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

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The Deadline is Approaching: Are You Ready?

In just days, most Federal employees will face a deadline for providing their agencies proof of COVID-19 vaccination. If we had to choose a theme for the past 19+ months, the word "unprecedented" would be high on the list. In addition to (still) facing pandemic-related challenges in fulfilling mission, while managing a larger-than-usual mobile workforce, agencies are inundated with requests for exemptions, questions about vaccine enforcement, and more.

On Wednesday, November 3, join instructor Katie Atkinson and me for a half-day virtual event where we tackle complicated scenarios and answer all your questions about the disciplinary, EEO, reasonable accommodation (religion and disability) and LR implications from Executive Order 14043, along with the most updated guidance from The White House, OPM, the EEOC, and more. Registration for The Exemption Proves the Rule: Reasonable Accommodation, Discipline, and the Vaccine Mandate is open, and group discounts are available.

This month, we tackle last chance agreements for those who refuse vaccination, as well as fixing the EEO process, setting expectations and much more.

Take care,

Deborah J. Hopkins, FELTG President

UPCOMING FELTG VIRTUAL TRAINING

Nondiscriminatory Hiring in the Federal Workplace: Advancing Diversity, Equity, Inclusion and Accessibility
October 26

The Exemption Proves the Rule: Reasonable Accommodation, Discipline, and the Vaccine Mandate
November 3

Employee Relations Week
November 15-19

Successful Hiring: Effective Techniques for Interviewing and Reference Checking
December 7

Managing Employee Mental Health Challenges During and After the COVID-19 Pandemic
December 9

UnCivil Servant: Holding Employees Accountable for Performance and Conduct
February 9-10

Advanced Employee Relations
February 15-17

*For the full list of virtual training events, including EEOC Law Week, Investigations Week and more, visit the **FELTG Virtual Training Institute**. If you'd like to bring any of these classes to your agency – onsite or virtually – email info@FELTG.com.*

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 Federal EEO Process is Broken: Can We Help Fix It?
By Ann Boehm

I started working on Federal EEO cases in 1993. From the first case I handled, I thought the process was very odd and inefficient. You probably are aware of the process, but in case you aren't, here it is:

> Informal complaint with counseling. Formal complaint. Investigation. Report of investigation. Request for a hearing with an Equal Employment Opportunity Commission (EEOC) Administrative Judge. Discovery. Summary judgment motion. Perhaps a hearing. A Decision.

But wait. There's more.

> A Final Agency Decision. Perhaps an appeal to the Office of Federal Operations. And even Reconsideration of that decision. What the EEOC says is final. No appeal to a court as an option (which is not the case for Federal Labor Relations Authority and Merit Systems Protection Board cases – those can be appealed to U.S. Courts of Appeals).

Who thought this up?

And throughout the process, the complainant can amend and add to the complaint. Plus, they will forevermore claim retaliation for anything that happens in the workplace after they file the first complaint. This can't be the best way to handle discrimination claims. But it's been the same for years and years.

A recent article in *Government Executive* gave me hope. Rep. Carolyn Maloney (D-NY) asked the Government Accountability Office to look at reforming the Federal EEO process. Finally, there's hope. Or is there?

According to the article, Maloney thinks the process is tilted against the complaining employees. She is correct that the process is "convoluted, slow, costly," but I'm not sure she's correct about "unjust."

She's correct that discrimination is still very prevalent in the United States. She is not correct, however, in asserting that the process is pro-agency -- at least not in my experience. I'd characterize it as onerous for agencies *and* complainants.

I teach a lot of EEO courses for FELTG. I hear from many attendees that complainants are filing multiple complaints – sometimes as many as 20 to 30. There's supposed to be a point where that number of complaints is frivolous, but the EEOC almost never makes such findings.

There's other abuse of the system. One attendee recently told me a complainant blatantly revealed she was filing a complaint to ensure she could claim retaliation for anything the agency might do to her in the future. According to the EEOC's 2019 Annual Report, employees claimed retaliation in 7,176 cases. There's either a lot of retaliation going on, or it's just easy to claim.

The concept of hostile work environment seems to be fundamentally misunderstood. I hear repeatedly that employers who assign work to their employees are getting claims of hostile work environment filed against them. Being told to do your job is not a hostile work environment. Doing your job is, well, your obligation. Employees are filing these claims for sure. The EEOC's 2019 report indicates that employees claimed a hostile work environment in 7,470 cases (7,044 non-sexual; 498 sexual).

My friends, these comments from practitioners all over the government and these statistics suggest to me that the process remains broken. There are way too many frivolous complaints tying up the process. The legitimate discrimination

complaints are lost in a system that allows the frivolous complaints to overwhelm that system.

Here are some more fascinating statistics from the EEOC's 2019 Annual Report that I think indicate some problems with the system.

Employees filed 36,348 informal complaints. Out of those, 14,138 filed formal complaints. Agencies spent $46,475,845 investigating those complaints. That's an average of $5,087 per complaint.

