



SCHOOL OF RISK CONTROL EXCELLENCE



EMPLOYMENT PRACTICES LIABILITY (EPLI)

Understanding the Exposure and Controlling the Risk

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A brief word from our attorneys....

The purpose of this presentation is to provide information, rather than advice or opinion. It is accurate to the best of the speaker's knowledge as of the date of the presentation. Accordingly, this presentation should not be viewed as a substitute for the guidance and recommendations of a retained professional. Any references to non-CNA Web sites are provided solely for convenience, and CNA disclaims any responsibility with respect to such Web sites.

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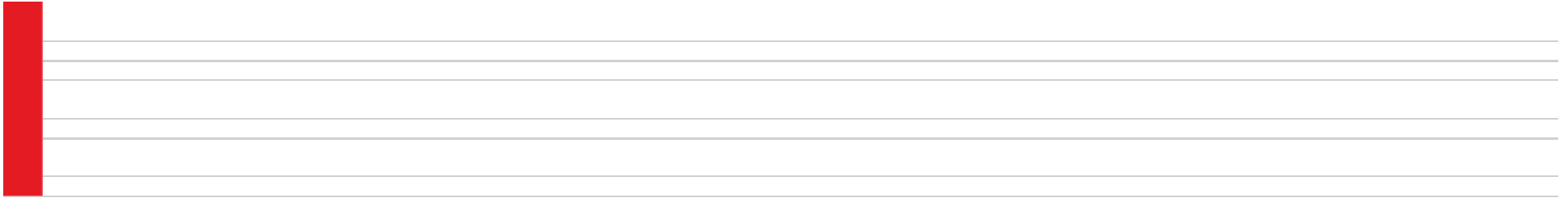




LEARNING OBJECTIVES

At the end of this class, you should be able to:

- Identify common EPL exposures, such as discrimination, harassment, and retaliation, and laws relating to those exposures
- Identify current trends in employment law
- Identify how certain policies, procedures, and training can be implemented to mitigate EPL risk



EMPLOYMENT LAW



ALPHABET SOUP - SOME IMPORTANT FEDERAL EMPLOYMENT LAWS

- **Civil Rights Act of 1866 (42 U.S.C. 1981), as amended by the Civil Rights Act of 1991** - prohibits race discrimination in employment
- **Title VII of the Civil Rights Act of 1964 (Title VII)** – prohibits discrimination or harassment against employees on the basis of sex, race, color, religion or national origin
- **Age Discrimination in Employment Act (ADEA)** – prohibits discrimination based upon age against employees over 40 years old
- **Americans with Disabilities Act (ADA)** – prohibits discrimination against employees with physical or mental disabilities. Also requires accommodation of disabilities if the employee can perform the essential functions of the job
- **Family and Medical Leave Act (FMLA)** – eligible employees can take up to 12 weeks of unpaid, job-protected leave for the birth of a child, placement of a child for adoption or foster care, or to care for a child, spouse or parent who has a serious health condition, or for the employee's own health condition (amended to include 26 weeks of military caregiver leave and 12 weeks of exigency leave)
- **Fair Labor Standards Act (FLSA)**– minimum wages and maximum hours of work; includes the requirement of overtime payment for employees that do not fit within specified exemptions

*some policies may not provide coverage for claims brought under one or more of the above-referenced laws. Review your policy and consult with your broker to determine what your policy provides. . Please remember that only the relevant insurance policy can provide the actual terms, coverages, amounts, conditions and exclusions for an insured.



IT IS VERY IMPORTANT TO CONSIDER STATE AND/OR LOCAL LAWS:

- An employer's actions must also comply with state and local laws as well as federal law
- State and local laws/ordinances often:
 - Have lower employee thresholds
 - Are broader than federal law
 - Have different procedures
 - Have different interpretative case law

Common Law Causes of Action/Workplace Torts

- Wrongful Discharge/Termination in Violation of Public Policy
- Breach of Contract
 - Includes handbooks
- Workplace torts
 - Misrepresentation/fraud
 - Invasion of privacy
 - Defamation
 - Intentional infliction of emotional distress
 - Intentional interference with prospective economic advantage
 - Intentional interference with a contractual relationship
 - Negligent hiring/retention/supervision
 - Wrongful failure to employ
 - Wrongful failure to promote
 - Wrongful discipline
 - Wrongful deprivation of a career opportunity

