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NILG WEBINAR SERIES

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>>: Hello. Everyone. This is Valerie Vickers. I would like to welcome you to today's session, what would you do? Exploring best practices for the employment individuals with disables. This session is being recorded. A copy of the presentation and the link for closed captioning were sent to all attendees. Question will be taken throughout the program. And I would like to take a moment to thank our sponsors for their support in making this webinar series possible. Without them, we really could not have done this.

And, now, it is my pleasure to introduce friend, supporter and trusted adviser to the -- Lynn is director of regulatory affairs for Berkshire associates, worked at EEOC and -- without further adieu, let's get started. Lynn, I will turn it over to you.

>>: Thank you so much val. You want to take moment to take the NILG board for putting on this virtual conference. It is definitely not the same as being in person. I am thinking that Val and I would have spent a number of hours together, if we were in person, at this year's conference. So I miss seeing everyone's face. I am really glad and appreciate the opportunity to talk with

federal contractors today. So I just want to say a huge thank you to the board. This is a big task. You all have to really transitioned so well from in person conference to a virtual conference. A special thank you to Tony Kayland who helped me prepare for this presentation. This presentation was intended to be very interactive. Had we been in person. My original plan was that we were going to go through a series of hypothetical situations and talk through as a group how those situations would be handled and what the best practices were under the ADA. That is a little bit hard to do with so many registered for webinars. Tony helped me come up with a way to make this interactive. I am keeping my fingers crossed that it works today. You know technology and I are not always the best of friends. Before we get started, I wanted to remind you, we are going to try to talk about practical strategies today. Before you imply men those strategies you want to consult with your dedicated legal counsel to make sure they make sense for your organization. In terms of our agenda for today, really, I think the topic couldn't be more timely. You want to take a moment to acknowledge that Sunday, this past Sunday was the 30th anniversary of the Americans with Disabilities Act. A number of the enforcement agencies and other disability rights organizations put out statements talking about really how far we have come in providing opportunities for individuals with disabilities, not just in employment but in public accommodations and elsewhere.

In light of that, I wanted to that take a moment at the beginning of this conversation and just say and recognize, really, the good work that EEOC and OSCCP have done in this area. Both of these agencies have been at the forefront of helping employers understand what the ADA means, what it requires, and why it is important.

In particular, since director lean has joined, he has really been a personal champion of this issue. I wanted to take a moment to acknowledge that his work in this area has really made a difference, and the work over the past several years, particularly as they have started focused

reviews, where they are looking at compliance with the ADA and Section 503. Really changed this conversation. Significantly. You know we are no longer focused does a person have a disability and therefore do I have to do something special for them. We are focusing more on how can we encourage individuals with disabilities to identify that way.

Today we are going to spend allege bit of time talk -- very discrete topics. And the idea of the session today is to share with you how the enforcement agency lose at these issues, give you some examples of how they are enforcing each of these requirements, and then talk about best practices or strategies that you can implement that might help you be successful in this area.

We are going to start by talking a little bit about the impact of the current health crisis and what that looks like under the AD arch then we are going to talk about really four discreet topics, evaluating job qualifications, processing accommodation requests, how to request appropriate medical documentation and how the agencies look at those requests. And how to manage the performance of an individual with a disability.

As **I said, we are going to try to bring practical tips to you and in particular as I was preparing for today's session, I tried to focus on what Berkshire has learned, what we have learned, as we have helped employers manage Section 503 focus reviews over the past year or so. I am pretty sure that one of our clients may have gotten the very first Section 503 focus review letter. I am really pleased to say that we have helped almost 40 clients at this point go through successfully 503 reviews. We have learned a lot, as a rule of that. What the agency is interested in, what they think compliance looks like. And so throughout the conversation today, I am going try to bring that experience and share it with all of you.**

So I want to start first of all talking about what are the available resources related to the can you remember health pandemic. On the screen you are going to see a link to EEOC Web site. I highly encourage you, if you have not looked at the EEOC sources on how the ADA and

COVID-19 interact and what are things you need think about, as you are managing the health crisis for your employees, I highly recommend that you look at EEOC's materials. They have been updating their documents very consistently.

The first guidance, what you should know about COVID-19, was originally actually a new document and has really been updated pretty consistently. This is what I call my Bible when a client has a question. This is the document that you should print out and put little tabs on it. Earmark pages. Really well done document. Answers some very basic questions. Pandemic preparedness guidance document was actually prepared in 2009 for the H1N1 pandemic. And updated in March this year to address specific facts related to the current health crisis. I think an important thing to note about these resources, they don't announce new policies. That's because these new documents weren't voted on by the commission. So when something is not vote odd by the commission, it is more of a policy guidance document. That means that it shouldn't be announcing new requirements. It is helping you apply what the agency had said about the ADA to a specific task situation, in this case the COVID-19 crisis. Or as the threat, the health safety threat changes, or as CDC or state and local guidance changes. It is important to continue to check these guidance documents. The answer that was accurate in March may not be accurate, you know, as things change with the virus.

>>: Lynn, we have a question regarding COVID: Can an employer require employees to disclose a positive COVID-19 test result?

