Federal Employment Law Training Group

Teaching the Law of the Federal Workplace

FELTG Newsletter Vol. XII, Issue 8 August 19, 2020

How's Your Mental Health These Days?

COVID-19 has taken a toll on people across the globe. Some places have been hit harder than others, but we can all agree that the world in the summer of 2020 looks nothing like it did in 2019. One of the areas where we've seen a lot of discussion is on the mental health challenges that have come along with the spread of the pandemic. People have gotten sick, lost loved ones, lost their jobs and businesses, been isolated, missed graduations and weddings and births and funerals, and more.

As if that's not enough, an estimated additional 75,000 deaths of despair are expected in the U.S. as a result of the effects of COVID-19. This includes suicides and overdoses. In an interesting bit of timing that may or may not have been driven by COVID-19, EEOC recently released guidance on how employers should handle scenarios where employees use opioids, codeine, and other prescription drugs in the workplace. In addition, FELTG is offering a virtual training on how to handle mental health issues in the workplace – including those involving substance use and abuse – August 26, and we hope you'll join us.

This month, we discuss the cost of delaying discipline, racist text messages, whistleblower reprisal, to-do lists, yellow donuts, and much more.

Take care,

Deb

Deborah J. Hopkins, FELTG President

UPCOMING FELTG VIRTUAL TRAINING

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

Managing Employees With Mental Health Challenges During the COVID-19 Pandemic
August 26

Understanding and Accommodating Employees With Hidden Disabilities
September 8

UnCivil Servant: Holding Employees Accountable for Performance and Conduct
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

Conducting Effective Harassment Investigations
October 6-8

Developing & Defending Discipline: Holding Federal Employees Accountable
October 13-15

Advanced Employee Relations
December 1-3

For more information visit the ***FELTG Virtual Training Institute***

Copyright © 2020 FELTG, LLC. All rights reserved.

Refuse, Report, Resign? Well, Two Out of Three Ain't Bad
By William Wiley

We've been seeing a lot in the national media lately about civil servants as whistleblowers. Some groups hate them, some groups love them. Unfortunately, neither group always understands the federal whistleblower protection laws. That can work to the whistleblower's significant disadvantage, especially when an apparently pro-whistleblower piece of advice can result in an unspoken disadvantage for the whistleblower.

Take the advice as to what a federal employee should do when ordered to do something illegal – say, hypothetically, to initiate a governmental action to serve a partisan political purpose rather than a valid governmental purpose. The lovely alliterative phrase I've heard recently is that when an illegal order is given, the employee should Refuse, Report, (and, if necessary) Resign. If you find yourself in the position of being ordered to take an illegal governmental action, and you're considering whether to follow this Three-R recommendation, please think twice.

First, the good news. After Congress passed the *Civil Service Reform Act of 1978*, it subsequently amended the law to make it illegal for an agency to fire an employee for "refusing to obey an order that would require the individual to violate a law, rule, or regulation," 5 USC 2302(b)(9)(D). We've previously written in this newsletter about the challenges a federal employee faces when confronted with an order requiring illegal activity.

Bottom line: If you are fired for refusing to obey an order, and the judge agrees with you that the order required you to do something illegal, then you get your job back (plus damages and the all-important attorney fees). So, the "Refuse" rationale makes sense legally.

As for the "Report" admonition, that's protected activity, as well. We call that "whistleblowing." Reprisal against a federal employee for blowing the whistle on governmental illegality has been protected (at least in part) since the *Lloyd-LaFollette Act* of 1912. The "Report" recommendation also makes sense if one is interested in stopping government malfeasance.

Which brings us to the third suggested action. When confronted with being ordered to take an illegal action, in addition to Refusing and Reporting the order, a federal employee should, if necessary, "Resign." Lordy, that would feel good, wouldn't it? Throw yourself on the hand grenade. Take one for the Gipper. It's how heroes are made, isn't it? Altruistic sacrifice to benefit the greater good. Mr. Spock would be proud ("The needs of the many outweigh the needs of the few" … that sort of thing).

