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

FELTG Newsletter Vol. XII, Issue 7 July 15, 2020

Staying Connected Across the Miles

It's the middle of summer – and what an interesting year it's already been. I remember a time during the summer of 2019, when I spent a few moments tallying the number of states FELTG had been to so far that year, and adding up the number of states we had yet to visit. I don't remember the exact total, but I can tell you we visited more states – physically – last year than we have this year.

That being said, we've still found a way to bring our classes to just about every state (and even countries in Asia and Europe) this year, thanks to the wonders of the Internet and our webinars and Virtual Training Institute. We miss seeing your smiling faces in the classroom, but we've still found ways to stay connected while travel is suspended and in-person gatherings are limited. We've introduced features into our web-based training including live polling, breakout sessions, workshops, and more, so you can stay engaged whether you're attending a 60-minute session, a week-long training, or something in between. We hope you'll join us for an upcoming event.

In this month's newsletter, we cover important topics including the recent Supreme Court decision on workplace sexual orientation and transgender discrimination, determining essential functions of work positions, how the civil service is like calculus, and more.

Take care,

Deborah J. Hopkins, FELTG President

UPCOMING FELTG VIRTUAL TRAINING

SPECIAL EVENT

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

FULL DAY EVENTS

Emerging Issues Week
July 20-24

EEOC Law Week
August 10-14

HALF-DAY EVENTS

FLRA Law Week
August 3-7

Effectively Managing and Communicating With Federal Employees
August 19-20

Workplace Investigations Week: Conducting Investigations During the Pandemic
August 24-28

UnCivil Servant
September 9-10

EEOC Law Week Seminar
September 14-18

MSPB Law Week
September 21-25

Absence, Leave Abuse & Medical Issues Week
September 28 – October 2

For more info: **FELTG Virtual Training Institute**

The Good News: Federal Labor Law Doesn't Have to Be (and Shouldn't Be) Political
By Ann Boehm

Nice article title, Ann. How can Federal labor law *not* be political? Isn't everything political these days?

I will acknowledge that the three-member Federal Labor Relations Authority, like the Merit Systems Protection Board, is usually comprised of two members of the President's political party, and one member of the opposing party. (The Federal Service Labor-Management Relations Statute (Statute) actually says it is composed of "three members, not more than 2 of whom may be adherents of the same political party." 5 U.S.C. 7104(a).) I will also acknowledge that over its 42-year history, FLRAs during Republican administrations have tended to be more pro-agency, and FLRAs during Democratic administrations have tended to be more pro-union.

Currently, I think we can say pretty conclusively that this FLRA is listing to the pro-agency side. One union recently filed a lawsuit and alleged unprecedented FLRA bias in favor of agencies. *Federal Education Association v. FLRA*, Civil Case No. 19-284 (RJL) (D.C.D.C. March 30, 2020).

Personally, I'm not sure that this FLRA's decisions in favor of agencies are all bad. Some of the decisions correct past FLRA pro-union bias.

What concerns me as a long-time watcher of FLRA law is how the political shifts continue to happen. I haven't done a statistical study, but it's fair to say that the Obama Administration FLRA was a bit (maybe more than a bit) pro-union. This FLRA then comes in and reacts by being pro-agency. Next time there's a Democratic administration, we will likely see a swing back toward the unions. And so on, and so on.

The thing is, it shouldn't be political. Let's start with the premise expressed by Congress in the very first lines of the Statute. To paraphrase: Congress stated that the right to organize, bargain collectively, and participate in unions is in the public interest. 5 U.S.C. 7101(a). Federal sector labor relations activities are supposed to benefit the taxpaying public. I'm not sure that's always the case -- and that's the fault of both unions and agencies.

Congress also drafted a very comprehensive statute that directs how labor-management relations are supposed to work. The FLRA has now had 42 years to interpret the language of the Statute. And the U.S. Courts of Appeals for every circuit but the Federal Circuit (that Circuit handles MSPB cases and not FLRA cases), and even the U.S. Supreme Court, have contributed to the case law interpreting the Statute.

But the political motivations continue to rear their ugly heads. We all have biases. Some people are more pro-union leaning, and some are more pro-agency. The key is managing the biases and trying just to comply with what Congress directed.

I worked at the FLRA during the Clinton Administration. I feel very fortunate to have worked there under Chair Phyllis Segal. She had this crazy concept: she did not want FLRA decisions to be overturned by the courts. She wanted the FLRA to issue decisions—get this—based upon a careful analysis of the facts, the issues, the Statute, and legal precedent. Lo and behold, when I defended those decisions in the courts (including the Supreme Court), we prevailed most of the time. The courts appreciated the careful analysis of the law by the body entrusted to interpret its own Statute – the FLRA.

