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NILG

>>TONY KAYLIN: Hello, everyone and welcome to the August starting of the webinar series. Today we have Laura Mitchell who is going to be talking about non OFCCP laws and regulations that impact affirmative action. We sometimes work in a bubble. We keep forgetting there are other laws that actually impact our data that would make our -- that would impact our affirmative action plan. For example, if you get an EEO classification wrong it could have FLSA classification therefore you could have an FLSA case. That impacts the job groups in the affirmative action plan. So next slide.
We want to start by saying thank you to our sponsors and today we have a new sponsor. Silberman Law PC. Thank you for being a new sponsor.
Next slide.
I want to introduce you to Laura Mitchell. You can read her bio. She is highly experienced and well regarded in the area. Laura, I move to you.
>>LAURA MITCHELL: Thanks so much, Tony. Hello, everyone. It's so nice to have the opportunity to be with you today. I really wish that it was in person so I could see all of your smiling faces, but at least NILG has presented us with this wonderful opportunity to engage this way in this web series. I have thoroughly enjoyed all the presentations up to this point. Now that we have some fantastic ones upcoming as well. But today as Tony mentioned I really thought that it would be interesting to take a moment and talk about all of the other laws in development that are going on right now in our world of employment law that intercept or touch on our obligations as federal contractors. There is so much going on in the country right now that understanding how things impact other affects and facets of what we do is really beneficial. And I think hopefully we can demistify some of this. We can take away some of the mystery behind some of these other laws to see really about how they are enhancing and impacting what we do.
The first thing though I just want to level set and talk about and

remind us where we're starting from as federal contractors. We have our three governing regulations and executive order that we all should be familiar with. The first is executive order 11246 which covers race, color, religion, gender, sexual orientation, gender identity, national origin. Section 503 of the Rehabilitation Act gives protection to individuals with disabilities. And then our Vietnam Era Veterans Readjustment Assistance Act or VEVRAA gives protection to protected Veterans.

So we are starting with this baseline and this premise that everything we're going to talk about today builds upon or enhances these obligations established by these three sets of laws. So what we're going to do is walk through some of the laws that we don't think about on a daily basis, talk through some hypotheticals, answer some questions or maybe pose some questions that we're understand able to answer today, but I really want to get you thinking about things in a different way.

So with that foundation, let's dive into some of the more recent developments. And one that we have most anticipated I think this year was from a ruling from the Supreme Court from the notion whether Title VII extends protections to individuals on the basis of gender identity and sexual orient I guess that. And we already kind of know the answer to that question. Surprisingly I think to a lot of us, the Supreme Court came out in their decision and said that in fact Title VII does give these protections. But how would that play out in an every day kind of occurrence for us? And what are the actual implications of that decision? So our hypothetical here we have a senior programmer at company XYZ who is known for lightening the mood on team Zoom calls. We're all up on Zoom or whatever web platform we're using Microsoft Teams these days, go to meeting. And often because his husband appeared in the background making humorous observations about working from home. He is adding levity to what can become nowadays these rote kind of web calls.

Prior to the pandemic, though the employee never openly discussed his sexual orientation and many coworkers were not actually aware that he was gay. He did however have two years of poor performance reviews and was actually on a performance improvement plan for the quality of his work. The quality of his work further declined during the pandemic and his employment

was actually terminated as part of a company reduction in force. He filed complaints with OFCCP and his state civil rights agency alleging that he was fired because he was gay.

The company has come to you amount wants to understand its liability, specifically, what are the remedies and do they include traditional Title VII protections and liabilities.

So what do we think. Do we think that the company should be concerned? Do we think that our senior programmer has a viable claim? Should he lose on a motion to dismiss? What happens now to his claim of discrimination on the basis of the fact that he is now known by his coworkers and his company to be gay I think under Bostock versus Clayton County our Supreme Court decision he clearly has the opportunity and the right to bring the claim. Certainly with the OFCCP that was established before with our executive order. With the state agency that he filed with.

Possibly here in Colorado that is a protection that is recognized by our state. So the filing with the state agency is appropriate. Even before boss stock, the EEOC was recognizing claims on the basis of gender identity and sexual orientation. So even though he didn't file with the EEOC, if there is a Memorandum of Understanding between the state agency and the EEOC, the EEOC could look at the charge and they likely actually will intensify their pursuit of these types of claims now with this new Supreme Court decision. We're actually already seeing new lawsuits being filed on the basis of alleged discrimination for discrimination on the basis of sexual orientation and gender identity. It hasn't taken much time for individuals to start using this new Supreme Court case as their support for their claim.