If you as a whistleblower were to resign when confronted with an order to do something illegal, you might well find that a degree of fame comes along with your act of selflessness. The *Washington Post* might run a piece or two about your bravery (full disclosure, Jeff Bezos does not own the *FELTG Newsletter*), MSNBC might book you on *Rachel* or *Lawrence*, and some extreme-media outlets might interview every ex-boyfriend or girlfriend you ever dumped who still blames you for their inability to develop deep personal relationships.

And then … what? You're out of a job. You're hungry, the rent's due, and baby needs a new pair of shoes. The publicity surrounding the circumstances under which you resigned from government has morphed into a degree of notoriety, at least in the eyes of certain prospective employers. You're still convinced that you did the right thing by refusing the illegal order and reporting the government malfeasance, but you sure would like to pay your bills next month.

Copyright © 2020 FELTG, LLC. All rights reserved.

Fortunately, you have been to an FELTG class on employee rights and know that there are statutory protections for federal employees who are whistleblowers. However, when you read the law, you recognize that it specifically prohibits a federal agency from taking a personnel action because of an employee's whistle blow. In your situation, the agency did not take an action. YOU took the action when you quit. Therefore, the refusal-to-obey protections of 5 USC 2302(b)(9)(D) do you little good.

Then, over a beer one night at your local watering hole, you come to find out that the guy next to you at the bar (six feet away, of course) is a federal employment lawyer. Hey, it IS Washington, DC after all. Try to find a bar that does NOT have at least one lawyer in it. He tells you that you may be the victim of a "constructive removal" and that you might have a case before something called the "US Merit Protection Systems Board."

OK, he's not a GREAT employment lawyer.

Anyway, long story short. You file an appeal with MSPB, and you lose. That's because many years of caselaw, backed up by almost as many court decisions, have supported the two-part principle regarding claims of constructive removal. First, resignations are presumed to be voluntary and thereby non-appealable. Second, this presumption of voluntariness can be overcome by the individual on appeal if the appellant can prove that the resignation was the result of intolerable working conditions which could not be resolved otherwise.

Do we have intolerable working conditions in your situation? No, not necessarily. It all depends on how management responded to the refusal to obey the illegal order and the subsequent whistleblowing. Maybe your supervisors just blew it off. Or, maybe they got somebody else to do the job instead of trying to force you to obey. Your being offended by the order itself, no matter how justified, standing alone, has never been found to constitute the creation of working conditions so intolerable as to justify your quitting; e.g., a constructive removal.

Instead of resigning, from a strictly defensible legal standpoint, the better R-option to consider would be to "Redress." Not resist because you disagree with a particular policy of upper management, but rather resist any efforts on the part of management to fire you for refusing to obey that illegal order. You have significant redress rights as a federal civil servant if you are fired. Most federal employees who are reprised against for refusing to obey an illegal order can file a complaint with the US Office of Special Counsel. That agency can intervene in the removal process itself, perhaps obtaining a stay of the proposed removal before it is effectuated.

FELTG Consultation

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

Separately from OSC, a fired career Title V employee almost always has a right to file an appeal with MSPB, with a discovery entitlement, a hearing and decision before an administrative judge, and three layers of appeals of that decision goes all the way to the Supremes.

This approach avoids the troublesome legal hurdles of the appeal of a claimed constructive removal. Instead, your claim is that the agency violated 5 USC 2302(b)(9)(D) when it fired you because you refused to obey an order that would have required you to commit an illegal act. That's a significantly easier bar to clear than would be your burden to prove intolerable working conditions.

Personally, I have to admire someone who gives up a good federal job to put a public spotlight on significate government

Copyright © 2020 FELTG, LLC. All rights reserved.

malfeasance. Unfortunately, my admiration does not put dinner on that former employee's table. Plus, I'll no doubt be onto the next political outrage within a few days while that individual is still trying to get through to the unemployment benefits office to file a claim. If you feel the need to *Refuse* and *Report* a supervisor's order that is motivated by illegal purposes, you are doing what our whistleblower laws (and most of our society) expect you to do. However, when it comes to the third step, consider *Redress*ing instead of *Resign*ing. The same number of talk show producers will give you a call. You can stick a pin in that.

