

RISK MANAGEMENT:

# It's Quite the Ride



## **Employment Practices Liability Coverage Update: There is a Dead Mountain Lion in Back of the Organization Vehicle**

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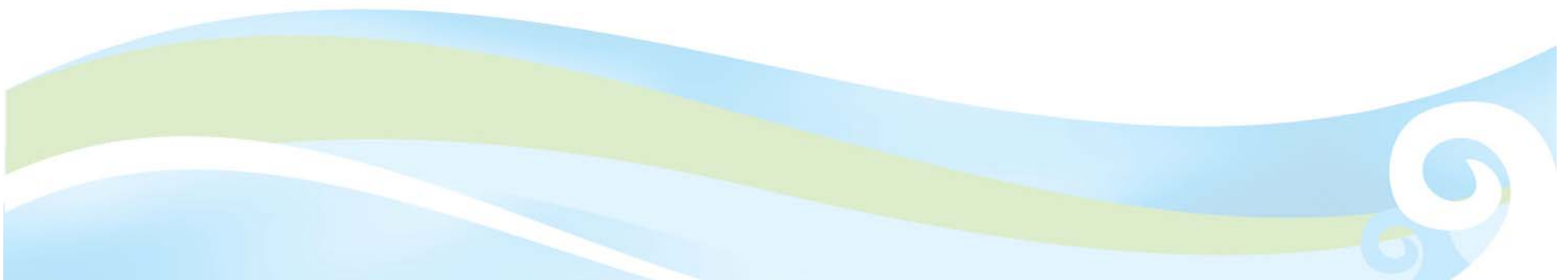
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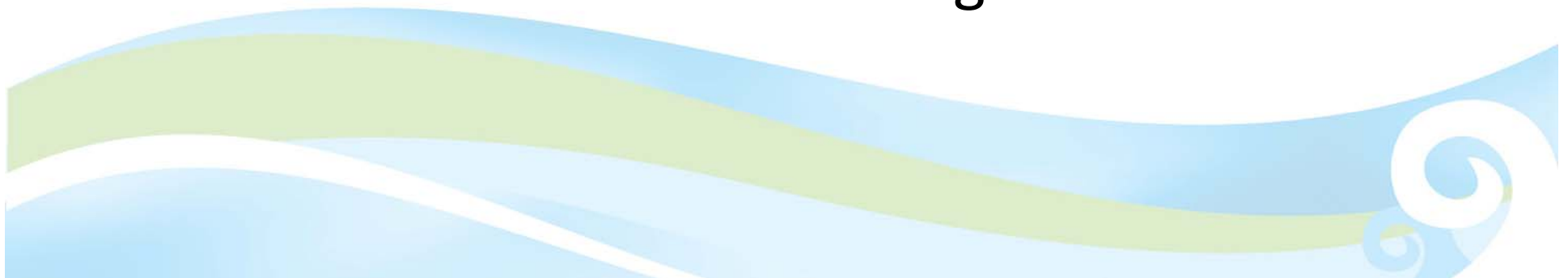
# You know it's HR In Montana, when...

- ...all of your staff want to skip their Board of Directors meeting to go to the “Vigilante Day Parade”.
- ...April 30<sup>th</sup> – highlights Ted Kaczynski's Cabin, Buffalo Jump and Women’s Boxing

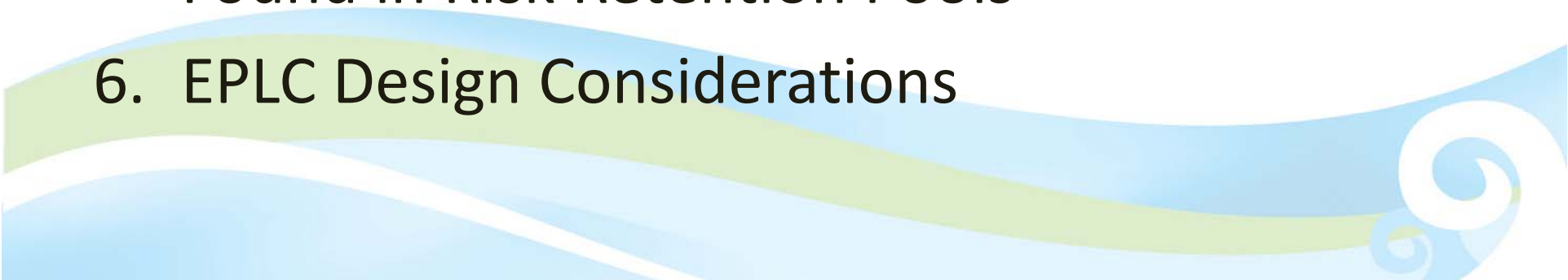


# Overall Objectives

1. Encourage interaction – what HR risks are you observing
2. Discuss practical approaches to managing risk through HR management
3. Apologize – I have lots to say, and not enough time to say it all – so hold on for turbo training



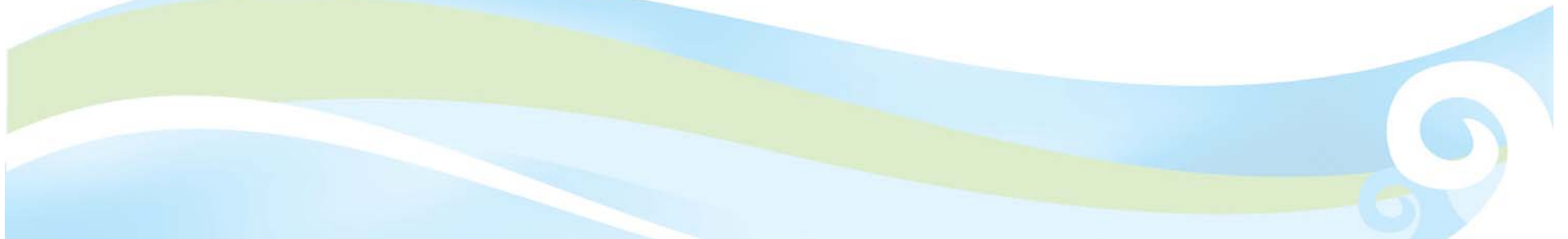
# Learning Objectives

1. HR management is risk management
  2. Overview of current issues in EPLC
  3. HR Audits / EPLC Underwriting
  4. Risk Retention Pools - Putting HR and Risk Management Together
  5. Types of EPLC Coverage and Support Found in Risk Retention Pools
  6. EPLC Design Considerations
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# HR Management is Risk Management

## *Eye Opening Fact...*

- You are statistically more likely to have an EPLC claim than a fire claim
- Would you even consider going without fire coverage?



# HR Management is Risk Management

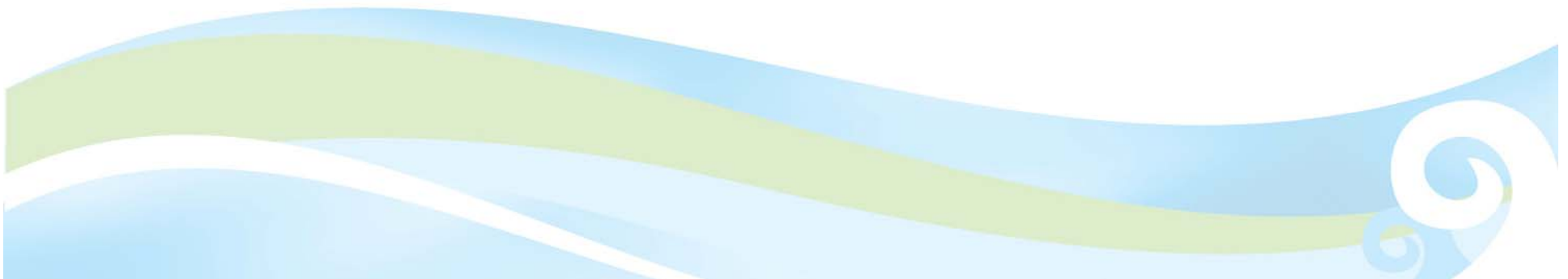
- It's more than employment related lawsuits
- A conceptual shift that proper Human Resource Management impacts entire organization
- It's organizational design and behavior that impacts productivity, safety and profitability
- HR risks can be managed – just need to decide at what degree to manage



# HR Management is Risk Management

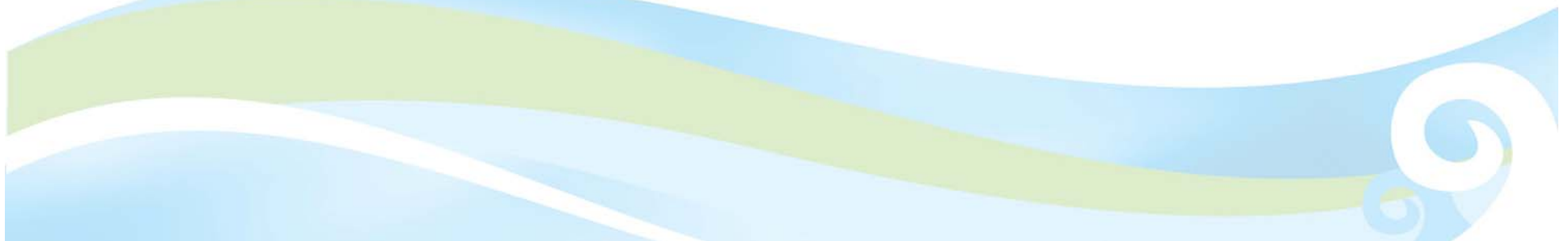
- My soapbox...

Help good employees avoid making bad decisions through demonstrated oversight (checks / balances / policies procedures / enforcement)



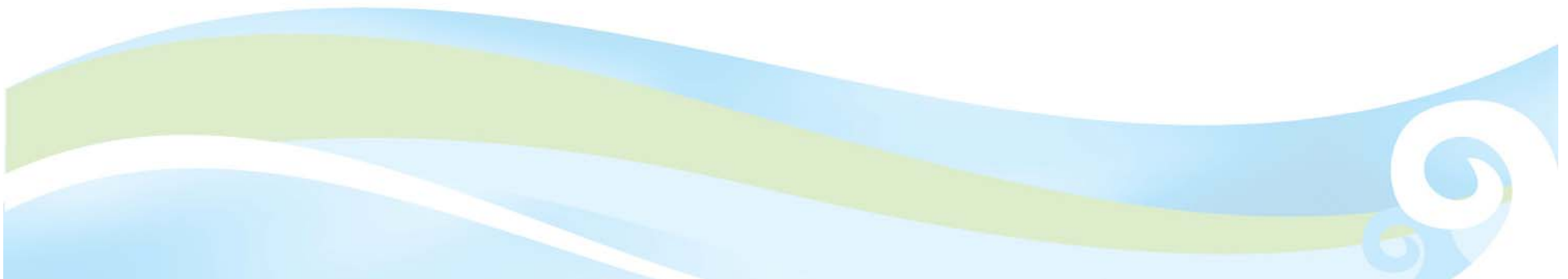
# HR Management is Risk Management

- Changing climates in State and Federal Courts
- American's with Disabilities Act (ADA) and ADAA
- Equal Employment Opportunity (EEOC)
- Title VII of the 1964 Civil Rights Act (Title VII)
- Equal Pay Act of 1963 (EPA)
- Age Discrimination in Employment Act of 1967 (ADEA)
- Family Medical Leave Act (FMLA) – passed in 1993



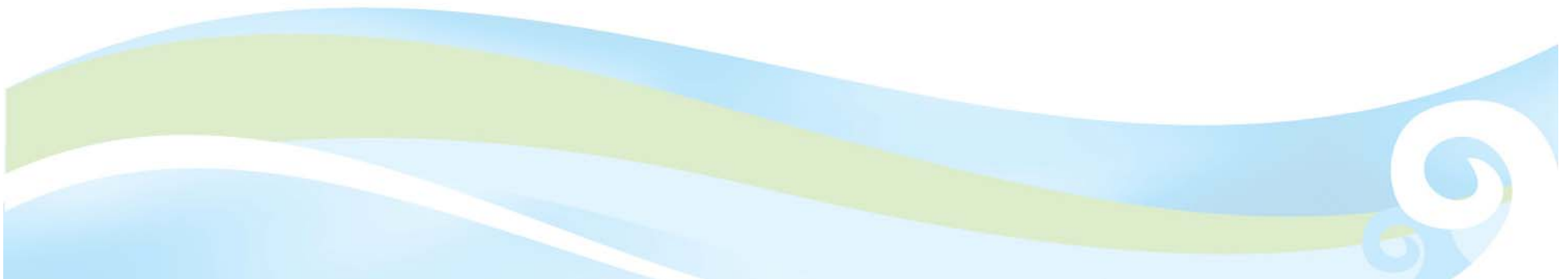
# You know it's HR In Montana, when...