Which brings me to a recent court decision. The FLRA issued a decision altering its own

precedent regarding the meaning of "conditions of employment" and "working conditions." *DHS, CBP and AFGE*, 70 FLRA 501 (2018). The FLRA overturned an arbitrator's award and issued a decision in the agency's favor. The union appealed to the U.S. Court of Appeals for the District of Columbia Circuit. On June 9, 2020, the D.C. Circuit vacated the FLRA's decision and remanded the case to the FLRA for further review. *AFGE v. FLRA*, Case No. 19-1069 (D.C. Cir. June 9, 2020).

Here's the real problem with what the FLRA did in its decision and why the court vacated the decision. The FLRA "failed to explain its departure from precedent." *Id.* It looks like the FLRA issued a decision for the agency based more on pro-agency bias than careful legal reasoning. And that's too bad.

It's possible the FLRA may have been able to overturn that precedent. But it needed to do so based on careful legal analysis and not a desire to make a pro-agency result.

It's not just the current FLRA that acted in this way. It's been done before and will be done again, mostly because of politics and bias. It's too bad that the cycle continues on.

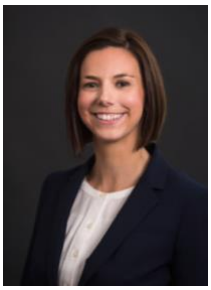
Maybe future FLRAs will just try to ensure that their decisions comport with statutory construction and legal precedent, and they will focus on how labor-management relations can benefit the taxpayer. Maybe it's a crazy concept, but I think it can be done. It doesn't have to be political. It really doesn't. And if we ever get to that point, it'll be Good News. Boehm@FELTG.com

FLRA Law Week in August

Over five half-days, Ann Boehm and Joe Schimansky will teaching you everything you need to know about FLRA law. The instructors have a combined 38 years working at the FLRA. So join us for FLRA Law Week, which will be held virtually August 3 -7. Register now.

Supreme Court: Employer Who Fires Individual for Being Gay or Transgender Violates Title VII

By Meghan Droste



You've probably heard the phrase "model employer" in connection with the federal government. Although the phrase comes from the Rehabilitation Act, the idea is now broader than just the area of disability rights — the federal government should set an example for all other employers when it comes to being an inclusive employer and in rooting out harassment and discrimination.

The federal government has been just that in the area of LGBTQ rights. The EEOC ruled in 2012 that Title VII prohibits discrimination on the basis of gender identity, and in 2015 that it prohibits discrimination on the basis of sexual orientation. Last month, the Supreme Court agreed. Following the Court's decision in *Bostock v. Clayton County, Georgia*, private and public sector employees across the country now have the same protections federal employees have had for years.

The Court's decision in *Bostock* was the result of three consolidated cases: *Bostock* and *Altitude Express, Inc. v. Zarda* addressed the question of whether Title VII prohibits discrimination on the basis of sexual orientation; *R.G. & G.R. Harris Funeral Home v. EEOC* focused on whether gender identity discrimination is prohibited. The Court concluded that discrimination on the basis of sexual orientation or gender identity is a form of sex discrimination and, therefore, is impermissible.

The Court's decision turned on the "ordinary public meaning" of the word "sex" in Title VII. Looking to the definition and usage of the word in 1964, the Court concluded that it referred to "biological distinctions between male and female." From there, the Court found that "it is impossible to discriminate

against a person for being homosexual or transgender without discriminating against that individual based on sex." As the Court illustrated in several examples, an employer cannot look to an employee's sexual orientation or gender identity without taking into account the employee's sex. As a result, any employment action based on either sexual orientation or gender identity is inherently because of sex, and therefore is not permitted under Title VII.

The Court provided several examples to explain its point. In one that I found most helpful, the Court considered a company that has a policy firing gay or lesbian employees because of their sexual orientation. In the hypothetical, the company has a model employee with whom the company has no issues. The model employee then introduces a woman as the employee's spouse at a company party. The question of whether the employer will fire the model employee turns on the employee's sex. If the model employee is a man, the company will not take any action. If the model employee is a woman, the company will fire her based on its policy of not employing anyone who is a lesbian. The Court noted that although the company's intention is to fire the model employee because of the employee's sexual orientation, the company will intentionally treat the employee worse because of her sex in order to achieve its goal.

The *Bostock* decision is great news for employees everywhere—now private and public sector employees enjoy the same protections, and federal sector employees know that their rights will not change or be undermined. Droste@FELTG.com

EEOC Law Week Offered Twice

If you're looking for training that covers the gamut of EEO issues and provides usable guidance for all practitioners, this is it: EEOC Law Week, held over five full days, will be held August 10-14. EEOC Law Week Seminar, held over five half-days, will be held September 14-18.