Watch this space. Wiley@FELTG.com

MSPB LAW WEEK NEXT MONTH!

Are you looking for a refresher on whisteblower law? Do you have a full understanding of how Trump's executive orders apply to how you do your job?

There is one place you are guaranteed to get the most up-to-date and useful guidance on these and other related federal employment law topics, and that's FELTG's MSPB Law Week. The next one will be held virtually September 21-25.

The situation at the MSPB may be uncertain, but that doesn't mean it's time to ignore MSPB law. The civil service world continues to change and MSPB Law Week imparts to you the critical information, whether it's legal requirements, best practices, or strategies for handling performance cases, defending against whistleblower reprisal, taking disciplinary action and much more.

The program will run from noon – 4 pm ET each day. Sign up for one day, pick a few, or join us for all five days of training.

Register now.

Ripped from the Headlines: A Case for Today's World
By Barbara Haga

This month I am going to leave COVID issues and turn to another topic that is also very timely. This one is about an employee making disparaging remarks that were racial in nature to and about other employees. This case was included in last week's MSPB case report. I am exaggerating a bit when I say "ripped from the headlines" since you would have to have seen the weekly Board report to find this, but this type of bad behavior in the workplace is exactly the kind of thing that could make the news if the press picked up on it. I can just see it – *High-level FAA Manager Fired for Racist Texts*. The case stems from a report of misconduct made in 2017 followed by a removal in March 2018. The employee appealed to the Federal Circuit after the MSPB AJ upheld the removal.

The case is *Jenkins v. Department of Transportation*, No. 2019-2075 (Fed. Cir. Aug. 6, 2020). Cara Jenkins was the Chief of Staff to the FAA's Associate Administrator for Human Resources. I did a bit of checking on what her position was and found her listed as Assistant Administrator for Human Resources on their HR website. That position is head of human resources for all of FAA's 45,000 employees. While the title is not an exact match, it looks like that may have been the position Jenkins was supporting, because her pay level, according to Federalpay.org was "among the highest-paid 10 percent of employees in the Federal Aviation Administration."

The decision notes that she had been employed for nearly 30 years and held the Chief of Staff position for one year prior to her removal. Jenkins, in addition to being part of the work of the human resources organization, was also a supervisor.

Copyright © 2020 FELTG, LLC. All rights reserved.

The charges contained in the proposed removal included (1) inappropriate conduct, (2) making disparaging remarks racial in nature, and (3) lack of candor.

The Misconduct

Jenkins sent a lot of inappropriate text messages. In fact, the removal notice included 18 specifications under charge 1 and 22 under charge 2. Each specification was a separate text message that negatively referenced one or more colleagues or contained a racial comment about a colleague. Jenkins sent these messages to at least two subordinates. The decision states:

> In 2017, one of Jenkins's subordinates, Sharon Bartley, complained to the FAA Accountability Board that Jenkins had created a hostile work environment. In support of her complaint, Bartley provided the Accountability Board with a number of personal cell phone text message exchanges that she had with Jenkins. Many of the text messages were disparaging toward Jenkins's colleagues, including senior officials at the FAA. Moreover, many of the messages contained derogatory comments about the race and gender of Jenkins's colleagues.

During the investigation, another employee (apparently a contract employee), Lavada Strickland, provided copies of text messages she had received that were of a similar nature.

Jenkins was interviewed about text messages she had sent to Bartley. She denied sending them, saying "I do not admit to the validity of these messages … They are allegedly from [a] phone identified as 'Cara' with no phone number … I am not saying I did not send them but that I simply do not remember sending some of them."

However, she apparently gave consent for search of her phone because the investigator exported texts she had sent and that is noted in the investigative report. I can only surmise that she gave consent for that search, since all of the cited messages were sent using personal cell phones and no government resources, as Jenkins later argued in her defense.

Advanced ER

Taught by FELTG Senior Instructor Barbara Haga, Advanced ER will be held December 1-3 offers in-depth training on leave, performance, misconduct, disability accommodation and more. Leave with tools to tackle the toughest ER issues.

