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

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A Topic We Wish We Didn't Have to Teach

Not a day goes by that we don't see reports of violence in our country, often in public places or the workplace. As the government moves toward reopening, it's more important than ever that your agency's supervisors, employees, and LEOs are aware of what steps to take – and not to take – in the unfortunate event that a co-worker, visitor, or bystander threatens violence or engages in a violent action.

With that in mind, FELTG is offering a first-of-its-kind event on June 28: **FELTG Town Hall: Handling Threats of Violence on the Federal Workforce**. During this two-hour virtual seminar, our panel will discuss how to efficiently and effectively address threats of violence and violent actions taken in or near the Federal workplace, including de-escalation techniques and bystander intervention strategies. They'll discuss warning signs, legal obligations and obstacles, what to do if substance use appears to be at issue, and the role of Federal law enforcement in managing a violent crisis. It's something we hope you'll never encounter, but if recent events at the U.S. Capitol, Fort Detrick, and the USCIS facility in Orlando (among too many others to mention) are any indication, we'd be remiss to not be prepared.

In this month's newsletter we cover SES misconduct actions, what "pro-employee" means, and much more.

Take care,

Deborah J. Hopkins, FELTG President

UPCOMING FELTG VIRTUAL TRAINING

EEO Counselor and Investigator Refresher Training
May 25-26

The Performance Equation: Providing Feedback that Makes a Difference
May 27

EEO Challenges, COVID-19, and a Return to Workplace Normalcy
June 2

Nondiscriminatory Hiring in the Federal Workplace
June 9

The Supervisor's Role in Diversity, Inclusion and EEO Compliance
June 16-17

Honoring Diversity: Ensuring Equity and Inclusion for LGBTQ Individuals
June 23

FELTG Town Hall: Handling Threats of Violence on the Federal Workplace
June 28

Hearing Advocacy: Presenting Cases Before the MSPB and EEOC
July 14-15

For the full list of virtual training events, visit the **FELTG Virtual Training Institute**.

FELTG is an SBA-Certified Woman Owned Small Business that is dedicated to improving the quality and efficiency of the federal government's accountability systems, and promoting a diverse and inclusive civil service by providing high-quality and engaging training to the individuals who serve our country.

The Good News: 'Pro-employee' is the Secret to Labor-Management Relations
By Ann Boehm

The media does it. The President and Congress do it. I do it. We break the world down into "pro-union" or "anti-union" and "pro-management" or "anti-management." And with these worldview parameters, we miss the key consideration: What is "pro-employee?"

The goal for any workforce is for the employees to accomplish the mission. The best way for that to happen is for employees to enjoy their jobs. That can be a little bit challenging, because it's "work," not "play."

There are good managers who have the knack for getting employees to work efficiently and effectively, thus helping them enjoy their jobs. But there are plenty of managers who do just the opposite.

Based upon my years of experience, and years of reading as much as I can on leadership, Federal personnel law and guidance, and media coverage of Federal personnel issues, I think the greatest source of union organizing and angst stems from leadership that forgets to take care of the employees.

In my very first Federal sector labor relations job, the workforce was evenly divided (by five votes in two separate union elections) on who wanted to be represented by the union and who did not. Amazingly, the division broke down based upon the leadership skills of the employees' supervisors.

The supervisors who were effective leaders tended to have employees who opposed the union, and the supervisors who were not effective leaders tended to have employees who supported the union. It was pretty amazing to witness.

For those employees frustrated with bad leadership, a labor union can seem like the knight in shining armor that will protect them from the wickedness. Yet this is not always the case, because unions are not necessarily "pro-employee" either.

I worked for Immigration and Customs Enforcement at one point during my career. At the time, I had 16 years of Federal experience. We were moving to new office space. I figured as one of the more senior Federal employees, I would get top pick for the new office space. Wrong.

As a bargaining unit member, I was constrained by the collective bargaining agreement theoretically negotiated on my behalf by the union. Turns out, seniority for the bargaining unit was based upon years of service with ICE. All my years of prior service meant nothing, and I was the last person in the office selection queue. I have to tell you it was a big morale killer. The union was not my knight in shining armor.

Unions often make bad decisions without really contemplating the impact on the employees. Unions tend to defend the bad employees, sometimes 100 percent, and often at the expense on the good employees.

Just this week, I heard from an agency that the union, in its defense of an employee's disciplinary action, challenged the agency's reliance on the recently revised OPM regulations on comparator employees (5 C.F.R. § 752.403(d). The union called the regulation "fruit of the poisonous tree."