>>: So That's a great question. It is actually a great introduction to my next slide. That's one of the things we are going to talk about. The short answer is you know that you can require medical exams and inquiries, as long as they are job related and consistent with business necessity. You can manage the pandemic. By asking employees to share information about whether they have tested positively for COVID or whether they have symptoms that might cause you to take certain

precautions in the workplace. So let's start, first, though, where you sort of always start with the ADA. A lot of folks have been asking, is COVID-19 a disability in and of itself. Answer to that is unclear at this point. So what EEOC has said is that this is a very new virus. We are still learning how it might substantially limit individuals and whether it is the actual virus or an underlying medical condition that causes those limitations. And so the agency has not yet said whether COVID-19 itself is a disability. It has said even if it were a disability under the ADA, that employers would always have the benefit of the direct defense. If you were taking action because someone had COVID-19, if you were doing that to avoid a direct threat or because a person caused a direct threat to themselves or others, that would be permissible under the AD arc. The other thing is what we are seeing is, a lot of individuals who have serious cases of COVID-19 do also have another underlying medical condition. That like I have a disability under the ADA for which accommodation might be required.

I am not sure if the agency will definitively come out and at least not anytime soon reach a conclusion as to whether COVID-19 itself is a disability. But a lot of the conversation is more so around helping individuals who have other medical conditions that are disabled, man the COVID-19 illness. As we saw from the question that came in, one of the biggest questions is how to handle testing. And really, what the agency has said, you can actually test, you the employer can actually perform testing for the presence of COVID 19. You can do that as part of your post offer employment screening. In fact, they have even said you can delay the start date or even withdraw a job offer, if the person needs to start immediately, if someone test positive for COVID-19 or who has symptoms. They have also said you can take the temperature of employees before they come into the workplace, as long as you do that consistently. Taking temperature is technically a medical exam under the ADA. Even though it seems something simple and straightforward, it is technically under ADA. The guidance says you certainly can,

in light of the health threat and the potential threat to others, based on current guidance from health officials, that it is currently appropriate to take the temperature of employees, or even administer a test to employees. You may also ask if all employees have had COVID-19 or currently have COVID-19, or whether they have symptoms of COVID-19. So whether individuals have a cough, sore throated, fever. And so those are all things that you can do. One of the things that EEOC has recently said you should not do based on current medical guidance is you should not require antibody testing. They said it was unclear whether anti testing could or should be -- consistent with business necessity under the ADA.

Since that time, the CDC and other health officials have come out and said antibody testing in interim guidance may not be a good way to tell whether someone is likely to pass the illness on or give the illness to others or even get sick themselves. The EEOC said currently with the medical information that is available, they don't believe the agency does not believe that antibody testing is job related and consistent with business necessity.

Another question that is sort of flows from, well, can you do exams and inquiries of employees, the question is what do you do with the information that you learn. That goes to medical confidentiality and whether you can share information with others, and how much information. What the agency has said, you can report that an employee has COVID-19 or might have symptoms to other employees. But you should really limit that communication. In many cases you should try to provide information without providing the specific name of the employee. But you may have to. The agency has acknowledged in order to protect the safety of others, you may need to disclose when an employee tests positive for COVID-19. They also have said it is appropriate and not a violation of the ADA confidentiality rule for employer to notify health noters of a positive test.

In terms of excluding workers from the workplace, we have gone over this. But I think it is

worth sort of repeating with what the EEOC has said here. EEOC has clearly said that employers can exclude individuals who have COVID-19 or symptoms. Or even exposure to the virus, because they pose a direct threat. They also have, agency has also said it may be appropriate to exclude individuals, if they refuse to answer questions reasonable job related questions. Or submit to testing and screening that is being required of all others.
You want to tread cautiously there. What the agency is acknowledging, I think is that, it really is giving a fair amount of deference to an employer's need to try to keep the entire workplace safe. And to balance that with the rights that individuals have under the ADA. One thing the EEOC has said very clearly is that employers really shouldn't be excluding individuals from the workforce, solely because the CDC or other health authorities have identified them as high risk. So, for example, you can't exclude workers with asthma, solely because they have asthma. Even though asthma might put them at higher risk for more serious COVID-19 illness. Similarly you can't exclude older workers or pregnant workers and in order to exclude a worker from the workplace, you need to show, you need to meet the direct threat standard, or it has to be in response to a request for accommodation from the employee. So if the employee themselves says I would prefer not to come into the workplace because I am at higher risk, that may be an accommodation request that you want to handle and process under the arc DA. What the agency is really reminding employers, we don't want to make stereo typical assumptions about trying to keep people safe because they are older or pregnant, unless you can demonstrate direct threat or something of that nature. In terms of the reasonable accommodation process, I think the rule to remember is the same rules apply. The pandemic doesn't change the fact that employer are still required to provide accommodation. You can verify that the employee has a disability and that an accommodation is needed. Or that a particular disability may put a person at higher risk to be exacerbated by COVID. I think one of the most helpful things that an EEOC

has said, is that an employer may consider whether accommodation poses undue hardship under the current circumstances. And what that means is -- the agency really went out of its way to acknowledge that because of the current impact of COVID-19 on business operations, an accommodation that perhaps could have been provided more easily prior to this, may actually pose an undue hardship during the health pandemic. I think that is helpful for employers to know that the enforcement agencies are trying to look at these issues, with the lens toward understanding the significant business challenges that some employers are facing.

