



# Federal Employment Law Training Group

Teaching the Law of the Federal Workplace

FELTG Newsletter

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## EEOC Guidance on Vaccine Requirements

I don't want to add up how many times we've written about COVID-19 over the past 15 months. I know without asking that we're all fatigued and ready for the pandemic's end and a return to whatever "normal" will be. While the case numbers are going down overall, research indicates that infections, hospitalizations and death rates are still high among unvaccinated individuals, and those not previously infected.

The EEOC recently issued guidance for employers on vaccines, including whether employers are allowed to mandate employee vaccinations, and what to do if an employee requests an exemption for medical or religious reasons. This is an emerging issue, and as agencies finalize [return to work plans](#), questions about vaccines will be at the forefront. So, on July 12 we're hosting a 60-minute webinar that will answer all your most pressing questions: [Vexing Vaccine Requirements: Responding to Requests for Exemptions](#). We hope you'll join us.

In this month's newsletter we cover topics including EEO reprisal, why some are still pushing for Schedule F, effective leadership, and more.

Take care,

Deborah J. Hopkins, FELTG President

### UPCOMING FELTG VIRTUAL TRAINING

**Honoring Diversity: Ensuring Equity and Inclusion for LGBTQ Individuals**

June 23

**FELTG Town Hall: Handling Threats of Violence on the Federal Workforce**

June 28

**Hearing Advocacy: Presenting Cases Before the MSPB and EEOC**

July 14-15

**Dealing With Employees with Mental Health Challenges During and After the COVID-19 Pandemic**

July 21

**The Post-Pandemic Federal Workplace: Managing Accountability and EEO Challenges**

July 26-30

**Workplace Investigations Week**

August 2-6

**Absence, Leave Abuse & Medical Issues Week**

August 9-13

**Writing Final Agency Decisions**

August 23-24

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.*

**A Schedule F Look-alike  
Rears Its Ugly Head  
By Deborah Hopkins**



Just when we thought Schedule F was gone forever, a recent report [Increasing Accountability in the Civil Service](#) (from some of the same minds behind Schedule F) is once again pushing for Federal employment to be at-will.

The good news for Feds is this push is coming from outside the administration. The bad news for Feds is, the whole reason this idea is still out there is because Federal supervisors underutilize the accountability systems that are already in place, and that leads the taxpayers to believe the system doesn't work and it's impossible to fire the Federal employees who deserve to be removed.

If I may opine, as I occasionally do in this space, this report highlights a few egregious instances of Federal employees behaving badly, and does not take into account all the agencies who follow the procedures and successfully hold employees accountable, thousands of times each year.

Because the successful removals, my friends, don't get your attention. But people remember things like the HUD employee who used his agency email to arrange a lap dance, or the USPS employee who bought cocaine on her lunch break and brought it in to the postal facility. If it bleeds, it leads, as I learned in broadcasting school. The sensationalism of the few bad cases on the front page is just another permutation of the question we ask in our [UnCivil Servant](#) training classes: What's more scary – a shark or a cow? (Hint: the cow should scare you more.)

**[Editor's note:** Would you like bring [UnCivil Servant](#) training to your supervisors? Contact FELTG Training Director Dan Gephart at [Gephart@FELTG.com](mailto:Gephart@FELTG.com).]

We don't need civil service reform. I'll say it again: *We don't need civil service reform*. In fact, I wrote about this a couple of years back in a three-part series where I detailed that holding people accountable [is not as difficult](#) as you might think, doesn't [take as much time](#) as you might think, and [doesn't require as much evidence](#) as you might think. And I stand by it today.

At FELTG, we have been teaching on accountability for more than 20 years. And in too many classes, we come across agencies where the supervisors, L/ER Specialists, or attorneys admit (or won't admit the truth) that they are risk-averse and don't like taking disciplinary or performance-based actions because they don't want to lose at litigation. So too often, they look the other way when employees have behavioral or performance issues.

For example, look at these statistics from a 2019 research brief the Merit Systems Protection Board:

**Ask FELTG**

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

[ASK FELTG](#)

**Top Three Reasons Supervisors Don't Fire More Bad Performers**

1. Agency's culture is to not remove: 83 percent
2. Lack of upper management support: 78 percent
3. Lack of quality HR support: 75 percent

*Remedying Unacceptable Performance in the Federal Workplace* (MSPB, June 2019).

