

Employment Issues: COVID-19, Employee Handbooks, and Member Benefits Available to Address HR Issues



Discussion Items

- ▶ COVID-19 Vaccination Mandates
 - ▶ Legal Issues
 - ▶ Requests for Accommodations to Vaccination Mandates Under the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII)
 - ▶ Developing a COVID-19 Vaccination Policy
- ▶ The Impact of President Biden's Employer Vaccination Mandate
 - ▶ OHSA's Emergency Temporary Standards (ETS)
 - ▶ MOSH's Response
- ▶ Employment Handbooks - Are They Current?
 - ▶ Disclaimers
 - ▶ Harassment Policies
- ▶ HR Resources Available Through LGIT
 - ▶ Online
 - ▶ In-Person
 - ▶ Over the Phone

Legal Issues

MOSH Guidance on Protecting Employees

- ▶ The Maryland Occupational Safety and Health Program (MOSH) is designed to ensure that every employee in the state has safe and healthful working conditions.
- ▶ MOSH “stands in the shoes” of Occupational Safety and Health Administration (OSHA) in Maryland.
- ▶ The MOSH general duty clause requires that “Each employer shall provide each employee of the employer with employment and a place of employment that are...free from each recognized hazard that is causing or likely to cause death or serious physical harm to the employee.”

How to Protect Employees from COVID-19

- ▶ Promote vaccination and facilitate employees getting vaccinated
- ▶ Require infected employees, those that have symptoms, or those that are unvaccinated and have had close contact with someone who has tested positive to stay home from work
- ▶ Require staff to wear masks
- ▶ Require staff to socially distance
- ▶ Rearrange workspaces
- ▶ Install plexiglass to separate employees
- ▶ Temperature checks

Limits on a Local Government's Ability to Mandate Vaccination

- ▶ Equal Opportunity Employment Commission (EEOC) Technical Guidance:
 - ▶ “The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA....”
 - ▶ In some circumstances, Title VII and the ADA require an employer to provide reasonable accommodations for employees who, because of a disability or sincerely held religious belief, practice or observance, do not get vaccinated for COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer’s business.
 - ▶ The analysis for undue hardship is slightly different depending on whether the accommodation is for a disability (including pregnancy-related conditions that constitute a disability) or for religion.

Collecting Information on Vaccination Status

- ▶ EEOC says that asking someone his or her vaccination status is not a medical inquiry or exam under the ADA.
- ▶ Collecting vaccination cards or other proof of vaccination is also not a medical inquiry or exam under the ADA.
- ▶ However, vaccination cards or other proof of vaccination status *must* be kept confidential.
- ▶ Vaccination records should be collected by one person or through a centralized office or department, such as Human Resources.
- ▶ Information can only be shared with those that need-to-know vaccination status - and that is a very limited group of people.

Requests for Accommodation to Vaccine Mandates Under the ADA

ADA Basics

- ▶ Prohibits discrimination based on disability
- ▶ Applies to employers with 15 or more employees
- ▶ Covered employee - an employee with a physical or mental impairment, whether actual or perceived, that “substantially limits” one or more “major life activities”
- ▶ In assessing whether an impairment substantially limits a major life activity, courts look to “the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment”
- ▶ Major life activities include, among other things, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working
- ▶ A short-term illness or other impairment may qualify as a disability if it is severe

ADA and Reasonable Accommodations

- ▶ Requires employers to provide “reasonable accommodations to employee” that will allow them to perform essential functions of his/her position
- ▶ Determining whether a reasonable accommodation exists is an interactive process between the employee and the employer
- ▶ The interactive process is designed to determine if there any reasonable accommodations available that would allow the employee to fully perform the essential functions of his or her job
- ▶ This requires an individualized assessment based upon the unique facts and circumstances of each request, including the employee’s disability and job duties
- ▶ A reasonable accommodation must be provided unless it causes an undue hardship for the employer

