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2018 EMPLOYMENT LAW CONFERENCE
MISSION=POSSIBLE

**LIABILITY STARTS WITH MANAGERS
AND SUPERVISORS**
SESSION 12

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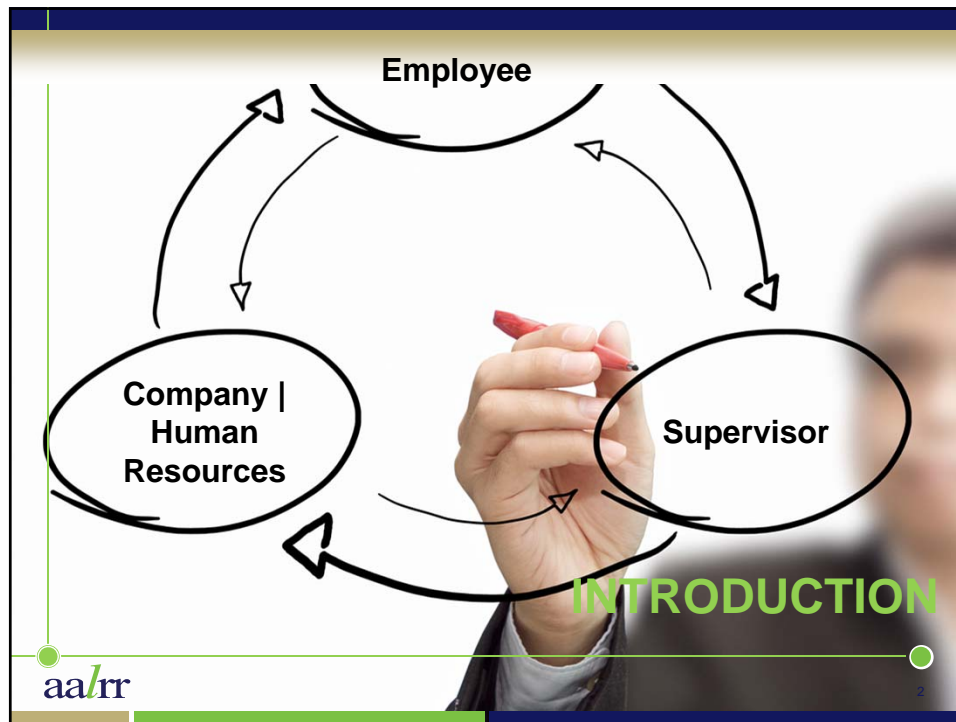


AGENDA

- Introduction
- Theories of Liability Arising From Supervisor Conduct
- Training | Reducing Liability
- Common Mistakes that Lead to Employer Liability
- Conclusion

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INTRODUCTION

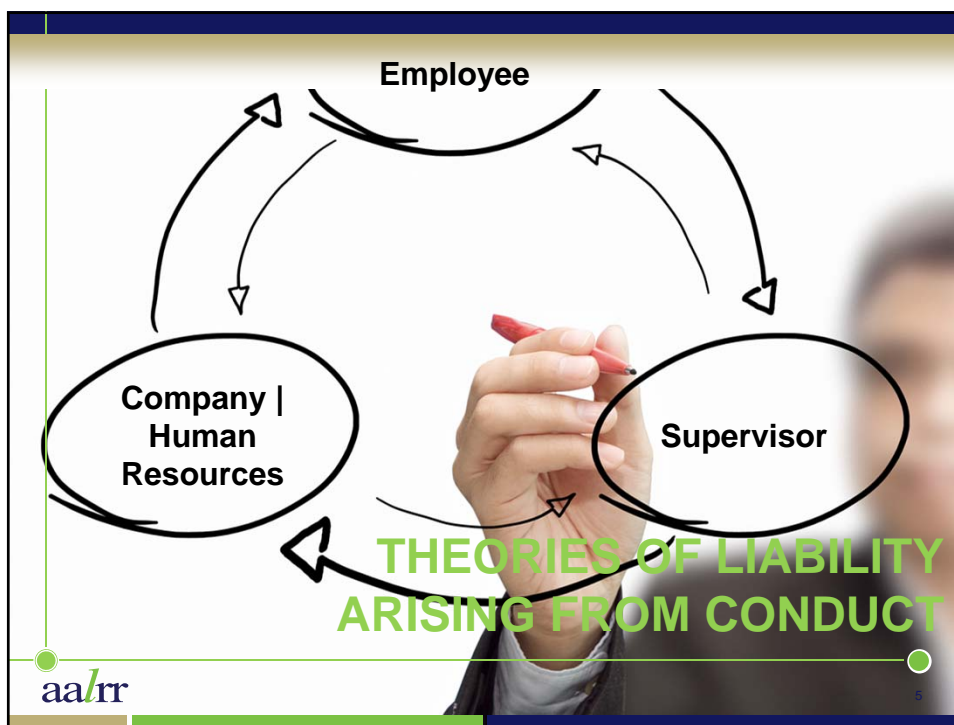
Jury awards employee \$4.5M for management's failure to engage in the interactive process

