Federal Employment Law Training Group
Teaching the Law of the Federal Workplace

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Living in a Virtual Reality World

It seems like years since I shared with you the photo I took from the top of the Washington Monument looking over the National Mall and the U.S. Capitol, but that was only in January. It's amazing how life during a pandemic alters the way time passes.

Time isn't the only thing that's been altered. The way we live life and the way we work has changed dramatically. Because telework, travel, and return to work guidelines vary from agency to agency and state to state, FELTG has decided to hold our open enrollment classes virtually through August. We hope this will eliminate some of the uncertainty of "will they or won't they run the class," and will allow you to make your summer training plans soon, knowing you can attend whether you're working from home or are back in your agency workplace. Our website list of events has a full calendar where you can see what programs we're offering, and when. We hope you can join us, as we all work through this "virtual reality" together.

This month's newsletter tackles the eventual return of employees to the workplace and other pandemic-related challenges, what happens when you leave a nuclear missile unguarded, Medical Inability to Perform removals, and much more – including an introduction to our newest instructor.

Take care,

Deborah J. Hopkins, FELTG President

THE FELTG VIRTUAL TRAINING INSTITUTE PRESENTS ...

Taking Defensible Disciplinary Actions
June 1-3, 2020

Federal Workplace Challenges in a COVID-19 World: Returning to Work During a Pandemic
June 10

Reasonable Accommodation Spotlight: Challenges and Trends in Federal Agencies
June 16-17, 2020

Developing & Defending Discipline: Holding Federal Employees Accountable
June 23-25, 2020

EEO Challenges in a COVID-19 World
June 30, 2020

Advanced Employee Relations
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Absence, Leave Abuse & Medical Issues Week
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Emerging Issues Week: The Federal Workplace's Most Challenging Situations
July 20-24, 2020

Federal Workplace 2020: Accountability, Challenges, and Trends
July 27 – July 31, 2020

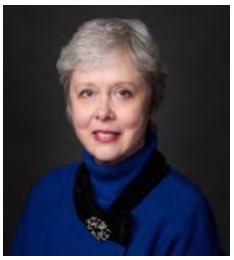
FLRA Law Week
August 3-7, 2020

EEOC Law Week
August 10-14, 2020

Effectively Managing and Communicating With Federal Employees
August 19-20, 2020

UnCivil Servant: Holding Employees Accountable for Performance and Conduct
September 9-10, 2020

Failure to Follow Instructions: A Charge That Seems Particularly Fit for 2020
By Barbara Haga



Ensuring that employees comply with work procedures and requirements has taken on a new characteristic with the pandemic. As agencies prepare to bring employees back into the workplace, there could be new problems with failure to comply with the precautions being set in place to try to minimize spread of the virus. Let's look at a couple of scenarios.

Back in the building after testing positive

Some of you who have been in classes with me have heard me use the phrase, "No good deed goes unpunished." Here's an example: In this situation, the agency had done everything one could reasonably expect, but things still went wrong. An employee was working in an office job where they were still reporting to their building. The employee reported to duty exhibiting symptoms and was instructed to leave and get tested. The employee tested positive for COVID-19. Other employees in the area were instructed to leave and a deep cleaning was performed. So far, so good.

That night, the employee came back to the building to pick up a laptop and files. She said she wore a mask and used gloves and wiped things down that she touched while in the office, etc. Management was furious.

At the time I spoke to the agency, I asked a lot of questions, such as whether the employee used public transportation to come back after the positive test result and whether the employee had contact with anyone else in the building such as security folks at the desk. I asked: Was there some critical deadline that the employee was trying to meet in spite of being ill, and did other people come into the spaces unaware that the employee had been back in there? Without that information, it is difficult to get terribly specific about a penalty.

Could you show that the employee failed to act reasonably under the circumstances? I think so. Back to our discipline model from last month's column, we need these things:

1. Establish a valid rule.
2. Inform the employee of the rule.
3. Prove the employee broke the rule.

Is it a valid requirement to send employees away from work if they appear to have the symptoms of COVID-19? Certainly. Would you have to have told the person to stay away as long as she was sick? I don't think so. That's one of those commonsense rules that I think you could establish by referring to CDC guidelines, public service announcements, or something in your agency guidance. In this case, the employee told the agency that she was in the building, so proving that would be simple. Obviously, she knew there was risk; that's why she volunteered that she wore the mask and gloves and wiped things down.

I wouldn't expect, in this scenario, that an agency propose an adverse action, assuming the employee was an otherwise good employee. Management was very unhappy that cleaning had to be done over and other employees' work was potentially impacted by delays in returning to the workplace, but I'm not sure that would add up to enough under *Douglas* to outweigh a number of years of good service and potential for rehabilitation. [Editor's note: It could be argued, however, that the harm, or potential for harm, of the employee bringing her known germs into the workplace outweighs the fact that she's a good employee].