The Algorithms of Civil Service Law
By William Wiley

For 20 years now, FELTG has been presenting teaching the how-to of civil service law. We start with the theory and the law, and then share the steps, tips, and tricks of applying the law. You leave a FELTG seminar with not only an understanding of the legal principles and requirements, but also the details of exactly how to do things, such as what to wear when negotiating, where to put the commas and periods in a disciplinary document, and when to offer a poorly performing employee the chance to accept a voluntary demotion.

Sometimes we have called what we teach *strategies.* Other times we talk about *checklists* or *recipes.* Whatever description we use, the objective is to point out that the best way to approach this business is by following certain pre-determined steps rather than by trying to reason through every situation every time. We've had the current fundamental civil service law for over 40 years. Most workplace situations have come up before, and to one degree or another, someone already has figured out how to handle them legally and efficiently. We learn from these prior successes and mistakes by reading case decisions, then incorporating those lessons into what we teach at FELTG.

Since your MOST HUMBLE AUTHOR has taken senior status with FELTG, I now have more spare time. One of the things I have done with that luxury, mainly to impress my whiz-kid grandson, is to learn how to solve a Rubik's cube. Anyone can do it. There are how-to videos online that demonstrate the steps to resolution. While involved in this stimulating project, I have learned three important lessons:

1. You can't just peel off the little stickers and rearrange them so that the sides are all the same color.

2. No human with an IQ less than 165 has any hope of figuring out how to solve the darned thing.
3. The only practical approach is to learn the solution steps figured out by someone who has gone before, then apply those steps in a very particular order. The smart kids call each of these steps an "algorithm."

An algorithm, for all you Luddites out there, is simply a step-by-step procedure for solving a logic problem. The Google tells us that a good everyday example of an algorithm is a recipe. You use an algorithm to go from a state of chaos (e.g., a kitchen full of cooking supplies) to a predefined outcome (e.g., a pot of gumbo). An algorithm often is made up of several smaller algorithms (e.g., first, you make a roux) that eventually take us to the desired outcome. If you try to figure it all out on your own, or start taking un-algorithmic steps along the way, you stand a good chance of messing things up big time.

As I learned the algorithms for solving a Rubik's cube, it dawned on me that what FELTG does in our seminars is to try to teach class participants the algorithms of civil service law practice. We learned the steps in the algorithms we teach by evaluating thousands and thousands of legal decisions from MSPB, FLRA, and EEOC – as well as from their reviewing courts – to tease out the tricks and tips of our business. We learn when practitioners make mistakes just as much as when practitioners do something correctly. By putting all this legal history into context, we try to demonstrate the safest, most efficient, legally-defensible strategies for dealing with problem employees while simultaneously honoring employee rights. Comply with the FELTG civil service law algorithms and we can guarantee that you will be successful. Start playing around with other approaches, or tweaking an algorithm in some manner that we don't recommend, and you run the risk of making a HUGE mistake.

With that said, let's take a look at a couple of semi-recent court decisions that reinforce several elements of the algorithms FELTG teaches relative to taking a disciplinary action against a federal employee. There's no new law in these two decisions. In fact, they rely on principles we've been presenting since our very beginning. However, we feel the need to emphasize them because too many supposed "specialists" in our business don't take the time to learn from history, to apply the algorithms, and instead try to figure out things for themselves. In no particular order, here are three FELTG-algorithm elements for your consideration:

Charges must be specific: When proposing to take an adverse action against an employee for disciplinary reasons, the employee's supervisor issues a Proposal Notice to the employee. That notice should contain the "specific reasons" for the proposal, i.e., a description of the misconduct specific enough that the employee can defend himself should he choose to respond to the proposal. That description is usually labeled as a "Charge" and the Charge is often accompanied by one or more "Specifications" that give the details of the misconduct. If the supervisor crafts a Charge that is vague, the employee's due process rights have been violated, and on appeal the adverse action will be reversed.

In a recent case bringing home this important part of the adverse action algorithm, the agency crafted the Charge as, "Possible misuse of protected information available to you as an EEO counselor." The information that was supposedly misused was not specified. The manner in which it was alleged to have been misused was not spelled out. On appeal, the court had no problem at all in deciding that this Charge was "certainly" too vague to provide the specificity demanded by due process. "The employee must be given enough information to enable him or her to

make a meaningful response to the agency's proposed [adverse action]."