Current Trends - EPL

- High unemployment = more claims
 - Record increase in EEOC charges and in wage/hour litigation
- Increased funding and enforcement efforts by the EEOC and DOL
- New laws/regulations/cases
 - Regulations implementing the Americans with Disabilities Act Amendments (ADAA)
 - The Genetic Information Non-Discrimination Act (GINA)
 - New - and amendments to - state laws
 - Many new employment laws pending at federal, state and local levels
 - Case law



Current Trends - EPL

- New/changing risks
 - Social media risks
 - facebook, twitter, etc.
 - Aging workforce
 - age and disability claims increase
 - Caregiver discrimination
 - Hiring practices



Trends - EEOC FY 2010 statistics

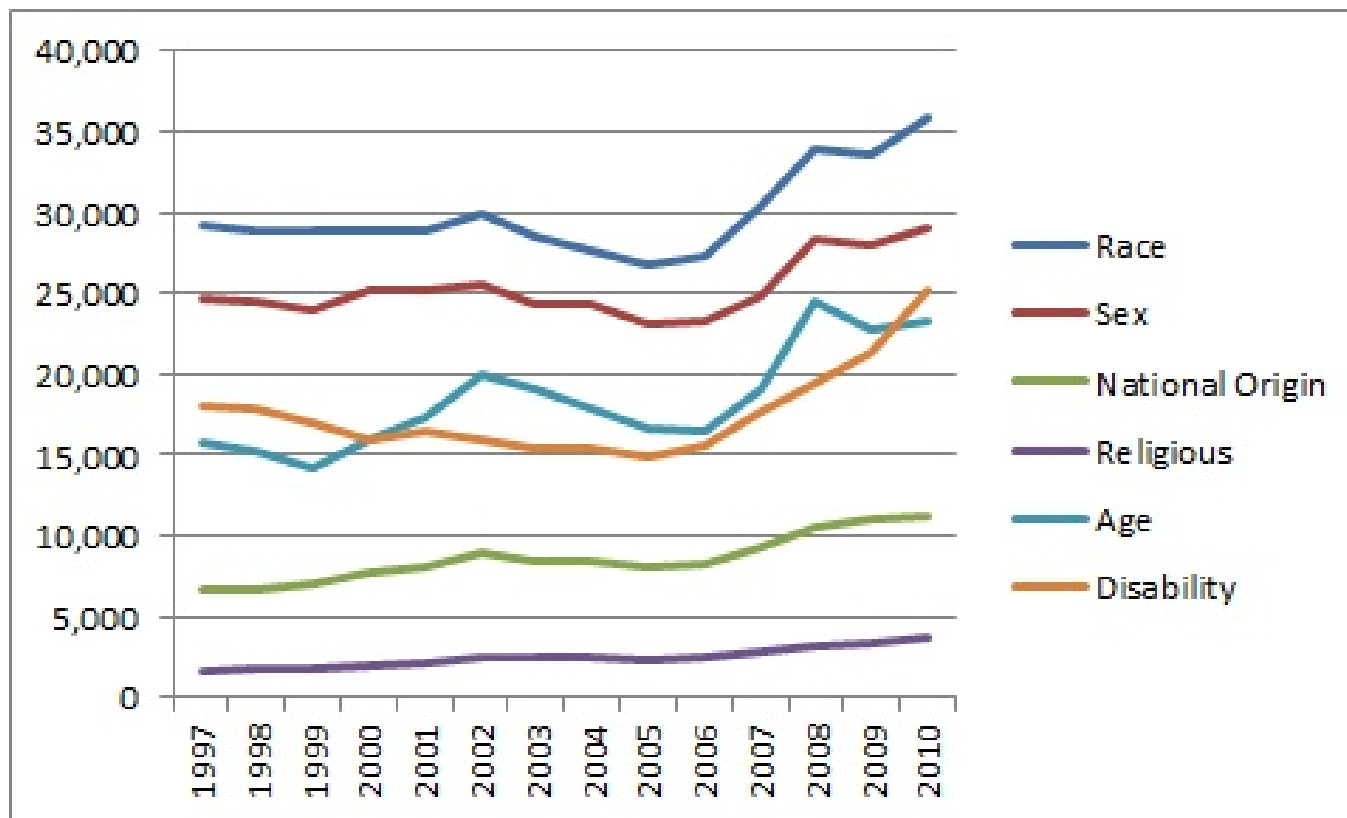
- Received 99,922 private-sector discrimination charges
 - Highest number of charges received in EEOC's history
 - Increase of 7.1% from last year
 - 465 systemic investigations undertaken, involving more than 2,000 charges
- Obtained record high monetary relief totaling \$404 million
 - \$319.4 million through administrative enforcement, which includes settlements and mediation of private-sector charges
- Retaliation surpassed all other bases of discrimination
 - Disability charges increased by 17%