- Della Hill worked as a drug counselor for Asian American Drug Abuse Program in Los Angeles
 - Hill took leave for a broken arm January 5
 - Hill became depressed and Dr. extended leave to April 11
 - AADAP terminated Hill on March 31

(Hill v. Asian American Drug Abuse Program, Inc. (2018) LA Sup. Ct, No. BC582516)

INTRODUCTION

- Employer liability often arises from the interactions between supervisors and managers and employees.
 - Good employees may not be good managers.
 - Challenges of staff supervision.
 - Failure to utilize human resources.



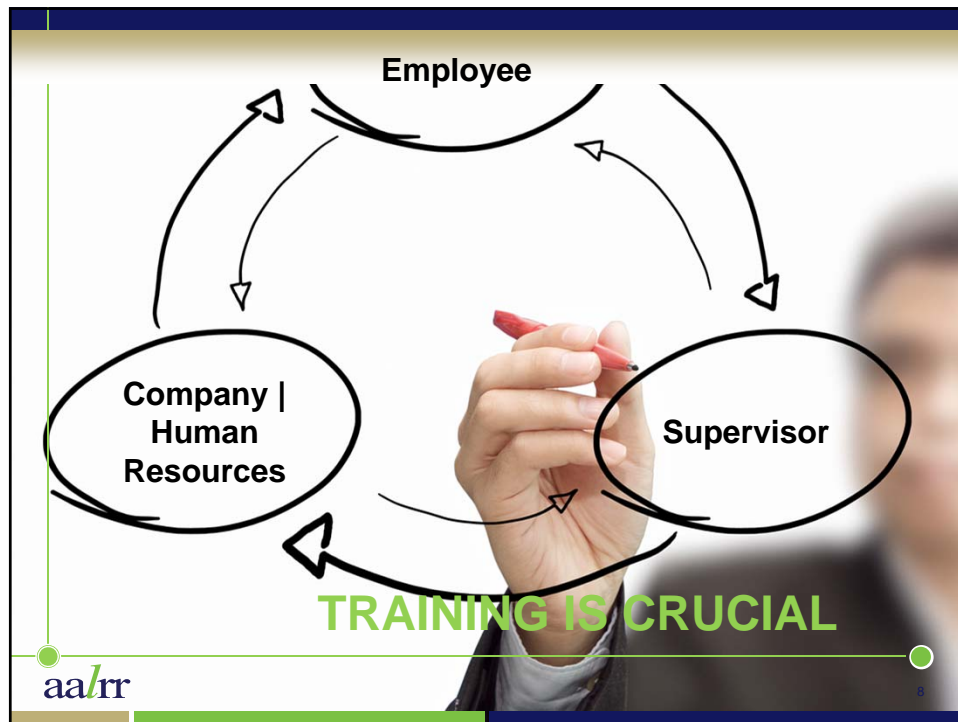
THEORIES OF LIABILITY

- Employer liability for the acts of its managers and supervisors.
- Theories of Tort Liability
 - Vicarious Liability.
 - Negligent Hiring and Retention
- Statutory Standards of Liability
 - Federal law
 - *Burlington Indus., Inc. v. Ellerth* (1998)
 - *Faragher v City of Boca Raton* (1998)
 - California law
 - *Kelly-Zurian v. Wohl Shoe Co.* (1994)
 - Who is a supervisor?