So what else should we be thinking of? What really are the far reaching implications of this decision? Not just the fact that it is now recognized protection under Title VII for sexual orientation and gender identity discrimination. And I think the key here is the language in the Court's decision that says the plaintiff's sex may not need be the sole or primary cause of the employer's adverse action for Title VII to a I apply. So this really means it can be a, but for causation type claim. Meaning there could be a legitimate reason, but there also could be some motivation based on sexual orientation and gender identity and the claim would still

survive. I think we need to brought en the way we think of some of our Title VII claims and think about potential applications for non Title VII protections as well.

Let's walk through how one of those scenarios might play out for us.

Here we have a female nightclub employee who is 47 years old. She has been employed by the nightclub in various roles for 15 years. She has a long extended history with this company. Over the years she has had minor attendance issues, but really has never had any significant disciplinary infractions or performance issues. She has been a pretty good employee for the last decade and a half. Without warning though despite this she is terminated -- her employment is terminated as a handful of other female employees in their 40s. Neither male employees nor younger females are terminated, have their employment terminated. She brings a sex plus age claim under Title VII alleging her employment was terminated because the club owner discriminated against women who were over 40. So older women. Is this intersectional claim viable under Title VII? Well the Tenth Circuit found that it actually was in reliance on this language in Bostock. With the thought being that age was not the motivating or the sole mode of any factor, but it was in addition to her gender claim. So it's not just that the employer was discriminating against women, but there was some unique discrimination faced by older women. In this situation if you think about a nightclub under possibly -- and there possibly is some type of uniform requirement or costume that may not benefit older women or you think about some of these other cases of restaurants where they require their servers to wear certain types of shirts or apparel, so this case in the Tenth Circuit has said that even though age is not protected under Title VII because it's protected under the ADEA, that it is recognized under her protections are recognized under Title VII because it is in addition to her sex claim her sex discrimination claim.

So what as federal contractors should we be thinking about. Does this extend beyond just age? What about claims involving disability or potentially Veteran status? I think we really need to start thinking about more if we haven't already been thinking about it, this notion of intersectionality. What is the relationship

between not just one of the protected characteristics, but multiple of them together. And it's something that we don't really hear, the term intersectional in the case law or in regulations or in guidance, but I think now with the Supreme Court decision we're going to start seeing that more often. It's something that we have been talking about certainly when we talk about the pay gap and pay inequities. We know that women of color have a larger pay gap than just women alone. So this notion of having and belonging to more than one protected class is going to start to come up more. There is going to be more viable claims around it. We're going to start seeing case law and decisions. It's something that as federal contractors we should be thinking about potentially in our analytics, if we're thinking about under utilization or looking at add very impact or in our pay equity analysis. Really understanding what the correlation is between multiple protected classes on our employees and our applicant population so something to kind of think about as we move forward in this light.

So leaving behind Title VII for a moment, let's talk about kind of a whole different realm and world. Let's talk about the impact of recent decisions from the national labor relations board. Have to say I reserve a special place in my heart for those attorneys that practice labor law just like I feel like people look at us who practice OFCCP affirmative action we kind of are the atypical lawyers that deal with data all the time. I definitely try to stay as far away from labor relations as a possibly can and leave that to the experts, but there is a little bit of overlap in our world in some things that we do need to think about that really are avoidable. Just as a little primary. The NLRA governs the rights and obligations duties for employers around employees rights to organize, right to unionize and the prohibition around that right to organize.

They govern and the rules and laws are enforced by the National Labor Relations Board, NLRB, who are politically appointed members. There has been some drama over the last couple years about whether or not there was a quorum, were there enough board members to actually have decisions that we can rely on. And the decisions of the NLRB impact how employers -- cover how employers categorize or treat employees

for the purposes of benefits and wages, conditions of employment or decisions whether or not individuals are actually employees. And that's where we see this intersect and overlap with our world as federal contractors. At least in one way. Our hypothetical here. Let's think about folks who do work for us. A janitorial employee was hired by and is on the payroll of company A. However, he does not perform any janitorial services for that company. Rather, he is contracted out to company B to provide evening janitorial services Monday through Friday for a year. The term of the contract is a year. The terms of his contract make it explicit that he is not an employee of company B. Though he is working for them doing work on their premises, he is an employee of company A.