Refusing to comply with precautions

Your agency has set conditions that will allow employees to return to the worksite. This includes, among other things, taking

temperatures. These precautions are included in the CDC guidelines for businesses for reducing transmission of the virus in the workplace.

The EEOC guidelines on medical evaluation were updated in March to cover the COVID-19 situation. Here is the EEOC guidance:

7. During a pandemic, may an ADA-covered employer take its employees' temperatures to determine whether they have a fever?

Generally, measuring an employee's body temperature is a medical examination. If pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus in the spring/summer of 2009, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees' body temperature.

However, employers should be aware that some people with influenza, including the 2009 H1N1 virus or COVID-19, do not have a fever.

Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions as of March 2020, employers may measure employees' body temperature. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.

Employees were notified of these conditions by e-mail and given a return to work date. However, one of your employees reports, but refuses to have his temperature taken. The rule was reasonable, it was communicated, and the employee refused to comply.

What kind of charge?

"Failure to follow instructions" is a charge that covers a variety of situations. It has been used when an employee failed to submit required medical documentation. *Archerda v. DoD,* 121 MSPR 314 (2014). It was sustained when an employee refused to report to a new duty station. *Jones v. Department of Justice,* 98 MSPR 86 (2004). It has been used for situations related to misuse of credit cards, failure to cooperate in investigations, and many other things. This charge goes to the heart of the ability of agencies to direct work and the workforce.

In *Pedeleose v. DoD*, 109 FMSR 200 (2009), *aff'd*, 343 F. App'x 605 (Fed. Cir. 2009), the Board wrote about the charge of failure to follow instructions: "The rule involved in this case has long been recognized as one that is necessary to an agency's ability to effectively manage the workplace. The rule generally requires an employee to comply with an agency order, even where the employee may have substantial reason to question it, while taking steps to challenge its validity through whatever channels are appropriate."

This charge seems like a good choice in both scenarios outlined. In the first scenario, the misconduct would all have been in the past, so that one is not as complicated. For the second scenario, the employee won't be allowed in the workplace without the temperature check. What would the action look like? The employee would have to be sent home on admin leave just like any other situation where you have an employee who reports not ready, willing, or able to perform work. The admin leave would extend until you could get your notice of proposed action completed. At that point, the employee would be on notice leave while waiting for the reply and decision. Because the COVID-19 situation is an emergency, you could likely shorten your reply periods on short suspensions, which is where I am assuming most would be with this scenario.

Perhaps the employee will agree to the check after receiving a proposed action. If so, then you could take that into account and consider reducing the number of days of suspension or revert to a reprimand. You

might really need the employee performing the work of the position so it may be in the agency's interest to *not* suspend if the employee complies and shows potential for rehabilitation.

What if the employee continues to refuse? Take a second action for another offense. This one would probably be a proposed removal.

At FELTG, we realize many of you are being confronted with issues that none of us ever conceived of before. Please keep sharing your questions/issues. We can get through this much more successfully if we put our heads together! Haga@feltg.com

To Err Is Human — And Maybe Also a Reason to Change a Personnel Record?
By Meghan Droste

As many of you are aware, the work of negotiating settlement agreements became more difficult on May 25, 2018, with the issuance of Executive Order 13839. Section 5 orders agencies not to "Erase, remove, alter, or withhold form another agency any information about a civilian employee's performance or conduct in that employee's official personnel records ... as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action." Up to that point, clean records — taking out proposed or final actions from an employee's OPF — had been a valuable tool for both agencies and complainants in negotiating settlements.

OPM subsequently issued guidance clarifying how to apply the EO. According to the guidance, agencies "are permitted to take corrective action on information contained in a personnel record that is not accurate or records an action taken by the agency illegally or in error." *See Haywood C. v. Dep't of Homeland Sec.*, EEOC App. No. 2019003137 (March 3, 2020). (For more discussion of the OPM guidance, check out Bill Wiley's comments from October 2018.)

Agencies and complainants have been struggling to understand the application of the EO when it comes to settling cases. What exactly constitutes an error? Is it OK to include the removal or change of documents in a settlement agreement if the agency decides there was an error? The Commission recently tackled a case involving these questions, and while it did not provide clear guidance, there are some interesting breadcrumbs for us.

In *Haywood C.*, the complainant alleged that the agency was in breach of a settlement agreement because it had not removed documents related to a proposed removal from his OPF. The agency argued that it could not do so because of the EO. In looking at the case, the Commission cited both the EO and the OPM in its decision. And then it decided that it was not going to determine whether or not the EO or the OPM guidance applied to the specific agreement at issue. This isn't exactly helpful for other cases, but I do think it is interesting and noteworthy that the Commission specifically pointed to the OPM guidance, even though it decided not to determine whether or not the guidance applied. I might be reading too much into this, but I think the Commission's decision to draw attention to the guidance might be a signal that it would apply it in the future and uphold settlement agreements that remove or change documents if the parties agree the agency put the documents in an OPF in error or they contain incorrect information. Droste@FELTG.com

Reasonable Accommodation

FELTG Instructors Katherine Atkinson and Meghan Droste will offer significant guidance during *Reasonable Accommodation Spotlight* on June 16 and 17 from 12:30 - 4 pm ET. Register Now.