EPL INSURANCE

- Employment Practices Liability coverage not unlimited
- No coverage for wage & hour claims
- No coverage for Punitive Damages
- Weigh the cost of coverage





TRAINING IS CRUCIAL

- One of the most effective ways organizations can reduce the risk of liability is to provide comprehensive and ongoing training to managers and supervisors
- Managers do not inherently know how to handle delicate employee issues
- Managers likely will not be up to date on the latest developments in employment law and requirements

TRAINING IS CRUCIAL

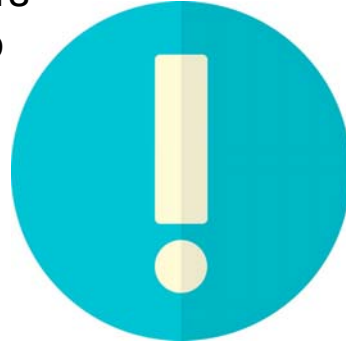
- The goal in training is not to transform managers and supervisors into employment law attorneys or human resources professionals, but instead to heighten their awareness of the law in key areas of potential liability.



**YOU ALREADY KNOW THIS STUFF,
BUT YOU NEED TO COMMUNICATE
IT TO YOUR MANAGERS &
SUPERVISORS**

CRUCIAL AREAS TO COVER

- Training provides managers with the tools necessary to build and refine their skills needed to manage people more effectively and to understand the legal consequences of their actions.



CRUCIAL AREAS TO COVER

- Important topics to cover when training include:
 1. Recognizing and preventing discrimination, harassment, and retaliation;
 2. Proper hiring, discipline, documentation, and termination;
 3. Compliance with wage and hour laws and safety requirements;

CRUCIAL AREAS TO COVER

4. Understanding leaves of absence;
5. Recognizing and accommodating disabilities
6. Recognizing the importance of the interactive process; and
7. Sexual harassment and abusive conduct prevention (AB 1825 required in organizations having 50 or more employee in California).

PRACTICAL CONSIDERATIONS OF TRAINING

- Expense
- Time
- How to convince your boss that training is a good investment



COMMON MISTAKES THAT SUPERVISORS MAKE

- 1** Not treating employees in a consistent and uniform manner in accordance with employer policies and procedures

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QUESTIONS TO ASK BEFORE TERMINATION

- ✓ Is the employee a member of a protected class?
- ✓ Has the employee recently engaged in activity that is protected by law?
- ✓ Are there prior warnings or disciplinary notices?
- ✓ Is the employee being criticized or disciplined for performance or conduct that was deemed acceptable or tolerated prior to the employee engaging in a protected activity?

QUESTIONS TO ASK BEFORE TERMINATION

- ✓ Is the proposed disciplinary action consistent with the employer's written policies?
- ✓ Is the proposed disciplinary action consistent with the employer's actual practice when presented with similar performance deficiencies or misconduct?
- ✓ Does the documentation support the discipline?
- ✓ Is the potential discipline consistent with information contained in the employee's personnel file?

QUESTIONS TO ASK BEFORE TERMINATION

- ✓ If the discipline is the result of employee misconduct, has there been a thorough investigation?
- ✓ Would an unbiased observer think that the action was reasonable or fair?
- ✓ Would the employer's "best employee" be treated the same way under similar circumstances?

COMMON MISTAKES THAT SUPERVISORS MAKE

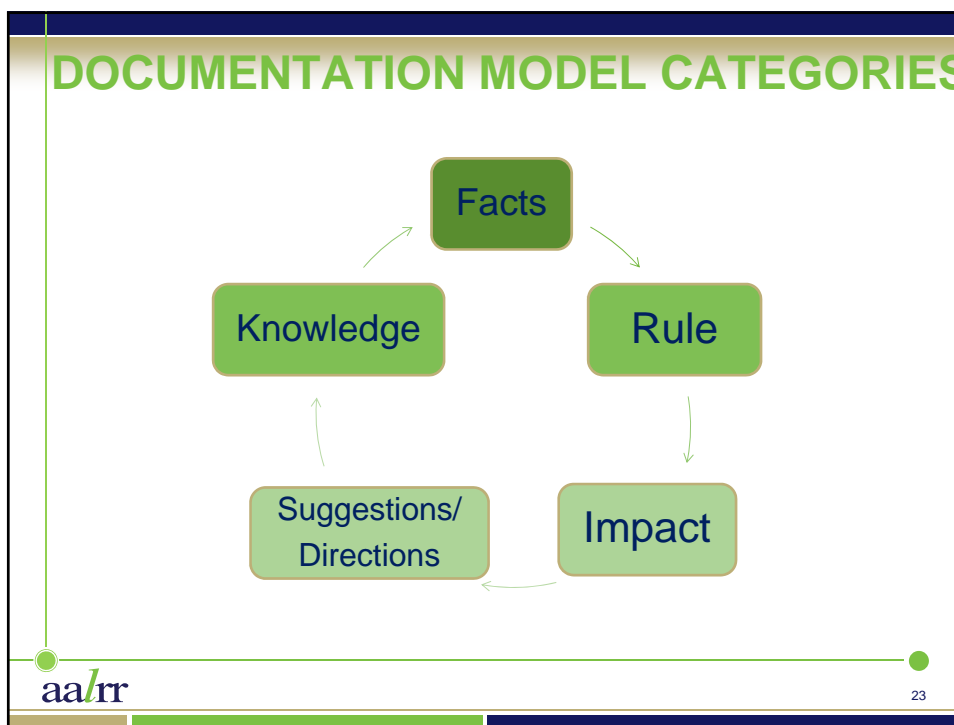
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Allowing retaliation against employees who engage in protected activity