I don't need to tell you that these are not good numbers. This all adds to the problem of perception. When bad employees are not held accountable, the good employees see that nothing happens, those bad employees get the same pay and benefits as your hardest workers, and it negatively impacts morale. Over the years, we have seen an

increase in positive morale when supervisors hold employees accountable, and we encourage you to do the same.

In our classes, we show you the hard evidence that if you follow the law, the chances of your disciplinary or performance action being upheld are really, *really* good. Don't let the shark scare you. Most people get through life without getting eaten by a shark.

Show America that we don't need civil service reform. Show your good employees that their hard work means a lot to you and to your agency. Use the accountability system the way it's intended – to remove employees, when you have cause. We promise, it's possible. We help agencies do it every day. [Hopkins@FELTG.com](mailto:Hopkins@FELTG.com)

### **FELTG TOWN HALL: HANDLING THREATS OF VIOLENCE ON THE FEDERAL WORKFORCE**

It's not hyperbole to suggest that a violent threat (whether by a gun, knife, vehicle, bomb, or mob) in or near your workplace would be the most demanding and traumatic situation you've ever faced. Unfortunately, the government is not immune from this violence, as events earlier this year at the Capitol illustrate.

Join FELTG for this special two-hour event on June 28 from 1-3 pm ET, where you will learn how to:

- Efficiently and effectively address threats of violence made by an employee, customer, known entity, or stranger with anti-government motivations.
- Understand the role of Federal law enforcement in managing a crisis.
- Implement best practices for workplace safety.

This is a rare opportunity to discuss this difficult topic as it applies specifically to the Federal workplace. Click [here](#) to register and to learn more about our panel.

### **EEOC's Guidance for Vaccines and Returning to Work**

**By Meghan Droste**



Happy almost-summer and Happy Pride Month FELTG readers! What a difference a year makes. This time last year, we were just a few months into the pandemic, with a return to "normal" not even close to being on the horizon for

many of us. Now we're discussing summer plans and even starting to get out and be in the same space as people we've only seen on a screen for the past 15 months. We have the wide availability of vaccines to thank for this return to a new normal. And with 53 percent of the 18-plus population in the U.S. fully vaccinated, many people are starting to look at a return to the office in the coming months.

The upcoming back-to-the-office season comes with many questions about what employers can and cannot do with respect to COVID vaccination requirements and issues surrounding them. Fortunately, the EEOC recently updated its [COVID-19 guidance](#) to address these issues.

The most commonly asked question seems to be whether an employer may require employees to be fully vaccinated before returning to the workplace? The EEOC says yes. "The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19."

For now, however, it looks like that won't be the case for most Federal employees. On June 9, the Biden administration released new guidance stating that "[a]t present, COVID-19 vaccination should generally not be a pre-condition for employees or contractors ... to work in-person."

Agencies should continue to monitor this guidance, as it could change over time.

If agencies do require vaccinations for some or, in the future, all employees, these requirements are subject to the reasonable accommodation requirements of the Rehabilitation Act and Title VII. As the Commission states in its most recent information, employers must provide accommodations for employees who are not vaccinated because of a disabling condition or a sincerely held religious belief, unless doing so would pose an undue hardship. **[Editor's note: Get the latest guidance and best practices. Register now for [Vexing Vaccine Requirements: Responding to Requests for Exemptions](#), a 75-minute webinar to be held on July 12.]**

As you know from the recent discussions of accommodations in my [Tips From the Other Side](#) columns, the appropriate undue hardship analysis depends on whether the requested accommodation is connected to a disability or to a religious belief or practice. Accommodations might include requiring unvaccinated employees to wear masks in the workplace and remain at a social distance from other employees. Agencies do not have to undergo the undue hardship analysis for employees who choose not to get vaccinated for reasons unrelated to disability or religion.

As we've all seen in the past year, things can change quickly when it comes to the pandemic and related advice. Be sure to continue to monitor the EEOC's website for their updated guidance on how to handle return to work issues in the coming months. And in the meantime, enjoy your (hopefully) vaccinated summer! [Droste@FELTG.com](mailto:Droste@FELTG.com)

### **The Post-Pandemic Federal Workplace: Managing Accountability and EEO Challenges**

Join us for one or all five afternoons of this timely and important FELTG training event July 26-30. The training covers EEO and COVID, leave challenges, telework, accountability and more. Read more about the event and register [here](#).