One of the common questions -- yes, val, go ahead.

>>: We do have a couple more questions that have come in. First one. Can an employer send an employee home, even if it knows that the employee doesn't have COVID-19 but is demonstrating COVID like symptoms, represented to another medical condition? For example, taking medication that makes someone tired or nauseous.

>>: So I think based on the way that question was asked, I think that would be a risky choice.

>>: Under the hypothetical that was posed, it sounds like the employer knows that the symptoms are not necessarily being caused by potential expose your the the illness. Sounds like they know for certain they don't have COVID-19. I don't know if that reality, in reality how to would play out. But under the hypothetical pose, I think it could be dangerous to do that. I would want a little more information before telling the employer in that particular case, yes, let's go ahead and order the protective safety of others and send that person home, when we don't think the symptoms are being caused by COVID-19.

>>: Okay. Next one: Is there specific guidance on who at the employer may minister exams?

>>: That's a good question. I don't believe the EEOC guidance has spoken to. That they have spoken to the fact that, if you are taking temperature, for example, you know, if you are keeping a log that needs to be administered confidentially. I don't think they have said, there is not a

requirement for example that the medical exam to the extent is something like temperature taking has to be done by a physician or a doctor or anything of that nature. For example, my workplace, we have a thermometer, when we come into our building. We actually administer our temperature, ourselves. We would only reported or need to let someone know if it is elevated such that it might be a symptom of having COVID.

>>: Okay. Very good. And what if an employee indicates that they cannot wear a mask, then is the employer responsible for providing another type of PPE?

>>: That's a great question. And actually, I -- whoever asked this question, the EEOC guidance has a number of examples about this issue. And the short answer is, yes, you may need to think about that as an accommodation. Individuals who read lists might need a different kind of PPE. So they can continue to communicate with others. They might need that for themselves, as well as others. They give an example of individuals who may not be able to wear the required PPE because of religious reasons. And in those instances, EEOC talks about the need for the employer to consider the key for me the ADA still applies. You have to conduct an individualized assessment, using the best available medical guidance. You may have able to show direct threat or undue hardship in giving current business operations more easily than you would have in a non health pandemic situation. And you really have to be careful about protecting or making paternalistic assumptions. The other piece of the puzzle, this in and of itself could be several webinars S. putting the ADA requirements together with state and local requirements. You know, and how does that work, how does it interact with the new lead requirements under the FMLA. I know the listeners are probably struggling with.

I am going to move on. We are going to totally switch gears. We are going to do our first poll. I am going to read the hypothetical. Then I am going to have Tony help me run this poll. So the hypothetical is: You have an employer job opening for administrative assistant. The

essential functions of the job are administrative and organizational in nature. Some occasional typing has been part of the job in the past. You have two applicants who have made it to the final interview. One has a disk act that makes typing difficult. The other has no disability and can type. The question that we are going to poll you on, can the employer refuse to hire the applicant because of her inability to type?

>>: Looks like every one is seeing the poll. Your choices are, yes, no, and not sure. I gave you an out. I am kind of interested to see what we get, in terms of polling. We will give you a minute to think about the hypothetical and to answer the polling question.

>>: While you are answering the polling question, I just wanted to let everybody know, we have gotten a number of questions in about COVID. In the interest of time, any of the questions that we won't get to, I am going to get over to Lynn so that she can see them. She can answer them and they will be on the NILG Web site.

>>: So Tony who is graciously helping me with the poll, I think we could close the poll. And see did we get results? I didn't see the results. Did I miss them? Here we go. Oh they are tiny. So I am having a hard time reading those. It looks like most individuals said no. There were a fair -- sort of equal number of individuals who said yes or not sure. So kudos to those of you who said no. This hypothetical was really intended to highlight the difference between two ADA concepts. One of which has been a significant focus in 503 focus review. That is, a qualification standard versus an essential function of a job. And they sound very similar. But, according to EEOC, the agency's perspective on this, the answer is, the way the hypothetical was set up, typing is not an essential function of this job. It is a marginal function. At least is what it appears to be. Because you -- it is also probably a qualification standard, right. It is -- if you are asking someone can you type, in this hypothetical qualification, the ability to type would be a qualification standard. You are supposed to base your decisions on the relative ability of each

applicant to perform the essential job function, with or without accommodation. So you should not under the ADA screen out an applicant with a disability because of the need to make an accommodation to perform job function, especially those that are marginal. If, however, this applicant could not type for another reason, unrelated to disability, then, obviously, you could select the applicant who was best able to perform all of the job function.

Now, why, you may be wondering, why am I telling you about, why did I choose this hypothetical? We are going to talk about why I chose this hypothetical in a moment. I just want to go over, again, the difference between job qualification standards and essential functions. EEOC basically says that qualifications standards are the personal, professional attributes, things like skill, experience, educational background, medical or physical or safety requirements. Those are job qualifications. Essential functions are in essence what the employee actually does on the job. So that could be things like the job is to repair computers. The way you might do that is if you have a particular certification or experience, which is a qualification standard. The distinction is really important because employers have to be certain that qualifications standards are actually reflective of whether a candidate can perform the essential functions of the job. Otherwise, if you start excluding candidates because they cannot meet a certain qualification standard outright because they have a disability, you could run afoul of the ADA requirements regarding qualification standard.

