Resources Personnel*

**This training program includes:**

- Employment “at will” and ways to avoid accidentally destroying that status
- Prevention of employee whistleblowing and public policy claims
- Avoiding the creation of oral and written employment contracts
- Thwarting wrongful termination claims
- Coverage of equal employment opportunity and antidiscrimination laws, including avoiding retaliation claims, and recent EEOC activity and strategic enforcement plans
- How to support performance management and termination decisions (coaching, warnings, discipline, and documentation)
- Proper responses to employee discussions about disability, leave and accommodation requests, including those related to religious observation, pregnancy and domestic violence
- Social media concerns
- Overtime and FLSA issues, including classification of employees
- NLRB activity and its impact
- Avoiding infliction of emotional distress claims
- Averting defamation claims

**Details:** Session generally lasting 4 hours

#### **DON'T LET THIS HAPPEN TO YOUR COMPANY**

Laid-off employees can sue for damages based “on an unlawful future promise of at-will employment” made by the employer’s managers.

*Schley v. Microsoft Corp.*, 2008 U.S. Dist. LEXIS 96059 (D.N.J. 2008)

## COMPLIANCE WITH FAMILY, MEDICAL, AND DISABILITY-RELATED LAWS

### *Training for Managers and Human Resources Personnel*

**This training program includes:**

- Conditions and circumstances covered by the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act and its amendments (ADAAA) and State leave and disability laws
- Reasonable accommodation issues, including telecommuting and medical marijuana
- Length of leave employers should accommodate
- Required notices to employees requesting protected leaves of absence
- Limited medical information employers can request from employees
- Employer record-keeping requirements
- Benefits employers must continue during protected leaves of absence
- Restrictions on employee's substitution of paid leave, *e.g.*, sick/vacation time
- Coordination of the FMLA with state family and/or medical leave laws, workers' compensation laws, short term disability policies, and the ADAAA
- The interplay of pregnancy accommodation and domestic leave laws with disability or family leaves

**Details:** Session generally lasting 2 hours

Under the Americans with Disabilities Act, employers must attempt to provide reasonable accommodations to employees regarded as disabled even though in fact the employees may not be disabled.

*Williams v. Philadelphia Hous. Auth. Pol. Dept.*, 380 F.3d 751 (3d Cir. 2004), *cert. denied* 544 U.S. 961 (2005)

## PERFORMANCE MANAGEMENT AND TERMINATIONS

### *Training for Managers and Human Resources Personnel*

#### **This training program includes:**

- Components of the annual/semi-annual formal evaluation process
- Consistent coaching outside the formal evaluation process
- Guidelines for fairly evaluating employees
- Tools for achieving consistency in the evaluation process
- Key elements of disciplinary investigations
- Issues to consider with respect to disciplinary decisions
- Proper documentation of employee performance and conduct
- How to prepare written warnings
- Factors to evaluate in terminating employees
- Termination meetings
- Termination checklist
- Exit interviews

**Details:** Session generally lasting 2 hours

#### **YOU DON'T WANT TO BE CONFRONTED WITH THIS PROBLEM**

Employer who did not promote employee because of “weak interpersonal and leadership skills” lost motion to dismiss discrimination suit because employee’s performance reviews “consistently rate her as meets or exceeds expectations [for] interpersonal communications and leadership ...”

*Imhoff v. KMart*, 149 F.Supp.2d 559 (2001)

## HIRING PRACTICES

### *Training for Managers and Human Resources Personnel*

**This training program includes:**

- Overview of restrictions under state and federal antidiscrimination laws
- Permissible interview questions and improper inquiries
- Avoiding the creation of oral and written employment contracts
- Restrictive covenants
- Trade secrets/confidentiality issues
- Affirmative action requirements
- Probationary and introductory periods
- Verification of lawful employment status
- Medical and physical exams
- Credit and other background checks, including criminal history checks
- Drug testing

**Details:** Session generally lasting 2 hours

#### **DID YOU KNOW?**

You can be sued under the Americans with Disabilities Act for asking improper questions during the hiring process even though the prospective employee does not have a disability.