This hypothetical sounds pretty familiar whether it's janitorial services or someone coming in and providing labor in a warehouse. This notion that you have an individual who is an employee of company A performing services for company B. Due to family obligations janitorial employee begins showing up late to his scheduled shift. He is rushing through his duties and consistently failing to complete the required tasks each night. He is really just not doing a good job cleaning. Company B's office manager, on the premise who has observed his performance on site most days gives the janitorial employee a verbal warning.

She discusses with him his performance inequities. When his performance does not improve, it escalates to a written warning. We're following the steps of progression. Eventually company B elects to terminate the janitorial employee. Question. Is company B now a joint employer of company A this employee of company A's?

And we give kind of this famous lawyer's answer of it depends. Let's see what the NLRB and NLRA say about this. This is a long standing question. It has a storied history. Kind of feels a little bit like the story between OFCCP jurisdiction over try care providers. We have had a lot of folks way in. We have had court cases, agency decisions. Most recently seems to have been decided at least for the current time period in a definitive way. What has happened is years ago, 2013, a number of years ago, there were established guidelines as to how you determine

whether or not two companies are joint employers. And it was a pretty rigid strict test that you had to show direct control, substantial. There really was no gray area. It wasn't kind of gray or fungible. Fast forward to a couple years ago. And that threshold level, that test changed. And it was known as the Browning-Ferris decision which really said you don't have to have the substantial and direct and immediate control. It can be more attenuated. You can just have really the option to exercise the control. It made it so this notion of joint employment covered more employment type situations.

You think about needing to have direct and immediate control with identified specific categories of actions. That feels very rigid. It feels very limiting. That notion was expanded a number of years ago. And then now has been contracted again to kind of what we call the pre Browning-Ferris standard where we're back to businesses must possess an exercise substantial direct and immediate control over at least one essential term and condition of employment.

It has to really impact regular or continuous consequent and -- sorry continue with us consequential effect on the working conditions of the employee.

Why does this matter? We're talking about wages about benefits. Hours of work. Hiring. Whether someone is going to be discharged or disciplined. Who has supervision. Who is giving direction. Why does that matter for us? Because as federal contractors, the definition of who is an employee impacts so much of what we do. Right? Tony mentioned in the introduction this overlay between classifications of employees or individuals under FLSA and how you create your job groups for your affirmative action plan. Well, it goes even beyond that for us. Right? The notion certainly of who is included in our affirmative action plan. Who at OFCCP would have jurisdiction over in an audit. Our definition of employee sets that. What about who we're reporting in our B 01 report or our Vets reporting. The FLSA has its own definition and standard. What if we get that wrong and classifying folks as employees or not employees. So now we not only have the NLRA, but we have the FLSA and OFCCP. We have all these organizations coming together.

At least now, the FLSA and the NLRA are aligned. They both have more kind of concrete definitions and standards around what is it to have control. It's more clear cut and narrow. So hopefully employers and federal contractors can proactively identify in a better space who would be an employee and who wouldn't be an employee. And FLSA definition aligns with what we're talking about before with the NLRA terms because we're talking about who has control over hiring and firing, who has actual supervision over the conditions of employment, control over the rate and the method of pay, and who controls the employee records.

Even though this is more defined and more concrete, it doesn't necessarily help us answer this question, whether company B is an enjoined employer with company A. Because every case is going to be based on the --

No audio.

>> So the fact that company A terminated the employment - does not mean absolutely that there has been a joint employer relationship established.

And I just want to make sure that everybody can still hear me. Tony, can you just let me know that everyone can still hear me?

>>ANTHONY KAYLIN: We can hear you. You were off for a second.

>>LAURA MITCHELL: Just want to make sure. Just to recap in case folks didn't catch that. Just one dispositive fact. The fact that company B terminated the employment of this individual does not make it such that we have an automatic joint employer relationship. We're going to take in the totality of the circumstances to answer that question of whether there is a sufficient level of control.

So this is something that again we have a better direction of where we should be going and give us more in sight for our AAPs and our EEO ones and our Vets reporting, but it's something we want to make sure we're thinking thoughtful ly about and making sure we're not making contradictory decisions and aligning with the FLSA and NLRA.