Yes, that particular OPM regulation derived from the now-revoked Trump Administration Executive Order 13839. But the language of that regulation is logical and consistent with MSPB case law dating back to *Douglas v. VA*, and other cases from the 1980s. It also corrects the craziness from the MSPB's "Terrible Trilogy" of cases, suggesting agencies had to look at comparators from all over the entire "big A" Agency.

Consider what the regulation says: "Employees should be treated equitably. Conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time. An agency should consider appropriate comparators as the agency evaluates a potential disciplinary action. Appropriate comparators to be considered are primarily individuals in the same work unit, with the same supervisor, who engaged in the same or similar misconduct." 5 C.F.R. § 752.403(d).

Call me nutty, but this provision makes a lot of sense to me. The union's knee-jerk reaction to this provision is ultimately not good for the workforce. Bad employees who engage in misconduct need to be disciplined appropriately. Otherwise the good employees the unions also represent will suffer. Disciplining every employee exactly the same just plain doesn't make sense, yet often that's what the unions seek.

Sometimes, though, agencies make bad decisions without really contemplating the impact on the employees, and the unions really can help. In 2018, the Department of Agriculture announced plans to relocate two of its scientific agencies from Washington, DC to somewhere else in the United States. The employees of these agencies were facing a major relocation to a point unknown. Not exactly a pro-employee action. The employees unionized pretty darn quickly.

When the USDA ultimately decided to move the employees to Kansas City, the union mobilized to try to mitigate the negative impacts of the relocation. The union was pro-employee in that situation, but the agency was not. Many of the impacted employees left the agency, despite the union's best efforts to be the knight in shining armor. Without the union, likely more would have left.

Knee-jerk reactions from management that anything the union suggests is bad, and from unions that anything management suggests is bad, are very common and tend to muck everything up. If both sides could consider the employees (all of the employees in the bargaining unit – particularly the good ones) as a primary factor in every decision, I think the Federal sector labor-relations world would be a better place.

Better labor-management relations, and happy employees – that would be Good News! Boehm@FELTG.com

The Connections Between COVID-19 and Civil Rights
By Meghan Droste

In January, I mentioned that it seemed like maybe we could see the light at the end of this COVID-19 tunnel. At that time, I honestly didn't think that light would be any more than a pinprick for many, many months to come. Surprisingly, it seems to be far brighter now that we've reached May. More than a third of the 18+ population is now fully vaccinated, with nearly 60 percent of adults at least partially vaccinated. CDC guidance on masks and group activities is changing somewhat rapidly. It feels like we might actually get back to some version of "normal" relatively soon. This feels like a long time coming, and also very fast.

While I know it's important to look forward to all of the things we can do soon and all of the people we can see after going far too long without being together, we also shouldn't be too quick to look away from the past year and the profound impact the pandemic has had, and continues to have, on so many people. The Commission took a look back recently during a hearing on how the pandemic hurt vulnerable populations. (A summary of the hearing is available here.) The Commission heard expert testimony on various impacts of the pandemic, including the disproportionate impact of job losses on women people of color, the significant decline of women's

participation in the workforce, and increases in disability discrimination.

As we're in the middle of Asian American and Pacific Islander (AAPI) Heritage Month, I also want to highlight the discussion of the significant impact on the AAPI community. As John C. Yang of Asian American Advancing Justice testified, "[w]ith the dual pandemics of COVID-19 and anti-Asian hate and violence sweeping through Asian American communities nationwide, Asian American workers face significant challenges, including threats to both their lives and their livelihoods."

As the Anti-Defamation League (ADL) reported the following in March in its annual survey of hate and harassment on social media: "Asian-Americans experienced the largest single rise in severe online hate and harassment year-over-year in comparison to other groups."

The harassment of the AAPI community tied to the pandemic has been widespread and tragically, violent at times. Recent news stories depict physical attacks on members of the AAPI community in locations literally coast-to-coast. The harassment has also been verbal, with reports of people yelling "China-virus" or "go home" to people who appear to be Asian American. Agencies, of course, have an obligation to prevent harassment in the workplace and correct it if it occurs. This includes addressing microaggressions ("Where are you really from?") as well as more open and obvious harassment ("Go back to Communist China."). I encourage you to keep this in mind as we all start to look forward to the end of the worst of the pandemic.

Droste@FELTG.com

[**Editor's note:** Would you like Meghan Droste to train your agency supervisors and/or employees on microaggressions and unconscious bias? Contact FELTG Training Director Dan Gephart at (202) 921-8439 or Gephart@FELTG.com.]

What You Should Know About SES Discipline
By Deborah Hopkins

While it's rare to see an individual in the Senior Executive Service (SES) receive disciplinary action, every now and then an SES breaks bad, and agencies respond accordingly. During a recent UnCivil Servant training class [Editor's note: Don't miss our next UnCivil Servant open enrollment class May 19-20], we received a number of questions about the process of disciplining a career SES, so I thought I'd share an overview with the FELTG Nation. As you'll see there are some similarities between SES and non SES discipline – and a few significant differences.