- ...time off with pay for “branding” season can still be found in some union contracts.



## You know it's HR In Montana, when...

- Strong History of Labor Movement
- ***Confessions of a Union Rep Ex-Wife*** – Yes in Montana you can have an unlicensed handgun on Organization property, shoot holes in the Organization car, lie about it, cover it up, get caught, and still keep your job and receive back pay



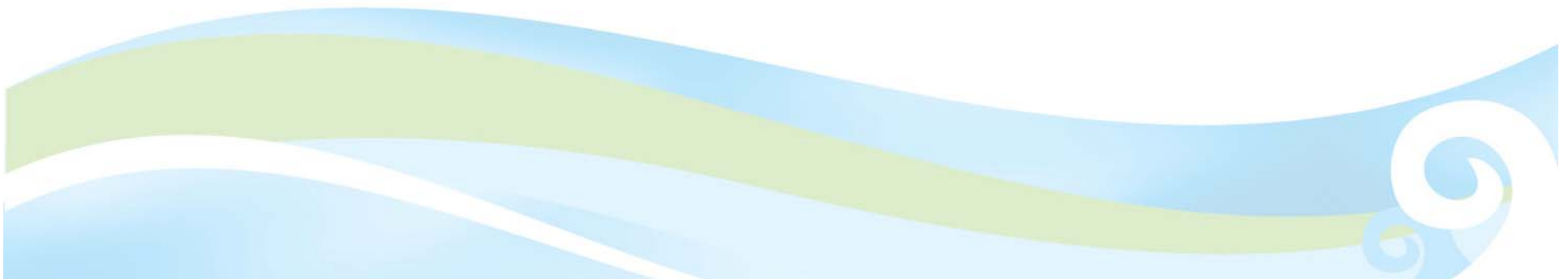
# HR Management is Risk Management

- New city employee put on 1967 street roller ..... roller has been without brakes for a decade
- Employee unaware that this roller is for use only on flat areas
- Loses control of roller while taking it down a hill – has to avoid several homes and then jumps off roller



# HR Management is Risk Management

- Runaway roller – perfect example where human resources, liability, property and workers' compensation intersect
- *Thoughts on how this could have been avoided?*



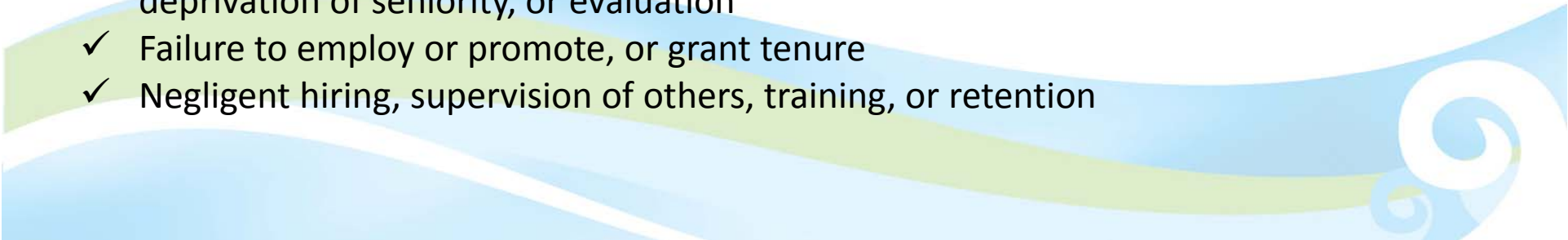
# Overview of EPLC

- Liability coverage protecting an employer against legal actions connected to wrongful employment practices – such as discrimination, sexual harassment, termination and other employment - related allegations.
- Provides protection for employers against claims by:
  - Past, Present, Future Employees
  - Outside Parties - if carry Third Party EPLC
  - Government entity or Agency
    - EEOC
    - Human Rights Bureau
- Provides protection for the Entity, Directors / Officers, Supervisors, Managers and Employees.



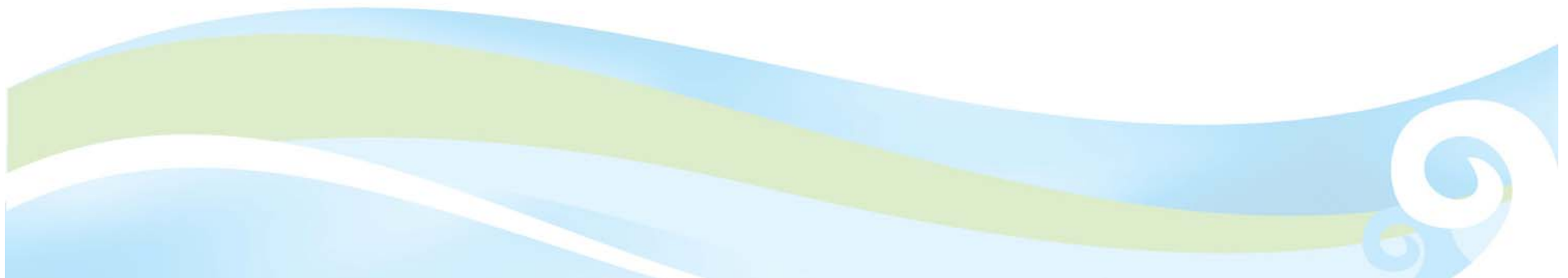
# Overview - What is covered under EPLC?

Wrongful Employment Practice means ANY *Actual* or *Alleged*:

- ✓ Discrimination
  - ✓ Retaliation
  - ✓ Sexual Harassment
  - ✓ Wrongful Harassment
  - ✓ Wrongful Termination
  - ✓ Breach of Employment Agreement
  - ✓ Violation of the Family Medical Leave Act
  - ✓ Employment-related Misrepresentation
  - ✓ Defamation, including Libel or Slander, or Invasion of Privacy
  - ✓ Failure to create or enforce adequate workplace or employment policies and procedures
  - ✓ Wrongful discipline, denial of training, deprivation of career opportunity, denial or deprivation of seniority, or evaluation
  - ✓ Failure to employ or promote, or grant tenure
  - ✓ Negligent hiring, supervision of others, training, or retention
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# Overview - Why the Demand for EPLC?

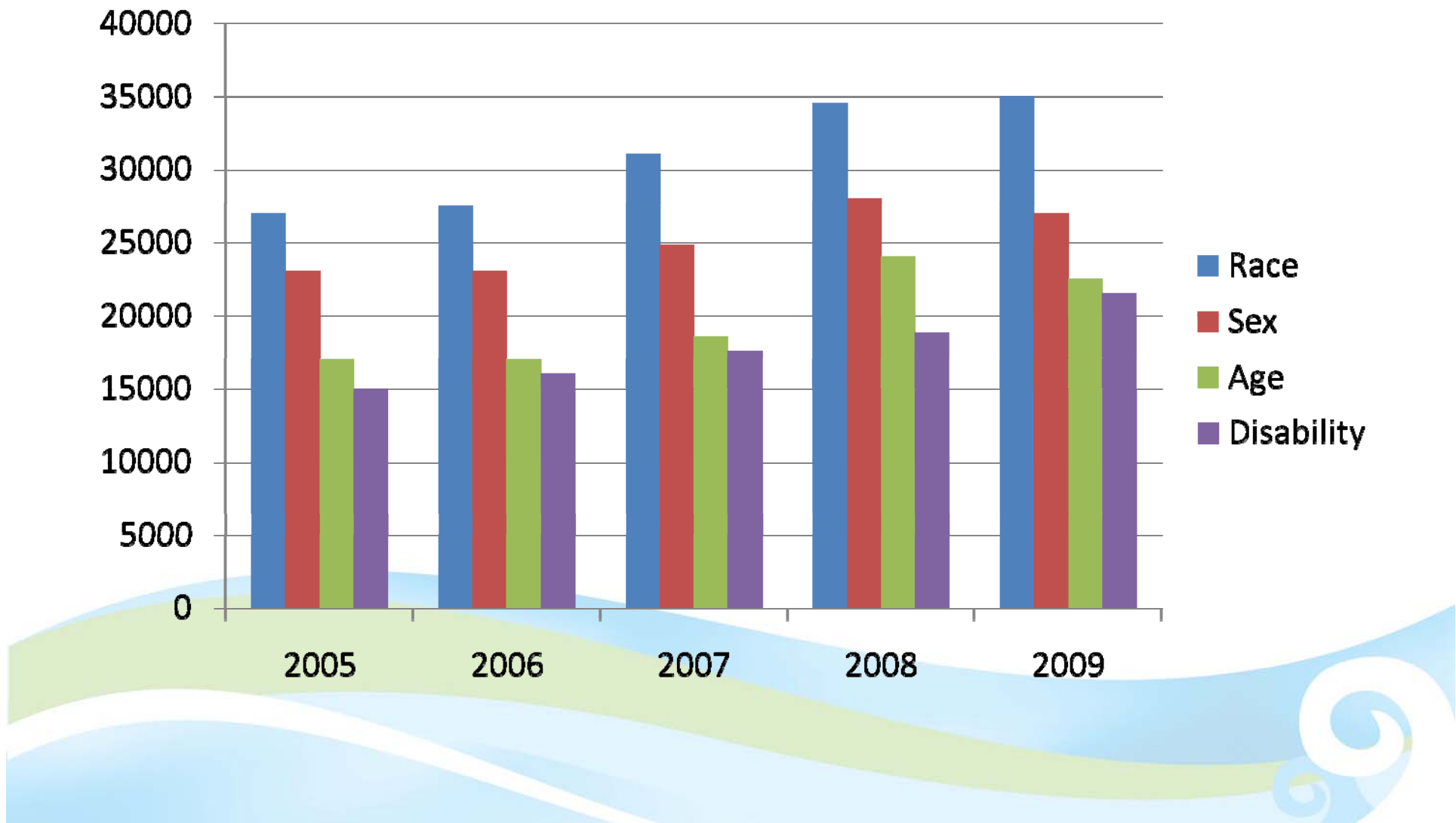
- Cases against employers are on the rise – Employment Law is one of the fastest growing areas of law.
- Companies are vulnerable from the pre-hiring process through the exit interview- few know & fully comply with the Law.
- Companies with proper HR policies in place are not immune to EPLC claims or allegations – even groundless allegations must be defended.
- Wrongful Act does not need to be “significant” harassment or discrimination – or even intentional
- Economic downturn – direct impact on EPLC allegation & litigation
- Excluded under GL and most other liability products.



# Overview - EPLC Trends

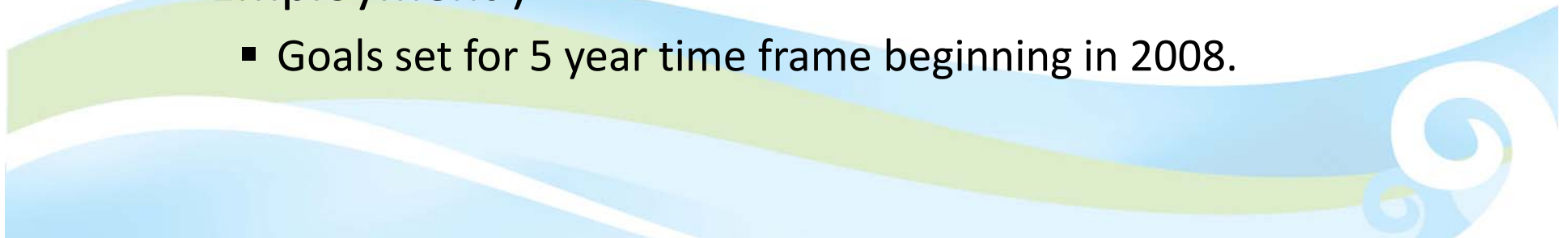
- 93,277 EEOC filings in 2009 ([www.eeoc.gov](http://www.eeoc.gov))
  - 2nd highest level (2008 highest at 95,401)
- Monetary relief obtained for victims \$376 Million
- Discrimination based on disability, religion and/or national origin hit record highs.
  - Disability claims increased by 10% to 21,451 (expected to continue)
  - Age discrimination claims reached the 2<sup>nd</sup> highest level ever (costly to resolve)
- Most frequently filed charges:
  - Race Discrimination – 36%
  - Retaliation – 36%
  - Sex-based discrimination – 30%

# Overview - EEOC Claim Trends



# Overview - Current EPLC Market

- ❑ Increase in EEOC filing – 2009 was the 2<sup>nd</sup> highest level in 5 years
- ❑ Expect EEOC filings will increase for 2010 due to:
  - Current Economic Conditions
  - “Baby Boomers” (now 44-62) largest population in workforce
  - EEOC has set objectives & goals for their E-RACE campaign (Eradicating Racism and Colorism From Employment )
    - Goals set for 5 year time frame beginning in 2008.