Leaving that area talking about definitions of employees and moving to a little more fuzzy area. The NLRB controls and

dictates how employers are supposed to treat individuals with respect to concerted protected activity. Speech in the workplace. Wanting to gather or come together in group and organize or unionize. But what happens when there is a seeming conflict between what the NLRB says is permissible and what our OFCCP regulations or Title VII says should not be permitted in the workplace? And we have seen these come up more often in recent years. And it's really about this notion of protected speech. So we have our recent case where an employee wrote kind of a derogatory remark on a sign up sheet for over time. And that was found to be protected by the NLRB. But on appeal, the district court said, well may seem protected under the NLRA. You have to take into consideration, employer, on whether or not it violated some of these other nondiscrimination non harassment laws when determining whether or not the employee was properly terminated for engaging in that conduct.

So there is this necessary enter play and potential conflict between what is protected activity and whether or not an employer has a right to discipline an employee for engaging in that protected behavior under different laws.

So multiple layers here again of the things that we should be thinking about. It doesn't come up a lot, but as you are working through your HR policies and practices and when you are thinking about consistent treatment of individuals and where our obligations are, it becomes complex when we think about all the different layers especially for our federal contractors with OFCCP regulations on top of everything else. Not to make your heads spin too much, but want to point out that we have got some other things to think about.

As if we didn't have enough to think about, right? 2020 has laid before us a pandemic. And with that, it has necessarily increased our reliance as employees and employers on rights and laws and obligations around medical leave, protections for individuals with disabilities and health conditions. And so that enter play that always existed between our federal contractor obligations and these other laws is now heightened. So let's spend a little bit of time talking about the medical leave act and the ADA protections for individuals with disabilities.

So --
>>: Laura, your slides aren't moving. We're still on the hypothetical slide.
>>LAURA MITCHELL: For which.
>>ANTHONY KAYLIN: Janitorial employee was hired by and is.
>>LAURA MITCHELL: Interesting.
It says I have internet connection. But it's not moving? It's not moving on -- it's moving on my end.
>>ANTHONY KAYLIN: Not on our end.
LAURA MITCHELL: Is it possible for you to move the slides? I'm on 17. I apologize for that.
Let me know when you are ready. While you are doing that we have a question back when I was talking about intersectionality about whether courts will look to existing case law regarding kind of, but for causation or sex plus other types of characteristics. I think the answer to that is necessarily, yes. That they will look at existing precedent when making determinations on intersectionality in other areas. There may be some courts who choose to distinguish those cases on factual basis or other reasons, but I think to the extent there is a body of law already out there that the Supreme Court case will enhance that and obviously, be the top precedent, but certainly in the relevant jurisdictions if there is case law then the Court should be looking at that to drive new determinations in other areas. That was a good question.
Are we back on with the slides Tony?
>>ANTHONY KAYLIN: Yes. Can you see it. Perfect.
>> Slide 17. We're going to start talking about the FMLA. Just as a reminder for those who don't deal with this area, the FMLA gives protection and establishes requirements for employers for leaves of absence for individuals who meet certain qualifications for their own health condition or for the care of a family member for a health condition. And that really has become important in this time of Covid-19.
So as we move to the hypothetical that be have on the screen, we have a situation where a tax accountant requests intermittent FMLA leave to care for her husband who is undergoing cancer treatment. And her boss approves the leave. This is enter Mitt tempt leave. So it's not consecutive days, but it's to deal with

appointments or when she needs to be home with her husband. When she tries to exercise this leave, the boss tells her that she is being in considerate to her colleagues because the firm is already short staffed due to kind of what has happened during the pandemic and she knows it's quote unquote busy season for the company.

The tax accountant realizes her boss has a point. She starts feeling guilty about taking that time off and she requests about her colleagues becoming overwhelmed with her work in her absence and covering her workload. She doesn't really want to create any tension with her colleague. She takes some, but not all of her planned leave.

Does she have an actionable claim under the FMLA? Is there an issue here? The leave was approved. She actually took some of it. If we can move to the next slide we can kind of talk through why she actually may have a claim under the FMLA. The next slide talks about the other types of claims under the FMLA. It's not just about granting leave, but it's about whether the employer is interfering with an employee's use of that leave. So the interference protection under the FMLA prohibits employers for interfering with, restraining, denying the exercise of, which we don't have a denial here, any right provided by the FMLA. So what do we think is going on here? Do we have a denial? No we talked about that. Is he restraining her in any way from using her leave? No. He is not saying - can't use it. But what is happening here seems to be a chilling effect. There is no intent needed. His motivation doesn't matter. It seems like his motivation is kind of pretty clear. But even if it wasn't it wouldn't matter for our tax accountant because she has decided based on his comments potentially not to take some of the leave that she is entitled to. But it's not clear. It's not clear whether or not words alone that discourage or dissuade the use of leave is enough to ultimately prevail on a claim under the FMLA. But it is something that potentially would get you through a motion to dismiss so that you could actually bring that claim before a finder of fact, a judge or a jury.