An agency may take disciplinary action against a career SES member (covered by subchapter V of chapter 75 of title 5 of the U.S. Code) only for misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.

Unlike unacceptable performance cases, which rather than removal provide the SES with placement rights into another position, any career SES removed for disciplinary reasons has no placement rights.

How it's the Same

Probationers. A probationary career SES member who was not covered by 5 U.S.C. 7511 immediately before SES appointment may be removed for misconduct. The employee must be notified in writing, and the action must be effective before the end of the last scheduled workday in the probationary period. For removals over conditions arising before appointment to the SES, the agency must provide advance written notice (the proposal letter) stating specific reasons for proposed removal, an opportunity to reply,

and a written decision showing reasons for the action and the effective date.

Procedures. For suspensions greater than 14 days and for removals, the SES is entitled to advance written notice, at least 7 days to respond, the right to a representative, an impartial decision, and the right to appeal the action to MSPB.

Ask FELTG

Do you have a question about federal employment law? A hypothetical scenario for which you need guidance?

Ask FELTG.

How it's Different

Nexus. The "efficiency of the service" standard used for non-SES employees does not apply in SES discipline. However, if an agency wishes to take disciplinary action based on the appointee's off-duty actions or misconduct, the agency must demonstrate a direct connection between the off-duty actions and the appointee's ability to carry out the assigned responsibilities of his/her/their position.

No short suspensions. The law is silent on short suspensions for SES. OPM's interpretation is that because there is no statutory authority for such action, agencies may not suspend an SES member for 14 days or fewer. However, agencies are not restricted from issuing a written reprimand for an offense that does not warrant a suspension or removal.

No demotions. By law, there are no demotions in the SES. That said, an agency is allowed to *reduce the pay* of a career SES appointee by up to 10 percent as disciplinary action for misconduct.

If the agency chooses this route, the SES must be:

- Provided written notice at least 15 days in advance of the effective date,
- Given at least 7 days to respond,
- Given the opportunity to have a representative,
- Given a written decision containing reasons for any pay reduction, and
- Given an opportunity to request reconsideration by the agency head within 7 days of the decision.

There is no third party review of this type of pay reduction. Sometimes, in lieu of a pay reduction, an agency will remove the SES member for misconduct, and then appoint them into a GS-15 or 14 position.

I hope this helps clarify the specifics on disciplining an SES. Next time, we'll tackle SES performance. Hopkins@FELTG.com

D E I A

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Nondiscriminatory Hiring in the Federal Workplace

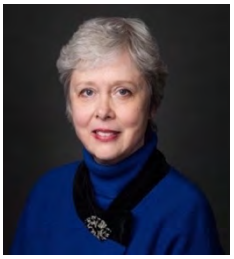
Nondiscriminatory hiring practices are not only the law, they are also an effective way to ensure that you have the most diverse and inclusive workforce necessary to meet your agency's mission. With renewed focus by the current administration on diversity and inclusion, this class is a must, especially if you plan to hire this year.

FELTG instructor and attorney at law Meghan Droste will explain how to ensure your hiring practices are nondiscriminatory and align with the merit systems principles.

Ms. Droste will cover the kinds of interview questions that can cause problems, and she'll discuss selection panel roles and responsibilities, including ensuring the selecting officials implement best practices to develop and maintain evidence demonstrating the non-selection was neither discriminatory nor retaliatory.

This session will be held on June 9, 2021 from 12:30 – 4 pm ET. It meets the President's mandate to provide training on diversity, equity and inclusion in the Federal workplace. Register now.

Position Descriptions and Performance Plans – Part I
By Barbara Haga



If one more supervisor says to me, "If it's not in the performance plan, I won't be able to hold the employee accountable for this," I'm going to scream. There are a lot of things that employees are expected to do or requirements that they are expected to meet that aren't performance plan matters. Performance plans are likely much more visible to employees and managers because they are reviewed a couple of times each year at a minimum. But position descriptions are the foundation for many human resource decisions, and well-crafted ones can help your organization in many ways.

This month, we are going to look at what position descriptions are supposed to be and how to get that foundation firmly in place. We'll address how the position description ties in with the performance plans in a future column.

According to OPM's FAQs on classification, a position description (PD) is "… a statement of the major duties, responsibilities, and supervisory relationships of a position. In its simplest form, a PD indicates the work to be performed by the position. The purpose of a PD is to document the major duties and responsibilities of a position, not to spell out in detail every possible activity during the workday." The position description describes not only the major duties and responsibilities, but it also describes the conditions under which that work is performed, such as the when the employee has the latitude to apply judgment to interpret guidelines. It explains what kind of supervisory review is expected.