How do OS -- and EEOC actually check for this? I am just having terrible trouble with arrows today. So before we talk about what OSTCP, how they would evaluate your job qualification standard, let's do another poll. This one might be easy, based on what I just told you. It is a common requirement. The question is: Is a lifting requirement, a job qualification standard or an essential function? The options are, one, the -- standard. Essential function, three, is it both, four, are you not sure. I have thoroughly confused you? Tony is showing you a poll. We are

going to take just a minute to do the poll. And then we are going to talk probably what is of most interest. We are going to talk -- looking it that issue in its Section 503 focus review. Hopefully, every one has had an ton to choose an answer. Majority of folks said both. We appear to be evenly split between other whose thought it was qualification standard and other whose thought it was essential function. The answer really is that in EEOC's view, lifting 30 pounds is not a qualification standard. Essential function is really for example, if you are a package mover, moving the packages or item. Lifting 30 pounds is a way that the employer predicts whether someone is going to be able to successfully do the function, which is moving packages. Not all the Courts have agreed with EEOC on this. So I do think it is important to say this is one area of the ADA that I think is still developing. There is not consensus on how you look at some of these issues. But it is important. We are going to talk about why it is important, in terms of whether it is a qualification standard or essential function. Depending on how you look at it.

How does with DA -- are supposed to be job related -- necessity. There are actually two relevant pieces. One in the regulations. One in the scheduling letter. The regulations, the Section 503 regulations actually say that you as part of your Affirmative Action plan, you are supposed to have a schedule for reviewing all of your physical and mental job qualification standards. And you are supposed to be reviewing them to make sure that they are job related and consistent with business necessity. The scheduling letter, this is true for not just a 503 focus review but full reviews, as well. Requests your most recent assessment of physical and mental qualification. And they would like the agency would like to see your schedule. And any actions taken or changes made. So how have employers been complying with this? Most of our employers do not have a formal schedule. In the way that you might expect based on these regulations. Some of our employers do. And some of our employees, for example, review

certain kinds of jobs every year or every two years, like high level jobs, or jobs with a lot of physical qualifications standard. So production related jobs. They have a schedule for looking at them, to make sure that the requirements are up-to-date and still consistent with what the job requires. However, a lot of you are probably doing a jobs qualification review and you have a schedule for doing it. It is just more informal. You may not be thinking of it in this way. A lot of our employers actually do job qualification reviews, whenever a new job is created. Right. That makes sense. Whenever you are creating a new job description or new job you are thinking about the mental and physical qualification standard. You are writing them down.

When you are doing that, you are really evaluating whether the, any kind of qualification requirements, so any kind of educational requirement or physical or mental does it accurately describe what we are expecting this individual to do in this role. And that is another way you can satisfy the requirement review physical and mental qualification standard. Another time you may be doing this is when accommodations are requested. A lot of times you are looking at the job description at that point, to figure out what are the actual requirements, and is this job description up-to-date and accurate. In terms of what we have seen in focus reviews, I don't think we have seen as much attention on this as we might have thought we would. We have had -- it has been asked for. It is required in every scheduling letter. But a general answer similar to what I have shared with you has so far seemed to be access I believable. We have had a few compliance officers ask pour more specific information. When did you do this? What was the date? Can you tell me what jobs you looked at? Do -- did you change anything? If so, can you tell me what you changed. And so in those instances, we have helped the employer go back through its record and identify a time, a recent time where they actually there review a job description and look at the requirements and for the most part, we have been able to

satisfy the agency that federal contractors are complying with this requirement. But this, I think is an area of potential room for improvement for contractors. I think there are a lot of qualification standards that are sometimes being used and used to screen out. Employers are not really taking a moment to think about is this a requirement that I really need for this job. And should I be using it to screen out candidates. I just want to take a moment to share just one case this is actually not EEOC. It is Department of Justice. It is the first case on this screen. It was probably a referral from EEOC. But the Department of Justice enforces cases against counties and states. This is a case you should all read and think about. Facts of this case. What happened here, the defendant was looking for a purchasing manager.

The job description required a driver's license. And individual with dwarfism actually wanted to apply for the purchasing manager role. He really met all of the requirements, but because of his disability he could not get a driver's license. The individual, the person who was interested in the job, actually e-mailed the employer to ask, you know, is the job, a driver's license a requirement a requirement? And could it be waived so that we could apply for the job? Employer got back to him and said, you know, unfortunately, no, the license requirement is mandatory. And furthermore, our online system actually asks you if you have a driver's licensor not. If you answer no to that question, our software, our Applicant Tracking System is set up it would automatically reject you. We wouldn't even see your application because you did not have a valid driver's license. The department of justice brought a claim alleging basically that the driver's license requirement was an employment qualification standard. That it really was not needed. It was not job related and consistent with business necessity. And, therefore, it was improper for the county to use that as a screening question. It was in fact a qualification standard that was screening out individuals with potential disabilities. The other interesting cases -- relief was, one of the things, this case was settled. There was not actually a formal

finding. That the Department of Justice's view was correct. One of the things that the employer agreed to do, this should sound very familiar to every one who does OS -- work. With respect to job listings, they had to input instruction force requesting reasonable accommodation on their career Web site. And they had to agree that only essential job functions would be included as mandatory requirements. And that they would not screen for the driver's license requirement or any other kind of qualification standard, unless it was really mandatory requirement for the job. So I just thought that case was such a good example of how all of these ADA concepts can come together for an employer, especially a federal contractor. Federal contractors use pre screening questions more than other contractors because of how the agency looks at applicant data.