42 U.S.C. § 12112(d)(2)(A)

## WAGE AND HOUR AND PAY EQUITY LAWS

### *Training for Managers and Human Resources Personnel*

#### **The Wage and Hour Laws training program includes:**

- Overview of federal and state laws concerning employee wages
- Overtime and minimum wage requirements
- Classification of employees as exempt or non-exempt
- Timing of payments
- Permissible/prohibited deductions from pay
- Independent contractors vs. employees

**Details:** Session generally lasting 1 hour

#### **The Pay Equity Laws training program includes:**

- Overview of federal/state laws that require equal pay for equal work
- Establishing a violation of the Equal Pay Act (EPA), Title VII, and/or state laws
- Gender equity notice requirements
- Preparing for and asserting defenses to pay disparity claims
- Damages and individual liability for employers and managers
- Guidelines for avoiding pay disparity claims

**Details:** Session generally lasting 1 hour

*\*\* The Wage and Hour Laws and Pay Equity Laws training programs can be combined into a session lasting 2 hours. \*\**

#### **YOU MIGHT BE SURPRISED TO LEARN**

Even if you are paying a female employee a higher salary than her male counterparts, she may still sue under the Equal Pay Act if you replace her with a higher paid male employee.

*Rhoades v. YWCA*, 423 Fed. Appx. 193 (3d Circ. 2011)

## THE “GIG ECONOMY”

### *Training for Managers and Human Resources Personnel*

**This training program includes:**

- A discussion about the proliferation of non-traditional worker relationships
- Data about “independent” workers
- The pros of the new workforce
- Legal challenges to the “gig economy”
- Joint employment tests
- The Department of Labor’s misclassification initiative
- Independent contractor classification and tests
- State and local legislation applicable to contingent workers
- Human Resources issues for employers utilizing contingent workers
- How employers can comply with the many laws governing the non-traditional worker relationships

**Details:** Session generally lasting 1.5 hours

38-43% of New Jersey employers were found to have misclassified independent contractors in audited cases.

**Source:** <http://www.nelp.org/content/uploads/Independent-Contractor-Costs.pdf>

## UNION AVOIDANCE

### *Training for Managers and Human Resources Personnel*

#### **This training program addresses:**

- Union organization strategies and processes
- Warning signs of union activity
- Employees' rights to join and refrain from joining labor unions
- Rights of non-employee union organizers
- The legal distinction between employees and supervisors
- Prohibited versus permissible statements and conduct for supervisors and union organizers during an organizational campaign
- Permissible statements and conduct for supervisors during an organizational campaign
- How to assess your company's unionization risk
- Evaluating employee perception and satisfaction
- Communicating company policies and practices
- Improving employee relations
- The union election process
- A brief overview of the unfair labor practice process
- Legal arguments to consider raising with the National Labor Relations Board
- Legal obligations that arise in the context of collective bargaining

**Details:** Session generally lasting 2 hours

New York and New Jersey are among the 7 states in the country with the highest union membership rates - respectively, 24.7 and 15.4% of workers - well above the national average of 11.1%.

**Source:** United States Bureau of Labor Statistics;  
*Economic News Release: Union Membership, Jan. 28, 2016; Table 5. Union affiliation of employed wage and salary workers by state, 2014-2015 annual averages, Jan. 28, 2016.*

## THE NLRB AND NON-UNION WORKPLACES

### *Training for Supervisory Employees*

**This training program includes:**

- Overview of NLRA applicability to non-union workplaces
- Discussion of NLRB activity
- NLRB election process
- NLRB notice posting requirement
- What is considered protected activity today?
- Social media concerns and policies
- Employment agreements, including confidentiality and non-disparagement clauses
- Witness statements during workplace investigations
- “At-will” disclaimers
- Off duty employee access
- Arbitration agreements

**Details:** Session generally lasting 1.5 hours

Most employers and employees in the private section, whether the workforce is unionized or not, are subject to the National Labor Relations Act.