Considering a Request for an Accommodation

- ▶ Verify the existence of the underlying disability
- ▶ Request medical documentation to support the accommodation request - documents that relate to why employee can't receive the vaccine
- ▶ Meet with the employee and discuss possible accommodations
- ▶ Determine whether proposed accommodations will create an “undue hardship”
- ▶ Implement an effective reasonable accommodation
- ▶ Confirm that the accommodation is effective
- ▶ Periodically revisit to make sure accommodation is still necessary / still providing a benefit
- ▶ As with everything, document the process

Undue Hardships Under the ADA

- ▶ Inquiry on whether an accommodation creates an undue hardship focuses on the resources and circumstances of the employer in relationship to the cost or difficulty of providing a specific accommodation
- ▶ Undue Hardships include accommodations that:
 - ▶ Are difficult to implement or expensive
 - ▶ Are extensive, substantial, or disruptive
 - ▶ Would fundamentally alter the nature or operation of the business

Examples of Reasonable Accommodations

- ▶ Require the employee to undergo weekly COVID-19 testing (at the employer's expense)
- ▶ Allow the employee to work remotely
- ▶ Restructure the employee's job
- ▶ Create a modified / part-time work schedule
- ▶ Require the employee to wear a mask in the workplace
- ▶ Reassign the employee to a different position for which he/she is qualified
- ▶ Relocate the employee to a different part of the office
- ▶ Provide unpaid leave
- ▶ Combination of these examples

Requests for Accommodation to Vaccine Mandates Under Title VII

Title VII & Religious Beliefs

- ▶ Must accommodate “sincerely held religious beliefs.”
- ▶ Title VII defines “religion” to include “all aspects of religious observance and practice as well as belief,” not just practices that are mandated or prohibited by a tenet of the individual’s faith.
- ▶ Belief in God or gods is not necessary; nontheistic beliefs can also be religious if they “occupy in the life of that individual ‘a place parallel to that filled by...God’ in traditionally religious persons.”
- ▶ Protections apply whether the religious beliefs or practices are common or non-traditional, and regardless of whether they are recognized by any organized religion.
- ▶ Social, political, or economic philosophies, and mere personal preferences are not “religious” beliefs within the meaning of Title VII.
- ▶ In *Thomas v. Rev. Bd.*, 450 U.S. 707, 714 (1981) the U.S. Supreme Court stated: The determination of what is a ‘religious’ belief or practice is more often than not a difficult and delicate task. . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

Sincerely Held Religious Beliefs

- ▶ No major religious denomination in the U.S. opposes vaccination outright
- ▶ However, an employee's sincerely held religious belief does not need to follow the tenets of a particular religion
- ▶ Simply because a particular church has encouraged its members to receive the COVID-19 vaccines, an individual member may hold a sincerely held religious belief to the contrary
- ▶ That said, simply saying, “I believe in God, I can't get vaccinated” is not sufficient
- ▶ An employee must be able to articulate a substantive explanation that's more than that
- ▶ Employers must engage in the interactive process to determine whether the belief is sincere or not
- ▶ But I cannot tell you that what you sincerely hold as a religious belief does not exist, so that's a potential challenge

...Continued

- ▶ Whether an employer grants a religious exemption to a vaccination requirement is generally based on a judgment of the employee's sincerely held religious belief
- ▶ An employee's stated religious belief is usually not in dispute and is generally presumed or easily established
- ▶ An individual's sincerity in espousing a religious observance or practice is largely a matter of individual credibility
- ▶ A sincere religious believer doesn't forfeit his/her religious rights merely because he/she is not scrupulous in observance
- ▶ An individual's beliefs - or degree of adherence - may change over time, and an employee's newly adopted religious practice may be sincerely held

Factors to Consider

- ▶ Whether the employee's behavior is inconsistent with the professed belief
- ▶ Whether the accommodation constitutes a desirable benefit likely to be sought for secular reasons
- ▶ The timing of the request if it renders the request suspect
- ▶ If you have an objective reason to believe the accommodation is not sought for religious reasons
- ▶ Evidence tending to show that an employee acted in a manner inconsistent with his professed religious belief is, of course, relevant to the fact-finder's evaluation of sincerity

EEOC Guidance

*“[T]he employer *should ordinarily assume* that an employee’s request for religious accommodation is based on a sincerely held religious belief, practice, or observance. However, if an employee requests a religious accommodation, and an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.”*

What Questions Can You Ask to Determine An Employee's Sincerity?