COMMON MISTAKES THAT SUPERVISORS MAKE

3 Failing to document properly

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PROHIBITED QUESTIONS

- According to the California Department of Fair Employment and Housing, avoid questions about:
 - Marital Status
 - Age or number of children or dependents
 - Nationality, ancestry, descent or parentage
 - Religious holidays days observed

(DFEH-E06P-ENG/May 2017)

COMMON MISTAKES THAT SUPERVISORS MAKE

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Thinking abusive conduct and bullying have no ramifications because they are not per se actionable under California law

PREVENT ABUSIVE CONDUCT

Caution! *What is Abusive Conduct?*

“ . . . conduct of an employer or employee in the workplace, **with malice**, that a reasonable person would find hostile, offensive, and unrelated to an employer’s legitimate business interests. [It] may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person’s work performance.”

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COMMON MISTAKES THAT SUPERVISORS MAKE

6 Misclassifying non-exempt employees as exempt

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“WHITE COLLAR EXEMPTIONS”

- California law and the FLSA provide an exemption from overtime pay for following employees:
 - Executive
 - Administrative
 - Professional
- Paid on a salary basis

COMMON MISTAKES THAT SUPERVISOR MAKE

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Allowing employees to work off the clock to avoid incurring overtime

OFF-THE-CLOCK WORK

Common Examples

- Time spent working before/after clocking in/out
- Time spent putting on/taking off uniforms/safety equipment
- Downtime when paid on piece-rate basis (other non-productive time)

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COMMON MISTAKES THAT SUPERVISORS MAKE

8 Allowing non-exempt employees access to work emails and other work communications during non-working time

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WAGE AND HOUR LITIGATION TRENDS

- Average workweek for full-time adults in U.S. is now **47 hours**
- **50%** of full-time employees say they work more than 40 hours per week

Hours	Percentage
60+	18%
50-59	21%
41-49	11%
40	42%
Less than 40	8%

Source : Gallup data from 2013-2014 Work and Education Polls

WAGE AND HOUR LITIGATION TRENDS

- Increase in technological capabilities
 - 9-5 workday is becoming 24/7
 - Higher demands on responsiveness, shorter turnaround times
 - More telecommuting, remote work



COMMON MISTAKES THAT SUPERVISORS MAKE

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Allowing non-exempt employees to work through lunch and failing to adequately compensate employees for such time

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MEAL PERIODS

Requirements

- Employers must “provide” a 30-minute unpaid meal period to each non-exempt employee, if shift is 5 or more hours
- Employers do not have to ensure employees take meal period
- Meal periods must be recorded
- Meal periods must begin before the end of fifth hour of work in order to avoid penalty

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MEAL PERIODS

Tips to Reduce Risk

- Maintain legally compliant written policies
- Implement written policy – Provide an unpaid, duty-free, at least 30 minute meal period
- Implement policy – Require employees to comply with meal period policy
- Implement policy – Require employees to acknowledge, in writing, they have not deviated from the meal period policy

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COMMON MISTAKES THAT SUPERVISORS MAKE

10 Discouraging employees from discussing their pay and working conditions

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COMMON MISTAKES THAT SUPERVISORS MAKE

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Failing to recognize when employees are entitled to leaves and other time off away from work

LEAVES



- Family Medical Leave Act / California Family Rights Act
- New Parent Leave Act (2018)
- Pregnancy
- Military-Related Leaves
- Other Leaves

COMMON MISTAKES THAT SUPERVISORS MAKE

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Not communicating with human resources personnel regarding employee absences that may be protected leaves

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COMMON MISTAKES THAT SUPERVISOR MAKE

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Not considering a request for leave as an accommodation for a disabling condition after FMLA/CFRA/PDL expire

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LEAVES AS REASONABLE ACCOMMODATION

EEOC Position:

- An employer must consider providing unpaid leave to an employee with a disability as a reasonable accommodation if the employee requires it, and so long as it does not create an undue hardship for the employer.