And I think especially now where we have financial implications on organizations and companies because of the pandemic, we have supervisors, managers employees everyone is under a

tremendous amount of stress and I think we have to be really cognizant of this potential chilling effect that can happen. Everybody wants to make sure that the company stays afloat, that we get the work done, that we respond to customer and client needs, but we have to be sensitive under the law that we're not potentially exposing ourselves or organizations to liability through actions and conversations that managers are having.
There is also another protection here. Right?
For retaliation. What would happen to said accountant if all of a sudden now she is denied a promotion or she isn't put on a really big new client because her manager doesn't feel like she is dedicated to her work because she has been taking this time off? That potentially could also be a claim under the FLS -- sorry the FMLA. Too many acronyms, because there is this protection just like we have in Title VII where we have under our OFCCP regulations that you can't retaliate against an individual for exercising one of their rights.
A lot of things to be thinking about here with the FMLA.
There is even more though if we move on to the next slide.
Things to consider under the FMLA.
Sorry. Slide 19.
What about OFCCP's new renewed increased focus on accommodations? It's no secret how director lean feels about accommodations which leaves of absence can be considered an accommodation even outside of the FMLA.
What about our obligation under executive order 13706 to provide paid sick leave?
There is this existing executive order that says that federal contractors and certain contract situations you have to give paid sick leave to employees. There is an overlap there with FMLA leave that we need to be cognizant of. And then these overarching impacts of Covid 19 where now it's not just an employee's condition, but it's caring for a sick family member under the expanded FMLA rights that we have right now that includes even time to take care of or to watch school age children who now are not going to school, but we're all dealing with virtual learning, child care obligations. There is so much to be thinking about for our employees and these protections around needing leave, about the health of each other, about themselves, their

family members, that there is some really big kind of pitfalls and things that we want to be thinking about.

So to the extent that we think that FMLA leave really is just kind of a separate bucket from what we do, we now know given the pandemic how it is just enter window ven into everything we're doing in our daily lives, but we can't forget about some of these other obligations that we have.

So we really again I can't emphasize enough want to make sure that this is not kind of a presentation to make you an expert in any of these things. It's really about getting you aware of so that you can issue spots so you can raise the question so you know where to actually talk to the experts within the organization about making sure that we're not infringing on someone's -- inaudible. Area of -- inaudible.

And that really comes to play as well when we're talking about the Americans with disability act. Tony, if we want to move to the next slide. Slide 20.

So this is another law that is really prevalent and important in our world right now. And I think going forward more so than -- inaudible. It's always been really important for us I think we have a new spot light on it. And as I mentioned, you know that inaudible. This is -- of OFCCP kind of pun intended there with our new focus reviews that have started and are well underway by OFCCP. Knowing how this law protects our employees and our obligations under this is really important for federal contractors because it overlays with Section 503 tremendously in our world.

So if we want to move to our hypothetical, Tony, which is the next slide, we can walk through what this looks like for our individuals. So company hires an employee who for three years, again we have a model employee who exceeds work expectations. She really is the best kind of employee that we could expect. But all of a sudden her behavior takes a turn. She starts missing deadlines. She has mistakes throughout her work. She is now often late to work. And we find -- her boss finds she is frequently away from her desk kind of taking a break. The employee confides to a coworker that she is suffering from some pretty major depression and that recent problems at home have made her conditions worse. We can imagine kind of what this impact

of a pandemic is having on them.
She explains that her tardiness is due to therapy appointments and that she is taking long and frequent breaks because she is unable to concentrate. She kind of needs the brain break. The coworker encourages the employee to alter her work schedule so she can consistently attend therapy sessions and take breaks when needed, but the employee is kind of reluctant to do so and decides to wait and not make that request.
Fast forward to her performance review. And not surprisingly, the supervisor points out the employee's poor performance in her performance review. And talks to her about what he is perceiving as a lack of effort and commitment to her job. At that point in time the employee reveals her condition, her depression, what is kind of going on in her world and kind of suggests or floats this idea of a modified work schedule. Her supervisor is dismissive, skeptical. That she is just making excuses for her poor performance and essentially just kind of brushes off the suggestion never to address or think of it again.
Does this employee have any recourse? I think hopefully we all listening to this webinar would say yes. Right? So we move to the next slide, Tony. What protections does this employee have?
And this really comes down to is this employee actually requesting an accommodation? And I think the answer is yeah. She doesn't have to make it an explicit. She doesn't have to use that word, accommodation. But it is her suggestion to her employer that she needs modification in order to perform her job duties. So she is talking about a change to the way that she does her job or her work environment. And it seems at least given our hypothetical that it potential could be a reasonable request. That's part of what we're going to evaluate the employer's obligation to respond to that request is whether or not it's actually reasonable.
This type of accommodation request is required both under Section 503 our governing regulations for individuals with disabilities for federal contractors and the ADA.
And it requires that when a manager or someone in HR receives this type of communication that they don't dismiss it. That you actually engage in the interactive process with the employee.

