



Federal Employment Law Training Group LLC  
Teaching the Law of the Federal Workplace  
[www.FELTG.com](http://www.FELTG.com)

FELTG Webinar Training

# **COVID-19 Guidance for the Federal Workplace: Medical Inquiries, Leave, and More**

Presented by

Deborah J. Hopkins,  
Attorney at Law

March 25, 2020

[www.feltg.com](http://www.feltg.com)

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## 2020 Upcoming Open Enrollment Calendar

|   |   |    |    |    |    |
|---|---|----|----|----|----|
| April 2020  |   | 21 | 22 | 23 |    |
| <b>FELTG Virtual Training Institute<br/>Emerging Issues in Federal Employment Law<br/>(Tuesday - Thursday)</b>  |   |    |    |    |    |
| April 2020  |   |    | 29 | 30 |    |
| <b>FELTG Virtual Training Institute<br/>UnCivil Servant: Holding Employees Accountable for<br/>Performance and Conduct<br/>(Wednesday - Thursday)</b> |   |    |    |    |    |
| May 2020  |   | 5  | 6  | 7  |    |
| <b>Developing and Defending Discipline<br/>(Tuesday - Thursday)<br/>(San Juan, Puerto Rico)</b>   |   |    |    |    |    |
| May 2020  |   | 12 | 13 | 14 |    |
| <b>Advanced Employee Relations<br/>(Tuesday - Thursday)<br/>(Washington, DC)</b>  |   |    |    |    |    |
| June 2020   | 8 | 9  | 10 | 11 | 12 |
| <b>Absence, Leave Abuse and Medical Issues Week<br/>(Washington, DC)</b>  |   |    |    |    |    |



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### Your Speaker Today

**Deborah Hopkins:** Deborah Hopkins is the President of FELTG and is admitted to practice law in the District of Columbia. She has experience handling cases before the U.S. Merit Systems Protection Board, the Equal Employment Opportunity Commission, and the U.S. Office of Special Counsel. She has also worked with the Government Accountability Project (GAP), a public-interest non-partisan whistleblower protection and advocacy organization. Ms. Hopkins has over 15 years of experience in adult education and training.

Before becoming an attorney, Ms. Hopkins was Training Manager at LRP Publications/cyberFEDS®. She has presented training sessions to thousands of federal employees in the HR, ER, LR, EEO, civil rights, diversity and inclusion, legal counsel, legal writing and supervisory arenas. She has developed courses and authored a number of training manuals for institutions of higher education. She also co-authored the fifth edition of *UnCivil Servant: Holding Government Employees Accountable for Performance and Conduct* (Dewey Publications, 2019).

Ms. Hopkins is a presenter for the FELTG open enrollment programs *Absence, Leave Abuse & Medical Issues Week, Developing & Defending Discipline, EEOC Law Week, Managing Federal Employee Accountability, MSPB Law Week, and Workplace Investigations Week*, as well as onsite training and webinars.

### FELTG Instructors

**Katherine Atkinson:** Katherine Atkinson is a partner at Wilkenfeld, Herendeen & Atkinson in Washington, DC, and is admitted to practice in the state of Maryland, before the United States District Courts for the District of Maryland and the District of Columbia, and before the United States Courts of Appeals for the District of Columbia Circuit and the Fourth Circuit. She represents public and private sector employees in employment discrimination and labor disputes before the Equal Employment Opportunity Commission, the Merit Systems Protection Board, arbitrators, federal district courts, and federal appellate courts.

Ms. Atkinson is a member of the Board of Directors of the Metropolitan Washington Employment Lawyers Association and a member of the National Employment Lawyers Association. She graduated from American University's Washington College of Law and holds a Bachelor of Science from Georgetown University. Ms. Atkinson taught legal writing and appellate advocacy as an Adjunct Professor at the University of Baltimore School of Law.

Ms. Atkinson teaches a wide range of courses for FELTG, including substantive areas of federal employment law and skill-specific courses such as investigating, writing, and supervising. She



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presents at *Absence, Leave Abuse & Medical Issues Week*, *EEOC Law Week*, and other FELTG programs.