Up to Date and Accurate

Having an up-to-date and accurate position description is important. They are not necessarily fun to write, but they are the underpinning for multiple issues supervisors have to deal with. For example:

- Position descriptions provide information that is used to determine qualifications for the position – knowledge and experience and physical (and sometimes mental) standards that must be met. For example, criminal investigator positions require emotional and mental stability in addition to the requirements for dexterity, vision, and hearing, etc.

- Position descriptions establish special requirements, such as the need for a security clearance, necessity for holding certain licenses or certifications, extensive travel, significant amounts of overtime, and more. While some of these are not qualifications per se, they are necessary for successful performance in the position.

- The position description should be the beginning of the selection process. When you are developing questions for the applicant and the references (yes, plan out questions for the current and past supervisors, too) you should be referring to the position description. This isn't just to ensure you covered the major duties in your questions, but also that you covered how the work got done. Let's look at your HR Specialist, GS-13 position: What kind of review did your supervisor conduct of your disciplinary letters? Did you have authority to contact your headquarters to obtain an opinion on a complex topic or were you required to raise these issues with your supervisor first? For a reference you might ask, when Mr./Ms. _____ prepared disciplinary letters, what kind of review did you conduct?

- The position description should be the first step in the interview. Assuming you have an in-person interview, I recommend having the employee read it outside the interview room before you ever begin asking questions. (Please don't ask them to read it while three people on the panel watch them.) This aids the applicant in understanding what your job is all about, so he provides more responsive answers to your questions. Also, he may have missed some of those special requirements that were mentioned in the job announcement, such as extensive travel, a certain license or certificate, or the ability to walk around the campus on foot to attend meetings. When the applicant sees those in the job description, he may ask questions about that and potentially withdraw if that doesn't work for him.

- Employees who occupy positions with physical requirements can be ordered in for physical examinations to determine if they meet the requirement(s) (See 5 CFR 339.203). Physical requirements are set for specific positions. They have to be essential for successful job performance and they must be clearly supported by the actual duties of the position and documented in the position description. Perhaps you have a group of eight Contract Specialists, GS-12. Only one of them has to provide service to a group located at a remote site 80 miles away. There's no reasonable way to get there except to drive, so the individual has to be able to maintain a driver's license and must also have the capabilities to safely operate a government vehicle. That person could be ordered in for a physical to make sure they could safely perform that function, even though the other seven contract specialists would not be subject to such a requirement.

- It's late on Friday, and your friendly HR Specialist left for the day. You're a manager and you're not sure if one of your employees is in the bargaining unit. You need to conduct a pre-action interview and you don't know if you should observe the *Weingarten* provisions in your contract. Where can you find the information? Normally it's on the cover sheet of the position description identified as a Bargaining Unit Status (BUS) Code. Or, you just found out about a rush project that needs to be taken care of on Saturday. You offered one of your employees compensatory time if she would come in on Saturday and take care of it, but she declined. Now you're trying to figure out whether you can require that employee to work extra hours for comp time. But, you need to know if the employee is Exempt or Non-Exempt to make that decision. That's conveniently included on the position description cover sheet, too. These decisions depend on what kind of job it is, the authority it has, the controls it operates under, etc.

I could go on, but I think you can see that there are myriad things that position descriptions accomplish. I'm not exaggerating about that being the foundation. We all know what happens when you have a faulty foundation.
Haga@FELTG.com

Guidance on New Leave Provision

Join FELTG Senior Instructor Barbara Haga for the 60-minute webinar Implementing the Employee Leave Provisions of the American Rescue Plan on May 26 from 1-2 pm ET. Register now.

4 Tips to Prepare for Increase in Requests for Accommodation, Telework
By Dan Gephart

As we careen toward the eventual return to workplace normalcy, it's a good time to take stock of where we are as a workforce after more than a year of pandemic-enforced remote work.

Although not geared to the federal workforce, a recent survey of US- and UK-based employers conducted by Arizona State University and the Rockefeller Foundation provides a great snapshot.

Let's start with the good news. Most employers say that employee engagement and productivity are up. Even better, 44 percent of employers surveyed say morale has risen as well.

The bad news? Employers are seriously concerned about mental health. Half of those surveyed have increased the use of available company resources related to mental health since the pandemic began.

I surmise three points from the survey:

1. Telework was more successful than many thought it would be.
2. There will be a significant increase in reasonable accommodation requests by employees dealing with mental health challenges, and many of those will likely be for anxiety disorders.
3. Many of those accommodation requests will be for telework.