In 2019, 4,054 of those complaints were resolved by an Administrative Judge's decision. Are you ready for this? Out of 4,054 complaints decided by an Administrative Judge, a finding of discrimination occurred in 100 cases – 2.47 percent. That means *97.53* percent of cases resulted in a finding of *no discrimination*. Why are there so many cases filed and so few findings of discrimination?

Is it just too easy to pursue an EEO complaint?

According to Maloney, these statistics suggest that the EEO process is not serving those who are victims of discrimination. To me, however, these statistics suggest that something is very wrong with the process.

In the private sector, employees must file a discrimination charge with the EEOC, and the EEOC investigates. If the EEOC determines there is likely discrimination, the EEOC or Department of Justice files a lawsuit against the employer. If the EEOC is not able to determine that there is discrimination, the employee receives a Notice of Right to Sue. The employee then can proceed in court against their employer.

If the EEOC tells you it does not think there's evidence of discrimination, that's a significant indication that you are not a victim of discrimination. In the Federal system, the EEOC does not get involved until there's an Administrative Judge's decision. This comes long after other time-consuming processes – the investigation, the report of investigation, and discovery. AJ decision statistics indicate there are not many cases of illegal discrimination in the Federal sector.

The private sector system forces employees to pursue cases against their employers in court. Going to court costs money. An attorney is likely involved. There's probably a court filing fee. An employee who wants to proceed against her employer in court has some real cost-benefit assessments to make. If she has a legitimate discrimination complaint, she has an incentive to go through the process. If she is trying to abuse the system, it's a bigger financial risk in the private sector than in the Federal sector.

Am I cynical? Yes. But I really feel like the current system does not serve the victims of discrimination. We know it takes an enormous amount of time and energy on the part of agency counsel, EEO specialists, EEO counselors, responding management officials, and yes, the complainants too.

So FELTG nation, how can we help? If GAO goes forward with the requested review of the process, what would you tell them? There's got to be a better way to process Federal EEO cases.

I hope GAO does a thorough review. I hope they talk to EEO counselors, EEO investigators, and agency EEO counsel. I hope people are honest. And I hope that the process can finally be improved. There I go again. Eternal optimist.

If you have any thoughts, send me an email. Boehm@FELTG.com

Service and Therapy Animals

Join Ricky Rowe and FELTG President Deborah Hopkins on November 2 for the 60-minute webinar Barking Up the Wrong Tree? Service and Therapy Animals in the Workspace. Register now.

How is the Federal Personnel Manual Related to Vaccine Refusals? … Or 10 Suggestions for Implementing the Vaccination Executive Order, Part II
By William Wiley

[**Editor's note:** *This is the second of a two-part article. You can find the first part here. In the way only he can do, Bill Wiley reminisced about the old Federal Personnel Manual and offered the first five steps of a Checklist to help you implement the COVID-19 vaccination EO. We pick up where Bill left off last week.*]

6. Assuming continued non-compliance, on November 15, the Vaccine Mandate Coordinator proposes a one-day suspension. Those of you in the FELTG Nation are aware that MSPB case law tells us that progressive discipline is not necessary prior to a removal. In addition, there's good argument a Reprimand in Lieu of Suspension is a better alternative to disciplining continued misconduct. However, given the high visibility that these cases will receive, and the general lack of public understanding of how discipline in the Federal civil service really works, a traditional suspension at this stage is a small step to take to avoid having to argue whether it is necessary (OPM even calls progressive discipline for vaccine refusal the "preferred approach"). You might need to craft exceptions to your existing agency disciplinary/grievance policies to make this work, but that should not be too difficult.

OPM's guidance recognizes that there is a regulatory difference between separating a career Federal employee by "removal" and a probationary employee by "termination". Traditionally, agencies don't engage in progressive discipline with probationers in large part because there is not much of a standard for terminating a probationer other than the generalized non-specific conclusion that the employee is not a good fit in that particular government position. That's why we don't have to provide due process or appeal rights in most terminations of probationary employees.

However, though progressive discipline is almost never used with probationary employees, you might want to consider engaging in it when implementing the vaccination EO. OPM doesn't rule it out and seems to go out of its way to emphasize the importance of it in this situation. Refusing to be vaccinated arguably is a different sort of misconduct from that which usually is the basis for a probationary termination. Maybe the jolt of a suspension will bring the employee in line with the President's mandate.

Frankly, here at FELTG, we wish OPM had taken a clear stand on this aspect of enforcement. Since it has not, and since the arguments are good on both sides, the decision as to whether to suspend a probationary employee who refuses to comply with the mandate comes down to an individual call as to your patience and your resources.