**Ann Boehm:** Ann Boehm spent 26 years as a government attorney, focusing primarily on employment and labor law in federal law enforcement agencies. She worked at the Drug Enforcement Administration for six years, litigating Equal Employment Opportunity Commission and Merit Systems Protection Board cases for the agency and advising management on employment law issues. She spent a short time with Immigration and Customs Enforcement, handling immigration law. At the U.S. Marshals Service's Office of General Counsel, Ms. Boehm litigated personnel cases for several years and served as Chief of Communications. Her most recent role at USMS was Chief of Discipline Management in the Office of Professional Responsibility, where Ms. Boehm oversaw the disciplinary process for hundreds of USMS employees. She also worked at the Office of the Solicitor, Federal Labor Relations Authority where she defended the FLRA in the U.S. Courts of Appeals and won a case before the U.S. Supreme Court. Throughout her career, she provided employment and labor training to agency employees. Ms. Boehm is admitted to practice law in the District of Columbia, Georgia, (inactive), the U.S. Supreme Court, and U.S. Courts of Appeals for the District of Columbia, Seventh, Ninth, and Tenth Circuits.

Ms. Boehm earned a Bachelor of Arts, *with distinction*, from the University of North Carolina at Chapel Hill. She received her Juris Doctor from the University of Virginia. She started her Federal career clerking for the Honorable Harlington Wood, Jr., Circuit Judge, U.S. Court of Appeals for the Seventh Circuit.

Ms. Boehm teaches several programs for FELTG, including courses on employee accountability, MSPB and EEO law, discipline, and more.

**Meghan Droste:** Meghan Droste is a senior associate at Wilkenfeld, Herendeen & Atkinson in Washington, DC. She is admitted to practice law in the District of Columbia and the state of Maryland, before the United States District Courts for the District of Columbia and the District of Maryland, and before the United States Courts of Appeals for the District of Columbia Circuit, the Fourth Circuit and the Fifth Circuit. She represents federal and private sector employees in employment disputes before the Equal Employment Opportunity Commission, the District of Columbia Office of Human Rights, federal district courts, and federal appellate courts. Ms. Droste has also represented federal agencies before the Equal Employment Opportunity Commission and the Merit Systems Protection Board.

Ms. Droste graduated from The George Washington University Law School. Ms. Droste holds a Master of Science in Justice, Law and Society from American University, and has a Bachelor of Arts in Political Science from Boston University.



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Ms. Droste teaches a wide range of courses for FELTG, including substantive areas of federal employment law. She presents at *Absence, Leave Abuse & Medical Issues Week*, *EEOC Law Week*, and other FELTG programs.

**Ernest Hadley:** Ernest Hadley is a former FELTG president and Professor Emeritus. He was previously engaged in the private practice of law in Wellfleet, Massachusetts, representing federal sector employees and agencies before the Equal Employment Opportunity Commission and the Merit Systems Protection Board, in arbitrations and in the federal courts.

He is the author of several books on federal sector employment law, including *A Guide to Federal Sector Equal Employment Law and Practice*, *Representing Agencies and Complainants before the EEOC*, and *A Guide to Federal Sector Disability Discrimination Law and Practice*, among several others. Mr. Hadley lives in Lunenburg, Nova Scotia where he is publisher and editor at Nevermore Press. He is a graduate of Bates College in Lewiston, Maine, and Antioch School of Law in Washington, D.C., and has studied fiction writing at the Fine Arts Work Center in Provincetown, Massachusetts and the Vermont College of Fine Arts in Montpelier, Vermont.

Mr. Hadley is a presenter at FELTG's *EEOC Law Week*, *Legal Writing Week*, and *MSPB & EEOC Hearing Practices Week*.