CFRA Regulation:

- If...employee cannot return to work at the conclusion of...CFRA leave, the employer has an obligation to engage that employee in an interactive process to determine whether an extension of that leave would constitute a reasonable accommodation... (2 CCR 11093(e)).

COMMON MISTAKES THAT SUPERVISOR MAKE

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Thinking that the interactive process is triggered only if the employee requests a “reasonable accommodation”

TRIGGERS

- Employer's obligation to engage in the interactive process begins when a request for a reasonable accommodation is made to:
 - Employee's supervisor;
 - A manager or supervisor in the employee's chain-in-command;
 - An EEO officer;
 - An office designated by the employer to handle the reasonable accommodation process; and
 - Any employee with whom an applicant has contact.



COMMON MISTAKES THAT SUPERVISORS MAKE

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Summarily denying reasonable accommodation requests without engaging in the interactive process

THE INTERACTIVE PROCESS

When engaging in the interactive process:

- Assess the nature of the condition;
- Determine the extent the condition imposes limitations on ability to perform essential functions of the job;
- Identify possible accommodations that may or may not overcome those limitations;
- Analyze the reasonableness of the accommodation; and
- Implement the most appropriate accommodation, if any.

COMMON MISTAKES THAT SUPERVISORS MAKE

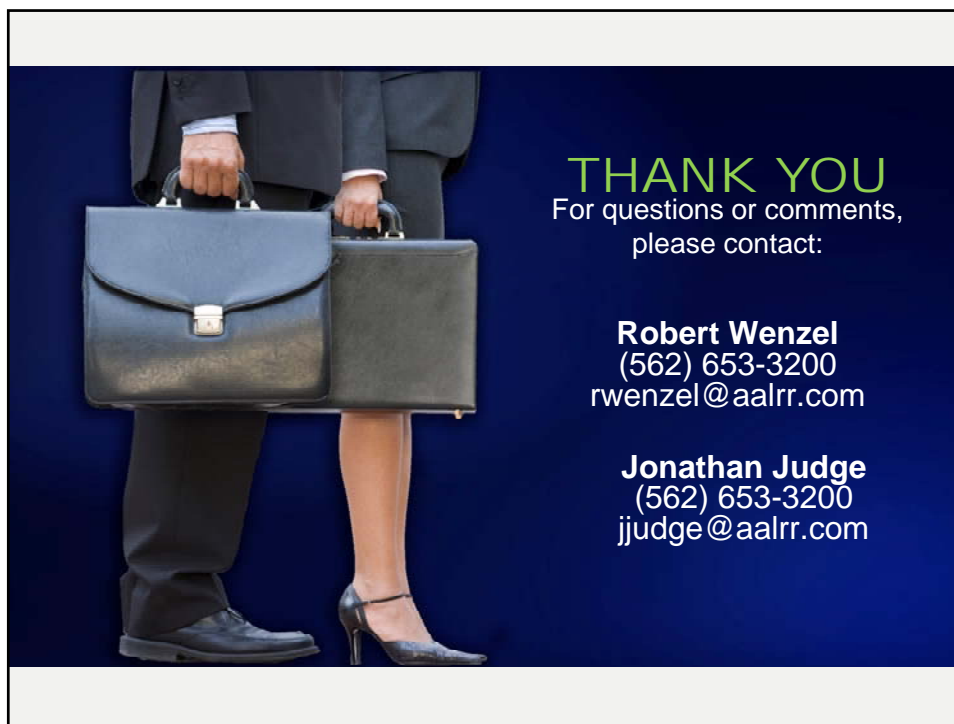
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Not recognizing that workers' compensation leave affects other statutory leaves and disability considerations



CONCLUSION

- When a single misstep could result in costly litigation, it is not sufficient for only human resources personnel to know the rules.
- Managers and supervisors should be trained on employment law, organizational policies and procedures.
- **Goal:** To provide a base-line understanding to recognize and avoid scenarios that often lead to litigation.



THANK YOU
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