Were this aspect of the case controlling of the outcome, the court would have ordered the removal set aside and the appellant reinstated with backpay. Fortunately for the agency, because it's employee relations practitioners properly adopted another aspect of the FELTG adverse action algorithm, the removal was affirmed. See below:

Supporting documentation should be attached to the proposal notice: The law says that when proposing an adverse action, an agency must provide the supporting documentation to the employee "upon the employee's request." 5 U.S.C. 7513(e). A number of agency counsel we have had in our seminars over the years tell us that their offices take a minimalistic approach to this requirement and require that the employee actually request the supporting material rather than the supervisor simply providing it along with the Proposal Notice. Well, if you are familiar with the caselaw, you know that waiting for the employee to request the information is asking for trouble, and a risk easily avoided by just giving the employee the materials as an attachment to the Proposal Notice.

There are a number of reasons for using a supporting-materials attachment that we discuss in our classes. One of those reasons came into play in the recent case that is the subject of the above section. The agency got itself into big trouble by mistakenly drafting a vague charge. However, the court upheld the removal in spite of the charge-framing mistake because the documents attached to the Proposal Notice provided the critical specificity lacking in the charge itself. Had the practitioner who drafted the Proposal Notice NOT attached those documents, as we have recommended in the FELTG algorithm since the cooling of the Earth, the court would have reversed the removal for a failure of due process. *Willingham v. Navy*, No. 2019-2031 (Fed. Cir., Apr. 8, 2020).

The *Douglas* factor penalty-selection analysis should be a separate document. In my years as Chief Counsel to the Chairman of MSPB, I participated in the drafting and adjudication of thousands of Board opinions. Based on that experience, I can say with a high degree of certainty that if a court or the Board bothers to mention a fact in its decision, it was important to the adjudicators who decided the case. The fact may not have been determinative of the outcome. However, if the adjudicator goes to the trouble of mentioning it, the fact most likely had an effect on the adjudicator's consideration of the arguments and issues.

In a recent decision issued by the Federal Circuit, the court went to the trouble of noting that the Proposal Notice contained a separate, detailed "written *Douglas* factor analysis." The court stated that this document "provided [the appellant] with an opportunity to respond orally and in writing" to the Proposal Notice. To the inexperienced reader, this might seem like a routine throwaway line of legal chatter. However, it is significant to those who know the FELTG adverse action algorithm. That's because a number of practitioners we've worked with over the years mistakenly believe that the Decision Notice rather than the Proposal Notice should contain the detailed *Douglas* analysis. Or, alternatively, an uninitiated HR specialist or attorney will cast the *Douglas* factor analysis as part of the body of the Proposal Notice, written in a run-on narrative format rather than the 12-part worksheet that we teach. Organize the factors in 1 through 12 format, keep the discussion of each factor specific to that particular factor, and do all of this on a separate document attached to the proposal. Your case may not be won or lost on this element, but doing so will tilt your

case toward being more winnable than if you do it otherwise.

By the way, as a bonus, the court mentioned that the Proposal Notice got the employee out of the workplace immediately by placing her on paid leave during the 30-day notice period. That element, as well, is part of the FELTG algorithm. The practitioner who built this case for DoD did it the FELTG-Way© and we are honored if that is because of attendance in one of our programs. *Noffke v. DoD*, No. 2019-2183 (Fed. Cir. Apr. 8, 2020).

No matter how smart you are or the number of fancy degrees you have earned, please don't try to figure this stuff out from scratch. Read the decisions, come to the FELTG classes, learn our algorithms. This is not always a commonsense business. Take advantage of those with more experience and you are most likely to come away from the appeal process with a winner rather than with a bill for back pay and a restored disgruntled employee.

Our next seminar that presents the adverse action (and unacceptable performance) algorithms will be offered virtually September 21-25. Hey, what the heck. Register for MSPB Law Week and who knows, maybe a FELTG instructor will demonstrate the Rubik's Cube algorithm, just in case that you, too, have a smarty-pants teenager that needs to be taught that his parents are not quite as dimwitted as he might think. Wiley@FELTG.com

MSPB Law Week

FELTG's MSPB Law Week covers the legal requirements and best practices for disciplinary charges and penalties, plus understanding the law and strategies in handling performance cases, and defending against whistleblower reprisal complaints. MSPB Law Week will be held virtually over five half-days from September 21-25, 2020. Register now.

Is There a Legal Path to Fire Dr. Fauci?
By Deborah Hopkins

Here's a hypothetical. Let's say you have a U.S. President who is in office during a global pandemic, and that president gives an interview to a news outlet and says that the country is in "a good place" with how it is handling said pandemic.

Now let's say that there's a high-level career federal employee who works in infectious diseases who makes a statement to a different media outlet that goes something like this: "As a country, when you compare us to other countries, I don't think you can say we're doing great. I mean, we're just not."