**Barbara Haga:** Ms. Haga is President of Federal HR Services, Inc., a small business which provides HR training, consulting, and functional services to Federal agencies. Ms. Haga retired in 2005 as Head of Organizational Development and Workforce Relations with the National Aeronautics and Space Administration Langley Research Center in Hampton, Virginia. She has also been employed by the Navy at the Human Resources Service Center, East as the Director of Training, and as a Labor and Employee Relations Specialist at the Office of Civilian Personnel Management, Eastern Region.

Ms. Haga is the author of *Federal Sector FMLA: Answers to Frequently Asked Questions* and *The Federal Manager's Everyday Guide to FMLA*. She served twice as National President of the Society of Federal Labor and Employee Relations Professionals (SFLERP). The Society awarded her the 2007 Lifetime Achievement Award for Outstanding Contributions to the Federal Labor-Management Relations Program and Dedicated Service to SFLERP. She received her bachelor's degree from the University of Virginia and received her Master of Public Administration degree from Old Dominion University.

A well-known speaker and trainer, Ms. Haga is the program director and presenter for FELTG's *Advanced Employee Relations* and *Employee Relations Week*. She presents numerous courses on various aspects of Performance Management and Leave & Attendance Management, and is also a presenter during *Absence & Medical Issues Week*.



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**Dwight Lewis:** Dwight Lewis graduated from the University of California at Berkley with an A.B degree in Communications and Public Policy in 1977. He then graduated with a Juris Doctor degree from Hastings College of the Law in 1980. He entered the United States Army in 1981, where he was appointed Installation Labor Counselor at Ft. Bliss, Texas. While there, he was heavily involved in EEOC, MSPB, and FLRA litigation and served in a principle role in contract negotiations with several unions.

Lewis was selected as an Administrative Judge in 1984 and was later appointed to the position of Chief Administrative Judge at the EEOC – Dallas Region in 1990. Mr. Lewis has served as an Adjunct Professor, teaching Administrative Law at the University of Texas at Arlington. He has been involved in a number of key initiatives at EEOC, including the writing of the *Administrative Judge's Handbook*, federal sector paperless, electronic processing of complaints, the *Practices and Procedures Handbook*, and Task Force recommendations involving reforms to federal sector case processing.

Mr. Lewis presents several programs on EEO for FELTG.

**Anthony Marchese:** Dr. Anthony Marchese has more than 23 years of experience as a trainer and technical assistance provider within the federal and corporate sectors, university professor and dean, and international consultant specializing in leadership and organization development. He has developed and delivered more than fifty adult-learning courses. Marchese has created individualized, strengths-based coaching programs for employees at all levels of professional experience.

Marchese has been published in numerous peer-reviewed journals, presented at national and international conferences, hosted a public television program devoted to contemporary leadership, and recently released his first book, *Design: An Owner's Manual for Learning, Living, and Leading with Purpose*. Marchese is the Global Director of Learning and Development for a DC-based consulting firm (6500+ employees/64 offices worldwide).

Marchese holds a Ph.D. in Organizational Leadership from Regent University, an MLA in Philosophy (Ethics) from Lee University, and postdoctoral credentials in Human Resources Management from the University of California Los Angeles, Negotiation and Conflict Resolution from the University of Notre Dame, and Change Leadership from Cornell University. He is also trained in the administration of several assessments including: Strengthsfinder, Facet5, Social Styles, Emotional Intelligence Inventory, DISC, Maslach Burnout Inventory, and the Gallup Q12.

Dr. Marchese teaches several courses for FELTG, including *Leadership Deep Dive* and *The High-Performing Team*.



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**Shana Palmieri:** Shana Palmieri is the senior vice president of Behavioral Health and co-founder of Xferall, and the managing partner of Clinical Education and Consulting for Healthcare Legal Education & Consulting Network (HLECN). She has more than 15 years of experience in healthcare and social services, including direct practice and healthcare administration. Ms. Palmieri's direct clinical experience spans multiple specialties to include emergency psychiatric assessment and treatment, domestic violence, chronic homelessness, mental health, and substance use disorders in both outpatient and inpatient settings.