The Federal Circuit decision does not quote the racial remarks included in the texts, but they do mention specifics from some of the texts included in the lack of candor charge. In several sections of the decision, the Federal Circuit mentioned that Jenkins sent texts wherein she described other human resources employees as "… backstabbers, dumb and that they did not know how to do their jobs."

One of the employees interviewed stated that her supervisor "really had me believing a lot of things about people in HR/Leadership." As noted in the decision notice, Jenkin's misconduct "… undermined the credibility and managerial authority of senior officials at the FAA."

Jenkins' Arguments

Jenkins' arguments at the Federal Circuit did not convince the Court that her removal was not warranted. Two of the arguments were that the FAA had not proven lack of candor and that the penalty was too harsh. Neither succeeded.

The other argument is important for cases like this. She argued that there was no nexus. The decision explains the reasoning that nexus was proven:

> Jenkins also argues that there is no nexus because her comments "were intended to be and were private using

Copyright © 2020 FELTG, LLC. All rights reserved.

personal cell phones and no government resources." Appellant Br. 29. Jenkins contends that "private off-duty speech is not intended to be the government's business" and "searching private speech for statements potentially subject to discipline is beyond the government's reach." Appellant Br. 38. But this is not a case in which the Agency violated Jenkins's right to privacy or free speech by illegally searching Jenkins's private communications for disciplinable conduct. The offending text messages were provided to the Agency by its employees, Bartley and Strickland, in connection with the Agency's investigation into a complaint about a hostile work environment. Once Jenkins's misconduct and its effect on the work environment became known to the Agency, there was no law, rule, or regulation that prevented the Agency from addressing the misconduct merely because Jenkins used a personal phone to send messages that she "intended" to be private.

Summary

How can someone who harbors the sentiments that Jenkins expressed rise to the level she did in any Federal agency and manage not to have exposed those beliefs somewhere before? One of Jenkins' arguments regarding the penalty included that she had a clean record, so no one had officially taken her to task over such behavior in any significant way that remained in her OPF.

Part of what struck me about this case was how closely it followed on the heels of something similar that happened with a broadcast on Facebook. The story reported on June 7 involved retired Navy Captain Scott Bethmann who accidentally broadcast about 30 minutes of his and his wife's racist diatribe. He is a Naval Academy graduate and apparently served successfully for a full-term military career. What is so shocking to me is how he served so long without showing his true colors.

I heard third hand that an African American officer who had served under Bethmann said that he never saw it. He never had any clue from anything Bethmann said or did that he (Bethmann) believed the things that he said during the Facebook broadcast.

I understand that racism can be hidden and subtle, but how is someone enough of an actor to pull off a 20- or 30-year career and never slip up in front of someone willing to take the issue on? Or, is the problem that others in positions of authority do see it, but they don't think they can discipline since there was no overt action, or, frighteningly, they agree? I can't solve the second part, but at least you now have a recent case that describes when a removal action was supported. It's a small thing in the big picture, but hopefully a step in the right direction. Haga@feltg.com

REASONABLE ACCOMMODATION IN THE FEDERAL WORKPLACE WEBINAR SERIES

FELTG's five-part series on reasonable accommodation in the Federal workplace will be concluding soon. Don't miss the last two classes in this series:

August 20 ***(that's tomorrow!)*** – 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.

Blaming the Victim, Or How Not to Respond to a Complaint
By Meghan Droste

While preparing slides for a webinar on involving race, national origin, and religious discrimination, I came across a 2015 Commission decision that is too surprising not to share, even though it doesn't fit my usual criteria of being a recent decision. The ultimate outcome of the decision is not a surprise (Spoiler Alert: It did not end in the Agency's favor), but the Agency's approach to the entire situation is.

Complainant v. Tennessee Valley Authority, EEOC App. No. 0120123132 (May 14, 2015), involves one of the most invidious forms of race discrimination -- a noose in the workplace. As the Commission recounts, the complainant first observed a noose hanging in the back of an agency vehicle on August 5. He brought it to the attention to the two coworkers who were in the truck at the time. Apparently neither of them did anything about it because on August 11, the complainant saw the noose again in the back of the same truck. He told his supervisor, who responded by informing him that the noose wasn't a "legal" noose because it only had seven knots instead of 13.