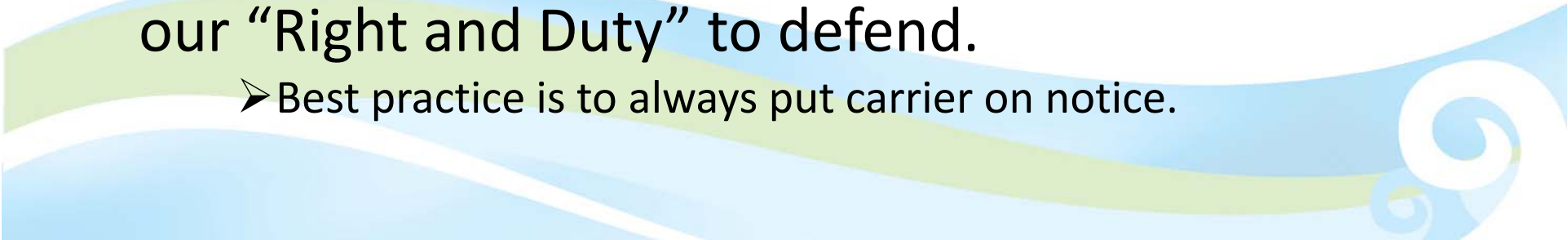


# Overview - Current EPLC Market

- ❑ EPLC cases are on the rise – 3 out of 5 firms will be sued by an employee.
- ❑ Even if a claim is groundless or fraudulent, it must be defended.
  - Cost just to respond to EEOC is \$5,000
  - 52,363 No Reasonable Cause in 2009
  - 3,902 Reasonable Cause in 2009
- ❑ The employer cannot control everything that is said or occurs in the workplace.

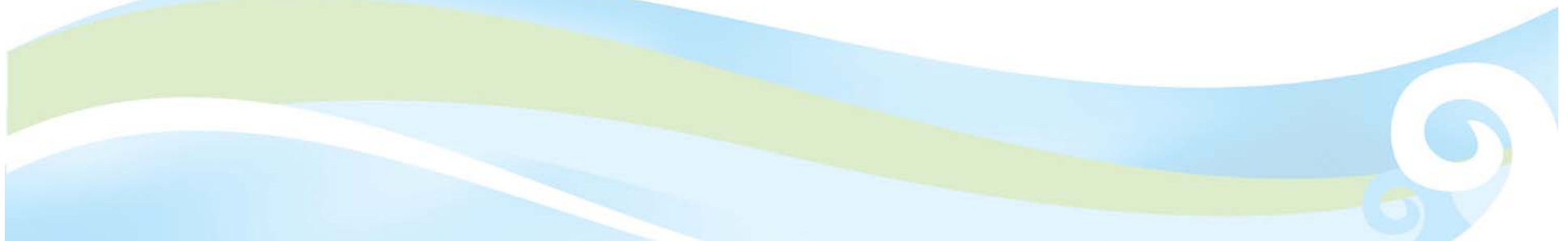


# Overview - EPLC Claim Handling

- ❑ Important that Claim Representative specialize in EPLC
    - Very sensitive/personal matters
    - Knowledge and experience with EEOC
    - Use counsel with EPLC expertise - can take case to trial
  - ❑ Insured must notify Carrier timely of all potential claims to avoid denial of claim
  - ❑ Under Duty to Defend – Insured cannot start defense process without Insurance Carrier – it’s our “Right and Duty” to defend.
    - Best practice is to always put carrier on notice.
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# Overview - EPLC Claim Handling

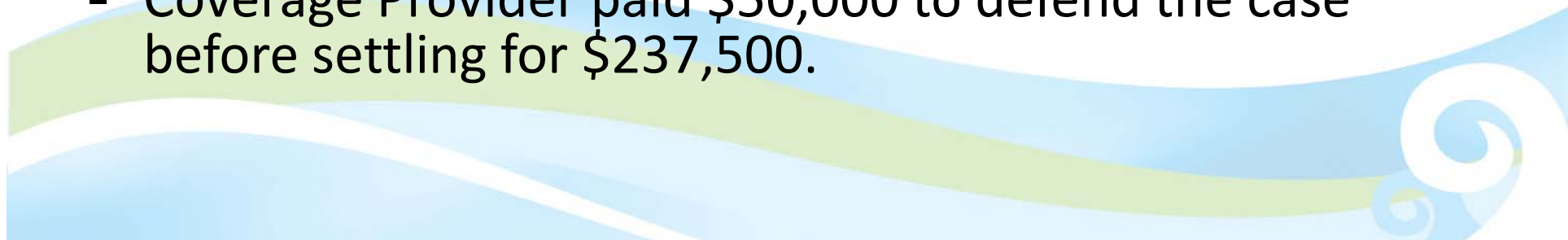
- American Ctr. For Int'l 04-01523 Labor v. Federal Insurance Co.,
- Ruling Employer cannot recover for its insurance co the costs of defense and settlement related to a discrimination claim when employer failed to timely notify their insurance Organization.



# Overview - EPLC Claim Example

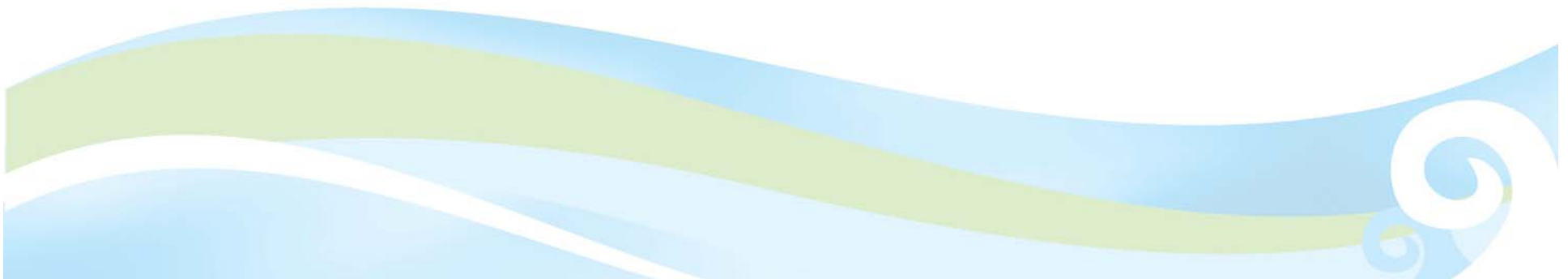
The Plaintiff, a graphic designer that had worked for the Organization for 4 years, resigned her employment claiming that she had been subjected to sexual harassment and gender discrimination. Specifically, she named 4 managers/directors of the Insured as wrongdoers. The Insured performed a thorough investigation and terminated 3 of the 4 people involved, but the evidence collected showed a long series of sexually explicit e-mails, jokes and comments in the workplace. The claimant was making \$45,000 per year.

- Coverage Provider paid \$50,000 to defend the case before settling for \$237,500.



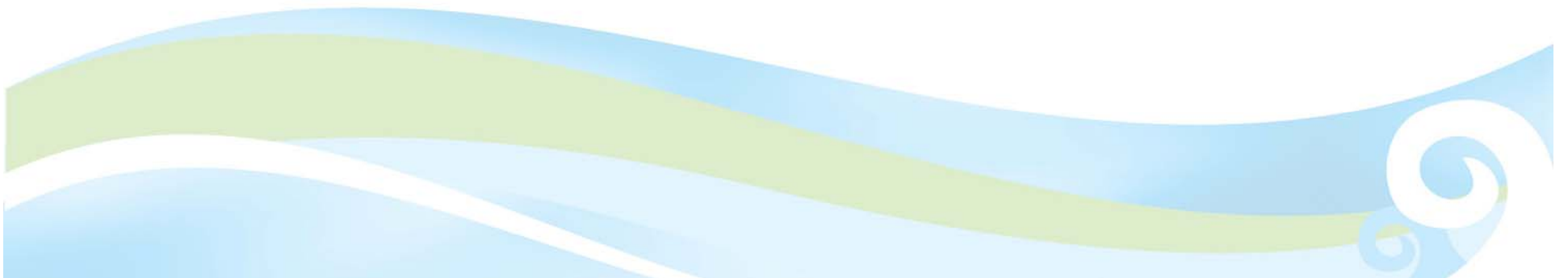
## Overview - EPLC Claim Example

- The New York State Department of Correctional Services will pay nearly \$1 million to settle a sex discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Attorney for the Southern District of New York



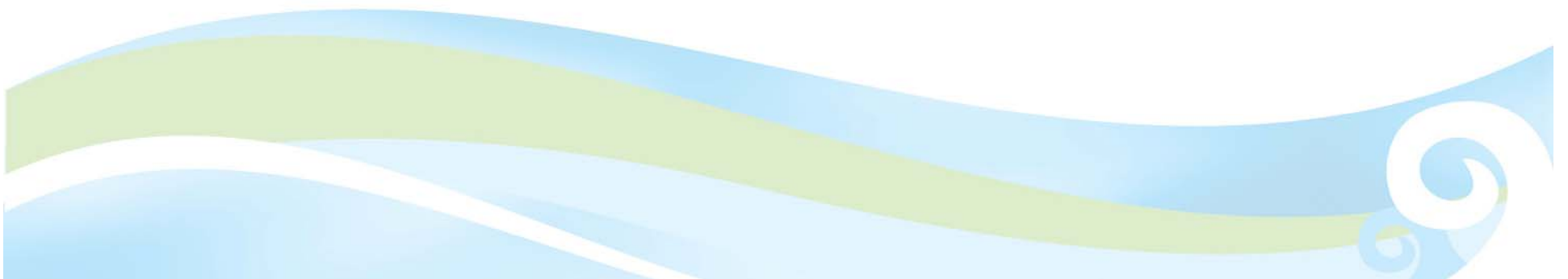
You know it's HR In Montana,  
when...

- No “At Will” Employment in MT
- Wrongful Termination from Employment Act
- Termination requires “Just Cause”



## You know it's HR In Montana, when...

- Seizure Dog, keeps slipping on old government building floors – example
- Social Anxiety Disorder Dog that other staff are allergic to - example



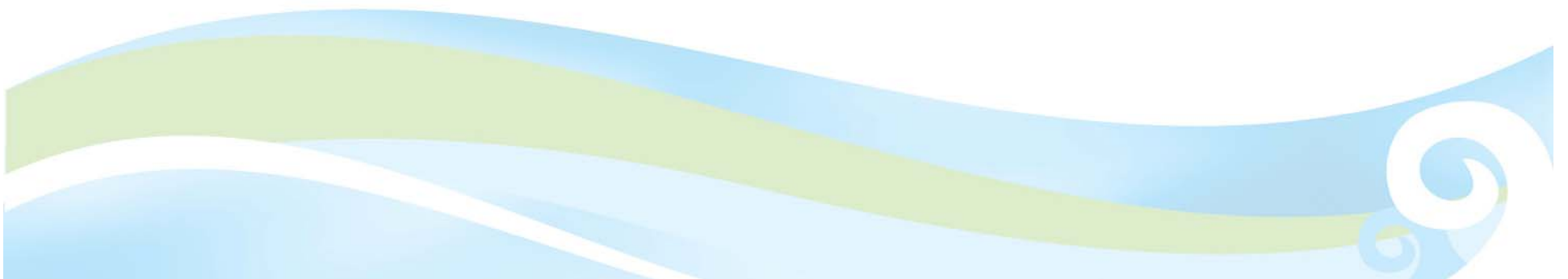
You know it's HR In Montana,  
when...