7. The government-wide minimum notice period for a proposed suspension of 14 days or fewer is 24 hours. If your agency policy or collective bargaining agreement provides for a longer response period, you will either need to create an exception to your policy or modify the following as appropriate. Otherwise, the suspension proposal notice can be straightforward:

> *Previously, you have been informed of the requirement that you provide documentation that you have been vaccinated against COVID-19. Upon your failure to comply with this requirement, you were counseled and thereby given an additional five days to provide the necessary documents. As of this date, you have failed to do so. Therefore, this office is proposing that you be suspended for one day in the hope that a suspension*

without pay will impress upon you the importance of complying with the government-wide vaccine mandate. You may defend your inaction by responding to this proposal by the close of business tomorrow. Any response should be addressed to this office.

8. Assuming an inadequate (or no) response, on November 17, the VMC issues a decision:

Previously, this office proposed that you be suspended for one day for failure to document that you have been vaccinated for COVID-19. As you have failed to respond to the proposal in a manner that would cause a different outcome, it is the decision of the Vaccine Mandate Coordinator that you be suspended without pay for one day effective tomorrow. If within five days subsequent to the suspension (by November 22) you provide documentation that you have been vaccinated as required, no further action will be taken. However, if you continue to fail to provide the mandated documentation, this office will propose that you be removed from Federal employment. If you so choose, you may challenge the validity of this suspension decision by filing a grievance with this office as soon as possible.

9. November 23: You got bupkis. Either the employee does not understand the gravity of the misconduct, or the employee is daring you to do something about it. Oh, sure; perhaps the employee has deeply held beliefs that the vaccine will cause the development of a third eye, or the whole "pandemic" is a government hoax. Maybe the employee has done independent research and decided to accept the opinion of someone on the Internet with "secret information" he obtained from the friend of a cousin (who has twice been probed by aliens) instead of the findings of every single reputable scientific body in the known universe. If so, personally my heart breaks. Still, as an agency, you have little choice at this point. You have to initiate the removal of the employee from government service. Here's your proposal notice:

Previously, this office counseled you, then suspended you, for your failure to comply with the order that you provide documentation that established that you have been vaccinated against COVID-19. Therefore, it is with regret that by this notice your removal from service is proposed. In selecting the penalty of removal, in addition to your previous disciplinary record, I have considered the following factor:

The nature and seriousness of the offense and your willful repeated failure to comply with clear notice of the vaccine mandate.

Within the past 45 days, the agency provided you notice of the government-wide mandate for you to obtain full vaccination against the COVID-19 virus, and to provide documented proof of your compliance (attach 1). Should you have been confused about the necessity to comply with the mandate, this office previously counseled you and then suspended you to give you the opportunity to comply with the documentation requirement, or to otherwise defend your inactions (attachments 2 and 3). Yet to this day, you have failed to provide the necessary documentation.

As for the seriousness of the offense, you have failed to comply with a government-wide Presidential order regarding a matter of life-or-death, relative to yourself and to those with whom you come in contact as a Federal employee. The Executive Order highlights the importance of a Federal employee being vaccinated:

"The health and safety of the Federal workforce, and the health and safety of members of the public with whom they interact, are foundational to the efficiency of the civil service. I have

determined that ensuring the health and safety of the Federal workforce and the efficiency of the civil service requires immediate action to protect the Federal workforce and individuals interacting with the Federal workforce. It is essential that Federal employees take all available steps to protect themselves and avoid spreading COVID-19 to their co-workers and members of the public. The CDC has found that the best way to do so is to be vaccinated.

The Safer Federal Workforce Task Force (Task Force), established by Executive Order 13991 of January 20, 2021 (Protecting the Federal Workforce and Requiring Mask-Wearing), has issued important guidance to protect the Federal workforce and individuals interacting with the Federal workforce. Agencies have also taken important actions, including in some cases requiring COVID-19 vaccination for members of their workforce.

Accordingly, building on these actions, and in light of the public health guidance regarding the most effective and necessary defenses against COVID-19, I have determined that to promote the health and safety of the Federal workforce and the efficiency of the civil service, it is necessary to require COVID-19 vaccination for all Federal employees, subject to such exceptions as required by law."

Should you provide the required documentation by the end of the notice period, this proposed removal action will be cancelled and no record of it will be retained in your official personnel folder. Should you provide proof that you have begun the process of becoming fully vaccinated using a two-dose series, but have not yet completed the vaccination cycle, the decision on the proposal will be delayed to allow you an opportunity to complete the requirements of your particular vaccine protocol.

[Your agency's standard rights-notification would go here.]

10. December 23, at the expiration of the statutory 30-day notice period for proposed removals, assuming continued non-compliance, you issue the decision:

Thirty days ago, this office proposed that you be removed due to your failure to provide documentation that you have been fully vaccinated against COVID-19. Finding your continued non-compliance and no mitigating factors warranting a different outcome, it is the decision of the agency that you be removed from Federal employment, effective tomorrow.

[Your agency's standard rights-notification would go here.]