If You Leave an Intercontinental Ballistic Missile Unguarded, You're Probably Getting Fired
By Deborah Hopkins

A few weeks ago, I wrote an article about progressive discipline, and explained how a time-tested approach to discipline in the federal government provides for a "three strikes and you're out" mentality, at least when it comes to minor workplace misconduct. There are times, however, when an employee engages in misconduct so egregious that the agency skips the first two steps in progressive discipline – typically a reprimand and a suspension – and jumps right to a removal. After all, an underlying tenet of progressive discipline is that, by disciplining an employee with increasing degrees of punishment, the employee is given the opportunity to learn from his mistakes. *Castellanos v. Army*, 62 MSPR 315, 324 (May 4, 1994). There are times, though, an agency determines the employee has done something so bad, he should not be given such a chance.

Let's look at a few of those cases.

You were warned

Sometimes agencies choose to issue warnings to employees, rather than issue formal discipline. A warning is an aggravating factor that is most commonly used under the *Douglas* factor for clarity of notice: How clearly was the employee on notice that there was a workplace rule in place?

Take, for example, the GS-12 attorney with a discipline-free record who was removed based on two charges: Disruptive Behavior (two specifications) and Making Inappropriate Remarks (seven specifications, including referring to his supervisor's writing as "crap," making unseemly accusations, and using a sarcastic or intemperate tone). The agency had issued "four express warnings" and the employee still did not correct his behavior, so the agency proposed removal. This appellant argued that he didn't understand the warnings because the language used by the agency regarding "maintaining his composure" was confusing. Nice try, but that expression was an aggravating factor that expressed a lack of remorse. A GS-12 attorney should know what maintaining composure requires, so the MSPB upheld the removal. *Pinegar v. FEC*, 2007 MSPB 140.

One strike and you're out

Some charges, by their very nature, have been recognized to be removal offenses even if there is no prior discipline. One such charge is Failure to Cooperate in an Investigation. Take a look at the following cases which all involved some version of an employee refusing to participate in agency-authorized investigations: *Weston v. HUD,* 724 F.2d 943 (Fed. Cir. 1983); *Negron v. DoJ,* 95 MSPR 561 (2004); *Hamilton v. DHS,* 2012 MSPB 19. Also check out *Sher v. VA,* 488 F.3d 489 (1st Cir. 2007) (Courts have repeatedly held that removal from employment is justified for failure to cooperate with an investigation).

Another charge where there's not always another chance for the employee is *Threat*, or some version thereof (such as Making Disruptive Statements). In one such case, an appellant's conditional threat that he would cut off his supervisor's head warranted his removal despite a lack of prior discipline and four years of service. The agency successfully argued that such behavior affected the agency's obligation to maintain a safe work place for its employees, thus impinging upon the efficiency of the service. *Robinson v. USPS,* 30 MSPR 678 (1986), *aff'd.,* 809 F.2d 792 (Fed. Cir. 1986) (Table). A note to practitioners: If you're going to charge Threat, you're going to need to be sure you have evidence to support the *Metz* factors. Come to FELTG's Workplace

Investigations Week in Denver August 24-28 if you'd like to learn more about that.

Multiple specifications are aggravating

Sometimes an employee engages in an act of misconduct several times, but has no disciplinary record because the agency hasn't yet issued discipline (which, as a side note, contradicts my colleague Bill Wiley's mantra "Discipline early, discipline often"). In those cases, the agency may choose to discipline the employee, and show the egregiousness of the conduct by listing multiple specifications, thereby justifying the penalty of a removal for a first offense of misconduct. A fairly recent case provides a perfect example of such a strategy: A first-offense removal was upheld because there were 10 specifications of continued sexual misconduct that occurred after appellant was asked to stop his inappropriate behavior. *Adkins v. DoD*, SF-0752-16-0294-I-1 (2016)(NP).

Harm or potential for serious harm

The Air Force has a rule: A Division 1.3 explosive must be attended at all times by its driver or a qualified representative of the motor carrier that operates it. One of our most-discussed-in-class cases at FELTG seminars involves a WG-09 Motor Vehicle Operator with 28 years of outstanding service, who left a truck with an intercontinental ballistic missile unguarded in a motel parking lot (keys in the ignition, doors unlocked) for 45 minutes, and then lied about to his supervisors when they confronted him. Though 28 years of service is a mitigating factor, and a discipline-free record is generally an asset, leaving a missile containing 66,671 pounds of explosive propellant unguarded was egregious enough to warrant a first-offense removal. *Dunn v. Air Force*, 96 MSPR 166 (May 24, 2004).