- ▶ Inquiry is narrower in scope than a request under the ADA where you can ask for documentation
- ▶ Explore the nature of the belief with the employee
- ▶ Ask the employee for a narrative explanation, in writing if possible, detailing his or her objection to the vaccine and the religious basis for the objection
- ▶ If the narrative supports the request for religious accommodation, then accept it as a valid request and go on to the next step of determining whether you can accommodate without undue hardship
- ▶ Employees can also submit letters from their imam, minister, pastor, priest, rabbi, or other spiritual leader, but they are not required to do so, and you should not ask for one
- ▶ If the sincerely held religious belief is based on use of fetal cells in the development of the vaccine, consider asking whether the employee takes other medications that also used fetal cells in their development, like Tylenol or Motrin
- ▶ An employee who fails to cooperate with an employer's reasonable request for verification of the sincerity or religious nature of a professed belief risks losing any subsequent claim that the employer improperly denied an accommodation

Undue Hardships Under Title VII

- ▶ If the narrative establishes a sincerely held belief, give the accommodation unless doing so would create an undue hardship
- ▶ Not defined by the statute but defined by the Supreme Court as “*more than a de minimis cost*”
- ▶ An accommodation may cause an undue hardship if it is:
 - ▶ Costly
 - ▶ Compromises workplace safety
 - ▶ Decreases workplace efficiency
 - ▶ Infringes on the rights of other employees
 - ▶ Requires other employees to do more than their share of potentially hazardous or burdensome work

Examples of Reasonable Accommodations

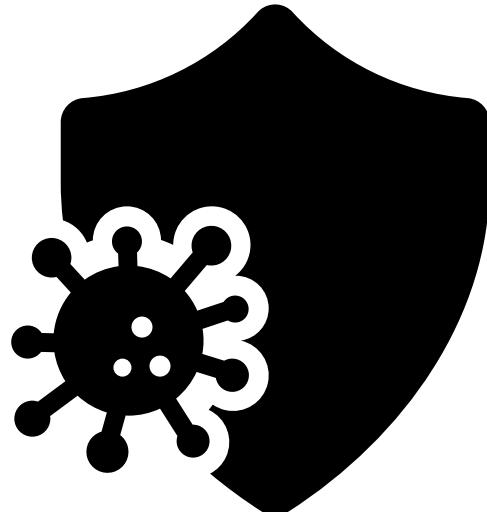
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Developing a COVID-19 Vaccination Policy

So, What's Next?

- ▶ Decide whether to institute a vaccination policy
- ▶ Issues to consider:
 - ▶ “Red line approach” (mandatory vaccination or termination) or “soft approach” (mandatory vaccination or weekly testing)
 - ▶ Determine who will be responsible for gathering vaccination information
 - ▶ Make sure that procedures are in place to keep the information confidential
 - ▶ Set a deadline for employees to report their vaccination status
 - ▶ If periodic testing is going to be an option for the non-vaccinated, determine:
 - ▶ Who will decide where testing is done - the employer or the employee (best practice is to let the employee decide)
 - ▶ Who will pay for the testing
 - ▶ How are the results to be reported and stored
 - ▶ Develop a procedure for receiving and considering requests for accommodation
 - ▶ Consider creating a committee to review and consider requests for an accommodation

Vaccination and Previously Infected



- ▶ Studies reported by the CDC reveal that among people that previously tested positive for COVID-19, they were more than twice as likely to be reinfected than individuals that are fully vaccinated after having had COVID-19
- ▶ CDC Guidance continues to be that individuals that previously had COVID-19 receive the vaccination
- ▶ Other studies say that individuals that have previously had COVID-19 have “natural immunity” and don’t need to be vaccinated
- ▶ Issue that you will have to address in developing your policy