Ms. Palmieri previously spearheaded the development and implementation of the Behavioral Health Division at The George Washington University Hospital. She received her undergraduate degree from Pennsylvania State University in Human Development and Family Studies and her master's degree from the University of Pennsylvania in Social Work. She is currently a licensed clinical social worker in the state of Hawaii.

Ms. Palmieri presents FELTG programs on Dealing with Behavioral Health Issues and Violence in the Federal Workplace and participates in *Emerging Issues Week*.

**Jim Protin:** Jim Protin has more than 30 years of Federal service, including more than 20 years as an active duty Navy officer.

After graduating from the U.S. Naval Academy with a Bachelor of Science degree in Computer Science, Mr. Protin served on three nuclear-powered submarines. He attended the University of Maryland School of Law under the Navy's Law Education program. His assignments in the Navy's Judge Advocate General's Corps included Command Judge Advocate and Legal Department head on the aircraft carrier USS John C. Stennis, Deputy Special Counsel to the Chief of Naval Operations, Special Assistant to the Secretary of the Navy for Legal and Legislative Matters, and Director of the Navy's Office of General Litigation.

Mr. Protin's Federal civilian career included service as the Senior Technical Manager for Department of Energy Activities at the Naval Reactors Division of the National Nuclear Security Administration. He was the first General Counsel for the Navy's U.S. Fleet Cyber Command/U.S. 10th Fleet in Fort Meade, MD. He also served as the Deputy Inspector General (acting), Assistant Inspector General for Investigations, and General Counsel to the Inspector General in the National Security Agency's Office of Inspector General.

Prior to rejoining the Department of Defense in 2019, Mr. Protin served as the Chief Operating Officer & General Counsel of Neptune Rising Maritime Cybersecurity Services LLC.

**Ricky Rowe:** Ricky Rowe, a US Army Veteran, began his federal career with the Department of Defense (DoD) in 1988 and transitioned to the Department of Veterans Affairs (DVA) in 1991. He has over 38 years of federal service. His most recent federal position was National EEO





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Manager where he provided Equal Employment Opportunity guidance, advice and assistance to over 340,000 VA employees, which included VA Senior Management Officials, Mid-level Managers and Union Partners.

Mr. Rowe began working in resolution management in 1999 and has held roles including EEO Counselor, EEO Investigator, and EEO Manager. He also has years of experience in conducting administrative investigations and training others to conduct investigations. In addition, he has also served as a Program Support Specialist, Lead Patient Service Assistant, Computer Assistant, Human Resources Assistant and HR Specialist (Staffing, Worker's Compensation and ER/LR). Mr. Rowe has been a Nationally Certified Trainer for EEOC for 19 years, as well as a VHA trainer, mediator, and facilitator, and was the recipient of the Resolution Award for the Highest Formal Resolution Rate for the VA Office of Resolution Management in the Southeastern Operation in 2007 and 2008.

Mr. Rowe teaches several programs for FELTG, including courses on misconduct investigations, preventing and correcting harassment, and communication.

**Joe Schimansky:** Joe Schimansky is the former Executive Director of Federal Service Impasses Panel (FSIP) and has more than 32 years of experience with the FLRA and its major components. As the FSIP's Executive Director, Mr. Schimansky provided leadership and supervision to the professional staff that investigates, analyzes, and makes recommendations and binding decisions to resolve negotiation disputes between Federal agencies and the labor organizations representing their employees. He participated in numerous informal conferences and mediation-arbitration proceedings, both as the FSIP's primary representative and assisting various FSIP Members, which resulted in voluntary settlements.

Mr. Schimansky issued hundreds of *Decisions and Orders* by direction of the FSIP, and numerous *Opinions and Decisions* (i.e., interest arbitration awards). Mr. Schimansky was part of the task force whose work led to the creation of the FLRA's Collaboration and Alternative Dispute Resolution Office (CADRO). He has provided training to Federal agencies throughout his career and most recently assisted the Air Force General Counsel's Office of Negotiation and Dispute Resolutions in efforts to rebrand and refresh its ADR program.