As the moderator for many FELTG webinars and virtual training events, I relay your questions to our presenters. So I know that few things cause more anxiety for federal supervisors as reasonable accommodations and, more specifically, requests for telework. But here's the thing: If you're too worried to address employee anxieties and other mental health issues, then that increase in engagement and morale is going to sink faster than an Elon Musk comedy skit on Saturday Night Live. So I'm offering four tips for you to keep in mind for the upcoming months:

1. Don't delay the interactive process, and take the right approach. Let me repeat: Do not delay. I can't tell you how to feel, but if you're seriously trying to avoid this process, then you may be in the wrong position. The law requires prompt action. This is the stuff that being a federal supervisor is made of. The employee has the best information about his/her/their functional limitations. You, presumably, have the best knowledge about the work. Go into the process with an open mind and work with the employee to find the most effective accommodation.

2. Don't be afraid to ask for medical documentation, and ask for the right information. Agencies are entitled to medical documentation as part of the reasonable accommodation process. But that information must be related to determining the existence of a disability and the necessity for an accommodation. Anything beyond that is not necessary. Remember there are two reasons you may want medical documentation. Yes, you want to substantiate the need for accommodation. But the medical documentation can also help you understand the functional limitations. Keep in mind that supervisors don't generally handle medical documentation, so check your agency's policy on who is responsible for these requests.

3. Don't automatically rule out telework, and ensure there is accountability. Look, skepticism about telework may be warranted at times, but it's about as fashionable as socks and sandals on a middle-aged man. Remember the study at the top of this story? Productivity is up while employees work en masse from home. Depending on the job, many people can work from home. Maybe the problem is you? Out of sight should not mean out of mind. Find the best way to monitor the work and stay engaged with the

employee. And if performance slips, hold the employee accountable using the FELTG tools, just as you would if the employee worked in a cubicle outside your office.

4. Don't get frustrated, and get some training. As always, FELTG has multiple opportunities for you to get up to speed on these issues. Here are a few:

- **June 2: EEO Challenges: COVID-19 and a Return to Workplace Normalcy.** In this half-day virtual training, attorney Katherine Atkinson will provide guidance on a whole host of challenges involving vaccines, pandemic-related harassment, and more. She'll also provide a framework for handling these challenges that you can apply to other yet unforeseen challenges.

- **July 13: Disability Accommodation in 60 Minutes.** During this installment of our annual Supervisory Webinar Series, FELTG President Deborah Hopkins will cover the requests for accommodation, the interactive process and much more, all in one hour.

- **Starting July 15: Reasonable Accommodation in the Federal Workplace.** This five-webinar series will tackle several reasonable accommodation challenges, including specific sessions on Accommodating Invisible Disabilities (July 22) and Telework as a Reasonable Accommodation (July 29).

- **July 21: Dealing With Mental Health Challenges During and After the COVID-19 Pandemic.** During this half-day virtual training, Licensed Clinical Social Work Shana Palmieri will de-stigmatize the truth about "mental illness" and will explain the impact various mental health conditions have on individuals, and those with whom they work. She'll also provide strategies for effectively supervising and managing employees with these conditions, whether they're in the office or working remotely. [Editor's note: Read Shana's article *Impact of COVID on Stress, Mental Health* below.]

- **July 26-30: The Post-Pandemic Federal Workplace: Managing Accountability and EEO Challenges.** This weeklong event (each day of training runs from 12:30 – 4 pm ET) offers the most timely and up-to-date accountability and EEO training you'll find. And it culminates on the last day, when you get to apply everything you learned earlier in the week about managing conduct, performance, leave issues and EEO in a telework setting.

Keep an eye out for other upcoming FELTG webinars and virtual training events. Gephart@FELTG.com

Join FELTG starting on July 15 for the 5-part webinar series Reasonable Accommodation in the Federal Workplace.

July 15: Reasonable Accommodation Overview and Analysis

July 22: Accommodating Invisible Disabilities

July 29: Telework as Reasonable Accommodation

August 5: Reasonable Accommodation Mistakes Agencies Make

August 12: Religious Accommodations: How They're Different Than Disability Accommodations

Impact of COVID on Stress, Mental Health
By Shana Palmieri

A comparative analysis completed by the NHIS and U.S. Census Bureau shows an increase of 11 percent of adults reporting symptoms of an anxiety or depressive disorder in January-June 2019 compared to 41.1 percent in 2021. A variety of stressors as a result of the pandemic contributed to this increase and continue to impact stress levels including:

- Financial stressors
- Social isolation
- Fear and uncertainty of the future
- Remote school learning
- Loss of loved ones to COVID

As the stressors continue, the initial acute stress experienced as a result of the pandemic can transition into chronic stress causing a lasting impact with serious symptoms for many. Chronic stress is a prolonged state of stress that does not give the body an opportunity to activate the relaxation response. There are numerous negative consequences from a constant state of physiological arousal caused by the body maintaining a chronic stress response.