Remember, the goal of discipline should be to prevent future misconduct from occurring. But sometimes, employees go over the line and there's no coming back. As long as your *Douglas* factors analysis supports removal, and the penalty is not grossly disproportionate to the offense, you're free to remove an employee with a discipline-free record. For more on discipline, join FELTG for the Virtual Training Institute's Taking Defensible Disciplinary Actions, June 1-3, or Developing & Defending Discipline, June 23-25 – from wherever you're working. Hopkins@FELTG.com

THE FEDERAL WORKPLACE 2020: ACCOUNTABILITY, CHALLENGES, AND TRENDS

The pandemic is making the possibility of attending summer federal conferences less likely each day. So we've launched the virtual training event **Federal Workplace 2020: Accountability, Challenges, and Trends** with 14 different live instructor-led sessions, July 27-31. Attend as many sessions as you want, from one to all, or anything in between. Earn 8 EEO refresher hours. Earn CLE and Ethics credits.

These sessions are being offered:

- *What Every Counselor and Investigator Needs to Know in 2020*
- *The Foundations of Accountability: Discipline and Performance*
- *Charges and Penalties in Disciplinary Cases*
- *Providing Performance Feedback That Makes a Difference*
- *What to Do When Performance Goes Bad*
- *Reasonable Accommodation in 75 Minutes*
- *The Latest on Sexual Orientation and Transgender Discrimination*
- *When the ADA and FMLA Collide*
- *Navigating the Morass of Mixed Cases*
- *Managing a Mobile Workforce: Tools for Accountability and Productivity*
- *Understanding and Working With Your Agency's OIG*
- *Handling Behavioral Health Issues in the Federal Workplace*
- *Case Law Update: EEOC, FLRA, MSPB, and More*
- *Ethics for the Government Attorney*

The Good News: You Can Still Boost Employee Morale Virtually
By Ann Boehm

In this strange COVID-19 world, we are struggling to see the bright side of the situation and trying to avoid the constant barrage of bad news. Actor John Krasinski is providing *Some Good News* and multiple news outlets are providing Good News updates. Unlike Krasinski, I can't get the cast of *Hamilton* to entertain you. Nonetheless, as the oddities of social distancing, telework for all, and virtual meetings continue to drag on, I think it's important to try to find a bit of good news in the Federal workplace. So here goes.

You can boost employee morale virtually. And you really, really need to try to do so now.

Following last year's government shutdown, I developed a list of Boosting Employee Morale Do's and Don'ts for Supervisors. If you've attended my training, you have heard them. They're based mostly on how to avoid being like bad supervisors and more like the good ones. I've modified them to fit the current COVID-19 situation.

Don't be a jerk

I know what you are thinking. I'm not a jerk. But you may not realize behaviors that end up making you seem like a jerk to your employees.

The first thing you need to do to avoid being a jerk to your employees is to honestly assess how you are handling extended isolation and supervising in a teleworking world. Or, if you are not among those teleworking, assess how you are handling the daily stressors and fears you have about your health and safety. Acknowledge your own frustrations and satisfactions. Some people are thriving in the teleworking world – thrilled to be avoiding long commutes and chatty co-workers. Others are missing the workplace and social contact. Different people are handling things differently. Some people are happy to have a job and income; some are very worried about their personal risk. Try to be sensitive to those differences.

Also remember that communication is different in the virtual world. Read your emails carefully to make sure the tone you intend is what is coming through in writing. Understand that your employees may need some assistance with that as well.

Focus on mission requirements and employee performance without getting stuck on bureaucratic 9:00 to 5:30 work hours. Understand that people are dealing with cranky spouses, children, and other family members in their care. If they need to get some work done from 5:00 a.m. to 7:00 a.m., and the rest done from 4:00 p.m. to 10:00 p.m., assess whether that is adversely impacting on your mission or whether it is fine, even if it is different than the norm.

Ultimately, if you stay mission-focused and open-minded, you will avoid being a jerk. And this will boost employee morale.

Do say thank you

Employees may be feeling a bit lost right now, and the best way to give them a sense of belonging is to thank them for continuing to work for the public. Some of you may be supervising essential workers who are not teleworking. Don't take them for granted. If you send a thank you email to an employee, I can almost guarantee they will share it with some family member or friend. Every employee likes to get praise.

Do include employees in planning

Take the time to look at whether your mission and your employees are matching up. And get employee input on this. Think about

those projects you and employees never have time for, and see if this is a good time to get them moving.

Analyze what is working well with teleworking and what is not. Some employees are going to get very used to teleworking. Start thinking now about what is going to happen when the workplace reopens. NASA has a re-entry program for astronauts for a reason. Change is hard. Getting people used to coming into an office will be an adjustment. The best way to create an effective workplace is to plan ahead, to the extent possible, and involve your employees in the planning.