**See:** <https://www.nlr.gov/rights-we-protect/employee-rights>

## ELECTRONIC COMMUNICATIONS AND SOCIAL MEDIA BEST PRACTICES

### *Training for All Employees*

#### **This training program includes:**

- Current statistics on e-mail, texting, internet and social media use in the workplace and impacting the workplace
- Electronic communications and social media activity using company equipment and during work hours versus use of personal equipment and time
- The impact of personal e-mail and internet use on productivity
- Potential consequences for inappropriate use of electronic communications, the internet and social media
- E-mail, texting and social media as evidence in lawsuits
- The technology of electronic communications and social media posts and why employees should be wary
- An overview of your company's electronic systems and social media policies and other policies impacted by electronic communications and social media use
- Pros and cons of "bring your own device" policies
- Protecting confidential and trade secret information
- The NLRB's decisions and their impact on electronic systems and social media policies and employee activities
- Laws concerning employee electronic data and site access
- E-mail etiquette: a practical tip list

**Details:** Session generally lasting 1.5 hours

13% of companies have battled lawsuits triggered by employee e-mail.

**Source:** The ePolicy Institute

## ELECTRONIC INFORMATION ABOUT APPLICANTS AND EMPLOYEES

### *Training for Managers and Human Resources Personnel*

**This training program includes:**

- Review of laws concerning employer control of the workplace
- Overview of laws concerning employee privacy, including employee electronic data and site access
- Discussion of laws concerning employee speech
- Pros and cons of “cyber screening” and monitoring
- Technology available to employers, such as computer algorithms, employee tracking, and other forms of monitoring
- Crafting policies concerning applicant and employee privacy and monitoring
- Employer decision-making based on monitored activity

**Details:** Session generally lasting 1 hour

## TITLE IX COMPLIANCE

### *Training for Educators, Coaches, and Human Resources Personnel*

**This training program includes:**

- What Title IX requires/prohibits
- Universities' broad obligations under Title IX
- Statistics regarding Title IX violations on campuses
- What constitutes notice under Title IX
- Reporting obligations
- Responsible employees
- A discussion of your university's Title IX policy and processes, including Title IX officers
- What to do if a student brings a complaint to you

**Details:** Session generally lasting 1.5 hours

“No person ... 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[.]”

20 U.S.C. § 1681(a).

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## TRANSGENDER ISSUES IN THE WORKPLACE AND HIGHER EDUCATION

### *Training for Supervisory Employees and Human Resources Personnel*

#### **This training program for employers includes:**

- What transgender means
- Statistics and survey data
- Federal, state and local anti-discrimination laws
- EEOC activity regarding transgender employees
- OSHA guidelines
- Recent case law
- Accommodating transgender employees
- Policies and best practices

#### **This training program for institutions of higher education includes the topics above and:**

- Title IX's protection for transgender students
- Family Education Rights and Privacy Act's applicability
- State and local anti-bullying laws
- Recent case law
- Accommodating transgender students
- Policies and best practices for schools

**Details:** Session generally lasting 1.5 hours

## LESSONS LEARNED FROM WORKPLACES MAKING HEADLINES: FROM “WHAT NOT TO DO” TO DIVERSITY AND INCLUSION

*Training for Managers and Human Resources Personnel*

**This training program includes:**

- The impact of the national conversation on harassment to workplace culture and change
- The difference between anti-harassment and discrimination mandates and diversity and inclusion
- The mandate for a workplace culture that has zero tolerance for discrimination and harassment and fosters diversity and inclusion
- How Equal Employment Opportunity, and related laws on the federal and state level, help mold our diversity and inclusion practices
- What your workplace can do to foster diversity and inclusion

**Details:** Session generally lasting 1 hour



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## ABOUT GIBBONS P.C.