Symptoms of chronic stress include aches and pains, decreased energy, insomnia, fatigue, difficulty with concentration, gastrointestinal problems, headaches, anxiety, depression, decreased immune response, irritability, nervousness, feeling a loss of control and helplessness.

If chronic stress is left untreated, it can turn into more serious conditions including major depressive disorder, anxiety disorder(s), diabetes, heart disease, high blood pressure, hyperthyroidism, ulcers and weight changes.

[Editor's note: On July 21, Shana will present Dealing With Employee Mental Health Challenges During and After the COVID-19 Pandemic.]

Returning the body to a state of relaxation is pertinent for the healing process to begin. Healing the body from the impact of chronic stress takes consistent effort and the constant practice of healthy habits. Stress reducing habits to heal from chronic stress include:

- Healthy sleep patterns – at least 7-8 hours a night
- Daily exercise
- Yoga/mindfulness meditation practice
- Healthy diet
- Connection through healthy relationships
- Setting boundaries to maintain work/life balance
- Talking with a therapist

Keeping the body in a healthy, relaxed state through the practice of healthy habits will create a state within the body better able to fight illness and will reduce the physical and mental symptoms of chronic stress. If you are a loved one are experiencing suicidal ideation, help is available at the National Suicide Prevention Lifeline at 800-273-8255. Info@FELTG.com

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Dealing With Employee Mental Health Challenges During and After COVID-19 Pandemic

The COVID-19 pandemic has exacerbated the ongoing behavioral and mental health crisis in this country. After a year of isolation, new work processes, heightened responsibilities, and political minefields, employees with a mental health diagnosis will be returning to the physical workspace. This virtual training program on July 21 will provide highly practical guidance and straightforward advice from Shana Palmieri, a licensed clinical social worker. Find out more here.

Tips from the Other Side: Religious Accommodations for the Nonreligious
By Meghan Droste

This month, I'm wrapping up our discussion of issues regarding religious accommodations. To recap, we've discussed the definition of an undue hardship in the context of religious accommodations (January), how far an agency can inquire into the sincerity of the religious beliefs or practices at issue (February), what an agency must do before raising an undue hardship defense (March), and the difference between a religious practice being part of a sincerely held belief and a voluntary activity that does not require accommodations (April). For our last look at this topic, we'll examine a slight twist on the issue — whether people who are not a member of a religious group are entitled to accommodations.

As you know by now, agencies have an obligation to provide accommodations, if doing so is not an undue hardship, to accommodate the sincerely held religious beliefs of employees. Unsurprisingly, we usually discuss accommodations in the context of an employee seeking to practice a specific religion (e.g. Judaism, Buddhism, Islam, Christianity). However, employees who are not members of a specific religion, and whose religious beliefs are that they do not believe in a higher being/divine spirit/god, may also be entitled to accommodations. How can this be? The Commission's decision in *Harmon v. Department of Transportation*, EEOC App. No. 01950755 (Feb. 2, 1998), provides a good example.

In the *Harmon* case, the agency required employees with substance abuse issues to attend a mandatory drug rehabilitation program, specifically 12-Step Narcotics Anonymous (NA) meetings. The problem for the complainant was that the NA meetings were religious-based; as an agnostic he found that the NA meetings caused him "extreme emotional turmoil and distress." In addition to compensatory damages he suffered as a result of the required participation in the NA meetings, the complainant sought an order directing the agency not to use religious-based drug rehabilitation programs for its employees.

In its decision, the Commission noted that an agency's "duty of reasonable accommodation includes efforts to eliminate any conflicts between an employee's religious beliefs and employment requirements, and to preserve the employee's employment status." The Commission then found that rather than ordering the agency not to offer religious-based rehabilitation programs, the appropriate approach was to offer non-religious programs as an accommodation to those employees, like the complainant, for whom religious-based programs conflicted with their beliefs.

In other words, the agency was required to provide secular programs to accommodate the complainant's religious beliefs that the existence of god is unknowable or the beliefs of other employees that there is no god. Entitlement to religious accommodations (and freedom from harassment or discrimination based on religion) extend to those who do not identify with any religion — if they didn't, many employees could be forced to participate in activities that violate their sincerely held beliefs, or treated differently simply because those beliefs do not take the form of a religion.
Droste@FELTG.com

Looking to Improve FEVS Scores?

There is one action you can take that when done effectively could have a major impact on your team's morale and productivity: Giving your employees honest and ongoing feedback.