Dissatisfied with this (lack of a) response, the complainant told the yard operations supervisor about the noose. This supervisor showed the noose to four other employees, but remarkably no one removed the noose from the truck. The noose remained up for four more days. On August 19, the complainant's supervisor read the agency's anti-harassment policy to the yard staff during a meeting but did not make any reference to the noose or address the issue. On August 22, a member of management alerted agency security officers about the noose. Officers waited until September, more than a month after the complainant first observed the noose, to begin an investigation. At some point during this time, the agency issued a write-up to the complainant, admonishing him for not reporting the noose sooner.

As you can expect, the Commission reversed the agency's FAD which found no discrimination. In the appeal, the agency argued that it was not liable because it had taken prompt and effective corrective action when it became aware of the noose. The Commission soundly rejected this. Nothing about the agency's response was prompt or effective:

- The agency allowed the noose to remain up for 10 days after the complainant first reported it.
- The complainant's supervisor responded to the seeing the noose by declaring it not a "legal" noose.
- The agency did not address the noose or the seriousness of the issue during the staff meeting.
- The agency made no effort to investigate the origins of the noose until a month after the complainant reported it.
- And, of course, the agency disciplined only the complainant and not any of the supervisors who were aware of the noose and failed to take action.

It is hard to imagine any other ways in which the agency could have mishandled this incident. The only good that I can see from this is that we can all look to this as an example of everything an agency should not do when confronted with harassment. Droste@FELTG.com

EEOC Law Week in September

Did you miss the EEOC Law Week held last week? No worries. If you're looking for training that covers the gamut of EEO issues and provides usable guidance for all practitioners, join us for EEOC Law Week Seminar. This class will be held during the afternoons of September 14-18.

Copyright © 2020 FELTG, LLC. All rights reserved.

Can Delaying Discipline Cause EEO Liability for an Agency?
By Deborah Hopkins

On the MSPB side of federal employment law, FELTG has long held the stance that agencies should take disciplinary actions as soon as is practicable after a federal employee engages in misconduct. The longer an agency waits, the less justification the agency will have of the "harm" the employee caused, and the more unreasonable its penalty begins to look.

Take a look at *Eotvos (pro se) v. Army,* CH-0752-17-0355-I-1 (2018)(ID). In this case, the employee solicited a minor for sex and the agency removed him. The AJ reversed the removal because the appellant disproved the rebuttable presumption of nexus by highlighting the following details:

- There was no proof of publicity about the event.
- There was no customer knowledge; the agency had no minors as customers.
- His coworkers did not care about his conduct.
- His work performance remained good.
- The agency waited 5-plus months to fire him.

While *Eotvos* is "just" an administrative judge's decision and has no precedential value, it illustrates the importance of timing. When an agency fires someone for misconduct it states as egregious, but then waits nearly half a year to take the action, a third party may begin to question how "bad" the misconduct really was if the employee wasn't removed immediately.

The longer you wait, the more precarious your position, unless you have a darn good reason for the delay.

For precedential MSPB decisions on the topic take a look at *Baldwin v. VA*, 2008 MSPB 169 (If an agency's delay in charging discipline is unreasonable, the charges may be dismissed), or *Brown v. Treasury*, 61 MSPR 484 (April 7, 1994) (In cases where there is not an explanation for the delay, the Board will consider how serious the agency actually considered the misconduct and may mitigate the penalty if it believes the delay undermines the argument for harm).

Every now and then this important principle of "discipline early and often" finds its way into an EEOC case. Take, for example, *Sharon M. v. Dep't of Transp.*, EEOC Appeal No. 0120180192 (Sept. 25, 2019). In this case, the complainant, an Air Traffic Control Specialist, received an email from a coworker that contained a racial slur (an abbreviation of the n-word).

The agency initiated an investigation and found that the coworker did indeed used an inappropriate racial slur, and that such behavior violated its code of conduct, so the agency told the complainant that her coworker would be suspended for 30 days. The conduct did not occur again.