With more than 200 attorneys, Gibbons is a leading law firm in New Jersey, New York, Pennsylvania, and Delaware, ranked among the nation's top 200 by *The American Lawyer*.

The attorneys in the Gibbons Employment & Labor Law Department defend and counsel corporations in many industries, including retail, research and development, advanced technology, pharmaceuticals, insurance, financial services, banking and finance, telecommunications, healthcare, manufacturing, construction, education, consumer products, publishing, service-oriented businesses, transportation, and nonprofits.

### **The Gibbons *Employment Law Alert***

To understand your rights and responsibilities as an employer, you need to understand many constantly evolving rules and regulations. The *Employment Law Alert*, authored by members of the Gibbons Employment & Labor Law Department, is a free online platform covering the current employment and human resources landscape, providing news, analysis, and other resources to help you better grasp the workplace issues that affect your business and bottom line.

Subscribe at [www.employmentlawalert.com](http://www.employmentlawalert.com).

## EMPLOYMENT LITIGATION

For many years, the firm has represented employers throughout the United States before federal and state courts, the Equal Employment Opportunity Commission, the Department of Labor and other agencies. Our attorneys have extensive experience in litigating claims of discrimination, harassment and retaliation as well as pension and benefits issues under ERISA. We also litigate wage and hour, Equal Pay Act and Fair Labor Standards Act issues. Likewise, we regularly litigate employment-at-will, employment contract, restrictive covenant/trade secret and whistleblower/wrongful discharge claims. We also have substantial experience in the defense of class and multi-plaintiff actions brought under federal and state discrimination laws and ERISA.

## EMPLOYMENT COUNSELING AND TRAINING

Our attorneys regularly counsel employers with regard to their rights and obligations under the myriad statutes and regulations that govern the employer/employee relationship. We assist employers with terminations, discipline, and investigations of employee misconduct, including allegations of harassment, discrimination, dishonesty and substance abuse. We also advise employers on compliance with the various leave-of-absence issues under the Family and Medical Leave Act, Americans With Disabilities Act, COBRA and other anti-discrimination laws. We provide advice on employment issues affecting corporate transactions, such as mergers, acquisitions, reductions in force, and workforce restructuring. We regularly draft employment-related policies and employment and severance agreements. The Employment Department partners with clients to avoid or resolve employment disputes whenever feasible. One of our

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most successful methods of doing this is through employment-related training, where training sessions are tailored to meet individual company needs.

## **EMPLOYMENT AUDIT SERVICES**

Gibbons attorneys work with Human Resources professionals and company managers to conduct internal audits of our clients' general human resources practices and policies, as well as audits to ensure compliance with specific, discrete areas of employment law. We have conducted audits that have addressed such issues as leaves, disability accommodations, employment relationships in the new workforce paradigm (the "gig economy"), and wage and hour concerns, including off-the-clock, fluctuating workweek, and misclassification (under the white collar, information technology, and outside sales exemptions) issues, among others. For example, we have spearheaded nationwide self-audits for two of the Big Four accounting firms, a large investment bank, and multiple business services companies. These audits have involved the use of questionnaires, supervisor interviews (both in-person and by phone), document reviews, oral reports, and preparation of detailed reports identifying potential problems, assessing the cost/benefit of leaving those problems unaddressed, and offering practical solutions for solving them, while at the same time trying to minimize overall exposure. We often continue to work with clients to create models and processes so they can continue to remain vigilant and monitor their compliance in the areas addressed by the audits.

We also conduct periodic labor audits and counsel employers on labor-related issues, including preventive labor relations.

For additional information about the Gibbons Employment & Labor Law Department, visit [www.gibbonslaw.com/employment-and-labor-law](http://www.gibbonslaw.com/employment-and-labor-law).