## **Position Descriptions and Performance Plans – Part II** By Barbara Haga



[Last month](#), we began a discussion of the relationship between position descriptions and performance plans. We talked about the need for a solid foundation and looked

at the various types of things position descriptions establish for positions, from physical requirements and medical standards to the necessity of holding a certain license or certificate. In this column, we are going to look at where performance plans and position descriptions should intersect.

### **General Schedule Positions**

Nonsupervisory GS positions classified under the Factor Evaluation System (FES) have basically two parts – the description of the major duties and responsibilities, and the nine FES factors that are common to white collar positions. According to the [Classifier's Handbook](#), the factors are:

#### Factor 1 - Knowledge Required by Position

- Kind or nature of knowledge and skills needed.
- How the knowledge and skills are used in doing the work.

#### Factor 2 - Supervisory Controls

- How the work is assigned.
- Employee's responsibility for carrying out the work.
- How the work is reviewed.

#### Factor 3 - Guidelines

- Nature of guidelines for performing the work.
- Judgment needed to apply the guidelines or develop new guides.

#### Factor 4 - Complexity

- Nature of the assignment.



- Difficulty in identifying what needs to be done.
- Difficulty and originality involved in performing the work.

Factor 5 - Scope and Effect

- Purpose of the work.
- Impact of the work product or service.

Factor 6 - Personal Contacts

- People and conditions/setting under which contacts are made.

Factor 7 - Purpose of Contacts

- Reasons for contacts in Factor 6.

Factor 8 - Physical Demands

- Nature, frequency, and intensity of physical activity.

Factor 9 - Work Environment

- Risks and discomforts caused by physical surroundings and the safety precautions necessary to avoid accidents or discomfort.

**Blue Collar Job Grading**

Blue collar or wage jobs are graded using a similar breakdown. These factors are outlined in the [Introduction to the Federal Wage System Job Grading System](#). The four factors are Skill and Knowledge, Responsibility, Physical Effort, and Working Conditions. While fewer in number, they cover most of the same things that the FES factors cover.

Which factors are particularly important for performance accountability? Let's begin with the first two.

Factor 1 – Knowledge is important, but the performance standards need to talk about how that knowledge is applied. I often see performance plans that just repeat the required knowledge instead of a proper demonstration of what the knowledge would look like. Examples that illustrate this issue for a GS-14 position follow:

**Original:** Demonstrates understanding of the agency's mission and priority initiatives and develops and executes strategies to engage constituents.

**Modified:** Demonstrates an expert understanding of the agency's mission and priority initiatives and consistently develops and executes well thought-out strategies to proactively engage constituents.

Factor 2 – Supervisory Controls describe the level at which the work is performed, or in other words, how much supervision should be needed. I often discover problems in this regard because the description in the standard clearly requires more than what should be needed for the grade of the position. Sometimes, this is just a case of writing too low. Sometimes, however, this reflects that there is a performance problem.

Let's go back to the classification standard. Supervisory controls for a job classified at GS-13 (Factor 2-4) should be something like this:

- The supervisor sets the overall objectives and resources available. The employee and supervisor, in consultation, develop deadlines, projects, and work to be done.
- The employee, having developed expertise in the line of work, is responsible for planning and carrying out the assignment, resolving most of the conflicts that arise, coordinating the work with others as necessary, and interpreting policy on own initiative in terms of established objectives. In some assignments, the employee also determines the approach to be taken and the methodology to be used. The employee keeps the supervisor informed of progress and potentially controversial matters.
- Completed work is reviewed only from an overall standpoint in terms of feasibility, compatibility with other

work, or effectiveness in meeting requirements or expected results.

Performance standards should align with those levels of control. Here are two examples from a GS-13 position where the expectations didn't match up very well:

Original a: Responds to general questions, requests for information and inquiries within one business day. Elevates more complex questions to supervisor or other individual responsible within one business day.

What was the problem here?

First, the supervisor didn't have a way to track whether the inquiries were answered in one business day or not. I suggested the supervisor instead set a written standard of "timely" but in discussion with the employee communicate a general policy that inquiries typically should be responded to in one business day.