- County Police Officer arrests City officer for domestic abuse
- On the way to the County detention center City Police Chief intercepts County Officer and takes custody of "his" officer
- On Tues. AM City hasn't heard from their Police Chief and his cruiser has been gone all weekend



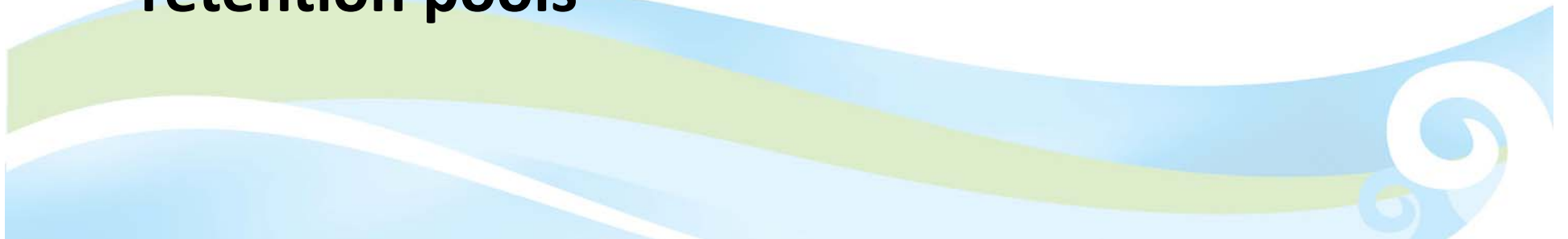
# You know it's HR In Montana, when...

- Town Pop. 3,500
- Story #1: Billy has just returned from college and is a lifeguard in the pool.
- Story #2: Susie is a high school senior picking up range balls on the golf course.



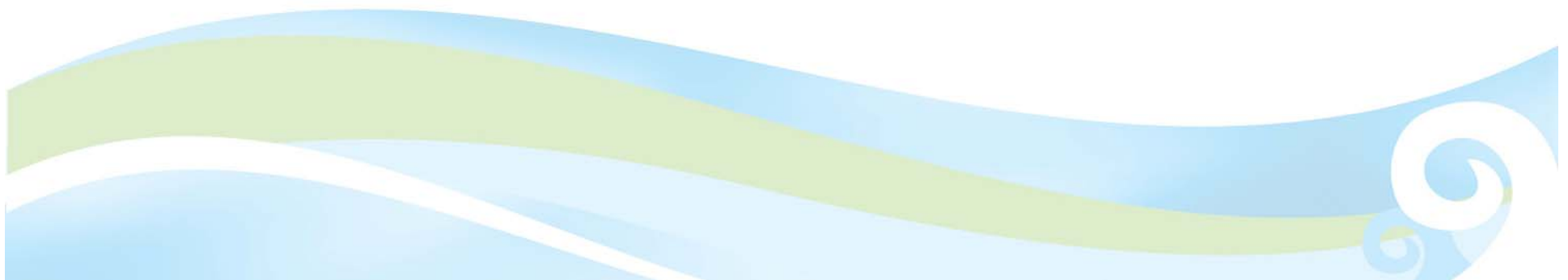
# Human Resource Audit

- Financial Audits
- Safety Audits
- Personnel / HR Audits should not be that far of a stretch
- **HR should be viewed as a profit center for an organization even government and risk retention pools**



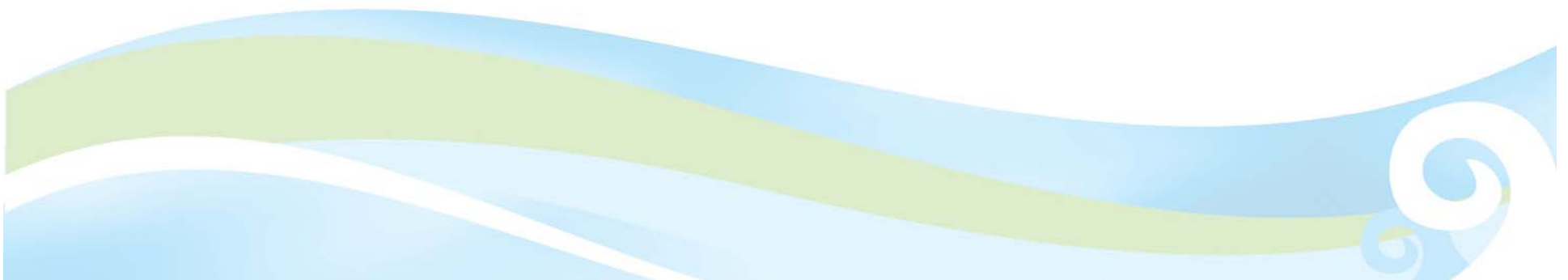
# Human Resource Audit

- A human resource audit reviews an organization's policies, procedures, job descriptions and personnel practices.
- Examines technical and practical dimensions of the HR function
- Examines vertical commitment to HR



# Audit as a Diagnostic Tool

- Not a “prescription” that fixes something
- Helps identify areas of concern & strength
- Organization must be ready to act on the findings of the audit
- Vertical acceptance of results (buy-in)



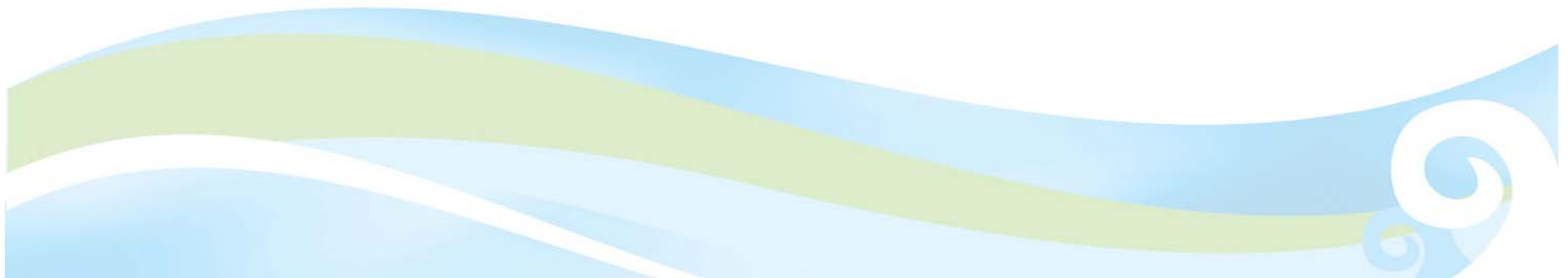
# Human Resource Audit

- Identifying practices, procedures and policies that are missing or are not compliant with statute.
- Developing a culture of risk analysis and procedures to identify measure the success of the organization's HR function.
- Evaluate the effectiveness and efficiency of human resource practices in their integration with business planning and strategy.
- Establish a baseline to evaluate whether or not its HR function is having a proactive impact on the organization.



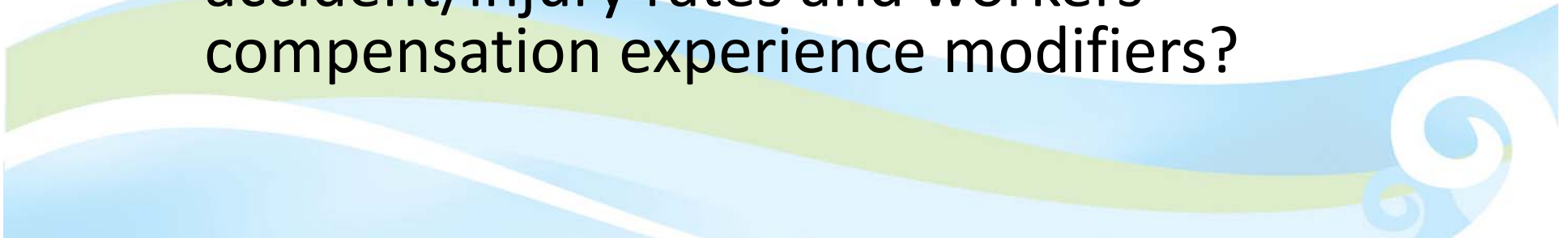
# Human Resource Audit

- **Personnel Policies**
- **Personnel Files Review**
- **Performance Appraisal**
- **Evaluation Processes**
- **Termination Processes**
- **Unlawful Harassment Compliance**
- **Hiring and Orientation Procedures**
- **Benefits and Compensation Review**
- **Employee Status and Classification**
- **Job Descriptions**
- **Exit Interviewing**



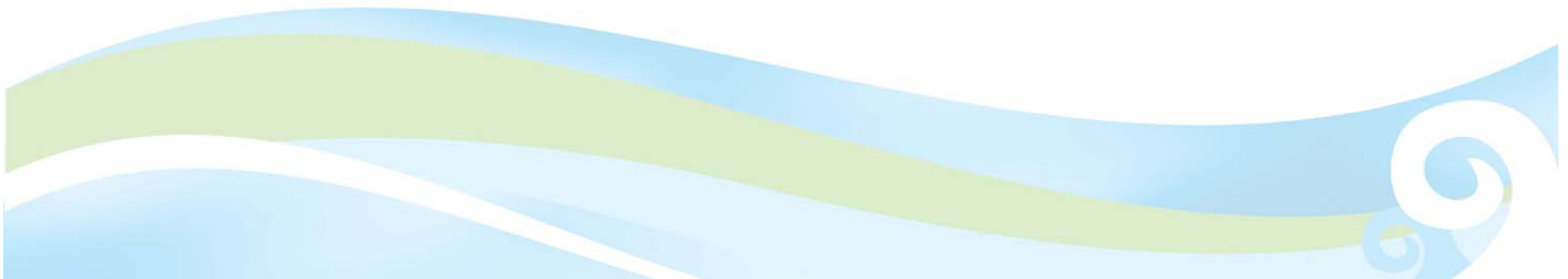
## Ask Some Pointed Questions

- How does our organization ensure compliance with applicable state and federal employment laws, practices, and legal rulings?
- Does our organization track historical employment losses to measure the success of employment practices; similar to accident/injury rates and workers' compensation experience modifiers?




# Ask Some Pointed Questions

- Does HR have a method of quantifying dollars of exposure the organization may have from wrongful employment practices?
- Is our organization able to trend past losses in order to predict possible future losses against some number that management can relate to, such as percent of gross revenue or profit.



# Human Resource Audit

- Does the organization have up-to-date job descriptions?
  - Does the organization have up-to-date personnel policies?
  - Wage and hour compliance review
  - Is there a clearly defined organizational structure and hierarchy?
  - Is the organization's mission clearly stated and followed?
  - Does the organization's goals and philosophy align with its compensation and benefit plans?
- 

# Human Resource Audit

- Has the organization established adequate lines and limits of authority?
- Are current communication channels effective?
- Does the organization have a corrective action / discipline policy (through termination) that adheres to applicable state and federal regulations?
- Does the organization effectively utilize a Human Resource Information System (HRIS)?
- Does the organization consistently conduct performance appraisals?



# Human Resource Audit

- Do the organization's benefits help attract and retain qualified employees who fit the organizational culture?
- Have supervisors received training on organization policies and employment law?
- Does the organization have a culture of following unwritten policies and procedures?
- Have there been any employment claims filed against the organization in the past two years?
- Is there a routine process for discharging an employee?