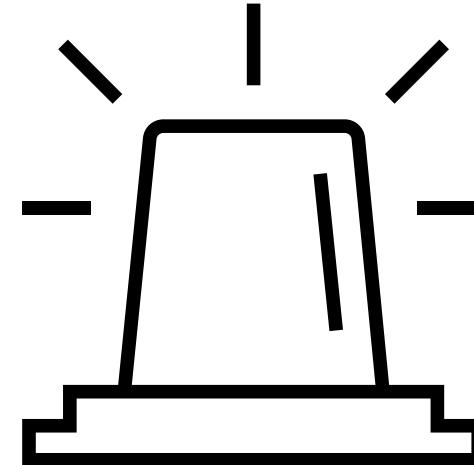
The Impact of President Biden's Vaccine Mandate

President Biden's COVID-19 Action Plan

- ▶ Mandatory vaccination for individuals working for employers that have 100 or more employees - 2% of employers, but over 80 million employees
- ▶ Those who refuse to get vaccinated must produce a negative test on a weekly basis in order to enter the workplace
- ▶ Accommodations are available under the ADA and Title VII
- ▶ Employers must provide paid leave for employees to obtain the vaccine and/or recover post vaccine
- ▶ OSHA has to issue an Emergency Temporary Standards (ETS) setting the regulatory scheme for the policy before it goes into effect

Occupational Safety and Health Administration (OSHA) Emergency Temporary Standard (ETS)

- ▶ We're still waiting for the ETS
- ▶ October 12, 2021 - OSHA sent the draft ETS to the White House
- ▶ Not made public yet
- ▶ Once the ETS is published, it will be controlling on private employers with 100 or more employees



Impact of President Biden's Action Plan on Maryland's Local Governments

- Maryland has its own OSHA workplace safety and health program (MOSH)
- MOSH has authority over most private sector employers and all state and local public sector employers
- Once the ETS are issued, MOSH has three options
 - Adopt the ETS as enacted by OSHA
 - Amend the ETS to be just as or more effective
 - Enact its own standard or rely on an existing standard that is “just as effective”
- MOSH has adopted all previously issued OSHA standards related to public and private sector employment operations, but has also adopted unique standards not addressed by OSHA
- No way of knowing what MOSH will do - we will just have to wait and see

General Timeline

- ▶ OSHA publishes the ETS and makes it available to the public
- ▶ Approximately a week later - OSHA publishes the ETS to the Federal Register - making it the “law of the land” - except in states like Maryland that have a “State Plan”
- ▶ Fifteen days after ETS published to Federal Register - MOSH must adopt ETS or announce an alternative
- ▶ Fifteen days later, MOSH must make the ETS or its alternative effective
- ▶ Typically, there is a thirty-day grace period for compliance

Employee Handbooks



Introduction

- ▶ Maryland is an at-will employment state - you can fire someone for no reason or a good reason - just not for a bad or unlawful reason
- ▶ Local governments therefore can set the working conditions
- ▶ Examples of bad or unlawful reasons for termination:
 - ▶ Filing a worker's compensation claim
 - ▶ Refusing to commit an unlawful act
 - ▶ Refusing to commit an act which violates another's constitutionally or statutorily protected legal rights
 - ▶ Whistleblowing
 - ▶ Gender, Race, Religion, or another protected characteristic

Disclaimer Language

- Employee Handbook should include clear and unambiguous language stating that it does not create an employee contract.
- Statement should be on the cover and in the introduction.
- Examples:
 - This Handbook Neither Constitutes nor Creates an Employee Contract. The Policies and Procedures Set Forth Herein May be Unilaterally Changed by (employer name) at Any Time.
 - Nothing in this employee handbook creates or is intended to create an employment agreement, express or implied. Nothing contained in this or any other document provided to the employee is intended to be, nor should it be, construed as a contract that employment or any benefit will be continued for any period-of-time. In addition, no employee, official, or representative of (employer name) is authorized to modify this policy for any employee or to enter into any agreement, oral or written, that changes the at-will relationship.