I would not recommend trying to create a system to track every single interaction. This supervisor's situation wasn't unique. I see this type of measure in performance plans at many agencies but when pressed the supervisors admit that can't actually tell whether the work is done in one day or five.

The second sentence is also a problem. This is a GS-13. The individual shouldn't be able to get away with kicking everything that was more complex upstairs as the standard suggests. The employee should do the necessary leg work and provide recommendations if they are performing at grade.

Modified a: Responds to general questions, requests for information and inquiries in a timely manner. Provides clear, accurate and up to date information. Identifies situations requiring higher level intervention in a timely manner and provides complete background

information and recommendations as appropriate.

Original b: Prepares correspondence, memoranda, briefing papers, etc., in advance of due dates, clear, accurate, thorough, appropriately written and formatted.

The measures regarding document preparation were fine. The issue related to submitting the documents ahead of deadline caught my eye. I asked about this measure. The supervisor wanted the documents early so there was time to revise them. Apparently, the written work was bad enough that this extra review was routinely needed.

The problem is the standard is written below what Fully Successful should be. Here's what the rewritten standard looked like:

Modified b: Prepares correspondence, memoranda, briefing papers, etc. by due date. Identifies any issues with deadlines with supervisor sufficiently in advance for alternatives to be effective. Documents are clear, accurate, thorough, appropriately written and formatted. [Haga@FELTG.com](mailto:Haga@FELTG.com)

**Deadline July 19: Is Your Return-to-Work Plan Ready for the President?**

A successful return to the physical workplace is going to require more than safety measures, as there are numerous HR-, EEO-, and legal-related challenges that will need to be addressed in your plan.

Time is winding down. Let FELTG help.

On June 30, from 1-2:15 pm ET, FELTG President Deborah Hopkins and Instructor Ann Boehm will provide guidance on return-to-work challenges involving leave, EEO and vaccinations, workplace flexibilities, and more. And they will answer your questions. [Register now.](#)

## ***The Good News: You Can Be an Effective Leader! (Part 1)***

**By Ann Boehm**



This article was inspired by a newsletter subscriber who read my [article](#) last month. I explained that during my very first Federal sector labor relations job, the workforce was evenly divided on who wanted to

be represented by the union and who did not. I further explained that the division broke down based upon the leadership skills of the employees' supervisors.

The reader focused on my conclusion that "[t]he 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." And she asked this question: "Do you think that effective leader supervisors are the key pro-employee element?"

The answer is an overwhelming "yes." The tricky part is trying to make sure that Federal supervisors are effective leaders. So my goal for this and next month's article is to expound on the effective leadership aspect of Federal employee and labor relations.

Pretty much anybody who has ever had a boss has had a lousy one. I had more than a few really lousy ones. The problem with those bad bosses is they rarely know they are bad. They are the ones at leadership training classes who think they are doing everything right already.

My quest is to ensure that supervisors are aware of what makes a good leader. I also want to try and make supervisors do an accurate assessment of themselves and their leadership styles.

I'm highlighting some effective leadership and organizational goals that date from my

husband's Army unit way back in 1991. It just so happens one of his colleagues from 1991 recently stumbled across a piece of paper that highlighted their Battalion's Command Focus, and he sent it to us. The Lieutenant Colonel who drafted the document retired as a Lieutenant General. He was a great leader. And what he wrote then is useful to anyone in leadership.

Here are the highlights:

**Focus on the fundamentals. Believe in the basics. Don't make it too hard.**

Sounds easy enough, right? But how often do supervisors make things too hard? They add busy work. They micromanage. They often lose the forest by looking at individual trees and forget the fundamental organizational mission. Bottom line: Keep things simple.

**Leaders live the standards. Establish, explain, enforce. Consistency in discipline and [employee] care. Mold and forge a team. Invest in leader training.**

Let's start with that first one. "Leaders live the standards." If you expect your employees to work hard, you need to work hard. If you expect employees to go the extra mile, you need to go the extra mile.

Then there's "Establish, explain, enforce." "Establish" what you need from your employees to support the mission of your office and agency. But don't expect employees to be mind readers. "Explain" what you need them to do to support that office mission. And "enforce" that by holding employees accountable for performance.