Of course by now you know I'm not speaking in hypotheticals. As it goes with media sensationalism, one of the stories over the past few days surrounds the legality of the President firing Dr. Anthony Fauci, the head of National Institute of Allergy and Infectious Diseases (NIAID). Most FELTG readers are probably aware that Dr. Fauci's statements on the COVID-19 pandemic have differed somewhat from those of the White House.

The question that is being asked on cable news, in media publications, and perhaps around dinner tables across the country: Can the president have Dr. Fauci fired?

The answer, based only on the evidence available to the public, is probably not. The President himself doesn't have the authority to fire Dr. Fauci, who is a Title 42 employee and not a political appointee. But were the President to hypothetically order an official at HHS to fire Dr. Fauci, in order for the removal to be legal there would have to be cause -- Dr. Fauci would had to have engaged in removable misconduct or poor performance.

Disagreeing with a President most likely does not fall into poor performance or misconduct. In fact, it is a prohibited

personnel practice to make an employment-related decision because of a career employee's political activities. While it may be acceptable for political appointees to be removed for differing opinions than those of their president, the fact that Dr. Fauci does not agree with the President about COVID-19 is NOT a valid reason to fire him.

We don't know the details of Dr. Fauci's work at NIH, so we can't speak specifically to his performance or conduct on the job. However, misconduct, loosely defined, is the violation of a valid workplace rule.

Is a statement made in contradiction with the President misconduct? Probably not. Dr. Fauci doesn't appear to have violated a workplace rule, as he has authorization to speak to the press about NIAID matters.

What about the list of the times Dr. Fauci "has been wrong on things," recently compiled by White House. Do these statements rise to the level of poor performance? Without seeing Dr. Fauci's performance plan, I cannot say for certain.

If Dr. Fauci is fired for any reason, whether it appeared to be legally valid or not, he could appeal his removal to the MSPB and let the Board (if we ever get one, that is) decide whether he engaged in misconduct or poor performance.

In case you're wondering how Title 42 employees have civil service protections, here's a brief lesson from *Lal v. MSPB*, Fed. Cir. No. 2015-3140 (May 11, 2016). Title 42 says that individuals may be "appointed" under Title 42 without regard to the civil service laws. A different statute gives agencies dealing with certain non-Title 42 employees the authority to "appoint[ ]…and remove[ ]… without regard to the provisions of title 5…" Reasoning that Congress saw a significance in the latter situation to include the authority "to remove" and that Congress did not specifically include the authority "to remove" in Title 42, Congress did not intend for Title 42 removal authority to be without regard for civil service protections. So, in sum Title 42 employees are hired under special authority but when it comes to being fired, they get the same protections as most of you in the FELTG Nation. And that includes Dr. Fuaci.

Interesting times, aren't they? I've got some ideas for follow-up discussion and would love to incorporate your thoughts and questions into the content. So, what's on your mind? Hopkins@FELTG.com

UPCOMING FELTG WEBINARS

Webinar Series
EEO Counselor and Investigator Refresher Training 2020
FELTG's annual refresher training wraps up with its last 95-minute session:

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

Webinar Series
Supervising Federal Employees: Managing Accountability and Defending Your Actions
Next session:

Intentional EEO Discrimination
July 23

Webinar Series
Reasonable Accommodation in the Federal Workplace Series
Sessions begin July 30
See the website for the full list of classes and descriptions.

Webinar Series
Navigating Challenges in Federal Labor Relations
Sessions begin September 3
See the website for the full list of classes and descriptions.

Suicidal Employees in the Federal Workplace: Your Actions Can Save a Life
September 24

10 Reasons Why FELTG Is the Best Option for Your Summer Conference Plans

If your favorite summer conference is not being held on-site, and you still have training funds, we hope you'll register for **Federal Workplace 2020: Accountability, Challenges, and Trends During the COVID-19 Pandemic**. Here are 10 reasons why:

1. It's hard to believe, but some virtual conferences require attendees to register for the full event even if you're only planning on attending a few sessions. This doesn't seem like a wise way to spend your agency's money. **Federal Workplace 2020: Accountability, Challenges, and Trends During the COVID-19 Pandemic** allows you to register and pay for only the sessions you want to attend.
2. And, speaking of sessions, we have some timely sessions from which to choose. All are updated with the latest information and guidance, especially as they apply to the current pandemic. There are sessions on performance and conduct challenges during a pandemic, EEO trends in the COVID-19 world, the latest on sexual orientation and transgender discrimination, and much more.
3. We also have sessions on the perennially challenging topics like mixed cases, reasonable accommodations, the intersection of the ADA and FMLA, performance feedback, and much more.
4. If you're going to a virtual training, you'd expect the event to be live, right? Beware: Some virtual training conferences are presenting recorded sessions. That idea doesn't fly with us here at FELTG Headquarters. All of our sessions will be presented ***live***, which means you'll have opportunities to ask questions of the instructors, and get immediate answers.
5. Speaking of instructors, your favorite FELTG presenters, such as FELTG President Deborah Hopkins, Barbara Haga, Katherine Atkinson, Dwight Lewis, Bob Woods, and Ann Boehm (just to name a few) will be a part of the event.
6. We make it easy for EEO counselors and investigators to get their 8 hours of annual refresher credits. Click **here** to register for all the applicable sessions.
7. No, we didn't forget about you attorneys out there. This event offers many chances to earn CLE credits, including two hours of Ethics.
8. **Federal Workplace 2020: Accountability, Challenges, and Trends During the COVID-19 Pandemic** has something for everyone, whether you're a supervisor, HR professional, EEO practitioner, union representative, or attorney.
9. This isn't our first rodeo. Since we launched the FELTG Virtual Training Institute earlier this year, we've produced several multi-day virtual training events.
10. If for some reason you can't attend this session, we have plenty of other upcoming, more specific events before the end of the fiscal year, including EEOC Law Week and MSPB Law Week. Check out the **FELTG Virtual Training Institute** for more details.

-- Dan Gephart, FELTG Training Director

Tips From the Other Side: How Long is Too Long to Provide Accommodations … in the Time of COVID?
By Meghan Droste

In last month's Tips From the Other Side, I covered the factors the Commission uses to determine how long is too long to providing a reasonable accommodation. (Quick recap: It depends, but you should move as quickly as possible. The Commission will look at who caused the delay and what the Agency did in the meantime, so ensure you have clear documentation of the steps the Agency took to provide the accommodation and provide interim accommodations when possible.)

Here's a follow up question for you: How long is too long in the time of COVID? Or put more precisely, do agencies get a free pass on processing requests for accommodations that are only needed in the office while everyone is working from home? In its COVID-related guidance, the Commission has said no, that's not quite how it works. Agencies are allowed to prioritize requests for accommodations employees need right now as they telework or for those employees who have continued to work in agency facilities throughout the pandemic. But that does not mean you should just stick all other requests in a drawer until sometime when employees are back at their (office) desks.

The Commission recommends that employers still engage in the interactive process during the pandemic and gather all of the necessary information to process the request. Agencies should, of course, keep in mind that employees may need a lot more time than usual to obtain medical documentation, as doctors may be overwhelmed with other appointments and employees who cannot meet virtually with care providers may have limitations on seeing a provider in person. Agencies should also use this time to start making arrangements for approved accommodations, such as ordering any necessary equipment as delivery times may be extended due to the pandemic.

For those employees who need accommodations right now — whether for working from home or for those employees at or returning to the worksite — the Commission also recommends considering temporary or interim accommodations without undergoing the interactive process so as to provide accommodations as quickly as possible during this unusual and difficult time. If your agency chooses to do provide these types of accommodations, the Commission recognizes that it may be appropriate to put an end date on the accommodation, such as a specific date or when an employee returns to the office. Once you reach that point, or ideally as you are coming up to the end date, you can check in with the employee about any ongoing or new needs for accommodations and engage in the more traditional interactive process at that time.

The Commission's COVID-related guidance is available here. I encourage you to read it along with the Commission's other pandemic-related resources.
Droste@FELTG.com

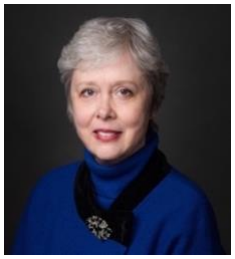
Effectively Managing and Communicating With Federal Employees

The one-size-fits-all approach to managing others is ineffective, and that becomes particularly apparent when the majority of your staff is teleworking.

Drawing upon the latest research and best practices in behavioral science, communication, team effectiveness, and generation studies, while making special consideration of the increased telework usage during the pandemic, Dr. Anthony Marchese will share his strategies to help you manage for success.

Join Dr. Marchese August 19-20 for two half-days of virtual training. Register now.

When Cleaning Desks and Wearing Masks is Required: Life with COVID-19
By Barbara Haga



We've previously talked about issues related to employees who report to work with symptoms and what to do about taking temperatures when employees are reporting to the worksite. What other issues could present once more and more employees are returning to work? This month, we look at wearing masks and cleaning workspaces.

Wearing Masks

Masks are a hot button issue. I do not understand it, but I have seen enough to accept it is real. *Forbes* published an interesting article in May on the top reasons why people don't want to wear them. The article explains it covers everything from claiming individual rights are being abridged to it's not cool or for those who worry about it, not masculine.