Sounds good, right? The agency did an investigation, took corrective action, and the conduct didn't happen again. So, we're good to go?

Not quite. Although the agency took corrective action, the EEOC found that the action was not "prompt" and, therefore, the agency was not absolved of liability. Why? The agency waited six months to discipline the coworker who used the n-word. Take a look at some language from the body of decision:

> …[T]he Agency is responsible for the hostile work environment unless it shows it took immediate and effective corrective action. Although the Agency took effective corrective action, upon review, we find that the Agency's action was not prompt. We note that

Copyright © 2020 FELTG, LLC. All rights reserved.

> the record clearly indicated that the investigation occurred in early December 2016… The Agency did not state how long the internal investigation took and failed to provide a copy of the internal investigation in the ROI for the Commission to determine how long the Agency investigated the matter…
>
> The proposed 30-day suspension was not received by [the coworker] until May 16, 2017, nearly a month after it was allegedly drafted. There is no reason given for the delay. In addition, it appears that the Agency took over six months to issue the proposed disciplinary action. Based on the events of this case, we find that six months is not prompt. See *Isidro A. v. U.S. Postal Serv.*, EEOC Appeal No. 0120182263 (Oct. 16, 2018) (finding that the Agency failed to take prompt and effective action when it investigated a single utterance of the word [n-word] in the workplace on July 15, 2017 and issued disciplinary action on November 21, 2017). As such, we conclude the Agency failed to take prompt action after learning of the harassment. Because the Agency failed to meet its affirmative defense burden, we find that it is liable.

In most cases similar to *Sharon M.*, we see agencies lose because they did not investigate promptly or did not put effective corrective action into place, but here the delay in taking *prompt* corrective action is what caused the loss.

While a delay is not always the death knell for a disciplinary action (check out my 2019 article on laches here), I hope you see now that it can be, both on the MSPB and EEOC sides of an issue.

And if you join us for MSPB Law Week, next offered virtually September 21-15, we'll discuss all these things and a whole lot more.
Hopkins@FELTG.com

The Good News: Now's a Good Time to Work on Your Pandemic To-Do List
By Ann Boehm

Here we are, in Month Six of the COVID-19 Pandemic, and not much has changed. Many of you are still teleworking. Some are gradually returning to the workplace. Some of you never left the workplace. Regardless of your status, there's no doubt that the day-to-day existence of your job is different and likely will stay different for a while. That's why I think it's a good time to work on a to do list that is specifically focused on the oddities of working through a pandemic. So here goes.

1. Get moving on performance and disciplinary actions, and investigations. When the virus hit and people were suddenly told not to come to work, many agencies put any performance and disciplinary actions on hold. Same for investigations. The logical thinking was that everyone would be back to work pretty soon, so why not wait until then to move on serious personnel matters. Now we realize that "pretty soon" is still not happening. It's a bit odd to serve a proposed removal virtually, I realize, but there's nothing illegal about it. Employees who want an oral reply can do so virtually. And decisions should certainly be issued sooner rather than later. It may seem unkind to remove an employee during the pandemic, but leaving a proposal hanging for too long is hard on everyone – the employee, the supervisor, and the co-workers. Investigations may be different in the virtual world, but technology will allow you to interview people and review documents. We don't know when this will end, so don't keep putting things off.

2. Assess what's working and what's not in the virtual world. It's very possible that the virtual world is making your workers more efficient. Or it may have negatively impacted

Copyright © 2020 FELTG, LLC. All rights reserved.

your office's ability to perform its mission. It is important for you to do an honest assessment of what is working and what is not. You may have a whole new appreciation for teleworking if you see that your workers are more efficient. And if you demonstrate that some mission requirements just cannot be done virtually, you will be better able to determine which employees need to return to the workplace. The key is to be honest.

3. Review performance plans. Pandemic or not, employees are still expected to perform. That being said, you need to review the critical elements in your employees' performance plans to determine whether they are accurate expectations during the pandemic. You may need to do some tweaking to reflect the reality of telework or safety issues.