What about "consistency in discipline and [employee] care"? Does that mean you have to treat every employee the same? That's not how I read it. I think it means you have to discipline employees who engage in misconduct. You can't ignore it. And you have to take care of your employees. It's not really about treating everyone exactly the

same in discipline and performance matters. It's about consistently holding everyone to the same high standards to ensure effective service on behalf of the American public.

If you focus on those first three things, then it should be easy to "mold and forge a team." As we regularly teach here at FELTG, supervising is an interactive process. You have to communicate with your employees. Inspire them to want to fulfill the requirements of the job. Make it easy for people to come to work every day. Help them enjoy their jobs. So often that happens when employees feel part of a team. It's called "employee engagement."

Key to all of this is "invest in leader training." FELTG offers [leadership classes](#). Many agencies have their own leadership training programs. Often, leader training can be on-the-job training. But as I stated earlier, the key to leader training is for supervisors to be honest in their assessments of their own leadership skills. It's also important for leaders up the chain of command to do honest assessments of the leaders below them. They need to pay attention to union activity; EEO complaints; grievances; frequent turnover. There are plenty of very bad supervisors who are very good at convincing those above them that they are the best. Everyone in leadership needs to honestly assess the work environment. Anonymous 360 evaluations are essential to this process.

### **Do the right thing for the right reason.**

The key to this concept is the last part – "the right reason." It is possible to do the right thing but for the wrong reason. One example of that would be a supervisor ensuring employees are mission focused so that the supervisor can get his/her/their next promotion, not because it is the right thing to do. So how can supervisors do the right thing for the right reason? The best way is to focus on the four characteristics of great leaders: integrity, accountability, humility, and empathy. If a leader has an employee

discipline problem, they should have the *integrity* to not sweep it under the rug simply because it may make them uncomfortable to confront the employee. They should have the *accountability* to hold not only their employees but their supervisors responsible for executing the standard. They should have the *humility* to always seek self-improvement through leadership training and 360 degree evaluations. Finally, they should have the *empathy* to understand what is going on in their employees' lives. This builds a bond between supervisor and employee and dramatically increases "employee engagement."

So there you have some outstanding guidance on leadership from a proven leader.

I want to leave you with one of my favorite tidbits on leadership from the professional sports world. I've used this before in articles and in training, but I love it, so I'm using it again. I found this in a *Washington Post* article on Davey Martinez, now the longest-tenured manager for the Washington Nationals. "Things change, but Dave Martinez remains the even-keeled beating heart of the Nats," by Chelsea James, *Washington Post* (October 24, 2019). The article appeared right before the Nationals started their successful World Series run. Here's what the article said about Martinez: "He doesn't berate players. He doesn't play mind games. He lets veterans lead how they see fit. He stays positive. He smiles. He cares."

Works for me. It's completely consistent with the guidance above.

Supervisors, make it your goal to ensure you are an effective leader. You will reduce your employee and labor relations problems. Stay tuned for next month's article where I pose some questions to see if you are the great leader you think you are. [Boehm@FELTG.com](mailto:Boehm@FELTG.com)

*Scott Boehm contributed to this article.*



## ***Return of the Inspector General*** **By Michael Rhoads**



At the end of the previous administration “[at least a dozen of the 38 presidentially appointed inspectors general](#)” positions were left vacant. Now that the transition dust has settled and a new Presidential administration has taken hold, members of Congress have started to re-examine the role of the Office of Inspector General.

A couple of bills have proposed changes to *The Inspector General Act of 1978*.

### **Legislative Support from Congress**

[Nextgov](#) reported that “new legislation in Congress to support IG subpoenas [The Inspector General Testimonial Subpoena Authority Act](#), introduced by Sens. Maggie Hassan, D-N.H., and Chuck Grassley, R-Iowa, would empower IGs to subpoena former federal officials, as well as contractors and grantees, for in-person testimony.”

The current law only allows IGs to subpoena current Federal employees, while the new law would allow IGs to pursue those who leave the Federal service in US District Court.

Sen. Grassley said: “This bill empowers inspectors general to compel testimony from former employees so bad actors in government can’t simply run from accountability by exiting government.”