That's it. Nothing fancy, just classic civil service accountability procedures. They work most every time if you know what you're doing. And if you've been to any FELTG training on this topic in the past 20 years, you already know this stuff. To save us all a little time, let me take a guess at a few questions you might have.

Question: FELTG has taught for many years that in a proposed removal, the deciding official should issue a decision soon after the employee's response, usually within just a couple of days. Why are you recommending here to delay the decision to the end of the 30-day notice period? For unexplained reasons, OPM's implementation guidance requires that the employee be retained at the worksite during the proposed removal period: "Employees should not be placed on administrative leave while pursuing an adverse action for refusal to be vaccinated." Obviously, this is dangerous to coworkers and clients of the agency, even when safety protocols are in place for non-vaccinated workers. Since you will have to keep employees in the workplace

during the notice period, it would be unnecessarily dangerous during that period to inform them that the decision has been made to fire them, then continue to allow them to access the workplace. We NEVER want a disgruntled employee to have access to a government worksite any more than necessary (just read the horrific news articles to appreciate what can happen when "disgruntled employees" get angry at their coworkers). Therefore, keep the employee around, but in the dark as to the outcome, until you can immediately implement the removal.

Question: There are 12 Douglas Factors. The proposed removal notice mentions only two or three (Nos. 1, 3, and 9). Why does it not discuss the others? The Board has held that an agency does not need to assess all Douglas Factors, only those relevant to the specific case. As the EO requires removal for failing to get vaccinated, and the employee by this point has failed to get vaccinated, there's really no lesser sanction available once the misconduct is established. As for consideration of a second, more severe, suspension in lieu of removal, there's no case law nor science that establishes that a second longer suspension is more likely to correct behavior than was the previous suspension. Remember, we're trying to correct behavior – to get the employee vaccinated – not trying simply to punish the employee for misbehavior. Plus, time is of the essence.

Question: What about our labor relations obligations to the unions? Absolutely you need to satisfy the statutory and contractual requirements relative to implementing a new agency policy. Exactly what will be involved in meeting those obligations is beyond the scope of this little article. However, it's worth noting the language of the official guidance on implementing the vaccine mandate policy: "[B]argaining over this Government-wide policy will be limited to impact and implementation issues not otherwise addressed in the guidance. Moreover, agencies must implement Government-wide policy by the deadline, so any bargaining that has not been completed by the time implementation must begin will have to be finished post-implementation."

Question: What about a request to be excused from the vaccine mandate to accommodate a disability? Another topic for a great long article, but not in this space. There are so many variables to deal with, it's hard to develop a common strategy other than the usual approach:

- Require that the employee provide evidence of the specific medical condition that prohibits vaccination. Once it's provided,
- Have agency personnel review the employee's medical evidence to see if an inability to be vaccinated is warranted by the proffered evidence. If it is,
- Evaluate the employee's duties and workplace to see if they can be modified so that the employee can perform safely without being vaccinated (be sure to consider steps that might allow the unvaccinated to work such as providing employee isolation, masks, and periodic testing). If not,
- Search the agency for vacant positions at the same grade and lower to which the employee can be accommodated and offered reassignment. If there are none,
- Fire the employee for Medical Inability to Perform.

Question: What about a request to be excused from the vaccine mandate to accommodate a religious belief? Unless I had smoking gun evidence that the employee's claim was a ruse to get out of being vaccinated (e.g., an email with sad little green emojis coupled with an admission that the employee doesn't really have valid religious beliefs), this Old Practitioner would yield to the claim and start looking at accommodations. If you would prefer to fight

out before EEOC whether the employee's religious beliefs are a "sincere and meaningful belief that occupies a place in the life of its possessor parallel to that filled by God," "part of a comprehensive religious belief system" and not simply an "isolated teaching," then bless you. We can always use the case law. Hope this helps. Best of luck out there. Wiley@FELTG.com

So, About that Employee Who Gets Vaccinated AFTER Being Removed
By Deborah Hopkins

In the previous article, Bill Wiley shared the logical process for agencies to use progressive discipline when a Federal employee refuses to be vaccinated and doesn't qualify for a legal exemption.

There are a couple of other scenarios also worth addressing, as it's likely they will occur in at least a few agencies. We'll begin where the employee has received a notice of proposed removal for refusing to be vaccinated.

Scenario A: At the response to a proposed removal, the employee:

1. **Says she was vaccinated after the proposal, or**
2. **Says she will get vaccinated if she's permitted to keep her job.**

OPM and the CHCO Council recently issued enforcement guidance that suggested the discipline should "end" if after the proposal notice the employee provides the agency with appropriate documentation that the employee is now fully vaccinated.

If the employee has only received one dose of a 2-dose vaccine, the guidance suggests the agency should "hold any disciplinary action in abeyance pending receipt of appropriate documentation that the employee has received the second dose within the designated 3- or 4-week interval depending on the vaccine received by the employee, even if this means the employee will not be fully vaccinated until after November 22, 2021."