Do talk to employees

Talk to your employees. Yes, really talk to them in some format — call, WebEx, Microsoft Teams, FaceTime, whatever. But talk to them.

I spoke with a friend the other day (an IT guru) who said he was just tired of the sound of Zoom meetings. The beeps when people click in and out. The computer audio. Ask your employees how they are dealing with these kinds of things. It will make them feel better if you just let them talk freely.

Another thing to consider is sending out some sort of weekly or bi-weekly email to your employees that tells them how you are handling the impact of the virus, how you value them, how your organization is staying mission focused, and any other fun information you think they would like to hear. Sometimes employees forget that supervisors are human too. Tell them if you have started a new exercise routine, discovered a great book or Netflix series, learned to play an instrument — you get the idea.

Remind employees that it's a good time to be a federal employee

This is a new addition to my do's and don'ts list. Just a year ago, with the government shutdown, federal employment didn't seem like such a great thing. But as unemployment skyrockets, federal employees need to be thankful for their jobs. It's my belief that the desire for federal jobs is going to go through the roof in the next few months. Use this to motivate people. They are now the truly fortunate ones who have jobs. They can be proud of their federal service, even as they may be frustrated with the daily existence in COVID-19 world. In the final analysis, maybe this is the really Good News for now.

Stay strong and stay safe.
Boehm@FELTG.com

EEO Counselor and Investigator Refresher Training

Meet your mandatory EEO Counselor and Investigation refresher training with FELTG this summer. Each 95-minute session counts toward the annual refresher requirement as mandated by the EEOC. Register for the entire series and receive a certificate of completion to show you have the mandatory 8-hour annual refresher requirement.
The series consists of five webinars over the next few weeks.

May 28: EEO Complaints in 2020: What Counselors and Investigators Need to Know

June 11: Understanding Current Issues: Reasonable Accommodation Trends in 2020

June 25: Practical Skills for Counselors and Investigators: Interviewing Complainants and Witnesses

July 9: The Latest on Sexual Orientation and Gender Discrimination in the Federal Workplace

July 23: Updates on Discrimination: Recent Cases About Race, Color, Religion, and National Origin

Webinars will be held 1:00-2:35 pm EDT.

The Employee Who Can't Perform the Essential Functions Because of a Disability
By William Wiley

At FELTG, we love a good hypothetical Q & A, especially a hypothetical that comes from a nice student who has attended one of our classes. Here's an example of just such an exchange:

> Greetings, I am an attorney who recently attended MSPB Law Week training. One of the key features of the training was information on how to remove an employee based on performance, and how this method was under-utilized and which the mechanics of doing so were often misunderstood.
>
> In my office, a regular hypothetical scenario that I encounter is cases where workers are unable to perform the essential functions of their position because of physical ailments or difficulties, and a reasonable accommodation will not work because of the nature of the work involved.
>
> What do you think about removing these employees under a performance rubric, using 5 USC 4303? Is this doable? Removing these types of employees for "Inability to Perform the Essential Functions" does not seem to have the same legal authority that a performance removal does.
>
> Any thoughts that you have on this subject would be greatly appreciated.

And here's our FELTG response:

> Very nice to hear from you. As for your question, you have a relatively common hypothetical situation and the legal road is clear cut. It is possible to remove someone for unacceptable performance if they have a medical condition that is preventing them from performing acceptably. However, doing so adds a step beyond what you have to do to remove the person for Medical Inability to Perform.
>
> In other words, to an employee with a disability for Unacceptable Performance, you have to prove everything you would have to prove to fire that employee for Medical Inability PLUS you have to meet all the requirements of a 432 performance removal, with no additional benefit. I would suggest just going with a Medical Inability 752 removal to avoid the extra work and the extra risk in litigation.
>
> To remove an employee for Medical Inability to Perform, you need to prove:
>
> 1. The employee cannot perform at least one essential function of the position. This is usually easy to do because the employee often presents medical evidence from his own physician that says he cannot perform in some way. Even a backwoods lawyer such as myself stands a good chance of winning when the evidence comes from the employee's own health care provider.
> 2. The agency considered ways to accommodate the employee in his current job so that he can perform the essential functions; e.g., reasonable accommodation. In my experience, the supervisor can usually document this consideration with a one-hour documented evaluation of the work and the reason that the function is not subject to such modification.
> 3. The agency, through testimony of its disability program coordinator or a staffing specialist, documents

that it looked for vacant positions being recruited for within the agency for which the employee is professionally qualified and in which the employee can perform acceptably even with his medical limitations (including consideration of whether the position can be modified to accommodate the employee's disability). The job search should be initially at the employee's current grade. If none are found at that level, then at lower grades.