EEOC annual report issued November 16, 2010

www.eeoc.gov



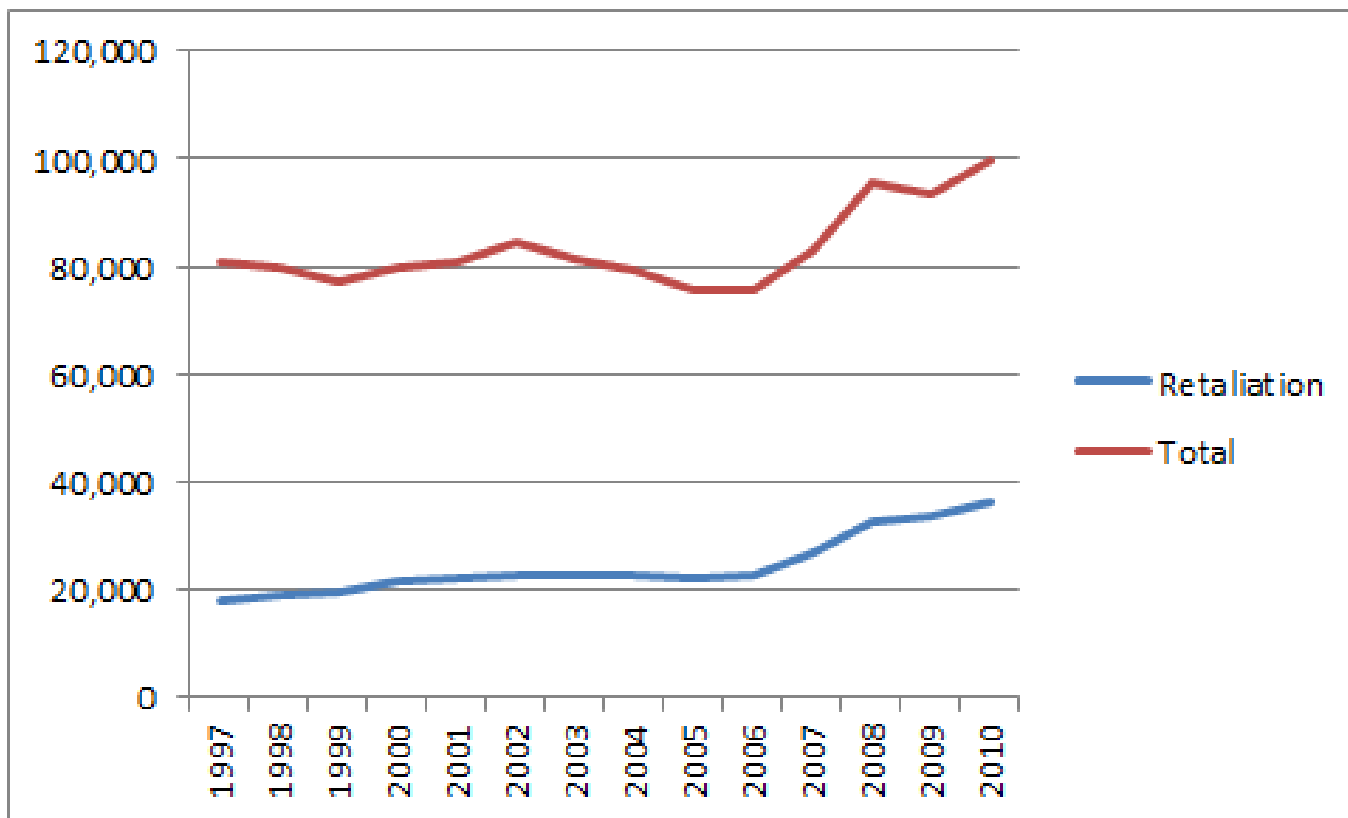
EEOC Statistics



<http://www.lawofficespace.com/2010/01/chart-of-eeoc-charges-1997-2009.html>



EEOC Statistics



<http://www.lawfficespace.com/2011/01/chart-of-eeoc-charges-1997-2010.html>



Litigation Statistics

- Median award - 2010
 - discrimination verdicts - \$317,032

<http://www.juryverdictresearch.com>

- Median settlement amount – 2010
 - \$95,000

<http://www.juryverdictresearch.com>

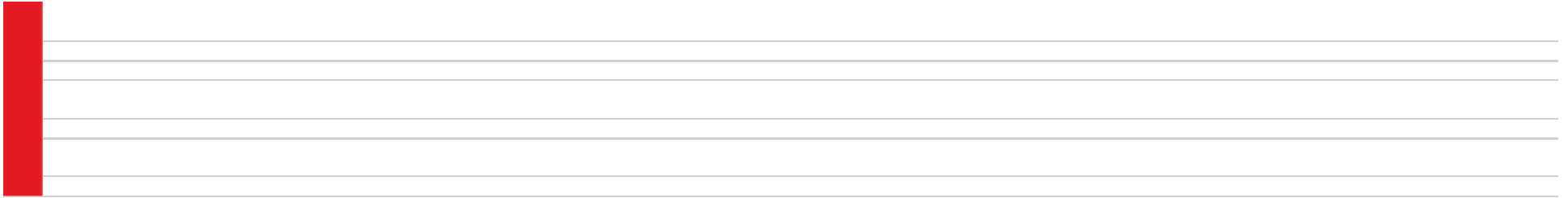
- Average Defense Cost to Litigate a Single-Plaintiff Employment Case to Conclusion (excluding cost of settlement/verdict)
 - \$50,000 – 90,000 - (response of 33% of companies)
 - \$100,000 – 499,000 - (response of 42% of companies)

Fullbright & Jaworski 6th Annual Litigation Trends Survey (2009)

- Reports estimate that the average cost of defending an employment discrimination case from beginning to end is approximately \$250,000.
 - <http://blog.thomasecon.com/litigation-avoidance/the-proactive-employer-publishes-its-first-book/#comments>

- Important Distinction - “fee shifting” provisions





EPL INSURANCE





EPL Insurance

- Covered perils are usually identified in definition of wrongful employment practices
- Review policy for exclusions
- Review definition of loss to determine what damages are covered/excluded
- Understand what constitutes a “Claim”
- Understand how to notify carrier of a Claim
- Understand whether your policy is duty to defend or reimbursement
- Use risk control resources


CNA's Risk Control Resources

Included, at no additional charge, when you purchase EPL from CNA:

- **HR Web Training**
 - Interactive, web based platform to assist policyholders with:
 - Training employees
 - Developing employment policies, practices and procedures
 - Sample Policies, Forms and Links
 - HR Self-Assessments
 - Weekly Training Bulletins
 - Best Practices Knowledge Base; and
 - The Workplace Resource
- **HR Help Line** - 1-888-CNA-EPL1 (1-888-262-3751) (toll free)
 - human resources consulting advice provided by Jackson Lewis, LLP, a national law firm which specializes in employment law*
- Articles and other resources – **www.cnapro.com**

**Please note that the H.R. Help Line can not provide legal advice pertaining to specific personnel decisions. Jackson Lewis is neither an affiliate of CNA nor an agent or broker. As such, information reported to Jackson Lewis is not notice to CNA of any claim or potential claim.*





RISK CONTROL



RISK CONTROL

- **Revise Handbook, Policies and Forms to Reflect Current Issues and Changes in Law**
- **DOCUMENT! DOCUMENT! DOCUMENT!**
- **Review Job Descriptions for Accuracy**
- **Exercise Caution With Leave Requests**



RISK CONTROL

- **Investigate Promptly and Thoroughly**
- **Guard Against Retaliation**
- **TRAIN, TRAIN, TRAIN**
- **Treat Employees Fairly and Respectfully**

H.R. Web Training – Training Tab

The screenshot shows a web browser window displaying the in2vate training portal. The browser's address bar shows the URL <https://www.in2vate.com/mytraining/index.cfm?tab=1>. The page features the CNA logo at the top left and a navigation menu with options: Training, Home, Library, Toolbox, Services, and Administration. The user is logged in as Laura Lapidus, CNA.