Regardless, the OSHA guidance recommends that employers encourage workers to wear face coverings at work. The CDC guidance updated in May 2020 advises employers to encourage employees to wear cloth face coverings in the workplace, if appropriate.

When are masks not feasible? According to the CDC, it includes situations such as the following:

- Working with people who are deaf or hard of hearing who rely on lipreading.
- People with intellectual and developmental disabilities, mental health conditions or other sensory sensitivities.
- Younger children older than 2 (e.g., preschool or early elementary aged).
- People engaged in high intensity activities, like running.
- People engaged in activities that may cause the cloth face covering to become wet, such as swimming.
- People who work in a setting where cloth face coverings may increase the risk of heat-related illness or cause safety concerns (for instance, straps getting caught in machinery, chemicals accumulating in mask, etc.).

Clearly, these are not typical issues in many Federal workplaces. The question will be whether masks are encouraged or required, and, if required, what happens when employees refuse to comply.

As noted last month, several unions have posted information about concerns regarding reopening and what they see as requirements for a safe return to the workplace. AFGE's "10 Principles on Return to Worksites" notes:

> "Protections must be put in place by the agency: temperature taking at the door/masks and appropriate PPE/hand sanitizer/soap/tissues, proper distancing, dividers, regular disinfecting, air circulation, etc."

The Federal Workers Alliance, which includes a long list of unions, including NAGE, IAFF, IAMAW, PASS, POPA, SEIU and IFPTE, demands that "[A]ll individuals present in the worksite should be expected to wear masks to reduce the possible spread of COVID-19 through respiratory droplets." NTEU's press release discussed whether agencies were providing hand sanitizer, disinfectant wipes and masks, but noted employee should be able to bring their own masks.

As discussed in my May column on taking temperatures, if the agency sets a mandatory requirement and is faced with employees who refuse to comply, then disciplinary action should ensue. The charge would likely be failure to follow instructions or some variation of that. Since the employee

won't be allowed in the workplace without the mask, he or she 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 could be on notice leave while waiting for the reply and decision.

The local union is not in a great position to argue against wearing masks if the national union is advocating their use. I suppose it is possible that an employee might have some medical reason (which would need to be supported with medical documentation) as to why he or she cannot wear a mask. That could create a question regarding accommodation if that underlying medical condition would rise to the level of a disability.

Or, perhaps the employee will agree to wear the mask after:

1- Receiving a proposed action
2- Or after the discipline is effected.

Cleaning Workspaces

The CDC guidance on reopening addresses the need for cleaning, stating that reducing the risk of exposure to COVID-19 by cleaning and disinfection is an important part of reopening that will require careful planning. What's in that plan? What new requirements are going to be necessary to keep workspaces as free from the virus as possible? Are there going to be issues with obtaining compliance with these reopening requirements? Could be.

The information issued by the unions may offer a clue. AFGE talked about protections that needed to be put in place by the agency, which included "regular disinfecting."

The NTEU press release noted: "Employees remain anxious about the risks posed by taking public transportation, being in enclosed facilities with hundreds of coworkers and whether their work stations will be consistently and properly cleaned and disinfected."

The Federal Workers Alliance post included a requirement to "assign and ensure that all shared/common areas and equipment are sanitized at regular intervals by personnel qualified and trained in disinfection of COVID-19" in their list of required agency actions. These postings seem to indicate that the expectation is that cleaning of individual workspaces is not being done by employees but by someone else.

Is it reasonable to expect there are agency personnel or contractors available with the necessary time, products, and training to do all of this? This may be within the realm of existing contracts and resources for some agencies.

It seems likely to me some agencies will need employees to take care of some of this. That means cleaning of individual keyboards, desk, phones, etc. It could extend to common areas such as counters in break areas, refrigerator doors, coffee pots, and door handles. Copiers, faxes, hole punches, and commonly used staplers might also make the list.

Encouraging voluntary compliance with these kinds of tasks is probably the easiest approach. Perhaps employees in the unit could draw up a rotational schedule for the tasks covering common areas. An employee might volunteer to do the cleaning. But, I believe it would be naïve to think that there won't be some who say "that's not in my p.d." Bottom line: If it is a requirement, not complying would be a failure to follow instructions, although perhaps not at the same level as with the masks.

These are actions that have likely not been carried out before. However, as has become painfully apparent, it's a brand new world. Haga@FELTG.com

Avoid Thoughtless Approach to Essential Function Determination

By Dan Gephart

Essential can be a loaded word. Any discussion on whether something is essential – whether it's workers, food, or art – will likely not lead to consensus. Would you have considered GrubHub drivers "essential" workers at this time last year? Probably not. Despite the authoritative nature of the word itself, *essential* is subjective in most cases.