Another bill recently proposed by Rep. Carolyn Maloney, D-N.Y., Chairwoman of the House Oversight and Reform Committee, Majority Leader Steny Hoyer, D-Md., and other Democratic House members is the [IG Independence and Empowerment Act](#). As reported in [Government Executive](#), the bill would amend the 1978 Inspector General Act and do the following:

- Only allow IGs to be removed for cause.
- Require a president to notify Congress before an IG is put on non-duty status.
- Require only current IGs or senior IG staff to serve as acting IGs.
- Add information the Council of Inspectors General on Integrity and Efficiency must include in its reports to Congress and make more of its information available to Congress.
- Give IGs the authority to subpoena witnesses who aren’t current government employees (such as those who previously served in government).
- Allow the Justice Department IG to investigate misconduct by the department’s attorneys instead of Justice’s Office of Professional Responsibility.
- Expand whistleblower training for employees in IG offices and IGs themselves.
- Require notifications to Congress and CIGIE about an IG’s ongoing investigations when an IG is put on non-duty status.
- Give CIGIE a single appropriation.
- Require IGs to alert Congress if agencies deny their access to information requested.

Amendments were introduced which sought to modify the provision on subpoena authority, and the provisions regarding presidents removing IGs, limitations on who can serve as acting IGs, and subpoena authority for IGs. These amendments were ultimately voted down. Stay tuned to see if these reforms make their way through the legislative process.

### **New Tools for IGs Needed**

In addition to legislative protections, Inspectors General need up-to-date tools to keep up with the demands of modern data analysis. IGs may still have to comb through

boxes of subpoenaed papers, but the data requested is often complex and too voluminous to go through each document individually, whether in physical or digital form. A modern workforce requires innovative, digital tools for the OIG to do its job efficiently and effectively.

In a conversation on Federal News Network, [Steven Burke](#), the chairman of the Investigation subcommittee of the Technology committee of the [Council of Inspectors General on Integrity and Efficiency \(CIGIE\)](#), said, “one of the ways to overcome those challenges is with good business relationships among government customers and external data owners.

“The Digital Accountability and Transparency Act of 2014 and more transparency of government information on websites such as [IGNET.gov](#), which is hosted by CIGIE, [Oversight.gov](#) and the White House; to government transparency of COVID-19 pandemic relief spending are all good opportunities to see where information is going.”

Momentum has shifted for the Inspector General community. Their work keeps our government from riding off the rails and keeps the ship of state upright and moving in the right direction. An OIG’s mission is fundamentally bipartisan and should not be influenced by shifting political winds. They should be given the necessary tools to ensure the work of the people’s government is not misused or mistreated.

The job of IGs and their staff is often misunderstood. To better understand the relationship between the Office of Inspector General and its agency, join Scott Boehm on June 24 from 1 - 2:00 pm ET for [Not a One-Way Street: How OIGs and Agencies Can Successfully Work Together](#). Find out how your Office of Inspector General is working to make your agency a better place.

Stay safe, and remember, we’re all in this together. [Rhoads@FELTG.com](mailto:Rhoads@FELTG.com)

### ***Tips From the Other Side: Retaliation Is a Very Real Issue*** **Meghan Droste**

Have you ever secretly wanted to get revenge for something? Hoped that the coffee shop messes up the order of the person who cut in front of you? Blamed something on your sibling — and getting them in trouble — as a way to get back at them for taking something of yours? Decided not to go to a friend’s party because they didn’t go to yours?

I imagine that you all can think of at least one example of when you’ve wanted to get even with someone for some slight, real or perceived. It might not be the best look, but it’s a completely human response.

Now let’s change the question a little bit: Have you ever wanted to retaliate against an employee or coworker? I assume that most people will say no to that question. You’re probably thinking to yourself that you would never do that, you know it’s against the law and you’re just not the kind of person who would do that. While I do hope that all you thinking that are correct, and that you will never engage in retaliation, research shows that the same perfectly human desire for revenge can pop up once someone is accused of having engaged in discrimination or harassment. The person named in the complaint feels wronged and, unfortunately, may act on that feeling.

For the next few months, we’ll be taking a look at relation claims in the Tips From the Other Side. My first tip is — don’t. Don’t engage in retaliation. I know, that’s obvious and not much of a tip. But unfortunately it’s something that needs to be said. Retaliation has been the most frequently alleged basis of discrimination in the Federal sector for more than a decade. In the most recently available EEOC Annual Report on the Federal Workforce, retaliation was alleged in 51 percent of the 15,154 formal complaints filed in FY 2016. No matter how much we all

want to believe that we would never engage in retaliation, it is clearly a very real issue.