Assuming the job search comes up empty, at this stage you can initiate a Medical Inability to Perform Removal. Were you to instead pursue an Unacceptable Performance removal, you'd still have to do all of the above to prove that you attempted to accommodate the employee's disability PLUS you'd need to prove that you properly initiated an opportunity to demonstrate acceptable performance period (DP), that the supervisor met with the employee to assist him during the DP, that the employee indeed performed unacceptably during the DP, and that the agency's performance plan was approved by OPM. There's no reason to take the performance route when the medical inability route works just as well.

For more on this, you may want to consider enrolling in FELTG's next virtual seminar that addresses medical issues like yours, Absence, Leave Abuse & Medical Issues Week, July 13-17. Good luck out there. Wiley@FELTG.com

Join Katherine Atkinson for an encore presentation of the latest guidance on how to handle specific EEO issues during the pandemic. *EEO Challenges in a COVID-19 World* will be held on June 30 from 12:30 – 4 pm ET. Register Now.

Three Things to Consider as You Prepare for Employees' Return to the Workplace
By Dan Gephart

While the nation's slow re-opening is being welcomed by struggling small businesses and Americans eager for a return to normalcy, it is also being met with hesitation and fear by many employees who will soon be making their way back to the workplaces they last occupied several weeks ago.

They are not the only ones who are hesitant. You probably are too. And you should be. Bringing teleworkers back to the physical workplace amid a pandemic will *not* be easy. Agency HR/EEO professionals, attorneys, supervisors, and managers play important roles in ensuring that their agencies follow the appropriate guidelines, comply with laws involving leave and reasonable accommodation, and meet their burden for providing a safe workspace.

Last month, we looked at the rise in virus-related discrimination and harassment against Asian Americans and Pacific Islanders. That is an ongoing problem, as EEOC Chair Janet Dhillon alluded to in a recent message sharing her concerns about race and national origin discrimination.

"Amidst the challenges we are all facing during these uncertain times, the anti-discrimination laws the EEOC enforces are as vital as ever," Dhillon wrote. "The EEOC is rising to the challenges before us, continuing our mission of advancing equal employment in the workplace and enforcing our anti-discrimination laws. The EEOC urges employers and employees to be mindful of instances of harassment, intimidation, or discrimination in the workplace and to take action to prevent or correct this behavior. Our collective efforts to create respectful workplaces for all our

nation's workers, even during these trying times, will enable us to emerge from this crisis stronger and more united."

If you caught Katherine Atkinson's insightful and engaging virtual training ***EEO Challenges in the COVID-19 World*** last week, you are now aware of the numerous EEO challenges you'll soon face, if you haven't already. (If you missed the training, no worries: Katie will be presenting it again on June 30. Register here. And then scoot on over to here to register for Federal Workplace Challenges in a COVID-19 World on June 10, where we'll cover leave, whistleblowing, mental health crises, reasonable accommodation, and much more.)

This month, we offer three bits of advice as you prepare for the eventual return of employees, the first two of which will be covered extensively in EEO Challenges in the COVID-19 World on June 30.

Beware of the potential liability of making age a factor in employment decisions.

The evidence is clear, and it's been repeated ad nauseum by everyone from the CDC to the President to your neighbor: The older population, specifically those 65 years old or older, are at a heightened risk for contracting the coronavirus.

So what do you do with that information? Here's what you *can* do: Recognize the risks to all of your employees, particularly those most vulnerable, as you facilitate the safe and healthy return to the workplace.

Here's what you *can't* do: Take an employment action against an employee because of his/her age and not for a legitimate, nondiscriminatory reason. Avoid any statements or actions that indicate an age-related bias.

Does that mean you can't forbid your older employees from returning to the physical workplace? This is where the waters get murky. Such a decision appears discriminatory on its face, but there may be some legal wiggle room because of the importance of health and safety of workers and the fact that this virus disproportionately impacts older individuals. Your best bet is to stay current with guidance out of the EEOC, CDC, White House, OPM, and OMB.

Meanwhile, keep an eye out that you, supervisors, or coworkers do not create a hostile work environment for employees based on their age, or their perceived vulnerability.

Brush up on the Americans with Disabilities Act, and include COVID-19 in your analysis.

As Katie explains during the virtual training EEO Challenges in the COVID-19 World, the ADA is relevant to the current pandemic in at least three significant ways.

1. It regulates employers' inquiries and medical examinations for all applicants and employees, including those who do not have ADA disabilities. In pre-pandemic times, it would have been unlawful for agencies to take employees' temperatures at work. Not now, though. Not only can agencies take employees' temperatures, but they can also administer COVID-19 tests, because COVID-19 is currently a direct threat.
2. It prohibits covered employers from discriminating against individuals with disabilities or excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a direct threat. And since 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. The most recent CDC and public health authorities' assessment provides the objective

evidence needed to deem COVID-19 a direct threat.