The main content area is titled "Best Management Practices - The Business Case for Preventing Workplace Harassment". Below this, there is a section for "Online Training Courses" with the following list:

- Anti-Discrimination Training**
Assigned: 09/24/2009
Due: 10/08/2009
- California Sex Harassment Prevention and Response Training**
Assigned: 08/10/2009
Due: 08/24/2009
- Connecticut Sexual Harassment Prevention and Response Training**
Assigned: 08/10/2009
Due: 08/24/2009
- Family Medical Leave Act (FMLA)**
Assigned: 08/24/2009
Due: 09/07/2009
- Maine Sexual Harassment Prevention and Response Training**
Assigned: 08/10/2009
Due: 08/24/2009
- TRAC**
Assigned: 10/01/2009



H.R. Web Training – Library Tab

The screenshot shows the in2vate website's Library tab in Internet Explorer. The browser's address bar displays the URL https://www.in2vate.com/my_library/index.cfm?tab=3. The website features the CNA logo in the top left corner and a navigation menu with the following items: Training, Home, Library (selected), Toolbox, Services, and Administration. In the top right corner, there are links for "Update My Account | Logout" and the user's name "Laura Lapidus CNA".

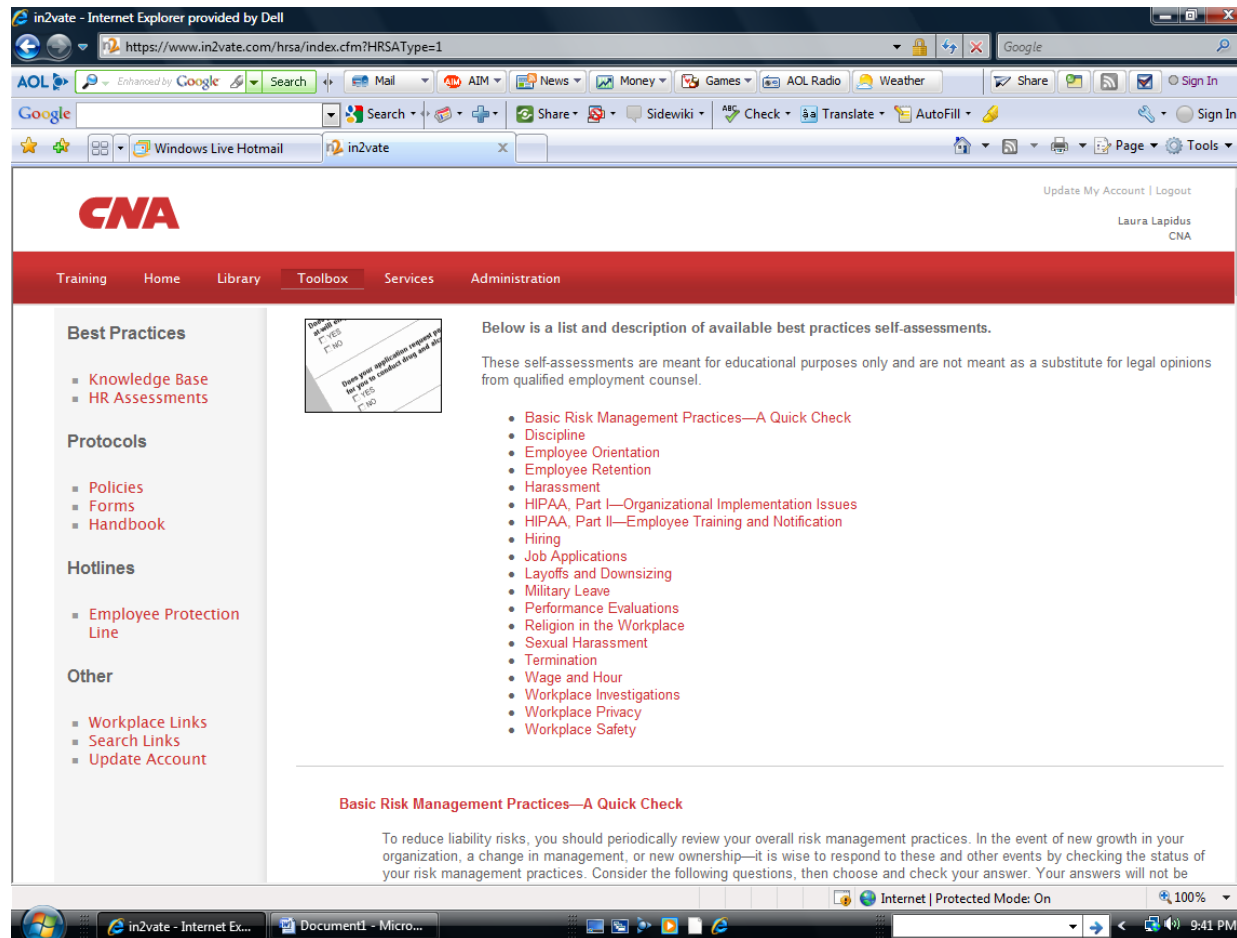
The main content area is divided into several sections:

- Workplace Resource:** A sidebar menu with links for "Articles" and "Search Articles". Below this is the "Employment Law Alliance" and a "Search All Articles" button.
- Workplace Resource Featured Article:** A large article titled "A Recipe for Workplace Success" with a sub-headline "Being good at your job is only part of the recipe for success at work. To heat up your career, remember to add these key ingredients." and a "Read More" button. An image of three people in a meeting is shown to the right.
- Disability Discrimination in 2010:** A short article snippet starting with "A decade ago, Americans added disability to the list of 'protected characteristics that employers cannot use when making decisions about workers. Over the past 20 years, the courts and the legislature have interpreted and clarified the disability laws. Most recently, Congress unanimously passed the ADA Amendments Act (ADAAA), effective on January 1," with a "Read More" button.
- Drug Testing in the Workplace:** A short article snippet starting with "Many employers perform drug and/or alcohol testing in the workplace, and many employers also believe that drug and alcohol testing is a simple matter. Unfortunately, that is just not the case." with a "Read More" button.
- The Effect of the Newest ADA Regulations:** A short article snippet starting with "If you have an employee who has a disability as defined by the ADA, now the ADAAA, you have an obligation to engage in an interactive process to determine if you can reasonably accommodate that disability in the workplace." with a "Read More" button.

At the bottom of the page, there is a footer with the in2vate logo, a copyright notice "© Copyright 2010, in2vate | All Rights Reserved", and a navigation menu: TRAINING | HOME | LIBRARY | TOOLBOX | SERVICES | ADMINISTRATION. The Windows taskbar at the bottom shows the system tray with the time 9:36 PM and the date 10/26/2010.



H.R. Web Training – Toolbox (self-assessments)



The screenshot shows a web browser window displaying the CNA HRSA website. The browser is Internet Explorer, and the URL is <https://www.in2vate.com/hrsa/index.cfm?HRSAType=1>. The website has a red header with the CNA logo and navigation links: Training, Home, Library, **Toolbox**, Services, and Administration. The user is logged in as Laura Lapidus, CNA.

The main content area is titled "Best Practices" and includes a sidebar with the following categories:

- Best Practices
 - Knowledge Base
 - HR Assessments
- Protocols
 - Policies
 - Forms
 - Handbook
- Hotlines
 - Employee Protection Line
- Other
 - Workplace Links
 - Search Links
 - Update Account

The main content area contains a section titled "Below is a list and description of available best practices self-assessments." with a disclaimer: "These self-assessments are meant for educational purposes only and are not meant as a substitute for legal opinions from qualified employment counsel." Below this is a list of self-assessments:

- Basic Risk Management Practices—A Quick Check
- Discipline
- Employee Orientation
- Employee Retention
- Harassment
- HIPAA, Part I—Organizational Implementation Issues
- HIPAA, Part II—Employee Training and Notification
- Hiring
- Job Applications
- Layoffs and Downsizing
- Military Leave
- Performance Evaluations
- Religion in the Workplace
- Sexual Harassment
- Termination
- Wage and Hour
- Workplace Investigations
- Workplace Privacy
- Workplace Safety

The "Basic Risk Management Practices—A Quick Check" section is highlighted, with a sub-heading: "To reduce liability risks, you should periodically review your overall risk management practices. In the event of new growth in your organization, a change in management, or new ownership—it is wise to respond to these and other events by checking the status of your risk management practices. Consider the following questions, then choose and check your answer. Your answers will not be..."