My next tip is to make sure your agency is providing sufficient training and information to managers. As the EEOC has noted, it is “important for federal agencies to help their managers understand the behaviors associated with retaliation by incorporating this information into organizational training ... Often, managers are not prepared for the inevitable conflicts associated with managing human relations within the work setting.” See *Retaliation – Making it Personal*, available [here](#). Agencies should also provide information managers at the outset of the complaint process that acknowledges “the potential emotional response involved with being accused of a discriminatory action, as well as the problematic implications of seeking to avenge any perceived offense.” See *id.* This information should help managers take a step back and think before taking any retaliatory actions. [Droste@FELTG.com](mailto:Droste@FELTG.com)

**[Editor’s Note:** Want more guidance? Register for the 60-minute webinar [EEO Reprisal: Handle It, Don’t Fear It](#), part of our annual Supervisory Webinar Series. It takes place on August 24, from 1-2 pm ET]

***If You Thought SES Discipline Was Unique, Wait Until You Read About SES Performance Procedures***  
By Deborah Hopkins

[Last month](#), we looked at some of the unique aspects to disciplining a member of the Senior Executive Service (SES). This month, we will cover your agency’s options in the rare event a non-probationary member of the career SES has a performance issue.

Unlike GS employees who can be removed for unacceptable performance entirely unrelated to an annual performance rating, a performance-based removal for an SES member must be based on that employee’s final rating(s) – typically the rating given as part of the annual performance appraisal.

If an SES member is performing unacceptably, however, agencies do not have to wait until the end of the appraisal year. There is flexibility to end an SES member’s appraisal period at any time (after the minimum appraisal period, which is 90 days in most agencies) if there is an adequate basis to prepare a final rating. [According to OPM](#), this rating may “serve as the basis, or part of the basis, for a performance-based action.”

However, the word removal in this context does not mean removal from Federal service (also known as firing); it is removal from the SES, and in cases of unacceptable performance, the SES member has a guaranteed placement right to a non-SES career civil service position. This right to placement does not exist [if the SES member is removed for misconduct](#).

If an SES member is performing unacceptably, the process generally follows these steps:

1 - The agency issues final rating of unsatisfactory or its equivalent (Level 1 in most agencies), at annual rating time or sooner, if the agency has an adequate basis to rate the employee, as detailed above.

2 - The agency notifies the SES member, in writing, of the impending “removal” from the SES, at least 30 days in advance of the removal date. The notice must contain:

- The reason(s) for the action.
- The effective date of the action.
- The employee’s placement rights and information on the position to which the employee will be moved. The placement may be:
  - a. A reassignment or transfer to another position within the SES, or
  - b. Removal from the SES and placement into a GS-15 or equivalent position, with SES saved pay.

According to OPM, SES saved pay is set at the highest of three alternative rates –

- a. Rate of pay for the position in which the employee is placed;
  - b. Rate of pay for the position from which the employee was appointed to the SES; or
  - c. Rate of pay earned immediately before removal from the SES
- Notice of the right to request an informal hearing from the MSPB at least 15 days before the removal is effective (although such an opinion is advisory only and is not binding on the agency). If applicable, the notice must also include the employee's eligibility for immediate retirement under 5 U.S.C. 8336(h) or 8414(a).

3 - The SES member is placed into the new position on the effective date. Those SES members who held a career or career conditional appointment immediately before entering the SES are entitled to an appointment of equivalent tenure. Those who did not hold such an appointment before SES (for example, they were hired from the private sector) may be appointed using Schedule B authority under 5 CFR 213.3202(m).

There is no traditional MSPB appeal right for a performance-based "removal" from the SES. If the SES member is placed into a GS-15 position and then performs unacceptably, chapter 43 performance procedures would apply.

But wait! We're not done yet.

Here are a few other odds and ends:

*Marginal performance won't cut it.* The SES member receives two final ratings of unsatisfactory within 5 consecutive years, or two final ratings of less than fully successful (a Level 2 rating) within 3 consecutive years, that employee must be removed from the SES and placed in a GS position – they may

not be reassigned or transferred to another SES position.