This is -- this is a recent case. This is something that I think enforcement agencies are also interested in. I am going move on. We are going to talk in the interest of time, we are going to talk a little bit. I am going skip the next polling question. We are going to talk about processing reasonable accommodation requests. This has been a huge area of focus during the Section 503 reviews. It has also been a significant area of focus for EEOC for the past 10 or 15 years. Key here is really to document the process that you are using and to make sure the process is interactive. What you want to be able to show as the employer is that you went through an interactive process with the employee that you did that timely. And that you really considered and explored available options before making your decision. How does OSTCP look at this in 503 reviews? Two parts of the regulation. There is a disconnect, I think between the regulations and what the scheduling letter requires. What the regulations say is that you are supposed to make reasonable accommodation. Unless, you can show undue hardship. Regulations also say that the development and use of procedures for processing requests is a best practice. It is not required. The scheduling letter for 503 reviews, yes, val?

>>: Based on this first part here, the contractor must make reasonable accommodation to the known physical or mental limitations. One of the questions that we had is: If the candidate never disclosed the disability or -- or disability? How would the employer know? I think the answer is probably they wouldn't.

>>: I think that's right. You know, we are going to talk in a few slides with pre screening questions. I think where this is actually really starting to come up for employers on a practical level is how you write your pre screening questions. And whether your screening individuals out unintentionally and whether you can write those screening questions in a different way to avoid that issue. I agree with you. There is a requirement under the ADA that you have -- you have to know that the requests for accommodation is due to a disability. You don't necessarily have to know all the details, but you have to know enough that the request is being made because of a physical or mental condition that would qualify under the ADA. And that is when the accommodation requirement is really triggered. The piece that I found interesting in terms of the OSPCP compliance issue is first let's talk about the scheduling letter. Then we will talk about OT -- the scheduling letter ask -- and documentation of any requests received and their rest lution. When I said there is a disconnect between the regulations and what is asking for in the scheduling letter, what I meant by that, either the regs don't actually say you have to track every accommodation. And document it. And keep that in some kind of log. But in essence, what we are finding, is that federal contractors really need to be doing that. Which is for documentation of all requests received during the review period, if you have not been maintaining some type of log about these requests. And so that -- much more challenging for large employers unless they have a centralized accommodation process.

>>: So what is the agency been asking about in terms of the 503 reviews? They have been asking for if you have any policies, if you have forms that you use as part of your reasonable

accommodation process, they want to see those forms. If you have a process document, you know, they want to see any internal process document, about how you process accommodations. Pretty consistently, they have been asking to talk to the manager who oversees the accommodation process. You know, they really want to understand how does this work. How long, how do employees request accommodation first of all. How long does it take you to process an accommodation request, they have been very focused on the timing of processing -- seem to be a little uncomfortable with the fact that it depends, that some accommodation requests can be processed very quickly. And others might take a little bit longer, depending on the documentation you need. They also have asked to interview employees who have made accommodations requests. I don't think any of these questions are surprising. You know, I think these are all the things that we would expect and hope the agency would look at, when they were trying to figure out if an employer was providing reasonable accommodation to individuals with disables.

One of the other things they have focused on, I will say that I think they are The Feed back some of our employers are getting is they don't have a formal written policy or process, is they really should. It is almost coming across as a requirement. And I think it is important to remember, again, that the regulations say that is a best practice. I don't disagree that that is a best practice. I think it is a good idea to have a written accommodation process and procedure document. So that employees know how to request accommodation so that managers know how to process those requests or where to go. But it is not technically required to be in writing. It is just that you must provide accommodation. The other thing that we have seen questioning about in the 503 reviews is a pretty significant focus on training. How did employees know how to request accommodation? Do you tell them? Is this part of an employee orientation? And how doing ins know what to do? Are you training managers on how to manager accommodation requests?

You know, what should they do? In many cases most employers, the answer is you come to HR. Or you come to a centralized accommodations board and we will help you manage or figure that out. But OSTPC wants to see that managers know what to do if an employee comes to them directly. You know that the answer is not just I don't know. Go look at the employee handbook and figure that out. So the there has been a significant amount of focus in the 503 reviews in terms of employees know about your policies. The other thing that has been interesting in a handful of reviews. We have seen the agency ask for personal activity data or employees that have requested accommodation.