Under Scenario A.2, though, here's another thought: The DO could offer the employee a Last Chance Agreement and include a requirement that she provide proof of the first vaccine dose within 5 days (any of the FDA-approved or emergency use authorized vaccines), and proof of a second dose (if applicable) within 21 (Pfizer/BioNTech) or 28 (Moderna) days, depending on the vaccine received. According to the guidance, the employee would need to provide documentation of full vaccination status within 5 weeks.

If the employee does not show proof of full vaccination by the end of that time period, the agency could then remove the employee under the LCA. As a bonus, other parameters written in to the LCA could also allow the agency to remove the employee for any misconduct or less than fully successful performance over the next two years.

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

Scenario B: The employee is removed, files an MSPB appeal, and gets vaccinated before his MSPB hearing.

In this scenario, the main question for the agency is whether MSPB is likely to uphold the removal since the employee's condition has changed. Indeed, the nominees for MSPB were asked about this very scenario during their committee hearing on September 22, and demurred on answering this specific question.

There are countless MSPB cases where the Board has upheld discipline for employee insubordination, failure to follow orders, and

related charges. See, e.g., *Phillips v. General Services Administration*, 878 F.2d 370 (Fed. Cir. 1989); *Gallagher v. Department of Labor,* 11 MSPR 612 (1982); *Parbs v. USPS*, 2007 MSPB 302 *Lentine v. Treasury*, 94 MSPR 676 (2003).

And of course, in light of Executive Order 14043, most of us are now familiar with a case where the Federal Circuit upheld an agency's decision to remove two employees who refused an anthrax vaccine mandate. The Federal Circuit agreed the agency had authority to require vaccines because such action was necessary and appropriate to protect the health of the employees. *Mazares, Jr. v. Navy*, 302 F.3d 1382 (Fed. Cir. 2002). The MSPB had also affirmed the removal in that case.

The answer on whether removal will be upheld may seem clear. However, remember that MSPB is allowed to mitigate an agency's penalty if it finds the penalty is outside the bounds of reasonableness. See *Payne v. USPS*, 72 MSPR 646 (1996). Will the incoming MSPB find a removal is too harsh for an employee who initially refused, but eventually got vaccinated? Doubtful, but possible.

One other fun thought: There are a few cases where MSPB has reinstated a removed employee whose situation has changed, but those tend to deal with non-disciplinary medical inability to perform removals. MSPB has such cases, where an employee's medical condition improves and the employee is medically able to work again, as easy to resolve because it would be "manifest absurdity" not to reinstate an employee who was removed for non-disciplinary medical reasons beyond their control. In such cases the appellant must produce evidence of a) full recovery b) prior to the close of the record before the Administrative Judge. See, e.g., *Street v. Army*, 23 MSPR 335 (1984); *Hodges v. DoJ*, 2014 MSPB 54. How this would work, if it would work at all, with a two-step vaccine mandate with a government-wide date certain, nobody knows.

FELTG suggestion: Rather than force the issue to litigation, the agency could settle with the employee and offer a reprimand in lieu of a 14-day suspension, if the employee was valuable to the agency and it would benefit the agency to bring the employee back.

Join FELTG November 3 for the brand new virtual event The Exemption Proves the Rule: Reasonable Accommodation, Discipline, and the Vaccine Mandate where we discuss all these matters, and more. Hopkins@FELTG.com

NEW VIRTUAL TRAINING PROGRAM

REQUESTS FOR EXEMPTIONS TO THE VACCINATION MANDATE

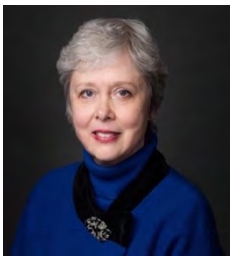
Federal employees have about a month to get vaccinated to comply with Executive Order 14043. The Biden Administration's mandate is direct. Yet a sizable percentage of the population remains unvaccinated and misinformation continues to spread. You should expect more than the usual share of request for vaccination exemptions on religious or medical grounds. How will you handle these requests? How do you plan to discipline employees who refused to get vaccinated?

Let FELTG guide the way. The November 3 half-day training The Exemption Proves the Rule: Reasonable Accommodation, Discipline, and the Vaccine Mandate will answer all of your questions.

Attorneys Katherine Atkinson and Deborah Hopkins have stayed on top of the ever-changing guidance and mandates and continue to provide FELTG customers with up-to-the-minute instruction on navigating issues related to COVID-19.

Click here to get more information on this virtual training event.

Performance Expectations – Getting Performance Plans Right
By Barbara Haga



Last week, I taught two performance classes and have been working on a description of a two-part webinar series that will take place in the spring on the idea of setting expectations for both performance and conduct and using available tools to build in accountability in both aspects of employee management.

Let's talk about performance standards - not so much in terms of case law and regulations, but from a more practical standpoint. When trying to build accountability in performance, the performance plan must measure what is important and do so in a clear, understandable, and reasonable way. Discussing some of my favorite points might be worthwhile.