*Moratoriums exist.* A career SES member may not be reassigned or removed from the SES within 120 days after appointment of a new agency head or of a new noncareer who is the initial rater for the career appointee, unless the reassignment or removal is based upon a final rating of unsatisfactory completed before the moratorium began. This is to protect the SES members from political motivations.

*Not demotions, but pay decreases.* If an SES member receives a less than fully successful rating or otherwise fails to meet requirements of a critical element and remains in the SES, the agency may reduce the employee's pay by up to 10 percent, subject to the 12-month restriction on pay adjustments. 5 CFR 534.404(j). [Hopkins@FELTG.com](mailto:Hopkins@FELTG.com)

### ***Listen and Learn: How to Be an LGBTQ+ Ally in the Workplace*** By Dan Gephart



On his first day in office, President Biden made diversity and equity a key initiative, and he made it clear that he expects the Federal workplace to lead the way. So it's no surprise then that the first week of the Pride Month

this year was marked by tweets, declarations and announcements of support from leaders at more than a dozen agencies, including the FBI, and the Departments of Transportation, Housing and Urban Development, Veterans Affairs, and more.

That is a terrific start. This kind of leadership is critical. But the real work will be done onsite, in each individual workspace, team, and office.

Everyone deserves to feel valued at work, and to have the same opportunities as every other employee to further their careers. And,



it should go without saying, everyone should feel safe at work. You may think this responsibility is above your pay grade, or that you have little influence on such matters. You'd be wrong. You can make a difference in creating an equitable and inclusive environment for LGBTQ+ Federal employees simply by being an ally.

How can you be an ally? Some think it means participating in marches and flying flags. But there's so much more to it, especially in the workplace. Use this Pride Month to assess what you can do better to be an ally. We suggest your start by *listening* and *learning*.

### Listen

This sounds simple, right? Yet, it's an immensely challenging skill that has few masters. Too often, when others are sharing their experiences, we are rummaging through the backrooms of our brains to find suitable replies instead of comprehending what the person is saying. It's estimated that 8 in 10 Americans know someone who identifies as lesbian, gay, or bisexual. But having a friend, sibling, or acquaintance in the LGBTQ+ community doesn't make you an expert. Don't assume you know what your colleague thinks, wants or needs.

What if you have questions? Before burdening your coworker with the responsibility of being your source for all things LGBTQ+, ask if they're comfortable answering the question.

Your colleague may tell you his/her/their preferred pronoun. Use their preferred pronoun when addressing them directly or indirectly. This will take some adjustment on your part, especially if the individual previously went by a different pronoun. You might sometimes inadvertently use the wrong pronoun. Accidents happen. But it's important to correct yourself before you move on.

That said, be on the lookout for individuals who deliberately misgender employees, or share an offensive joke, a slur, or

misinformation. This would be the time to speak up – and where your role as an ally can make the most impact. Immediately correct the person spreading wrong or hurtful information. Inform the offending person in private why what they said is hurtful. If it continues, report it, no matter how small the problem may seem. Microaggressions and microinsults could lead to legitimate claims of discrimination or harassment. Whether they rise to that level or not, they create an unhealthy environment.

### Learn

The other important thing an LGBTQ ally can do is learn more. And, fortunately, there is no shortage of websites, documentaries and books. If your agency puts on any workshops or seminars, sign up. Take part in events, not just during Pride Month, but all year long.

Here are just a some reading lists and resources (hat tips to Meghan Droste and a fellow Gephart) you may find helpful in your quest to become an ally:

- [The Stonewall Alliance Center Recommended Reading](#)
- [Lambda Literary Award Winners](#)
- [Transgender Reading List for Adults](#)
- [Transwhat?](#)

And, as you probably expect me to say if you're a regular reader of my articles, FELTG has you covered here, too. Next week – June 23 to be exact – FELTG Instructor Meghan Droste will present a two-hour virtual training event [Honoring Diversity: Ensuring Equity and Inclusion for LGBTQ Individuals](#). On September 1, Meghan will present another two-hour virtual training [Honoring Diversity: Eliminating Microaggressions and Bias in the Federal Workplace](#). Both training events will run from 1-3 pm ET. We can also bring these courses to your agency. Contact me if you'd like to find out more about this option.

There is no secret to being an ally. Listen and learn. Stand with your colleagues in the face of discrimination and bias. And remember it's not about you. [Gephart@FELTG.com](mailto:Gephart@FELTG.com)