On May 27, Join Anthony Marchese, PhD, for the half-day virtual training The Performance Equation: Providing Feedback That Makes a Difference and leave tools to nurture a culture of candor in your unit.

OWCP Covers ARPA Steps, Definitions for COVID-19 Workers' Comp Claims

By Frank Ferreri, Special Guest Author

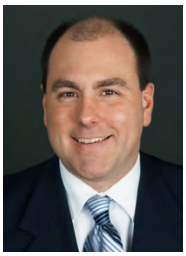
With the American Rescue Plan Act (ARPA) looking to make it easier for Federal employees diagnosed with COVID-19 to file workers' compensation claims, the Office of Workers' Compensation Programs has put together updated guidance for processing coronavirus-related claims.

In FECA Bulletin No. 21-09, which supersedes Bulletins No. 20-05 and No. 21-01, OWCP addressed the processing of pre- and post-ARPA claims as well as what counts as "exposure," why a CA-1 is required, and how employees must establish a COVID-19 diagnosis. The following chart highlights OWCP's latest guidance

Workers' Compensation Considerations	OWCP Guidance
Previously accepted cases	COVID-19 FECA claims that were accepted prior to March 12 are not impacted because coverage for benefits had already been accepted. Because these aren't ARPA cases, they are not subject to that law's limitation that no benefits may be paid after Sept. 30, 2030.
Previously denied cases	OWCP's FECA program will review all COVID-19 claims previously denied to determine if claims can now be accepted under ARPA. If so, the employee and agency will be notified that the case will be reopened.
Previously closed cases	No action will be taken on cases that are already administratively closed. Any future actions will be taken in accordance with ARPA since the claim had not been formally accepted.
Form-filing process	The Employees' Compensation and Management Portal should be used to file new claims, and ECOMP has been updated.
Use of the CA-1	OWCP considers COVID-19 to be a traumatic injury per 20 CFR 10.5(ee) because it is contracted during a single workday or shift. The agency also considers the date of last exposure prior to the medical evidence establishing the COVID-19 diagnosis as the date of injury.
Codes	All cases filed after March 11 for COVID-19 will use the following codes: • Nature of Injury – COVID-19 (T9). • Cause of Injury – Exposure to COVID-19 (9C).

	• Location of Injury – COVID-19 (ZZ).
Employees covered	The claims examiner should determine whether the employee is an employee under 5 USC 8101(1) and whether she was diagnosed with COVID-19 between Jan. 27, 2020, and Jan. 27, 2023. If the employee's diagnosis does not fall within that date range, routine FECA case-handling procedures apply.
COVID-19 diagnosis	To establish a COVID-19 diagnosis, an employee or survivor should submit one of the following: • A positive polymerase chain reaction COVID-19 test result. • A positive antibody or antigen COVID-19 test result together with contemporaneous medical evidence that the employee had documented symptoms of or was treated for COVID-19 by a physician. • If no positive laboratory test is available, a COVID-19 diagnosis from a physician together with rationalized medical opinion supporting the diagnosis and an explanation as to why a positive test result is not available.
Covered exposure	An employee is deemed to have had exposure if, during the covered exposure period, she carries out one of the following: • Duties that require a physical interaction with at least one other person in the course of employment duties. • Duties that otherwise include a risk of exposure to COVID-19.
Covered exposure period	The evidence should establish manifestation of COVID-19 symptoms or a positive test result within 21 days of the covered exposure.
Teleworking employees	An employee who is exclusively teleworking during a covered exposure period is not considered a "covered employee." In that case, routine FECA case-handling procedures apply.
Death claims	In death cases, the FECA program will ask for evidence and records to support that the death was the result of COVID-19 or that COVID-19 was a contributing cause of death.
CA-16	When an employee uses ECOMP, the agency will be prompted to provide a CA-16 if they do not substantively dispute the employee's description of cause and nature of injury. Issuing the CA-16 will allow the employee to obtain the necessary test to confirm COVID-19 and receive medical treatment.

EEOC Hearing: Pandemic Created Civil Rights Crisis for Many Employees
By Michael Rhoads



As Meghan shared above, on April 28, 2021, the EEOC held a Hearing on the Civil Rights Implications of the COVID-19 Pandemic. Several experts weighed in on how the EEOC can assist workers and employers as we move forward toward reopening the physical workspace and addressing the civil rights crisis exacerbated by the pandemic.

The experts who gave testimony touched on an array of topics, such as helping caregivers return to the workforce, increasing empathy in the workplace, sexual harassment during the pandemic, predictions as to when employees will return to the physical workplace, and how to help teleworkers.