Mainly, the request has centered around termination data. This is really only happened in a handful of reviews. But the request was for, can I have a list of employees who have terminated and were, and did any of themself idea as a disabled individual, or did any of them request accommodation? When we ask why the agency was seeking that information, we what we were told is internally, they were wanting, they needed to look at whether there was any impact from requesting an accommodation. So in other words, was there any retaliation or impact on future employment opportunities or was someone terminated because of a disability, like for example, was someone terminated because their leave was expired and no additional leave was provided as an accommodation? That is only happened in I think two of the reviews that we have managed. It is possible that it is happening more broadly. But most of the time that request for personnel activity data, we have not seen that consistently. But that is something to watch for. And something as a best practice for you to think about. If you are looking at your disability practices internally, try tracing the life cycle of an individual with a disability. Should just make sure that there are not any bearers to equal employment and the impact of requesting accommodations is not negatively impacting the individual going forward. That is not a bad proactive exercise to do. And it appears some at the agency are going to be asking you about

that during these 503 reviews. The other thing I would say, the first set of bullets are being asked in regular reviews. We have a -- where they have asked to talk to the manager of the leave an accommodation process. It is not a 503 focus review. But it is part of the corporate management compliance evaluation. They want to go through part of this process. During the virtual on site. So these tips really apply, even if you are not a 503 focus review list.

>>: We had -- can a link or site be provided for a copy of the scheduling letter?

>>: Oh, absolutely. So the scheduling letters are publicly available and after the presentation, I will make sure that every one listening in has links to the different scheduling letters. At this point, there are three or four different scheduling letters depending on the type of review. I would highly recommend, just as a tip, if you are trying to get a handle on your compliance with requirements, there are a couple of places to start. One is to look at the scheduling letter, two, with respect to disability issues, the agency has a terrific landing -- related to 503 reviews. Most importantly, it has an on site guide on it as well as the form that compliance officers complete as they are going through a 503 focus review. That tells you, it is really a good summary of the things that the agency is going to be interested in during these reviews. What we are finding is the agency is also interested in those same things during a full review. And the other document that is available on OCTP Web site is federal contract compliance manual. It also has very detailed guidance about the types of issues that the agency is going to check in terms of compliance. Along with what the agency expects to see. After this presentation, I will make sure I get Val and Tony to those documents. We can up load them, I guess, with the transcript and things are made available. In terms of the EEOC, oh,

>>: What should a contractor be doing to meet the compliance, as far as a mental review? We talked about the review of the physical and mental qualification. And I think that the physical qualifications are a little bit more clear and understandable. But what would a review of the

mental qualification lose like?

>>: Yes. I agree with you. It is easier I think for all of us, sort of think through how we would review physical qualifications. You know, mental qualifications standards could be things like certifications or degrees. Or skill level. And so you would, really, the process is the same, whether it is a mental or physical qualification requirement or some kind of certification requirement. You are wanting to make sure it is job related and consistent with business necessity and actually predictive of the job. Specific job that the person is going to do.

I will say that in so far in the focus reviews we have had, we have not had a lot of clients who have had significant questions around mental qualification standards. They are not often asked as pre screening questions or things of that nature, unless you are looking at certain degree or education requirements. Or certification requirement. But you -- the analysis is really the same, whether it is physical or mental.

In terms of how EEOC is reviewing accommodation requests, what I like to say about the EEOC's focus in this area, it has been true for many, many years, it is all about finding policies that impact a large number of individuals. I have two examples on the screen. But there are many, many, many more. If you look back what the agency has done over the past 10, 15 years under the ADA, some of the agencies biggest settlements, systemic -- have been under the ADA. The ADA is uniquely situated and the EEOC is uniquely situated to look at policies that impact large groups of individuals, with disabilities, and to try to bring claims on behalf of those individuals. Some of the biggest have really been in the leaf area. So companies for many years and the agency still continues to challenge these cases. They still, employers still have these policies. Which they are called fixed leave policies, where you basically provide an employee a certain amount of leave. And then after that leave is exhausted, they are typically terminated. What the EEOC has said is that type of policy might be a violation of the ADA, if

you are not considering at least considering whether additional leave could be provided as an accommodation under the ADA. And they have brought countless numbers of suits against employers who have had alleged sick leave policies.

Similar with attendance, no fault attendance policies are vulnerable under the ADA. The way a no fault attendance policy works you get a certain number of points. Once us reach the maximum number of point for attendance violations you are terminated. Problem with that is that under the ADA, you have to look at as an accommodation whether the attendance should be excused. Whether the points should not be effect. And what that looks like. The EEOC under the ADA, they have been very successful, is looking at what systemic policies, nationwide policies or company wide policies and their impact on individuals with disabilities.

So in terms of best practices, you know, these are probably obvious ones. Think about developing written accommodation policies and procedures. At a minimum, I do think at this point, it is a best practice to have a short policy at least in your handbook that explains that you do provide accommodations, not just for disability but also for religion. And how employee consist request those accommodations.

You know, at least informing employees of the process they should follow, whether you have a more detailed document kind of depends. Thinking about training managers and employees on the process. They there really is not a requirement in the Affirmative Action regulation the Section 503 regulation to train managers on the section 503 requirements. I think some employers are missing that opportunity. So that is something to add to your training process.

You do need to be thinking about how whether you are going to track accommodation request.

Two tips that are worth thinking about: Centralized process for managing accommodation requests and centralized budget to pay for accommodations. Neither of those are required. Under the ADA or 5023. But I think what we are finding that it is a way to ensure consistency.