Mr. Schimansky presents at several programs for FELTG, including training on negotiability, negotiation techniques, grievances, official time, and more. He also presents at FELTG's *FLRA Law Week*.

**William Wiley:** William Wiley is the co-founder and former president of the Federal Employment Law Training Group. He is currently professor emeritus. An attorney with over 35 years of experience, Mr. Wiley formerly served as Chief Counsel to the Chairman of





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the MSPB and Chief of Staff to the General Counsel of FLRA. He is now an attorney in private practice representing agencies before the MSPB, EEOC, and OSC.

Mr. Wiley is the developer of the e-training modules, *How to Fire a Federal Employee* and *How to Defend a Federal Employee*. His latest book is *UnCivil Servant: Holding Government Employees Accountable for Performance and Conduct*, Fifth Edition.

Mr. Wiley presents at FELTG training programs *FLRA Law Week* and *MSPB Law Week*.

## Tips for a Successful FELTG Webinar Experience



Dan Gephart  
FELTG Training  
Director

- We'll start the program promptly at 2:30 pm.
- Please close all other computer programs.
- Please place your phone/mic on *mute*.
- This program will not have a Q & A break.
- However, we will take written questions to consider and answer in our newsletter.
- Submit questions via the chat feature, text them to 561-313-3381 or email them to [gephart@feltg.com](mailto:gephart@feltg.com).



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## COVID-19 Guidance for the Federal Workplace: Medical Inquiries, Leave, and More

Presented on March 25, 2020, by the  
Federal Employment Law Training Group, LLC  
Deborah J. Hopkins, Attorney at Law, President



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## What We'll Cover Today

- ADA and EEOC guidance on the medical impact of COVID-19 in the federal workplace
- **OPM and White House guidance on agency operations during the COVID-19 pandemic**
  - Telework
  - Evacuation orders
  - Weather and safety leave



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Statutory Basis

## The Americans with Disabilities Act and Global Pandemics

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## Americans with Disabilities Act

- Passed in 1990.
 

42 USC § 12101, *et seq.*
- Did not apply to federal government; excluded from definition of employer.
 

§ 12111(5)(B)(i)
- But - Rehabilitation Act was amended in 1992 to incorporate ADA standards on nonaffirmative action requirements.



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### Why the ADA and COVID-19?

- The ADA is relevant to pandemic preparation in at least three major ways.
  1. It regulates employers' disability-related inquiries and medical examinations for all applicants and employees, including those who do not have ADA disabilities.
  2. It prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat" (i.e. a significant risk of substantial harm even with reasonable accommodation).



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### Why the ADA and COVID-19?

- The ADA is relevant to pandemic preparation in at least three major ways (con't).
- 3. It requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic.



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### Drawing a Distinction

- **Disability-Related Inquiries**
  - An inquiry likely to elicit information about a disability
  - Asking about cold or flu symptoms is not a disability-related inquiry
- **Medical Exams**
  - A procedure or test that seeks information about an individual's physical or mental impairments or health



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### Direct Threat

- Definition: “A significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”
  - According to EEOC, exposure to COVID-19 falls into this category.
  - If the illness is akin to seasonal flu, it is not a direct threat. But the assessment of COVID-19 by the CDC and public health authorities provides the objective evidence needed for a disability-related inquiry or medical examination.



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### Direct Threat

- As of March 2020, a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace.
- At such time as the CDC and state/local public health authorities revise their assessment of the spread and severity of COVID-19, that could affect whether a direct threat still exists.



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What can you ask for during a pandemic?

### Medical Documentation and Inquiries During a Pandemic

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## Requesting Medical Documentation

- During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus.
- For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Agencies must maintain all information about employee illness as a confidential medical record in compliance with the ADA.
- OPM has recently said that federal employees may self-certify.