4. Be aware of your agency's return-to-work policies and make sure your employees know about them. CDC guidance. Agency guidance. Department guidance. The safety requirements for returning to work will include things like temperature taking, sanitizing, and of course, the controversial wearing of masks. Find out what policies are out there. Read them. And make sure your employees receive them.

5. If you supervise bargaining unit employees, read what the national unions have said about return to work. The national unions are insisting on strict workplace safety protocols. AFGE, for example, has a list of 10 return-to-work principles posted on its website. It's important to know what the national unions are saying so that you can work effectively with the local bargaining units to ensure all employees are complying with workplace safety protocols.

6. Develop a plan for how to handle employees who do not comply with safety protocols. You can pretty much plan on some employees not wanting to wear a mask. Or they may not wear them properly. What are you going to do when that occurs? Figure out a plan. Warnings will probably be a wise first step. And you may need to take disciplinary actions. No one said this would be easy, folks.

7. Take advantage of any spare time you have and read agency policies you may not have read for a while (like Leave, Misconduct, Investigations, Performance). When I conduct training, I like to remind supervisors, and HR specialists, and counsel to read agency policies. Too often we get complacent and forget to review the policies we think we know so well. If you are still teleworking, use downtime to look over some of the agency policies most relevant to what you do.

8. Read the OPM guidance on COVID-19 Leave. The Families First Coronavirus Response Act created a new type of leave that is specific to COVID-19. OPM issued detailed guidance about the leave. Your agency may have provided supplemental guidance. You are going to have employees who get COVID-19. You will have employees who need to be quarantined due to exposure to someone with COVID-19. Get ahead of this by reading available guidance on how to handle employee leave if any of this occurs.

9. Talk to your employees and find out how they feel about their current work situation and return to work. One of the most surprising things to me about the pandemic is how wrong I have been in predicting other people's perception of danger during the pandemic. Some people who I thought would be very worried are not worried at all, and others I figured would be happy-go-lucky are terrified. You really cannot guess how anyone is feeling about their own personal risks and family member risks. We can assume, based upon what I read in the media, that most people are very concerned about the safety of being at work. It's important that you find out how your employees feel about returning to the workplace. They may need to come to work

Copyright © 2020 FELTG, LLC. All rights reserved.

despite their fears, but at least you will know in advance about their worries and be better able to manage the situation.

10. Talk to your supervisor about your concerns and make sure you understand what's expected of you as the pandemic continues. Pretty much everyone except the President has a supervisor. Our training focuses mostly on how supervisors interact with the employees who work for them. But it's also important for supervisors to talk to their supervisors about their feelings during the pandemic. Don't operate in a vacuum. Boehm@FELTG.com

Yellow Donuts, Unnecessary Shopping Trips, FELTG, OPM and Accountability
By Dan Gephart

Please don't tell my wife this, but she's almost always right when we debate the best way to get something done. Here's an example: I realize we're out of bananas, just as I'm preparing a smoothie. So as I grab my car keys, I holler: "I'm running to the supermarket to get bananas." She replies: "Don't we need lightbulbs for the kitchen, too, and batteries for the remote? And while you're out, what about dropping off the bag of food at …"

I don't hear that last part because I'm out the door. I have one mission: Getting bananas. I want a smoothie. Why worry about that other stuff? But later that night when I go to turn on the kitchen lights and the last remaining bulb remains dark, I get the look. I storm out of the kitchen and turn on the TV. Click. Click. Nothing. Remote needs new batteries. And then I hear: "You know, you could've saved yourself time while you were out …"

She's right and she understands efficiency. Take the right steps now to make your life easier in the long run. Why make three separate trips to three stores in the same vicinity, when you can do it all in one trip?

We preach a lot about efficiency here at FELTG. I mean A LOT. It's what we do. But instead of unnecessary car trips, we help rid supervisors of unnecessary actions when it comes to handling performance and conduct issues. Let's face it: Life as a federal supervisor, particularly during a pandemic, is quite difficult. Why make it harder?

My favorite slide that you'll find in many of FELTG's materials is what we endearingly refer to as the "dreaded yellow donut."