Harassment Policies

- Federal, State, and County Law identify “protected characteristics” and employees cannot be discriminated against based upon them.

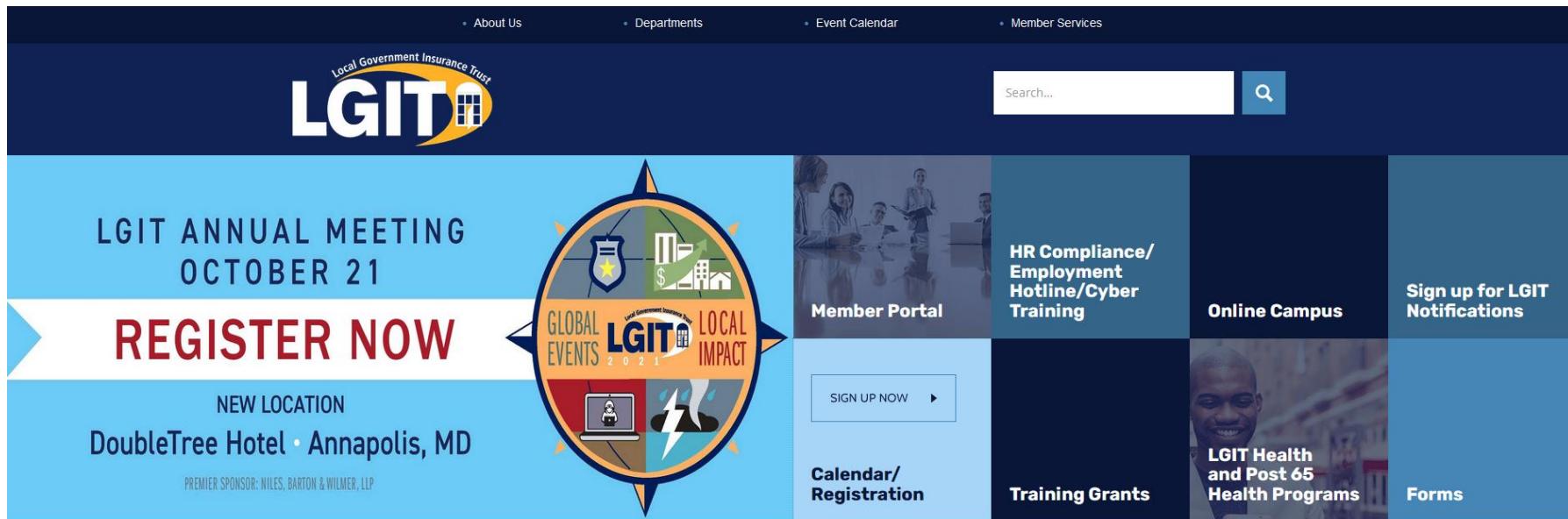
Race	Color
Religion	Sex/Gender
Sexual Orientation	Gender Identification
Pregnancy	Ethnicity
National Origin	Age
Disability (mental or physical)	Marital Status
Genetic Information	Veteran Status

Harassment Policies

- ▶ Policy should be reviewed every few years
- ▶ Key provisions:
 - ▶ Clear and unambiguous statement that harassment will not be tolerated
 - ▶ All characteristics identified in federal, state, and county laws should be listed
 - ▶ Also include a catchall provision at the end of the list - “and any other characteristics protected by federal, state, or county law”
 - ▶ Anti-retaliation provision for victim and third parties
 - ▶ Alternatives for reporting
 - ▶ Brief explanation of the investigation process
 - ▶ Statement regarding ramifications if the policy is violated