Measuring results

I am sure most of you have heard this phrase before. We need to measure results. But what does that mean in a practical sense? I believe it means we should be focusing on outcomes – papers written, briefing delivered, meetings participated in, reports prepared, and claims processed – AND what those things meant to the organization.

When thinking about results, let's look at a couple of things in the list. What did that delivered briefing do? Did it help citizens understand how to tap into government services? Did it mean that managers were up to date on recent changes in case law? Did it mean that organizations were on notice of pending IT changes that would protect systems from cyber criminals?

What about processing the claims? Were travelers promptly reimbursed? Were questionable credit card transactions identified in a timely manner and appropriate follow-up action initiated? Were injured workers paid compensation within a reasonable period after their continuation-of-pay?

I've spoken about attending meetings quite a bit in recent training, because I have seen it in a lot of narratives for high grade positions justifying ratings above fully successful. The narrative is responding to a standard that says something about representing the organization in biweekly meetings. The narrative sometimes just repeats that – the employee represented the organization in these meetings. So, are we measuring butts in chairs, or should the measure be about contributing something in those meetings? Perhaps the person delivers briefings in these meetings or leads a discussion on an important initiative in the meeting or steps up to lead a workgroup to report back at the next meeting.

Perhaps the employee prepares written notes from the meeting that are circulated to other members of the unit. It seems to me that if a measure is part of a critical element, there should be something more there than taking up a seat.

Complete work

I see a lot of performance standards that stop too soon. I believe a lot of this comes from guidance about writing measures with numbers in them (and that is just guidance, neither the Federal Circuit nor the MSPB in their decisions interpreting Chapter 43 said you had to have numbers in standards.) Because managers are sometimes uncomfortable with subjective judgments, I see standards that say, "Complete XX of things (reports, documents, transactions, etc.) on time."

Shouldn't those things be complete, accurate, and apply up-to-date guidance? Shouldn't the supervisor be able to hold the employee accountable for effective oral or written communication?

Here's an example of a standard that I believe stopped too soon - *Perform document system integrity checks weekly, monthly, quarterly, annually*.

I'd be willing to bet that was copied word for word from the position description. But the purpose of the position description is to assign the work. The purpose of the performance standard is to set what fully successful performance looks like. Should the integrity check be thorough? Complete? Conducted in accordance with current guidelines? Results communicated to appropriate officials in a timely manner? Those are the measures that need to be in the performance standards.

Standards written at grade

I see performance requirements all too often that are written at a lower level than what they should be for the grade assigned to the job. It could be that management is just not asking for what they could/should require, or it may be that there is a poor performer in the job that the supervisor is allowing to perform below grade. Neither of those are line with this idea of accountability.

If you go to the Classifier's Handbook, you will find descriptions of the various factors and how they fit with grade structure. (I'm reaching WAY back to my classification days, but sometimes it's necessary!) Factor 2-4 is listed as the typical level of supervisory controls one would find in either a professional or administrative GS-13 position (see pp. 14-15). Here's a sample description for level 2-4:

- 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.* (My italics)

When I see GS-13 standards that talk about detailed review of every document (*documents have less than two errors 90 percent of the time*), something is wrong. Standards that indicate that GS-13s escalate what the employee determines to be "complex" matters to higher level officials without any requirement for them to do any background work or make recommendations don't seem to line up very well with what a GS-13 should be doing. Haga@FELTG.com

EMPLOYEE RELATIONS WEEK

Join FELTG Senior Instructor Barbara Haga as she tackles everything ER during this engaging and informative week of training. And we do mean *everything ER*.

After a day of grounding attendees in the basic foundations, Employee Relations Week dives into a number of challenging topics, such as performance plans, standards, hours of work, leave (includes types, accrual, FMLA, leave stacking and more), dispute resolution, drug testing, medical issues, and much more.

Daily sessions run from 9 am – 4 pm ET. Sign up for any or all days of training. Register before Nov. 1 to get the Early Bird Tuition.

5 Suggestions for Hiring the Right Person
By Dan Gephart

Here at FELTG, we often get inquiries from HR professionals and supervisors wondering what they can do about their poor-performing and/or misbehaving employees. By the time someone seeks our guidance, the employee has already created havoc and damaged morale or, at the very least, lowered productivity.

As any regular FELTG customer or reader knows, that's our bailiwick, and we can help you take the steps necessary to rid your agency of the problem.

If you listened to the press and certain politicians, you'd think all these employees were bad people. But that's not the case. Many times, employees struggle with performance issues (and sometimes conduct) because they are poor fits for the job. And that often goes back to the hiring manager.

Look, we all know hiring someone into the Federal workforce can be a long and patience-trying process. And we know that if you're in the market for a new employee, you're likely short-staffed and working hard to pick up the slack. You probably feel like you don't have enough time or energy to focus your full attention on the hiring process.