# Basics of Underwriting

- Total Employee Count
- Industry/business operations
- Employee Turnover/layoffs
- HR Practices/Employment Handbook
  - Sexual Harassment Policy
  - Anti-Discrimination Policy
  - Equal Employment Opportunity Policy
  - Annual written employee performance evaluations
- Loss History and response to prior claims
- **MMIA's Risk Retention Pool Process**

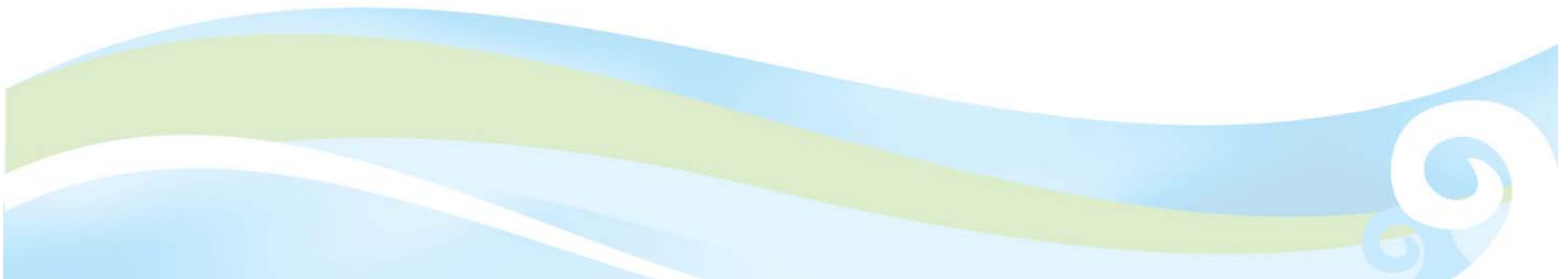


# HR and RM - MMIA Risk Avoidance Program

- Developing work comp and liability best practices by municipal department
  - Specifically claims driven – not OSHA
  - Roll out voluntary adoption with possible movement to requirement to participate in the “pool”
  - HR Practices / Policies woven into safety / liability mitigation steps
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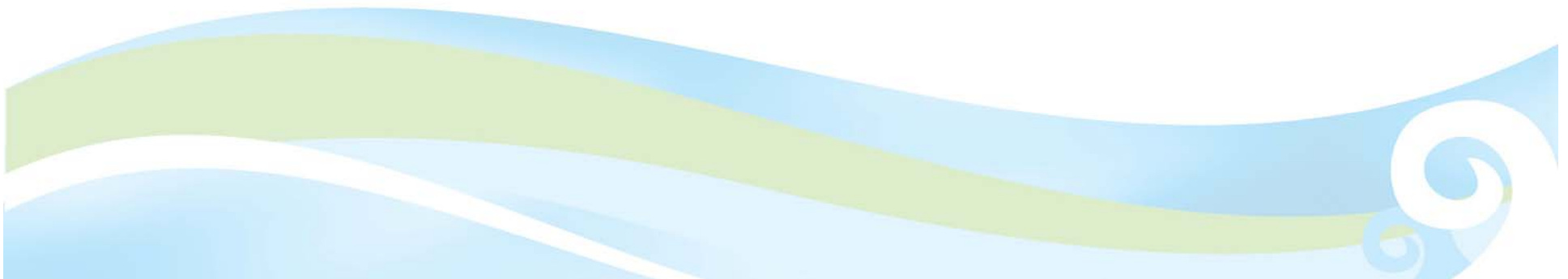
# HR and RM - MMIA Risk Avoidance Program

- Workers' Compensation and Liability losses tied to break down in personnel management – to varying degrees
- Voluntary adoption difficult
- Cost allocation back to departments
- Top down adoption will be required



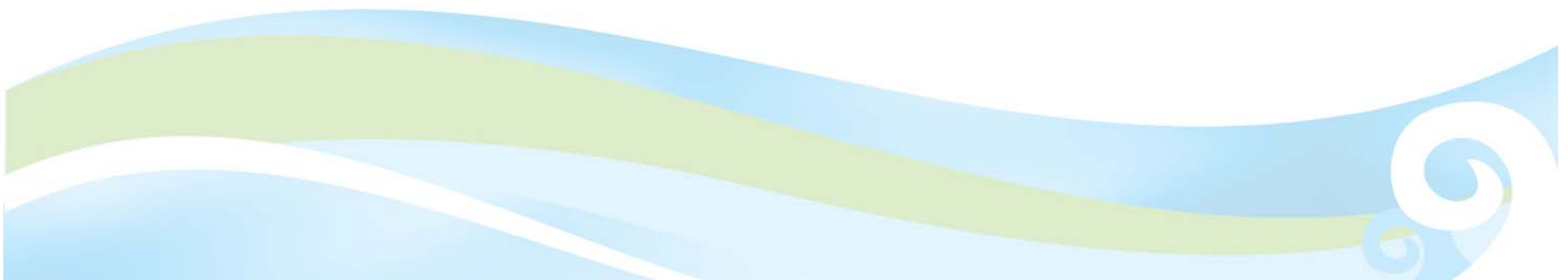
# HR and RM - PRIMEX DISC Testing

- Why do some employees seem to be more cognizant of risk management issues than others, why do some seem to work in a way that mitigates risk while others seem to throw caution to the wind?



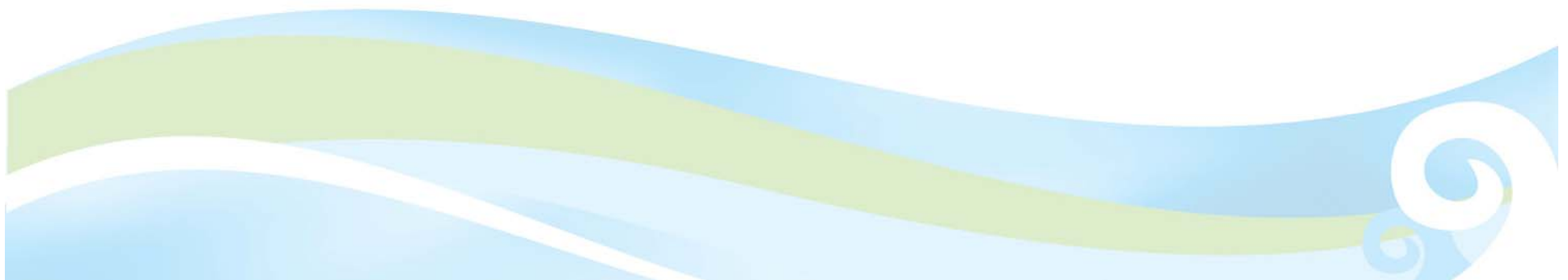
# HR and RM - PRIMEX DISC Testing

- Have you really appreciated the enormous risk management opportunity that the hiring process brings?



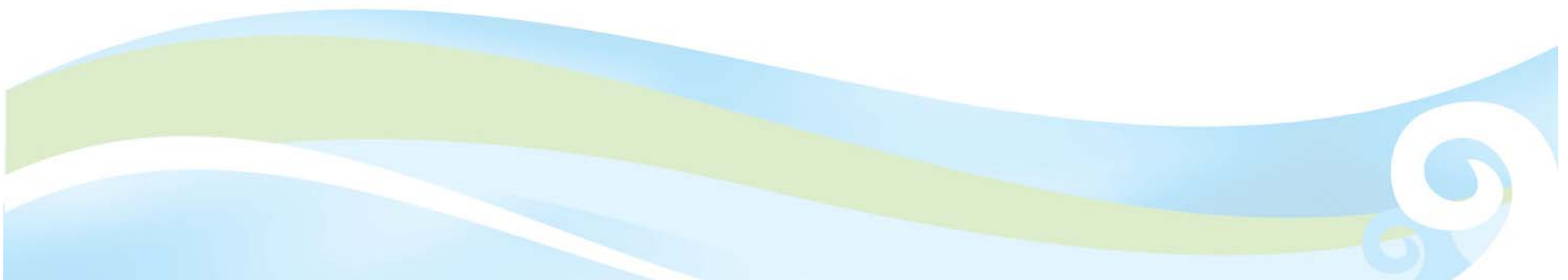
# HR and RM - PRIMEX DISC Testing

- The results of using a human factor assessment tool have often steered the hiring authority away from hiring an individual (risk mitigation) and toward hiring someone else (maximizing the potential of the hiring process).



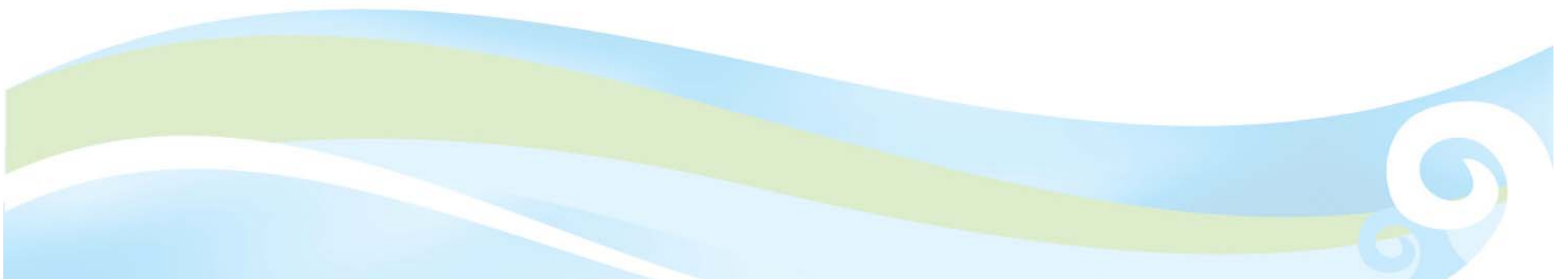
# HR and RM - PRIMEX DISC Testing

- *Supervisory training and development* - “good management is good risk management”. The better managed the organization the better its risk management performance ought to be.



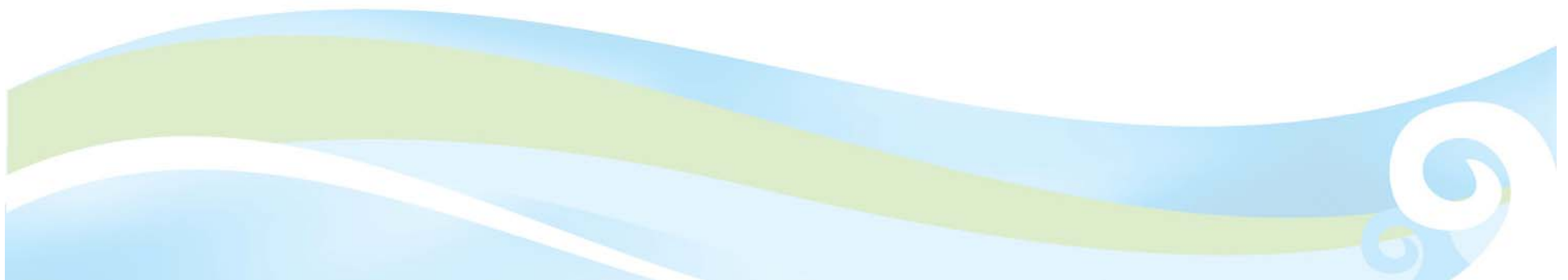
# HR and RM - PRIMEX DISC Testing

- A look at the supervisor's human factors can become a central component of supervisory training and development.
- Understand what makes them tick.



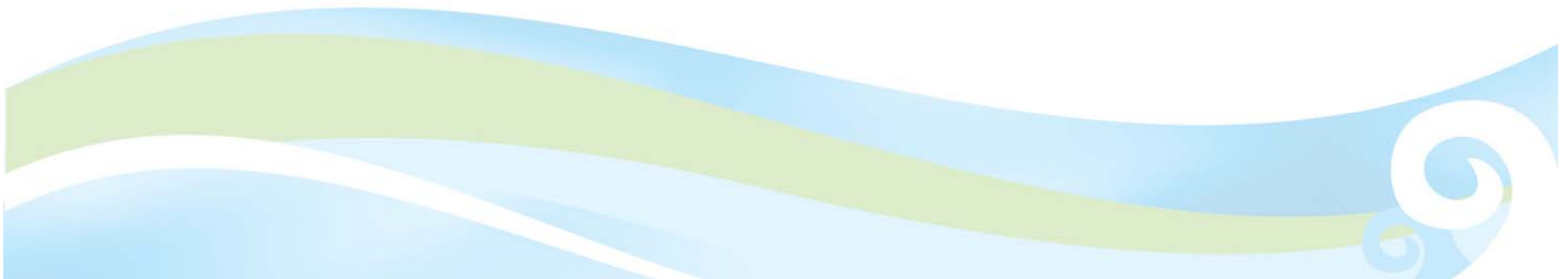
# HR and RM - Why Create or Update our Personnel Policy Manual?