3. It requires reasonable accommodations for qualified individuals with disabilities during a pandemic. Employees with COVID-19 are not entitled to reasonable accommodation solely by virtue of having the disease. Does that mean you should dismiss the thought of accommodating an employee recovering from COVID-19 or at risk for COVID-19? Consider an employee with an underlying respiratory condition: You should follow the usual analysis for determining if the employee is a qualified individual with a disability.

Effectively communicate changes and policies with your employees.

Do you remember labor-management partnerships? Regardless of your opinion on this Clinton-era concept, you have to admit: A strong working relationship between unions and management would be especially helpful these days.

Some of the changes to the physical workplace over the next year could be substantial, particularly until a vaccine arrives on the scene. Tightly filled open workspaces are likely a thing of the past. Some private-sector employees are installing clear acrylic safety shields (think sneeze guards) between employee cubicles. We can likely expect more environment-altering innovations.

How will that play out in the federal workspace? Agencies and unions have waged battles over inches of space in an office. Think of how these new workplace layouts and innovations will go over with union reps. And what will bargaining unit employees think of new restrictions such as mask requirements or enforced social distancing requirements? How can any of the sudden and dramatic workplace changes be implemented in a way that makes everyone comfortable and limits labor clashes?

Few contracts address any of the specific changes we're going to see implemented. However, as FELTG instructor Joe Schimansky reminded me last week, most contracts include the statutory right for agencies to take whatever actions may be necessary to carry out their missions during emergencies. Joe will undoubtedly be covering these challenges when he presents FLRA Law Week with fellow FELTG instructor Ann Boehm August 3-7.

We're entering uncharted waters, and there's only one thing we know for certain: Effective communication is the starting point. As always, FELTG has you covered: Join Dr. Anthony Marchese on August 19-20, 2020 for the virtual training program Effectively Managing and Communicating With Federal Employees. Good luck out there. Gephart@FELTG.com

Monthly Observations, Guidance, Tools, and Tips to Make Your Job Easier

Supervisor Survival Series: Trust Your Teleworkers – Unless There's a Reason Not To

Right now, an unprecedented number of federal employees are teleworking as the COVID-19 pandemic continues to spread across the globe. Supervisors are understandably overwhelmed, especially as they work to fulfill their agency's mission while also modifying their management approach to lead remote teams.

Supervisors may feel suspicious of employees who are teleworking, and may assume their employees aren't doing their jobs. But in reality, if your employee is a good employee in the office, they will probably be a good employee while they're working from home as well. Sure, some people are not cut out for telework, but most people are doing what they can right now.

Instead of micromanaging your employees, FELTG suggests you trust them, unless and until they give you a reason not to. Yes, there may be employees you have to watch more closely during this time, but if most of your employees are performing their work acceptably, then take the pressure off yourself to feel the need to manage their every move. They'll appreciate it, and so will you.

Tips From the Other Side: Provide an* Effective *Accommodation and Follow Up
By Meghan Droste

As we continue into what feels like the third year of quarantine (but is really just getting to the end of month two, at least in the Washington, DC area), I have a bold prediction for my fellow employment law practitioners: I expect we are going to see an increase in requests for accommodations in the coming months, if you haven't already. (I know, I know, this isn't exactly groundbreaking, but I'm sticking to it.) In anticipation of this, it is a good time to go over some of the basics for accommodations.

The first, and possibly most important, is to remember that if an employee is entitled to an accommodation, the agency must provide an *effective* accommodation. While it is often said that an employee is not entitled to the accommodation of his or her choice, the same is true in a way for agencies — an agency cannot simply offer an accommodation and call it a day. It has an obligation to ensure that the accommodation it provides actually helps the employee perform the essential functions of the position at issue, and if it doesn't, it needs to find a new accommodation. Without providing an effective accommodation, the agency has not provided a reasonable accommodation.

The Commission's recent decision in *Kristopher M. v. Department of the Treasury*, EEOC App. No. 2019001911 (March 3, 2020), provides a good example of this. In this case, the complainant experienced paralysis in one arm and, therefore, requested dictation software to assist with performing his duties. The agency agreed to install Dragon software on his computer and provide training. At this point — before the complainant had the training or attempted to use the software — the reasonable accommodation coordinator considered the case closed. She testified at hearing that simply providing the software, regardless of whether it functioned properly, was sufficient to meet the agency's obligations. Unfortunately for this complainant, the software was not compatible with several programs he needed to use and he spent two years trying to find a way to make it work. His efforts to make the accommodation actually effective took significant time away from his

work. Also, working without an effective accommodation caused pain in his other arm.