Who knows, maybe you get lucky and hire a star. But more likely, failure to go all in on the hiring process will probably result in you reaching out to FELTG within a few years to ask us how to handle your "problem employee."

Even more importantly, President Biden has issued Executive Orders that charge you with promoting diversity, especially among traditionally underserved populations. In the most recent Federal Employee Viewpoint Survey, 79 percent of employees agreed that their supervisor was committed to a workforce representative of all segments of society. That's a solid C+. Let's just say that there is a lot of room for improvement.

Here are 5 tips to help you navigate the hiring process successfully:

1 - Prepare. If you're just going through the motions to get to the interview, you are miscalculating greatly. As Barbara Haga will explain in her December 7 virtual training Successful Hiring: Effective Techniques for Interviewing and Reference Checking, "the time invested in preparation pays huge dividends." The pre-interview part of the hiring process includes writing the position description and job announcement and preparing interview questions.

Skipping over any of these parts will come back to haunt you at some point. So closely review the job description to ensure it's up to date, and that all the duties and functions are specified, and the required skills and abilities are included. Make sure the job announcement gives a full and accurate description of the job. Nobody should be surprised about the job they're taking on. Also, the major duties and responsibilities should match the essential functions of the job, which should be measured by critical elements. Doing this now will help you later.

2 - Make sure your selection criteria is job-related. Once you get to the candidates with the minimum qualifications, it's onto the selection criteria. These criteria are often unique to the specific position and will be key to selecting the most-qualified candidate.

Ensure your selection criteria is equally applied to all job candidates and beware of the subjective. It's OK to be subjective. In fact, it's often necessary. But if the criteria is not job-related, you could be on shaky ground. For example, in *Varley v. Attorney General*, EEOC Appeal No. 01972338 (1998), the agency selected a polygraph examiner based on his "people skills." But

these skills were not in the guidelines. Good judgment, self-motivation and – get this folks -- ability to work well *alone* were in the guidelines. People skills should not be a consideration for someone who works alone.

Applying subjectivity to criteria that is not strongly job-related could lead to discriminatory decisions, which leads us to our next tip.

3 - Beware what you ask. You're going to ask a lot of questions before you know if you have the right person. But those questions should only be asked if they are providing information "essential for determining if a person is qualified for the job."

Agencies can get into trouble when requesting information that touches on protected categories. Those categories are race, color, national origin, religion, sex, and reprisal/retaliation, age, genetic information, and disability. Not only should you not ask about these categories directly, be careful that your questions don't indirectly elicit answers that you give information about protected categories. Read the next article by Michael Rhoads for more on this topic. And join Katherine Atkinson on October 26 for a half-day virtual training on Nondiscriminatory Hiring in the Federal Workplace: Advancing Diversity, Equity, Inclusion and Accessibility.

4 - Avoid the first impression trap. Three years ago, I wrote about a brand-new professional sports mascot whose introduction to the public went completely haywire. The initial reaction to Gritty's first press conference was so incredibly negative, it's hard to believe that the Philadelphia Flyers' furball made it to a second day. But he did. And, as I noted in the article, he started to grow on people. I mean that positively, not in a "I have a rash that won't go away" way.

First impressions are formed within milliseconds and are based heavily on our biases. Relying on that "initial gut feeling" will lead to poor hiring decisions as well as a staff that looks and thinks a lot like you.

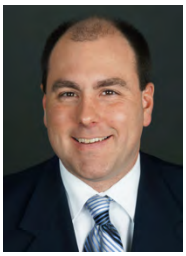
By the way, Gritty has come a long way in the last three years. The one-time laughingstock is now one of the most recognized and popular mascots in all of professional sports. In fact, Business Insider Magazine recently ranked Gritty the top professional mascot out of 110 in American professional sports leagues, a spot ahead of his neighbor the Phillie Phanatic. Sadly, mascots are all us Philly fans have to cheer these days.

5 - Make effective use of the probationary period. During the probationary period, the employee's MSPB appeal rights are limited. Consider those first 12 months, depending on the position, as part of the hiring process. Most employees will be on their best behavior when they start a new job. If, during that probationary period, it becomes clear to you that the employee is not able to do the job, remove the person. It's that simple and it's only fair to you, the employee and the team.

Oh, and one final bonus suggestion. If you do not have DEIA on your mind as you're making these hires, then you've made a big mistake. DEIA – diversity, equity, inclusion, and accessibility – is a major component of President Biden's Executive Orders, which charge agencies with making the Federal workplace look more like America. So, if your applicant pool is looking like it's always looked, then it's time for you to find new places to recruit. As FELTG Instructor Marcus Hill told virtual attendees earlier this year, it's time to "go where the candidates are." Consider social media and online forums. Visit colleges and universities that haven't been a part of your usual search and include technical schools if you haven't already. Have you looked at community programs or non-profit organizations as sources for recruits?