- If PPM is more than 4 years old it should be reviewed
- Allows For Proactive Management
- Improves Employee Relations
- Helps Guide Your Supervisors
- Train to the PPM



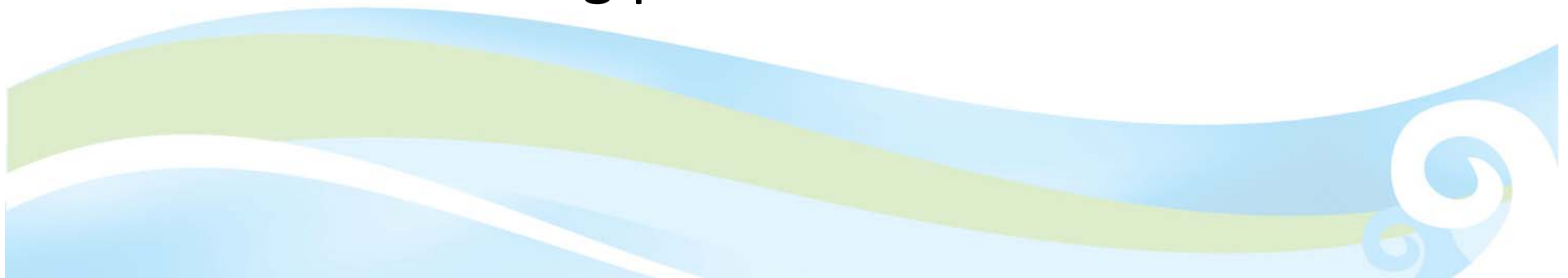
# HR and RM - Why Create or Update our Personnel Policy Manual?

- Assists in developing “Consistent” personnel management practices
- PPM meeting underwriting criteria may be required in order to attain Employment Practices Liability Coverage (EPLC)



# HR and RM - Proactive Management & Employee Relations

- Policies are established in writing and address situations in a uniform and non-discriminatory manner
- Orients employees and assists them in understanding and following policies
- May assist with union relations
- Assists in making personnel actions defensible



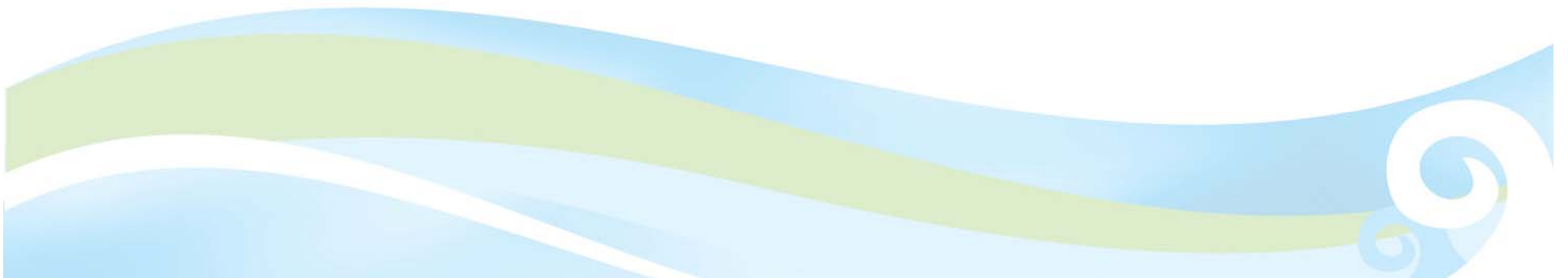
# HR and RM - Guiding Supervisors

- Provide guidelines to supervisors
- Reduce misunderstandings
- Increase consistency
- Support disciplinary action
- Avoid charges of discrimination and favoritism



# HR and RM - Recruitment & Retention Tool

- Introduce your culture and environment and provide a clear understanding of policies and procedures
- Include a Welcome Letter, and your Vision, Mission, History of your city/town and an Organizational Chart
- Manual should be non-technical and accessible to a wide range of educational levels



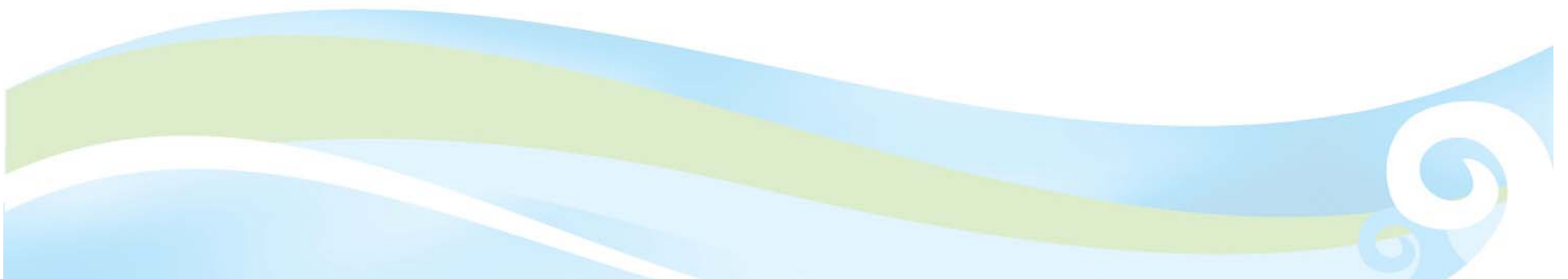
# HR and RM - Consistent Personnel Management

- Examine what is in writing vs. what actually happens “on the job”
- Consistency is key to employees adopting the guidelines
- Provide training to employees, supervisors, and Council Members
- Include *Employee Signature Receipt Page* with Policy Manual



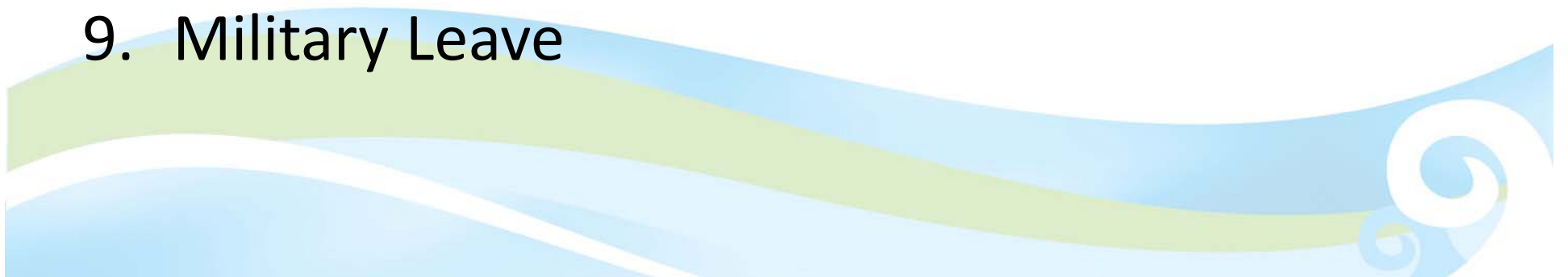
# “Essential” Personnel Policies

1. Probationary Period
2. Unlawful/Sexual Harassment
3. Corrective Action and Discipline
4. Complaint Resolution and Grievance
5. Equal Opportunity Statement



# “Essential” Personnel Policies

6. Work Site Safety
7. Family Medical Leave Act: *public, state, & federal employers & private-employers who employed 50 or more employees in 20 or more workweeks*
8. Maternity Leave
9. Military Leave



# “Essential” Personnel Policies

10. Reduction In Force (RIF) Policy

11. New Employee Orientation

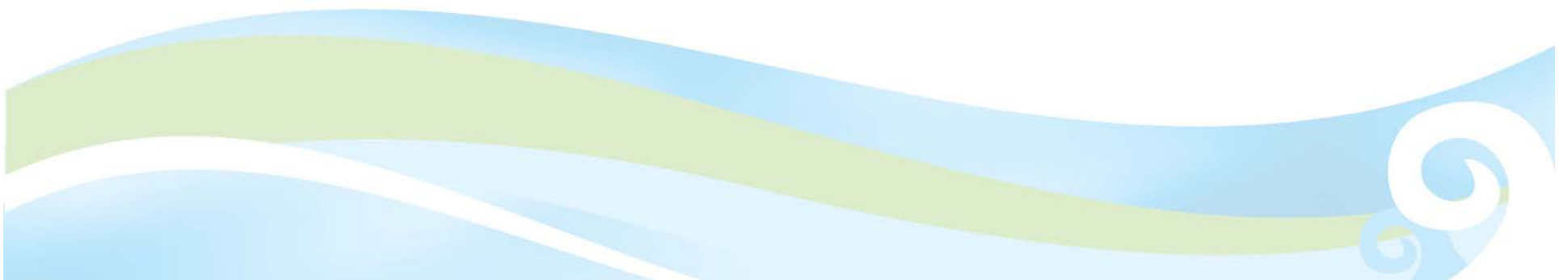
12. Drug Free Workplace / Drug and Alcohol Testing

13. Receipt Page (signature page for employee)



# “Essential” Personnel Policies – In Action

- **Safety Policies / Procedures**
- **Supervisor Training to Policies / Procedures**
- **Demonstrated Accountability**

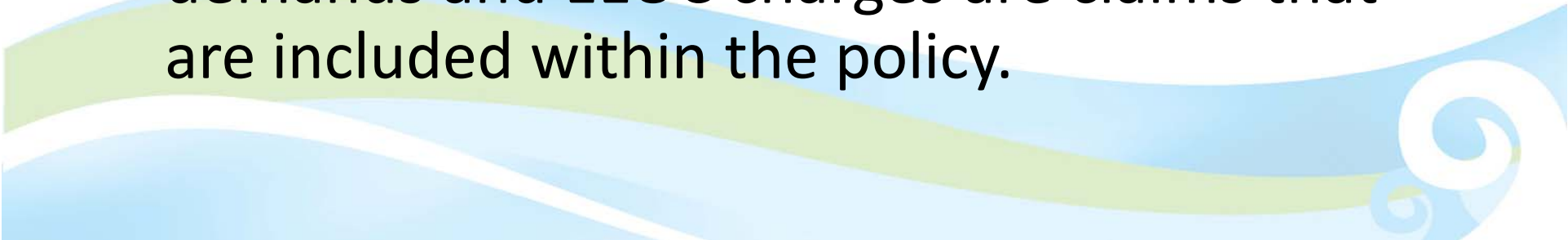


# I've put my manual together, now what?

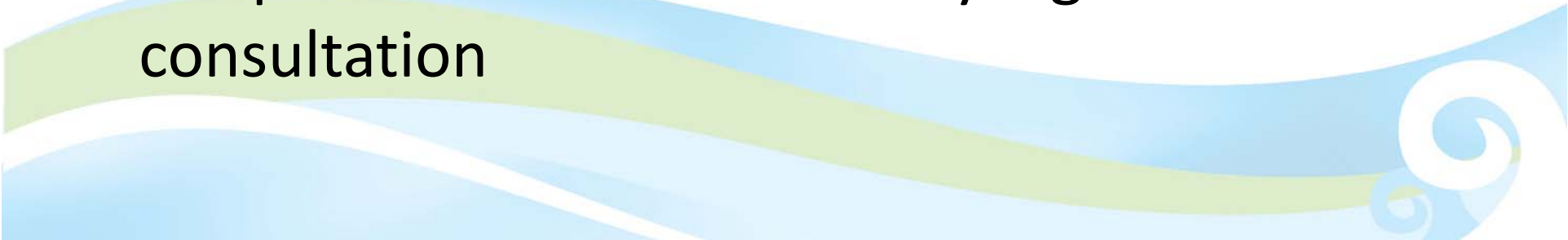
- Train employees and supervisors
- Employees must acknowledge reading and understanding manual content
- Remember it is a “living” document subject to legislative rulings, industry norms, technological advancements, and changes in your organization