HR Resources Available Through LGIT

Online Resources Available Through LGIT



The screenshot shows the LGIT website homepage. At the top, there is a dark blue header with the LGIT logo and navigation links for About Us, Departments, Event Calendar, and Member Services. Below the header is a search bar with a magnifying glass icon. The main content area features a large blue banner on the left with the text "LGIT ANNUAL MEETING OCTOBER 21" and a "REGISTER NOW" button. To the right of this banner is a circular graphic with the text "GLOBAL EVENTS LGIT 2021 LOCAL IMPACT" and icons for a laptop, a lightning bolt, and a building. The main content area is divided into several sections: "Member Portal" (with a photo of people at a table), "HR Compliance/ Employment Hotline/Cyber Training" (with a photo of people), "Online Campus" (with a photo of a person), "Sign up for LGIT Notifications" (with a photo of a person), "Calendar/ Registration" (with a "SIGN UP NOW" button), "Training Grants" (with a photo of a person), "LGIT Health and Post 65 Health Programs" (with a photo of a person), and "Forms".

HR Compliance Portal - “Solutions” Tab

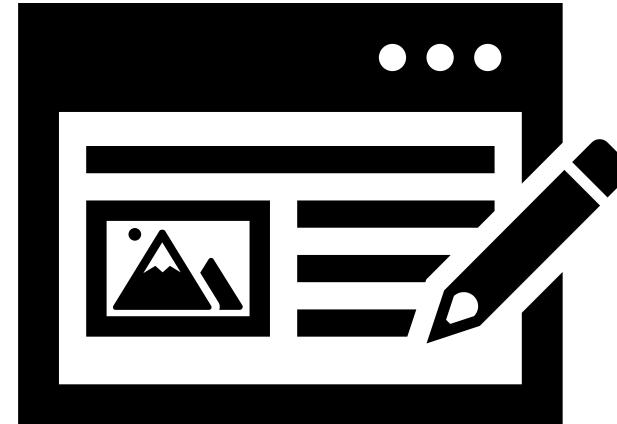
- ▶ Must receive a login and password from LGIT to use this member benefit
- ▶ Select solutions tab and then five options come up:
 - ▶ HR & Employment
 - ▶ Cyber Essentials
 - ▶ Emergency and Disaster
 - ▶ Safety Compliance
 - ▶ Website Accessibility

HR Compliance Portal - “Solutions” Tab

- ▶ “HR and Employment” has numerous resources
- ▶ Handbook Builder
 - ▶ Helps identify “must have” topics for your handbook
 - ▶ Still must be customized to meet your government’s particular needs
- ▶ Sample Job Descriptions - Searchable Database
- ▶ Mandatory State and Federal Posters - Available to Download
- ▶ Webinars - Examples
 - ▶ Pay Equity & Gender Discrimination
 - ▶ COVID-19 Updates
 - ▶ Minimizing Retaliation Claims
- ▶ Pod Casts - Examples
 - ▶ Basics of Human Resources - Six Part Series
 - ▶ Tricky Employment Conversations - ADA Accommodation Discussions; Harassment Investigations; Termination; and Exit Interviews - Six Part Series

Mandatory Federal and State Posters

- ▶ Discrimination is Unlawful Poster
- ▶ Earned Paid Sick and Safe Leave Poster
- ▶ Employment Discrimination Poster
- ▶ Equal Pay for Equal Work Poster
- ▶ Health Insurance Coverage Poster
- ▶ Minimum Wage Poster
- ▶ Paid Leave Poster
- ▶ Safety and Health Protection On The Job (Public Sector)
- ▶ Unemployment Insurance Poster
- ▶ Workers' Compensation Poster



LGIT's Online Campus

- ▶ Must receive a login and password from LGIT to use this member benefit
- ▶ LGIT Online Campus courses have been created with adult learning styles in mind
- ▶ Courses are typically 45 to 60 minutes
- ▶ By requiring employees to take classes you are:
 - ▶ Expressing a strong commitment to your staff's professional and personal development
 - ▶ Helping to manage risk exposures to your organization
- ▶ Employees can be assigned courses and are typically given a test to assess their understanding of the material
- ▶ Certificates generated to provide proof of training