If all the requests are coming to one place, you can make sure that individual managers aren't handling things differently. You can also keep better track of the requests that are being made. And whether they have been approved and what is outstanding. Then the budget, obviously having a centralized budget, makes it potentially easier for managers to consider accommodations or consider individuals who might need accommodations, if they know that the price of whatever accommodation is going to be born from a centralized account and not coming out of their operating budget. Those are some good tips in terms of managing accommodation. Disability related inquiries. This, too, could probably have its own webinar. I will say that I think this is a topic that not, that employers are not always paying enough attention to. There are a lot of things that can be considered disability related inquiries. Like for example, taking temperature tests during the health crisis. That is technically a disability related inquiry, potentially. Or at least a medical exam. And so you have to be very careful when you make disability related inquiries. The other type of disability related inquiry that I want to mention in light of the time period of this webinar, is you know, technically the request to voluntarily self identify as an individual with a disability, is a disability related inquiry. It would normally not be permitted under the ADA pre offer, except for the fact that there is a regulation that requires federal contractors to do it. The reason I bring this up is there is, as you all know, a specific form that you are supposed to use to collect disability status information. Just this morning OSTCP sent out an e-mail reminding every one that OMB approved form was recently revised and that employers must begin using the new form to collect disability status information on August 4. So that is just around the corner. If you have not heard of this, this is something the OCCP Web site, the new form is available there. This is the form that you use to gather disability status information from applicants and employees. As of August 4th, you are only allowed to request that information using the new form that was recently approved or some

version of it. You can modify it a little bit if you are using it. It is through an electronic. The words can't be changed too much. But you can change fonts and formatting and things like. That just a reminder, disability inquiry is permissible because of OCCP rule. We have to do it differently beginning August 4th.

What I want to say about disability related inquiry, in terms of what OSTCP has been asking about, this has been a focus during the 503 reviews. There have been consistent questions. It usually starts with have any medical exams been -- do you use medical examinations as part of your process? Either as part of your hiring processor during employment? If you say yes, the agency is asking you for more details about those medical examinations. If you have a pre employment medical process, the agency wants to know a little bit more about that process. When are you requesting the information? What kind of information are you requesting? How are you using the information once you obtain it? You know, the rule generally is that you can ask pre employment medical inquiries post offer only. My prior life, as an attorney at a large law firm, I did, there were instances where an employer was not doing this exactly correctly. Right. I remember counseling employers about the timing of these post offer medical inquiries. And what does it mean to actually make the inquiry post offer? And you know, you have to be very careful that you are doing it at the correct time. The other piece that you have to be very careful about is how you are using the information that you received? Someone that I used to work with at EEOC said to me, the way she described it to employers, is: In essence you are having a medical doctor act as your proxy under the ADA. So you want to be very careful about what that medical doctor is saying to you, in terms of whether the person is able to perform the essential functions of the job with or without accommodation. That is your obligation as the employer under the ADA. I think that is a good reminder. The other thing O -- is checking is to make sure you are taking this information separate. That it is kept confidential. And that is

not just medical exam information but also the disability self identification information. That is not supposed to be kept in a personnel file. They are supposed to be limited access, really recruiters and managers should not be allowed to see that information. And if the agency is checking that, during these 503 reviews, and then they are also looking at your pre screening questions to see if any of those are disability related inquiries, whether you are asking for medical information or information about absences or things of that nature, because those could run afoul of the ADA and Section 503.

We have a question come in. What penalties can employers face if they do not have the new self ID form implemented by August 4th?

>>: That's a good question. I wish we could tell if someone from OSCTP was listening to the webinar today. I think technically speaking, it is a technical violation, right. If I had to characterize it in OSCP speak. OTSPP doesn't really have the ability to fine or impose a monetary penalty for a failure to use this form. So there is not a monetary penalty necessary play the could be assessed. I guess in theory, it -- they could argue it becomes impermissible disability inquiry, if you are not using the correct form as of August 4th. I am not sure that they would do that, especially if the employer could show that they had plans and were diligently trying to implement the new form. I would hope there would be some grace, especially during the health crisis. The agency did give -- however, I will say this: The agency did already give some additional time in terms of implementing this form. I think a lot of employers think it may not have been enough time. That it is harder than it appears to actually change this form, especially in an Applicant Tracking System from HRS. Given the health crisis, you know, it may have been hard to get this done by August 4. But I would think, my best guess, and I would hope, my recommendation from the agency if they are listening, that they provide compliance assistance for some period of time between August fourth and next several months. When it will be

implemented. Hopefully, they wouldn't actually cite or issue a notice of violation for this.

Okay. We are at 3:18 eastern time. Anymore questions that come in, feel free to keep them coming. We will have Lynn address them after the webinar is completed. To make sure we get through all of her slides.

>>: Yeah. I appreciate that, val, I am not sure if I will get through all my slides. I am going do the best I can. I do appreciate the conversation. I always look at these webinars as an opportunity to try to address what the audience is interested in hearing. And so we are going to try to go through the last few slides, just to make sure we kind of give you a high level overview. I am happy to answer questions. I will, val, will send me the questions that have come in. If you have separate questions, you can reach out to me independently.