Unsurprisingly, the Commission upheld the administrative judge's decision that the agency had failed to accommodate the complainant during the time that the software did not work. This resulted in the agency having to pay damages, but it also kept an employee from successfully performing his job. If the agency had stayed on top of the request and worked more diligently to address the software issues, it could have avoided the judgment against it, but more importantly it could have had a productive employee focused on his work and not the failure to provide accommodations. So, as you encounter the increase in requests for accommodations, be sure to slow down and make sure the accommodations you provide are effective before considering a request closed and moving on to the next one. Droste@FELTG.com

Supervising Federal Employees: Managing Accountability and Defending Your Actions

No other training provides the depth and breadth of guidance federal supervisors need to manage the agency workforce effectively and efficiently. You missed the first several webinars? No problem, you can jump into the series at any time. Here are the next few webinars in the series:

May 26: Disciplining Employees for Misconduct, Part II

June 9: Tackling Leave Issues I

June 23: Tackling Leave Issues II

July 7: Combatting Against Hostile Work Environment Harassment Claims

July 21: Intentional EEO Discrimination

August 4: Disability Accommodation in 60 Minutes

The series runs through September.

And Now a Word With … Bob Woods
By Dan Gephart

We are thrilled to announce the newest addition to our FELTG Faculty – Bob Woods (*pictured at right*). As a former federal conference program chair, I had the opportunity to work with Bob in recent years. He's smart, engaging, approachable, and cares about the federal workforce. In other words, he fits right in with the rest of FELTG's instructors.

If you have seen Bob present or if you've worked for the Department of the Navy, then you already know this about Bob. If not, you'll get to see and hear him in action soon. Bob will be one of the presenters during the FELTG Virtual Training Institute's Taking Defensible Disciplinary Actions on June 1-3, 2020 and EEOC Law Week August 10-14, 2020.

Most recently Bob served as the Principal Deputy Assistant Secretary (Manpower and Reserve Affairs) for the Department of the Navy. He was the principal advisor to the Assistant Secretary in executing responsibilities for the overall supervision and oversight of manpower and reserve component affairs of the Navy, including the development of programs and policy related to military personnel (active, reserve, retired), their family members, and the civilian workforce; the tracking of the contractor workforce; and, the oversight of Human Resources systems within the Department.

Previously, Bob served as Assistant General Counsel (M&RA) where he was legal advisor to the Secretariat for matters concerning military and civilian personnel policy. He also coordinated the efforts of Navy attorneys worldwide in administrative and federal court employment litigation. He

was appointed Special Counsel Litigation where he was responsible for the most important litigation matters under the cognizance of the General Counsel. His pre-Navy career included stints with the General Services Administration and the Department of Commerce, where he handled labor and employment litigation.

Bob retired from the U.S. Air Force in 1998 after more than 20 years of active duty.

We had to put an end to the FELTG Faculty initiation process a few years ago, so instead, we're submitting Bob to an *And Now a Word With …* interview.

DG: What's the best advice you've received that had the most impact on your federal career?

BW: I'd have to say that in addition to "follow the golden rule," the best advice I received was the tried and true (for the most part) "bloom where you're planted." About 98 percent of the time, I was "planted" in places where I could bloom and thrive. In those cases, I found that putting in the work and being a generally cheerful and helpful colleague enabled me to be recognized for my potential and helped me get the assignments and jobs that I wanted and that helped me progress. I learned that I was/am responsible for myself and that I can choose to be sunny (or gloomy). Learn your craft, be inclusive, take on the tough assignments, be timely, be collegial and you're likely to be successful. In those *very* few cases where I was "planted" in less than "fertile soil," I made an effort to improve the conditions by doing those things (hard work, cheerful colleague, etc.) that helped me thrive. Sometimes however, no matter what you do, you can't fix toxic conditions and you have to find a way to move on.

> ***Case and Program Consultation***
>
> FELTG's team of specialists has decades of experience. They can help you tackle your most challenging workplace issues. If you have a difficult case or situation and think FELTG can help you, email us at info@feltg.com or call 844-283-3584.

DG: What's the federal employment law-related myth that you think is most prevalent government-wide?

BW: I think the most prevalent federal employment law-related myth I've encountered is that you can't fire a civilian. In my experience, many supervisors suffer poor-performing or toxic employees for far too long. These employees make up a very small fraction of the civilian workforce, but account for a disproportionate amount of grief. In my opinion, the tools available to deal with poor performers are sadly underutilized, despite the fact that they are fairly straight forward and relatively easy to use.

DG: How can that be fixed?

BW: This is clearly a leadership issue. Some supervisors would rather put up with the poor performer than use these tools. This is probably because they either don't understand how to use these tools or they're afraid of having to defend against the employee's complaint or appeal (or a combination of the two). To fix this problem, supervisors need to be taught how to use the tools, provided good support from their leaders, HR and Legal teams, and held accountable themselves by their supervisors to do the right thing.

DG: What's your favorite part of teaching/presenting?

BW: I enjoy the fact that I'm able to share what I know with the audience and I enjoy interacting with them. Federal employment law can be a complicated topic and I enjoy breaking it down for folks to be able to better understand and use these tools.
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