And you can just ignore this advice. Then I'll expect to hear from you in a couple of years. Gephart@FELTG.com

I Wouldn't Ask That if I Were You: Pre-employment Questions to Avoid
By Michael Rhoads



Executive Order 14035 on Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce charges agencies with identifying "strategies to advance diversity, equity, inclusion, and accessibility, and eliminate, where applicable, barriers to equity, in Federal workforce functions, including: recruitment; hiring … and onboarding programs."

Because the Federal government will be going on a hiring spree in the next several months, it might be a good time to consider what you can and cannot say during the hiring process. (Also see Training Director Dan Gephart's article *5 Suggestions for Hiring the Right Person*.)

Pre-employment inquiries are a critical stage where the wrong question, whether on an application, in an interview, or on a reference check, can lead to legal action if the applicant is not selected for the job. When seeking information from an applicant, ask yourself: "Does the information pertain to an essential job function?"

For example, if a person is applying for a warehouse position where most packages weigh up to 30 pounds, it is appropriate to ask an applicant if they can lift 30 pounds on an application form.

In Prohibited Employment Policies/Practices, the EEOC advises:

> *As a general rule, the information obtained and requested through the pre-employment process should be limited to those essential for determining if a person is qualified for the job; whereas, information regarding race, sex, national origin, age, and religion are irrelevant in such determinations.*

The EEOC also has some notable advice when it comes to the gray areas regarding an applicant's race, marital status, or disability.

Race

It is prohibited by law to consider a person's race when applying for a job. At the same time, agencies and employers are asked to keep track of demographic information, including race, that is reported to the EEOC. The EEOC advises to keep this information separate from the applicant's information.

One example of this would be to use a "tear-off" sheet when collecting demographic information, and file it separately.

Marital status, children

Our personal relationships are an intricate part of our private lives, but these relationships are off limits when it comes to pre-employment questions. Typically, these questions have been used to discriminate against women. Yet, an agency is not off the hook if the same question is asked of both men and women. EEOC's short list of topics to avoid related to marital status and children are:

- Whether applicant is pregnant.
- Marital status of applicant or whether applicant plans to marry.
- Number and age of children or future child-bearing plans.
- Child-care arrangements.
- Employment status of spouse.
- Name of spouse.

LOOKING FOR LR TRAINING?

Join FELTG for these upcoming 60-minute webinars:

November 4: Who's In, Who's Out? Understanding Bargaining Unit Exclusions

December 7: FLRA Decisions Under the Biden Administration

Disability

This is one topic where EEOC's guidance is cut and dry. "Employers are explicitly prohibited from making pre-offer inquiries about disability."

There are some pre-offer questions related to reasonable accommodation that are permitted, however. If an applicant has an obvious or voluntarily disclosed disability or need for accommodation, an agency may ask limited questions related to how to accommodate the applicant. A full list of recommendations on these and other pre-employment inquiries can be found on the EEOC's website at EEOC Prohibited Employment Policies/Practices.

Once a conditional offer is extended to an applicant, the rules change slightly.

To get a better understanding of what you need to know throughout the hiring process, join Katherine Atkinson on October 26 from 1:00-4:30 ET for Nondiscriminatory Hiring in the Federal Workplace: Advancing Diversity, Equity, Inclusion and Accessibility.

Stay safe, and remember, we're all in this together. Rhoads@FELTG.com

A Few Takeaways from the 2021 'Issues of Merit'
By FELTG Staff

A few weeks ago, the MSPB issued a report assessing, among other things, telework effectiveness and employee engagement. A few points to consider:

- Telework and employee engagement are closely related: 65 percent of Federal employees who agreed that their supervisor encourages and supports telework were reported to be engaged in their agency's work, compared with only 31 percent of employees who disagreed.
- Unsurprisingly, workplace flexibilities played a significant role in ensuring employees were able to meet work and family responsibilities during the pandemic. The flexibilities included telework, children attending virtual school from home, and liberal use of flexible schedules and leave.
- The use of post-pandemic telework may increase in Federal organizations based on the experience they gained with this workplace flexibility during the pandemic. Our guess at FELTG is that the agencies who permit continued flexibilities will see a higher retention level than those who don't.

Check out the full report here.

WORKPLACE INVESTIGATIONS TRAINING TOMORROW – REGISTER NOW!

Successfully Interviewing Witnesses With Mental and Behavioral Conditions

For many, it's the most difficult and unpredictable part of the workplace investigation – conducting the interview. This is especially the case when the witness has a behavioral or mental health issue, or violent tendencies.

During the 60-minute webinar Workplace Investigations: Successfully Interviewing Witnesses With Mental and Behavioral Health Conditions, Shana Palmieri, LCSW will provide you with a set of tools to handle these challenging interviews. Ms. Palmieri will explain temperament traits and personality disorders, and then provide you with a road map for the interviews. AND she'll provide guidance on how to de-escalate emotionally charged situations.

The webinar will be held October 21 – that's tomorrow. So register now.