H.R. Web Training – Toolbox (self-assessments)

The screenshot shows a web browser window displaying the CNA HR Self Assessment: Discipline page. The browser is Internet Explorer, and the URL is https://www.in2vate.com/hrsa/show_hrса.cfm?hrsa_id=10&HRSA_Type=1. The page features the CNA logo at the top left and a navigation menu with options: Training, Home, Library, **Toolbox**, Services, and Administration. The user is logged in as Laura Lapidus, CNA.

The main content area is titled "Human Resource Self Assessment: Discipline" and contains five questions with radio button options for Yes and No:

- Question 1. Does your organization train its managers on its written discipline policy?
 Yes
 No
- Question 2. Does your organization's written discipline policy include language that expressly preserves the "at will" status of its employees?
 Yes
 No
- Question 3. Before imposing discipline, does your organization train its managers to verify the discipline it has imposed in the past on other employees for similar offenses?
 Yes
 No
- Question 4. Does your organization train your managers to have all the facts before imposing discipline?
 Yes
 No
- Question 5. Does your organization train its managers to check first the possible application of the Americans with Disabilities Act and the Family and Medical Leave Act before imposing discipline for unexcused absences?

The left sidebar contains a navigation menu with the following categories and links:

- Best Practices**
 - Knowledge Base
 - HR Assessments
- Protocols**
 - Policies
 - Forms
 - Handbook
- Hotlines**
 - Employee Protection Line
- Other**
 - Workplace Links
 - Search Links
 - Update Account



H.R. Web Training – Toolbox (self-assessments)

The screenshot shows a web browser window with the URL https://www.in2vate.com/hrsa/grade_hrsa.cfm. The page is from CNA and is titled "Human Resource Self Assessment: Discipline". The user is logged in as Laura Lapidus, CNA. The page features a navigation menu with "Toolbox" selected. On the left, there is a sidebar with categories: Best Practices (Knowledge Base, HR Assessments), Protocols (Policies, Forms, Handbook), Hotlines (Employee Protection Line), and Other (Workplace Links, Search Links, Update Account). The main content area contains three self-assessment questions:

- Question 1:** Does your organization train its managers on its written discipline policy?
Your answer was No. The ideal answer is Yes.
Managers trained on your organization's discipline policy are more likely to uniformly and consistently apply the policy. Train your managers periodically on your discipline policy. Pay particular attention to managers hired from other organizations. They may inadvertently apply their former employer's discipline procedures instead of your organization's. It is a good risk management practice to train your managers to review your organization's written discipline policy before imposing discipline. Provide a checklist for them to use as preparation for a disciplinary session.
- Question 2:** Does your organization's written discipline policy include language that expressly preserves the "at will" status of its employees?
Your answer was Yes.
A discipline policy should include language that expressly preserves the "at will" status of your employees. For example, some organizations have a progressive approach to discipline. These policies should contain language that allows a manager to bypass, when appropriate, any aspect of the progression to terminate an employee immediately. In addition, be sure to train your managers not to make statements during disciplinary sessions that could be construed as a guarantee of employment. Train your managers to avoid such guarantees.
- Question 3:** Before imposing discipline, does your organization train its managers to verify the discipline it has imposed in the past on other employees for similar offenses?
Your answer was No. The ideal answer is Yes.

The browser's taskbar at the bottom shows the system clock as 9:44 PM.



H.R. Web Training – Administration Tab

The screenshot shows the CNA in2vate Administration interface in Internet Explorer. The browser address bar shows the URL <https://www.in2vate.com/csa/index.cfm?tab=6>. The page features a red navigation bar with the CNA logo and a user profile for Laura Lapidus. The main content area is divided into three sections: System Administration, System Messages, and Online Training Courses.

System Administration

- Users
- Profiles
- Sites
- Departments
- Communication Center
- System Setup

Training Administration

- Training Bulletins
- Online Training Courses
- Live Training

Reports

- User Reports
- Training Reports

System Administration

Quick Links

- User List
- Assign Online Training
- Online Training Report
- Training Bulletin Report
- Live Training Report
- Calendar of Scheduled Training
- Schedule a Session

User Search

Enter a piece of information about the user:

(user id, first, last, email)

System Messages

There are no system messages at this time.

Online Training Courses

Courses completed	16
Courses incomplete	61
Courses overdue	61

Live Training

Upcoming live sessions	0
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