In her opening statement EEOC Chair Charlotte A. Burrows stated: "The purpose of today's hearing is to examine the workplace civil rights implications of the COVID-19 pandemic. The past 12 months have been frankly, incredibly difficult for the American people. It's been clear for some time that the pandemic is not only a public health and economic crisis, but truly a civil rights crisis. While every single one of us has experienced challenges during this pandemic, it's important to recognize that the pandemic hasn't impacted everyone in the same way. The COVID-19 crisis has exposed and intensified existing inequalities in our society. As employers seek to juggle telework, keep employees safe and stay up to date with the latest public health announcements, to name just a few of the challenges, we should help them as much as possible to understand specific equal employment opportunity issues arising due to COVID-19."

Returning caregivers to the workplace

Childcare providers have been especially impacted by the pandemic causing them to leave the workforce or reduce the number of working hours. Commissioner Andrea R. Lucas asked Ms. Fatima Goss Graves, President and CEO, National Women's Law Center, to address these concerns by asking her directly: "What best practices do you recommend employers implement to handle applicants with extended gaps in employment either due to the pandemic or caregiving obligations in general?"

Goss Graves pointed to a current trend where some employers have outsourced their hiring process using AI technology, which would automatically eliminate applicants with employment gaps. This may have a disparate impact on women who may have needed to take time off during the pandemic to care for a child, spouse or other family member.

"One in six childcare providers left during this pandemic and have not yet fully come back," Goss Graves said. So if you have a rule that's going to have a disparate impact on women outsourcing. It is not a solution."

Harassment during the pandemic

Commissioner Keith E. Sonderling asked Goss Graves about the "new and unique types of harassment" are appearing as a result of the pandemic.

"What we have found is that in our intake at the TIMES'S UP Legal Defense Fund, is that about 7 out of 10 people report that when they experience harassment, they are also experiencing retaliation when they try to use their employer's systems," Goss Graves said. "But I do think it's important to speak to what harassment is looking like in the context of COVID. People might be under the misimpression that just because people are working virtually that harassment doesn't occur. It's occurring, it just happens virtually."

A more empathetic workplace

Johnny C. Taylor, president and CEO for the Society for Human Resource Management

said American workforce us facing "an empathy deficit today … that significantly impairs our ability to provide every American worker equal opportunity to work and to do so free from harassment and discrimination."

He continued, "Think about it. We've had laws on the books forever about sexual harassment and other workplace forms of discrimination. But at the of the day, it is empathy that keeps us all doing the right thing. Building our empathy muscles will be critical to economic and business recovery because empathetic workplace cultures retain the best and perform the best."

[**Editor's note:** If you are looking to promote diversity and inclusion in your unit, join our newest faculty member, Marcus Hill, with Deb Hopkins and Bob Woods on June 16-17 for The Supervisor's Role in Diversity, Inclusion and EEO Compliance.]

Taylor predicted there will be two waves of workers returning to the workplace. The first will be after the July 4 holiday and the second will be after Labor Day.

He predicted the second wave, after Labor Day, will be larger, "because presumably children will be going back to school and there'll be less childcare concerns for our employees who are having to take care of their children who can't find the appropriate childcare and or schooling."

Supporting teleworkers

While the pandemic has necessitated working from home for those with job flexibility, some employees have felt isolated and depressed without the daily interaction that occurs in the workplace.

"As extended remote work continues for some personnel, and we are doing that, we are seeing gains in the percentage of employees across industries, experiencing depression, hopelessness, feeling of failure and reduced concentration." Taylor said. "All of that obviously directly impacts an employer's product and/or services. EEOC's partnership in establishing best practice guidance when safely returning employees to physical work sites, safety standards, and vaccination education are areas where the EEOC could assist stakeholders during their operational analysis."

FELTG instructor Shana Palmieri will tackle this on July 21, 1:00-4:30 PM ET in Dealing With Employee Mental Health Challenges During and After the COVID-19 Pandemic.

In a press release, Chair Burrows concluded: "Today's testimony makes clear that, while the pandemic continues to have serious impacts on public health and our economy, it has also created a civil rights crisis for many of America's workers. All of us have a critical role to play in our economic recovery. We must come together to ensure that all employees can work free of discrimination and that everyone who wants to work has equal employment opportunities."

We here at FELTG will give you up to date information from the EEOC and provide training that will support your agency's mission. FELTG is currently offering several presentations related to diversity, equity, inclusion and accessibility (DEIA). These trainings meet the President's mandate to provide DEIA training in the Federal workplace.

Stay safe, and remember, we're all in this together. rhoads@feltg.com

Join FELTG on June 23 for **Honoring Diversity: Ensuring Equity and Inclusion for LGBTQ Individuals**, a two-hour virtual training event covering the law, new EOs, gender stereotyping, transgender protections, unconscious bias, microaggressions and more.