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## Taking Temperatures

- Generally, measuring an employee's body temperature is a medical examination.
- Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, agencies may measure employees' body temperatures.
- However, employers should be aware that some people with COVID-19 do not have a fever.



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## Clearance to Return to Work

- May an agency require medical clearance for an employee who had COVID-19, before allowing the employee to return to work?
  - Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees.



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## Clearance to Return to Work

- As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation.
- Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.



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There's a lot of information out there.

## OPM and White House Guidance

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## Telework During a Pandemic

- The *Telework Enhancement Act of 2010* states that “each executive agency shall incorporate telework into the continuity of operations plan of that agency.”
  - If an agency COOP plan is in operation, that plan “shall supersede any telework policy,” (see 5 U.S.C. 6504(d)(2)) and allow greater flexibility to expand telework to a larger segment of the workforce in support of agency operations) so that as many employees as possible are working during a COOP activation.



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### Telework During a Pandemic

- During an emergency situation such as the COVID-19 pandemic, an agency can require a telework-eligible employee to work from home without a telework agreement.
  - Though an agreement is a good idea.
- An agency can also require an employee who has not been previously designated as telework-eligible, to work from home.
- May have to get creative with work assignments.



5 CFR 550.409(a)

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### And if the Kids are Home

- OPM evacuation payment regulations do not prohibit an evacuated employee from working from home during a pandemic health crisis with children in the home.
- An agency may direct an evacuated employee to either telework or request personal leave (e.g., annual leave, sick leave if applicable, or leave without pay) as necessary.



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### How Do Orders to Evacuate Impact Labor Relations?

- Agencies are encouraged to review applicable collective bargaining agreement provisions to determine if the matter is already covered by the collective bargaining agreement.
  - **However**, 5 U.S.C. 7106(a)(2) says an agency may “take whatever actions may be necessary to carry out the agency mission during emergencies” subject to 5 U.S.C. 7106(b)(2) and (b)(3).
  - **COVID-19 was declared a national emergency on March 13, 2020.**



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### “But that’s not in my PD”

- Under OPM regulations, an agency may assign any work considered necessary without regard to the employee's grade or title.
- However, an agency may not assign work to an employee unless the agency knows the employee has the necessary knowledge and skills to perform the assigned work.



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### If a Teleworker Gets Sick

- Any telework-eligible employee is generally expected to perform telework at home as long as the employee is asymptomatic.
  - See 5 CFR 630.1605
- But, if a telework program participant experiences symptoms of COVID-19 while on telework, the employee would be expected to take sick leave for the time they cannot work.



– NOT Weather & Safety Leave

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### Weather & Safety Leave

- If the employee is not telework-eligible and cannot safely report to the worksite, the agency may grant Weather & Safety Leave, which is paid leave provided to employees during:
  - An act of God,
  - A terrorist attack, or
  - Another condition that prevents employees from safely traveling to or from, or safely performing work, at an approved location.



5 U.S.C. 6329

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### What About Exposure?

- If an employee has been exposed to someone with COVID-19 and does not want to come to work, her options include:
  - Telework, whenever possible
  - Annual leave, LWOP or comp time
  - Weather & safety leave only applies if a local health authority determines the employee would jeopardize the health of others if allowed to return to work



Sick leave DOES NOT apply in this scenario

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### Helpful Resources

- EEOC's website
- OPM's website
- CDC's website
- Telework resource: FlexJobs.com



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### Final Reminders

- Things are changing daily as this pandemic continues to impact the majority of countries around the globe
- Always follow the directives of the CDC and other respected authorities.
- Be safe out there.



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## Upcoming Virtual Training Events

- **Emerging Issues in Federal Employment Law**
  - April 21-23
  - Three days, nine sessions
- **UnCivil Servant: Holding Employees Accountable for Performance and Conduct**
  - April 29-30
  - Two half-days (12:30 – 4pm)
  - Meets the 5 CFR 412.202(b) mandatory supervisor training requirement




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Thanks for attending FELTG's Webinar:  
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Deborah J. Hopkins, Attorney at Law  
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