But when it comes to reasonable accommodation for a disability and an employee's job functions, *essential* is not a word to be played with loosely.

In order to be a "qualified individual with a disability," an employee must meet the basic job qualifications and be able to perform the *essential* functions of the job with or without reasonable accommodation. When you actually identify the essential functions of a job, you might find that they're not always what you may think they are. As you go through this process, it's important that you analyze each function and avoid rash decisions.

Consider the following:

The time spent on the function may not be as important as the consequences. Here's an example: A firefighter may not regularly have to carry an unconscious adult out of a burning building. However, the consequence of failing to require the firefighter to be able to perform this function would be serious.

Outcomes are more important than how the function is usually performed. Essential functions are the fundamental duties of a job -- the outcomes that must be achieved by someone in that position, not the means by which those outcomes are achieved. There are plenty of EEOC cases where agencies felt an employee was not qualified because of a lifting restriction, only to find out there are a lot of ways to move items. In *Small v. U.S. Postal Serv.*, EEOC Appeal No. 0720100031 (Apr. 5, 2012), a push cart was just as effective as a satchel for a letter carrier with a lifting restriction.

The written job description isn't the be-all and end-all. Just because a function is in the job description doesn't necessarily mean it's essential. Sometimes the position description includes functions the employee never actually performs, while functions that are essential have become part of the job over time. Focus on whether you actually require the employee in the position to perform the functions that you claim are essential. You'd be surprised to find out how many functions are listed in the job description that the employee has never actually done and will never need to do. The written job description can be evidence of an essential function – but it's not the be all-end all.

And here is the best example, why you shouldn't rush to make a decision.

Attendance is *not* an essential function. In *Cottrell v. USPS*, EEOC Appeal No. 07A00004 (2001), an employee with ADD

couldn't be in the workplace certain days of the week due to his disability. However, there was a reasonable accommodation that allowed the employee to complete essential functions.

In many jobs, of course, attendance seems to be essential. But in the federal government, poor attendance is looked at as a potential undue hardship, not as an essential function.

Here are some other considerations, per 29 CFR § 1630.2(n)(2), as you determine the essential functions of a position:

- The reason the job exists is to perform that function.
- A limited number of employees available to perform the function/
- The function is highly specialized such that incumbent is hired based on expertise or ability to perform that function.

If you're looking for training on reasonable accommodation, FELTG has plenty of options. *Reasonable Accommodation in 75 Minutes*, which will be presented by former EEOC Dallas Region Chief Judge Dwight Lewis, will be one of 14 sessions we're offering during our conference-like event Federal Workplace 2020: Accountability, Challenges, and Trends during the COVID-19 Pandemic.

Also, you can register now for the Reasonable Accommodation in the Federal Workplace webinar series, which begins on July 30. You can register for any or all of the five 60-minute webinar events.

The bottom line: Take requests for reasonable accommodation seriously. There may be times when you'll find an employee is *not* qualified for the position with or without a reasonable accommodation. But if you take an open-minded, creative and analytic approach to reasonable accommodation requests, you'll find that in almost all cases you'll find an effective solution. Gephart@FELTG.com

REASONABLE ACCOMMODATION IN THE FEDERAL WORKPLACE WEBINAR SERIES

Updated for 2020, FELTG proudly presents a five-part series on reasonable accommodation in the Federal workplace, covering everything from the basics of the law to challenges such as providing accommodations to teleworkers.

Attend one session or attend them all.

July 30 – FELTG kicks off the series with Reasonable Accommodation: The Law, the Challenges & Solutions, which provides an overview of the current state of disability law and how the ADA, ADAAA, and Rehab Act apply to federal employees with disabilities.

August 6 – In Reasonable Accommodation: A Focus on Qualified Individuals, Essential Functions and Undue Hardship, FELTG instructor Katherine Atkinson, attorney at law, will take a focused look at three challenging areas in the disability process that have changed in recent years.

August 13 – Telework is one of the most commonly requested – and most effective – accommodations for individuals with disabilities. When should you consider it? Telework as a Reasonable Accommodation: When to Say "Yes" and When to Say "No" will provide the answers.

August 20 – Learn from the blunders other agencies have already made. Join Dwight Lewis, former Chief AJ/EEOC Dallas Region, for Hear it from a Judge: The Reasonable Accommodation Mistakes Agencies Make.

August 27 – There are important distinctions between religious accommodations and those made for individuals with disabilities. Attend Understanding Religious Accommodations: How They're Different from Disability Accommodations to learn the difference.