# EPLC Design Considerations

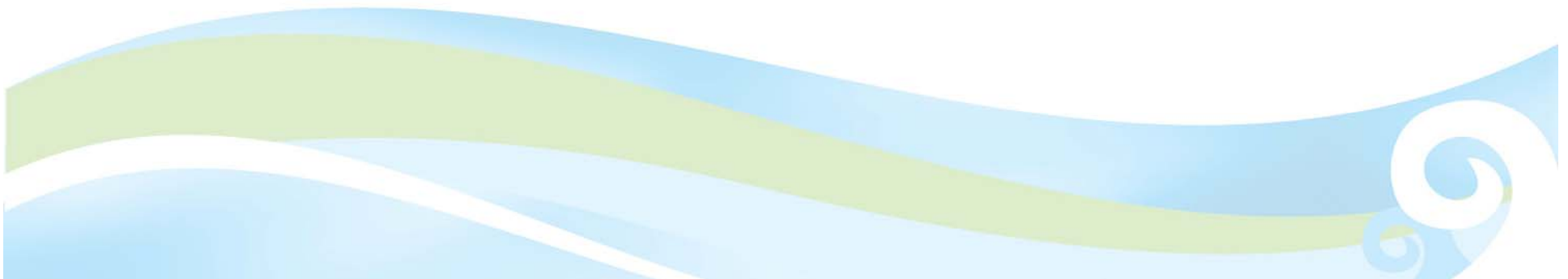
- **A good EPLC can supplement other liability policies**
  - Providing additional coverage for discrimination, sexual harassment and wrongful discharge. Organizations also should seek a policy that covers claims for breach of express and implied employment contracts. They also should ensure that written demands and EEOC charges are claims that are included within the policy.
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# EPLC Design - PDRMA HELP Program

- PDRMA's H.E.L.P. Program contains two major components that combine to serve your current and future human resource needs. These include:
    - Comprehensive and industry specific training and education programs
    - Telephone HELpline for timely legal consultation
- 

# EPLC Design - PDRMA HELP Program

- PDRMA's H.E.L.P. Program contains two major components that combine
- A human resource and employment practices resource center for written materials
- The HELP Program assists with the related Article 13 of their EPLC Coverage



## EPLC Design - PDRMA Article 13

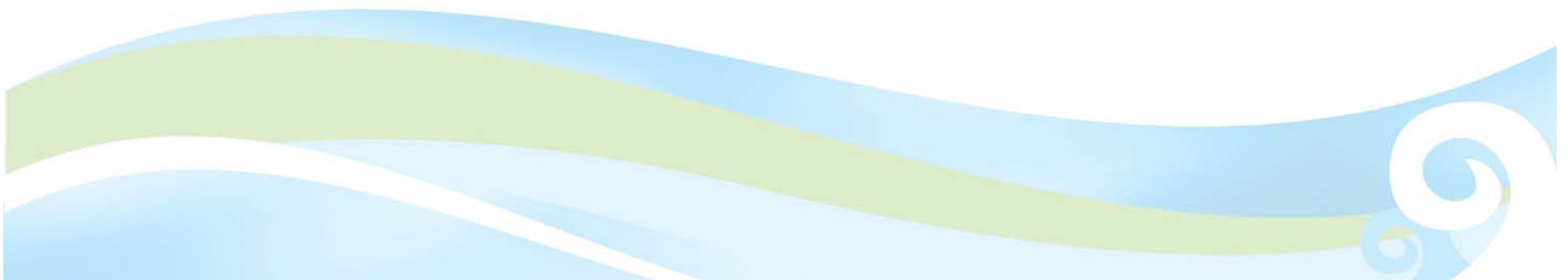
### Employment Liability And Duty To Cooperate:

- Contact us before taking action involving a past, present or prospective employee that could reasonably be expected to give rise to a claim or allegation of Unfair Employment Practices;



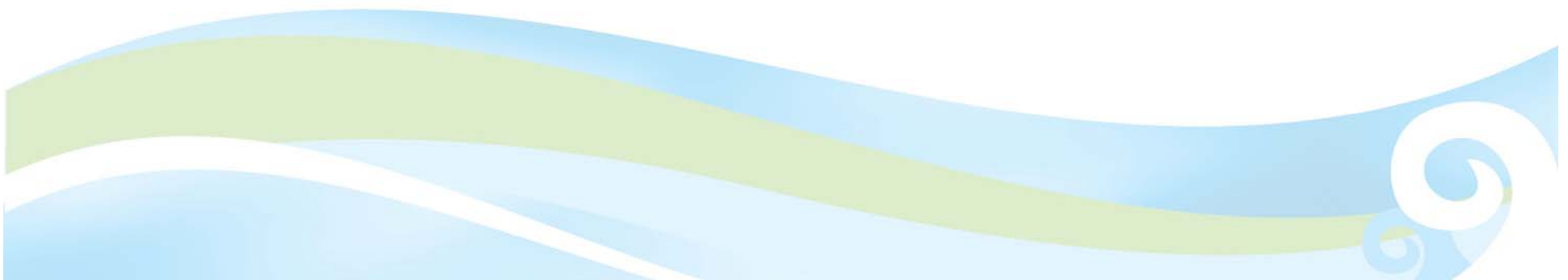
## EPLC Design - PDRMA Article 13

- Notify us the next business day after you have been informed, either formally or informally, of a potential claim of Unfair Employment Practices by a past, present or prospective employee or their legal representative;



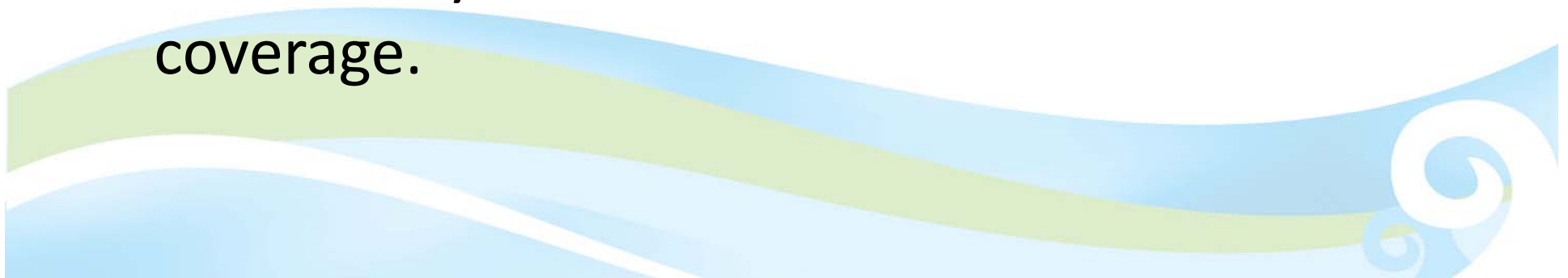
## EPLC Design - PDRMA Article 13

- Not intend to and/or knowingly engage in Unfair Employment Practices;
- Provide us all information, documents, correspondence and any other materials relating to a claim or allegation of Unfair Employment Practices;




## EPLC Design - PDRMA Article 13


- Follow specific recommendations made by your corporate counsel, our defense counsel or defense counsel retained by us, that will assist us in preventing and/or defending a claim or allegation of Unfair Employment Practices;
- Failure may result in declination of coverage.



# EPLC Design Considerations

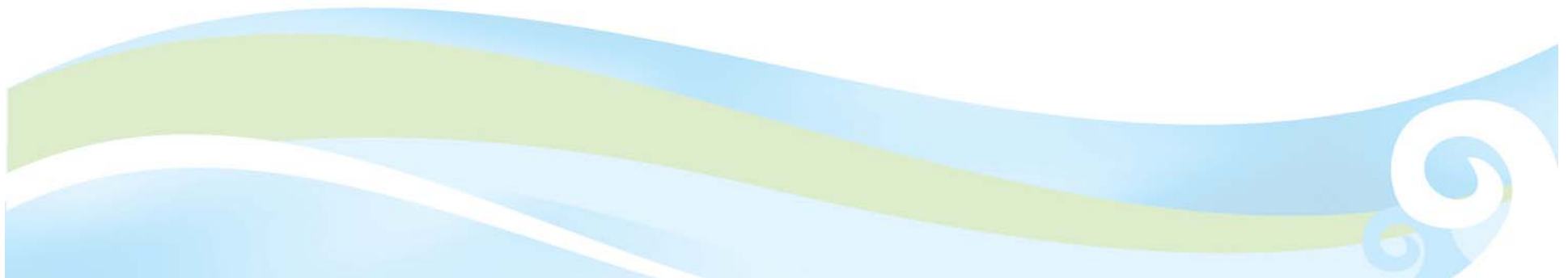
- **Examine the Coverage Provided**
  - Examine whether the policy provides defense-only coverage or both defense and indemnity coverage. In a defense-only policy, the insurer pays for all or part of the cost of defending a claim, but does not pay for any settlement or judgment. Indemnity coverage includes the coverage.
- 

# EPLC Design Considerations

- **Examine Application & Disclosure Forms**
  - Application may contain questions regarding an organization's policies and procedures, including past claims, and facts known at the time that the app is signed which may lead to a claim. Failure to make disclosures can jeopardize the insurance.
  - *Generally, claims disclosed on the application will not be covered by a new policy.*
- 

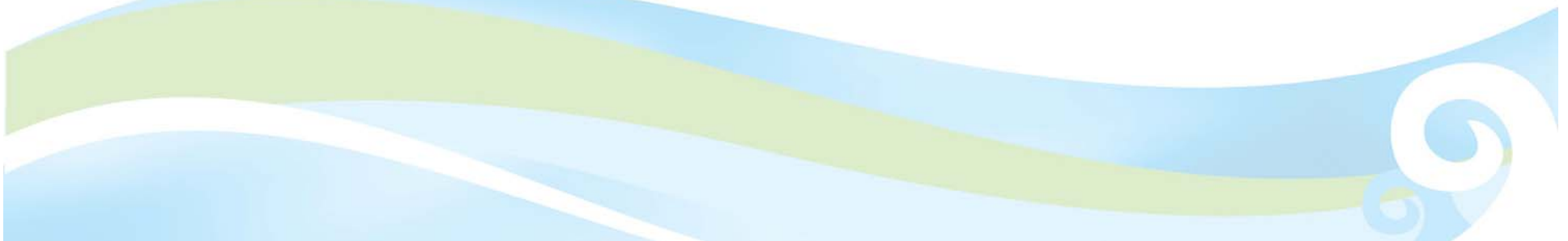
# EPLC Design Considerations

- **Policy and Procedure Establishment:** Some EPLC apps will require the org to meet specific underwriting criteria.
- **Legal Council Selection:** Orgs should consider obtaining a "special handling" endorsement offered by many insurance organizations. Such an endorsement allows organizations to choose their own defense counsel. Without such an endorsement, all control over the defense of employment claims rests with the insurer.
- *But will the insurer allow this?*



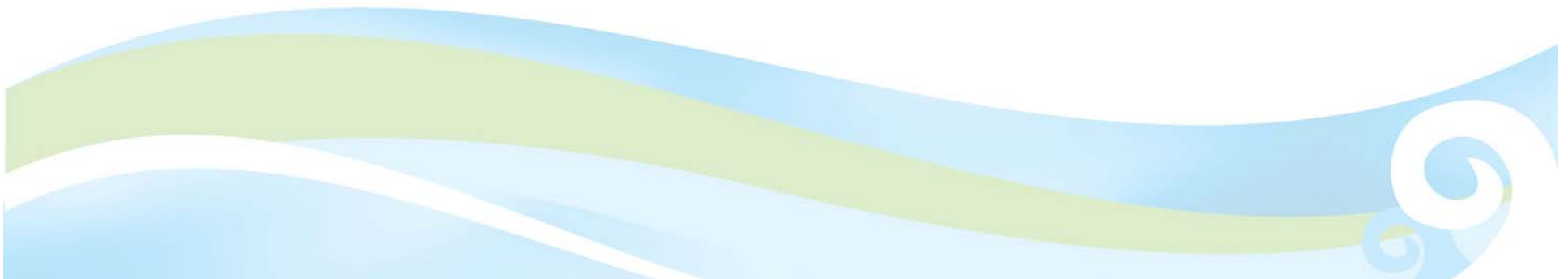
# EPLC Design Considerations

- **Coverage Period:** Most EPLC policies cover only those claims first asserted during the policy period and reported to the insurer pursuant to the policy's "notice" requirements. Timely notice is a condition precedent to coverage, and failure to comply with the policy's notice requirement may jeopardize coverage altogether.
- *The org should clarify if the policy is set up on a claims made or per occurrence basis.*
- *Almost always claims made.*



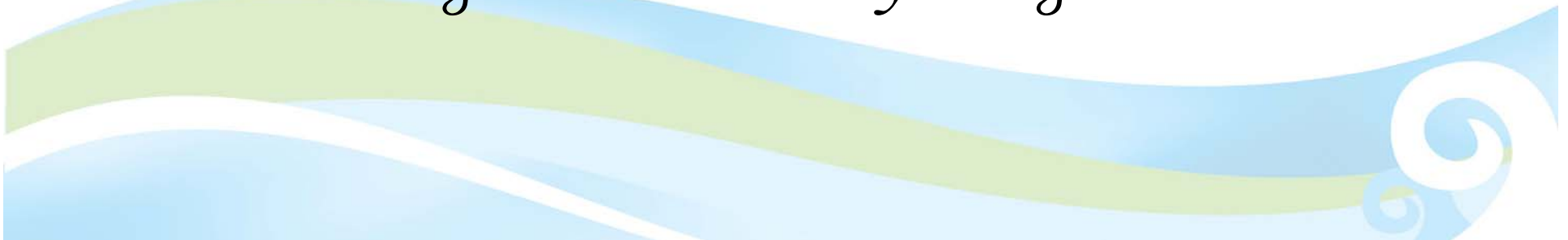
# EPLC Design Considerations

- **Deductible or Self-Insured Retention:** Some organizations may wish to manage small claims themselves. A self-insured retention can be an effective tool for price containment. Generally, an insurer will want to see that an insured has effective controls and protocols in place for management of claims within a deductible or SIR.