Sample Online Course Offerings

- ▶ Dozens of Topics and Hundreds of Classes
 - ▶ Generational Differences
 - ▶ Supervisory Skills
 - ▶ Diversity in the Workplace
 - ▶ Enhancing Work Relationships
 - ▶ Workplace Bullying
 - ▶ Stress and Your Health
 - ▶ Sexual Harassment in the Workplace
 - ▶ Managing a Remote Workforce

LGIT's Online Campus and Law Enforcement

- ▶ Law Enforcement is currently required to undergo 18 hours of Maryland Police Training Commission (MPTC) approved in-service training each calendar year
- ▶ Online Campus currently offers 39 classes that are approved for between one and two credit hours by the MPTC
- ▶ Great resource for your departments because the Online Campus provides the flexibility that live in person training does not
- ▶ Not suggesting online training is a substitute for in-person training, but it is a compliment to meet the mandatory minimum number of hours of training

In-Person Resources Available Through LGIT

Live Training Opportunities

- ▶ Basics of Risk Management
- ▶ Beginning Supervisors Workshop
- ▶ Defensive Driving
- ▶ EVOC - Emergency Vehicle Operations Course
- ▶ Flagger Training
- ▶ Unlawful Harassment in the Workplace
- ▶ Recognizing Drug & Alcohol Misuses - “Reasonable Suspicion”
- ▶ Sewer Backup Loss Prevention
- ▶ Miss Utility Training
- ▶ Law Enforcement Liability Issues

LGIT's Training Grant Program

- The Training Grant Program is designed to assist Members who wish to increase and improve their employees' knowledge through training and thereby reduce liability claims and property damage
- Training grants are awarded to attend seminars, workshops, conferences, technical classes or other related training programs
- All training grants are a 50/50 matching grant
- Maximum award is \$2,500 - this cap is not applicable to law enforcement related training requests
- Application available online
- Applications reviewed and decided upon by the Risk Management Committee
- Awarded in three cycles - fall, winter, and spring

Over the Phone Resources Available Through LGIT

Employment Law Hotline

- The Employment Law Hotline is available at no charge to LGIT members of the Primary Liability Pool
- Provides members with direct access to a licensed Maryland attorney at Karpinski Cornbrooks & Karp P.A. during normal business hours
- Attorney will answer legal questions and help resolve specific issues and situations that arise in the workplace
- Attorney can provide up to 30 minutes of free legal advice for each employment issue
- If a member uses the Employment Law Hotline before making an employment decision, and the matter later results in litigation, the member's deductible for that matter will be reduced by half

Employment Law Hotline Phone Number

1.800.845.8055

410.727.5000

LGIT'S Human Resources Department

- ▶ LGIT's Human Resources Department serves not only LGIT staff, but also membership
- ▶ Designed to complement the Employment Law Hotline
- ▶ The HR Director is available to:
 - ▶ Serve as a “second opinion” for HR / Administrative staff
 - ▶ Have something “run by him”
 - ▶ Answer general HR related questions
 - ▶ Participate in group discussions on various HR related issues
 - ▶ Review handbook policies for topics such as Harassment and FMLA
 - ▶ Provide live, in-person trainings
- ▶ Employee specific questions will be referred to the Employment Law Hotline

LGIT'S Human Resources Department

Phone Number

443.561.1700

Resources and Contacts

- ▶ LGIT's website - www.lgit.org
 - ▶ HR Compliance / Employment Hotline / Cyber Training (michelek@lgit.org)
 - ▶ Online Campus (michelek@lgit.org)
 - ▶ Training Grant Program (lbohlen@lgit.org)
- ▶ Live offerings:
 - ▶ In-person Trainings (lbohlen@lgit.org)
 - ▶ General HR Questions (mpeter@lgit.org)
- ▶ Telephone Access
 - ▶ Employment Law Hotline - 800.845.8055 or 410.727.5000
 - ▶ LGIT's Human Resources Department - 443.561.1700



Thank you for your time
and consideration.