Read about the concept of the yellow donut here. Basically, the donut is a reminder to take the minimum steps in performance and conduct actions. The more unnecessary steps you take, the harder it gets, the longer it takes – and the more likely you are to make a mistake.

As we found out in my interview with Dennis Dean Kirk last week, OPM's Employee Services Team wants to make sure federal supervisors are appropriately "equipped to address performance and conduct issues." (Sidenote: Oh, how I wish I was interviewing Mr. Kirk about his experiences as a new MSPB member.)

As baseball announcer Mel Allen used to say: How about that? It's not just a FELTG thing. It's an OPM thing, too. So go out and grab a donut (and anything else you need while you're out), then register for the FELTG flagship program UnCivil Servant: Holding Employees Accountable for Performance and Conduct, which will be held virtually on September 9-10 from 12:30 pm – 4 pm ET.

Or if you're an HR Director, team leader. or attorney advisor, and you want to reach a larger group of supervisors, bring UnCivil Servant: Holding Employees Accountable for Performance and Conduct to your office virtually or onsite. Don't do it because it's a FELTG thing, or an OPM thing. Do it because it's the right thing. Gephart@FELTG.com

Copyright © 2020 FELTG, LLC. All rights reserved.

Tips from the Other Side: What's Acceptable During a Pandemic
By Meghan Droste

Last month, the return-to-work efforts at several federal agencies made the news, with employees and some members of the Senate expressing concerns about the safety of these plans. With the ongoing risks of the coronavirus still present across the country, there will be some significant changes for those employees who transition back to their offices in the coming months. Because we are still in the midst of a pandemic, some of the rules regarding medical exams and medical information are a bit different than usual. I highlighted below some key guidance from the EEOC on what is and what is not acceptable during this time:

- **Agencies may ask employees if they are experiencing symptoms of COVID-19.** Normally an employer is not permitted to ask employees if they are sick, but the rules are different during a pandemic. If employees will be in the workplace, agencies may ask if they are currently experiencing the recognized symptoms such as fever, chills, a cough, shortness of breath, and a sore throat. The Commission advises that employers continue to check the CDC's guidance to stay current on what the known symptoms are. Agencies should also remember that some people with an active infection will be asymptomatic.

- **Agencies may check employees' temperatures.** Temperature checks are medical exams so employers cannot usually require all employees to submit to them before entering the workplace. The pandemic changes things. As long as a fever remains a recognized symptom (something that seems unlikely to change), employers may require temperature checks. But again, the Commission reminds us that not everyone who has COVID-19 will have a fever.

- **An agency may require employees to take a COVID-19 test and provide the results to the agency.** While agencies may require COVID-19 tests because the virus poses a direct threat to others in the workplace, agencies may not require employees to undergo antibody testing. The Commission has specifically stated that antibody tests, which do not provide information about an active infection, do not meet the job-related and consistent with business necessity standard.

- **Agencies may order symptomatic employees to go home.** An agency may direct an employee who is displaying any of the recognized symptoms of COVID-19 to go home and may require a doctor's certification before allowing the employee to return. As the Commissions notes, employers should remember that employees may experience significant delays in receiving test results or being able to see a doctor during this time.

- **Agencies may delay start dates for new employees who have COVID-19 symptoms.** An agency may also withdraw a job offer if there is a need for the applicant to start immediately and it is not possible to wait the required quarantine period before the applicant enters the workplace. An agency should not, however, delay or withdraw an offer for an asymptomatic applicant who will start working remotely and not report to a duty station.

- **Agencies may not delay a start date or withdraw a job offer simply because an applicant is in a high-risk category.** If an applicant in a high-risk category is willing to enter the workplace and has no symptoms, there is no justification to delay a start date or withdraw an offer. Doing so could result in a finding of discrimination based on sex, age, or disability, depending on the specific applicant's protected category.

For those of you who will be returning to work soon, I wish you good luck and good health. And for everyone else who will be moving into their sixth month of remote work soon, stay strong! Droste@FELTG.com

Copyright © 2020 FELTG, LLC. All rights reserved.