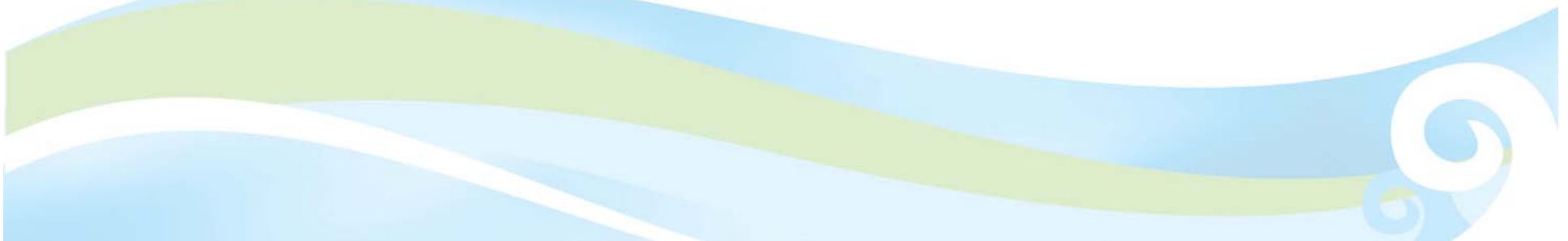
# EPLC Design Considerations

- Organizations with larger self Insured layers can face challenges
- How are risks / claims managed in this layer
- Does control get lost when claims moves to legal dept.
- Does feedback occur & is there accountability
- Are underwriting criteria followed in this layer
- *Other thoughts or comments you might have*



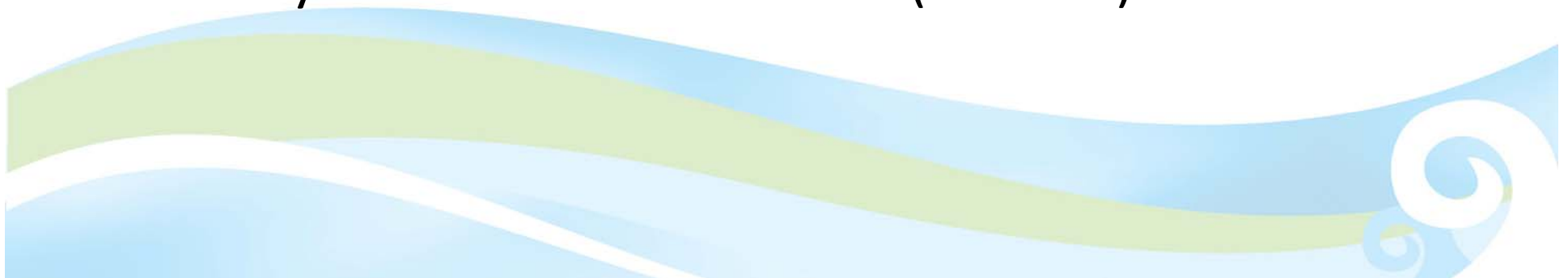
# EPLC Design Considerations

- **Review EPLC for Exclusions**
- Review the EPLC policy to confirm that it does not contain exclusions for certain categories of potential federal and state law employment claims. It is not uncommon for EPLC policies to exclude coverage for claims of assault and battery arising in the harassment context, sexual harassment filed by non-employees, retaliation and negligent hiring, and training and supervision.



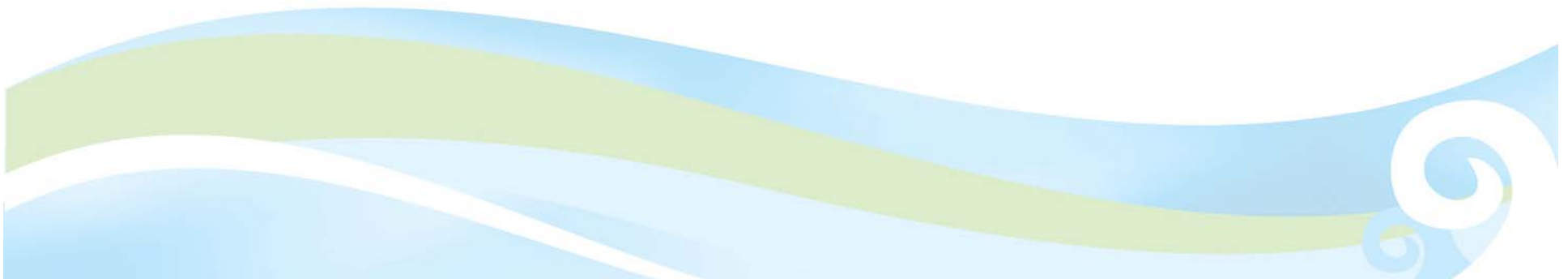
# EPLC Design Considerations

- **Review EPLC for Exclusions**
- In addition review EPLC for exclusions based on violations of such laws as the Family and Medical Leave Act ("FMLA"), the Worker Adjustment and Retraining Notification Act ("WARN"), the National Labor Relations Act ("NLRA"), the Fair Labor Standards Act ("FLSA"), and the Occupational Safety and Health Act of 1970 ("OSHA").



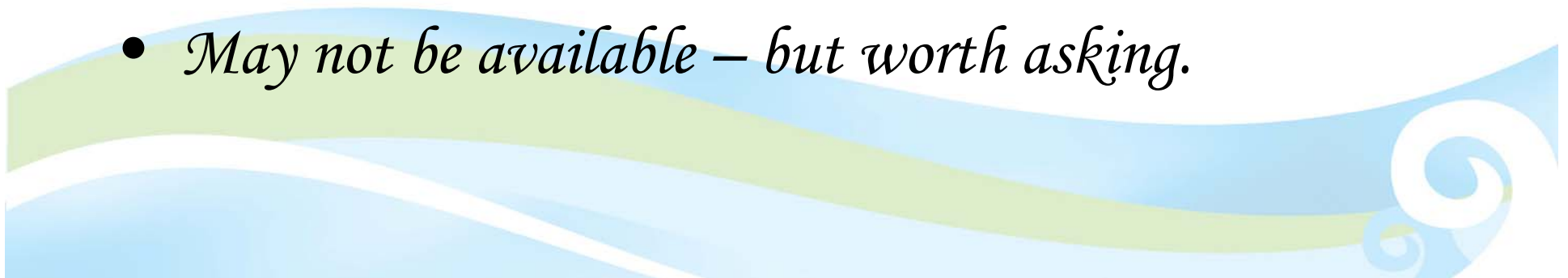
# EPLC Design Considerations

- **Review EPLC for Exclusions**
- Many employers purchase EPLC coverage without realizing that the policy provides limited protection and leaves employers vulnerable to a variety of significant employment claims.



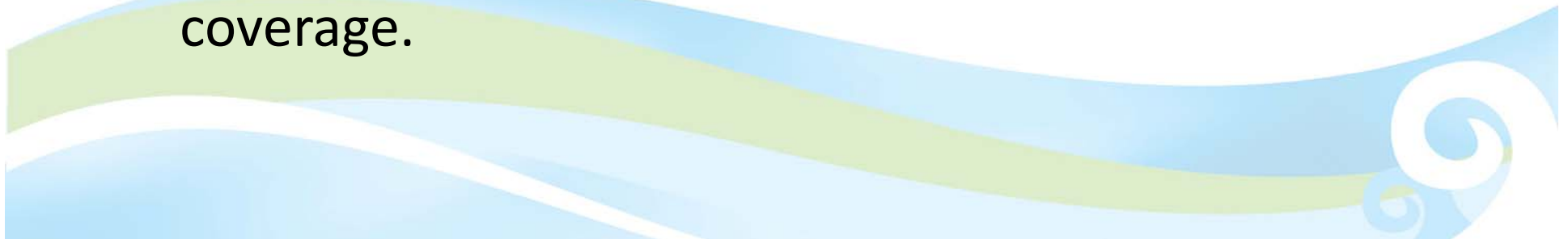
# EPLC Design Considerations

- **Reserve the right to control settlement of matters.**
- Employers may want to negotiate with the insurance carrier to include a "consent to settle" provision in the EPLC policy, to prevent the carrier from imposing a settlement without the employer's consent.
- *May not be available – but worth asking.*



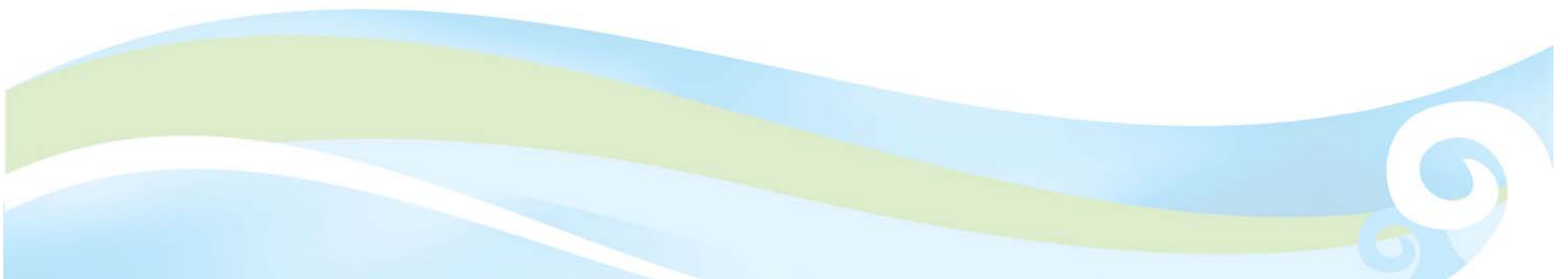
# EPLC Design Considerations

- **Make sure the policy covers all appropriate entities and individuals.**
- If an employer is comprised of several different business units or entities, it is important to ensure that the EPLC policy covers all appropriate entities.
- This is especially significant since individuals filing suit against employers often identify the business unit or entity incorrectly in court documents, which can result in protracted disputes regarding coverage.



You know it's HR In Montana,  
when...

- Your HR Director thinks it's ok to bring home a dead mountain lion (found on the hwy) in the trunk of the Organization car...
- Because it would be a good science experiment for their kids



# Thank You & References

- Gen Re a Berkshire Hathaway Organization  
EPLCI research - Libby Benet
- Park Districts Risk Management Agency  
(PDRMA) - Brett Davis
- Primex - Nick Manolis
- MMIA website for copies of materials  
[www.mmia.net](http://www.mmia.net)
- [jcumming@mmia.net](mailto:jcumming@mmia.net)

# Handouts Available

- From [http://www.mmia.net/training\\_docs.asp](http://www.mmia.net/training_docs.asp)
- PRIMA - HR Risk Management Article
- MMIA's - EPLC Underwriting Checklist
- MMIA's - Sample EPLC Endorsement
- MMIA's – EPLC Coverage Language
- Performance Appraisal Tool
- MMIA Safety Audit Tools & MMIA Risk Avoidance Programs call 800-635-3089