Pre screening questions, I think this is a huge area of interest. I have heard people at EEOC talk about pre screening questions. I talked to you earlier in the presentation about the DOJ lawsuit where really a pre screening question was involved. That is part of the problem, it is knocks a person out depending on how they answered that question. You really want to look at your pre screening questions. Make sure they are written well. That they accurately are asking things about the job, the specific job that you are trying to fill. One tip that I have always talked about is rather than asking if someone is able to do something, focus on their willingness. That is different. If you ask about ability to work some overtime, you really should say are you able to work over time with or without accommodation? If you ask about someone's willingness to work over time, that's when it takes out of the realm of the arc DA. You are no longer asking if they are able to do is a task. Which can make it a disability inquiry. You are asking if they are willing. Looking at the words you are using, I think is a best practice, as a way to attract individuals with disabilities. That is good idea to have reasonable accommodation language either in each pre screening question or at the beginning to say to applicants, you can answer

these questions that we as a company are willing to provide reasonable accommodations that are needed, due to disability. And so please answer our pre screening questions with that in mind. You do want to monitor responses. We have -- as part of their proactive work in this area, decided that they were actually going to pull all of their applicant data for a certain period. They looked at the answers in their pre screening questions. They looked at them in terms of how individuals with disabilities were answering them. We didn't end up finding any areas of concern. I thought it was an interesting proactive way to examine the data and to think about are there barriers to employment to individuals with disabilities, that we have not thought about. In terms of how EEOC reviews compliance with this issue, they have brought some challenges, particularly with respect to policies around sort of attendance and disclosure of specific information for sick leave or other kinds of absences. You do have to be careful, when you ask for that kind of documentation. They have also brought a number of cases in recent years related to how employers are using information obtained as part of post offer medical exam. Expectation is, you will not have very many blanket exclusions. But that you will be individually assessing whether someone's medical condition prevents them from doing the role. The settlement on the top was interesting. This was part of the corporate acquisition. As part of the process the firing company actually looked at the number of days that employees were absent, when they were I deciding which employees they were going to hire from the predecessor company. That was a big flag for EEOC. And they brought -- they actually filed a lawsuit in that case was settled over the past year or so, I think.

In terms of best practices, easiest thing is to first of all make sure you are maintaining the documentation confidentially. You want to look at your pre screening question. If you do do medical exams, I really, really encourage you to look at the scope of the medical exam. And the timing. You know, oftentimes when I have worked with employers in this area, I do worry that

employers are asking for more medical information than they need in a post offer medical exam and how they are using it, I think could create some risk under the ADA. I am not saying it is permissible. As we begin to think about how we can attract individuals with disabilities, I do think the post offer medical exam is one area where you can proceed actively look, reevaluate. If you have been doing it 20 years, it is is a good idea to take a step back and think about why are you doing it, how are you doing it, do you still need to do it, do you still need to do it at the scope and level that you are doing it. In many cases you might decide that you do. Then that's okay. But just doing that re-evaluation, because the agencies are definitely interested in postdoc or the medical exams for obvious reasons they potentially pose a barrier to some individuals with disabilities.

I am going to skip the polling question. I have already gone over my time. I want to talk briefly about managing performance. Just sort of highlight the complex, what I view as a conflict between what O -- and what EEOC has said about this issue. Section 503 regulations have a specific Affirmative Action obligation, that a contractor is shall notify the employee of any performance problems and ask if the problem is related to a disability, and if accommodation is needed. When the -- when it is reasonable for the employer to conclude that the contractor, that the employee has a known disability. EEOC has taken a very different view on this issue. And they have really gone the opposite way. What EEOC guidance has said generally it is not a good idea for employer to focus discussion about a performance or conduct problem on the disability. And there is sort of a striking contrast between what OSCCP would like you to do as part of your Affirmative Action efforts and what EEOC has said is a best practice for all employers. We have not seen a lot of question b this issue in 503 reviews. I will admit, I am a little surprised. I kind of thought that the agency might ask about performance, if anyone was with a disability had been put on a performance improvement plan or had been terminated for

performance reasons. Those would have been ways for the agency to sort of explore this issue. And maybe that's to come. I think agency is still learning itself a little bit about the ADA. But we definitely have not seen a huge number of inquiries on this issue. It is something that contractors have to decide, you know, how are you going to manage this sort of conflict between these requirements? Are you going to take the step of asking an individual if a performance problem is related to a disability, if it is reasonable for you to conclude that it might be? And is that in your interest under what the EEOC has said about this issue? With that, I am going to turn it back to val. We are, and Tony. We are nearing the end of our time together. I think the NILG was kind enough to give me some additional time. Before I do that, I just want to say briefly, thank you all for joining me today. I want to take a moment to say thank you to all of you for doing what you do. These have been difficult times for all of us. Not just managing the health crisis but as -- around social justice in our country, and I know all of you have been working hard to do the best you can. And so I appreciate you taking time out of your schedule to join me today. I am looking forward to next year when I hope we can all be in person. And, again, I just want to thank the NILG board for inviting me to talk today.

>>: Thank you. This was a great presentation. I would just encourage our attendees if you are not currently part of a local NILG, go to the Web site to find -- close to your geography. Thank you to our sponsors. We hope to see you next year at the 2021 conference. It is going to be a great one. It is going to be in the city of Nashville. We have already started planning it. And we are really looking forward to seeing you there, hopefully, when we can all be in person again. Thanks again for attending. I hope you guys have a great day.

(Conference ended at 3:29 p.m. EST.)