Aside from obviously, needing to do some training for management employees about how to recognize a request, how to handle it appropriately, even if he wasn't sure that it was an actual request for accommodation, it seems like it was close enough he should have referred it to HR or to someone else within his organization to at least talk to the employee to see if they could provide assistance or accommodation. But typically what we see as requests for accommodations are providing written materials or adjusting a work schedule, changing work environments that improve accessibility, we know about standing desks or providing a chair for someone who is in a role that requires standing for a lot of times, those are things that have been in place for a typical workforce or working environment. What is going on now though that we're in this Covid-19 world where a lot of folks are working from home, teleworking, that does not mean we don't have to make accommodations anymore. Right? It just changes the nature of those accommodations.

So if we want to move to the next slide, Tony, slide 23 I believe, things that the EEOC is asking employers to consider. Recent guidance, that is applicable to us as federal contractors. Think about what is an accommodation for someone who works remotely.

What does that look like. Is there still a notion of accommodating a work schedule? About how much time someone needs to be online? Are you still present for your job? Now that we have more folks that are using telehealth appointments? Do we have a need for accommodating breaks and schedules so that even though the employee is not leaving their work environment, they still are getting time to address their health concerns. What about jobs that can only be performed at the workplace? I think this is a concept really that is being modified and changed for employers right now because they are necessarily finding out that a lot of these jobs can be performed from home.

And so in the past where we have required or said that it is a necessary essential function of the job that you be in the workplace, that has kind of been turned on its head a little bit, or a lot, I should say, so that employers cannot say anymore no,

that request is unreasonable. You have to be here to perform your job. Owe, but low and behold, half of our workforce, entire workforce has been performing this role at home for the last five months.

Right? So we need to think about how this pandemic has necessarily changed the way that we do work. And also think about how the stress of this pandemic of working from home or not knowing how we're going to care for our children, or get them virtual learning, or just the stress of the unknown of getting sick and maybe we lost a family member, how does that exacerbate a preexisting condition for our workforce such now that they do need accommodation or now may have become disabled under the definition of disability for purposes of the ADA or even Section 503. And what really truly is now an undue hardship for employers to accommodate due to the pandemic. I think limitations maybe on resources because of the financial impact of the pandemic. But again this notion of really can we prevent folks from working from home as an accommodation now. So things, a different perspective, a different length to look for these requests for accommodations. And then --

>>ANTHONY KAYLIN: There was a question. Can you explain how anxiety given the Covid situation how anxiety interacts with 503 and the ADA. I think that's a really good question and whether or not increased anxiety rises to the level of a disability. And I think that that again kind of is a factual basis what really is the employee manifesting. How is it impacting them. What is the duration of this. And I think the general guidance would be not to be dismissive. To go through your normal process that you would have as an organization to understand whether this is something a condition that you can accommodate or what is being requested. Do we need under processes to have a medical information from a medical provider around it.

So I think it's really a notion around we have to be sensitive to that, but you have to follow your normal protocols and processes around that when an employee raises an issue and a concern. And I think anxiety is something that is real for a lot of individuals right now who may be didn't know that they had this condition prepandemic. So I think that's a fantastic question, but I think it really is going to depend on the nature of the circumstances and

the facts of the individual situation.
So thanks Tony for that question.
I think one other thing I wanted to talk about around the ADA is this notion of employers and folks that now during the pandemic are going to be collecting a lot of additional medical information. I mean just temperature checking in order to go to the workplace or to enter a building. And what kind of obligations and protections are around that. Confidentiality. Privacy concerns. All of those things overlay with potentially the ADA, but certainly are privacy laws. Again, I feel like everything that we talk about all these hypotheticals have four different possible answers and three laws that potentially are implicated by it. But again it's just some things that we want to make you aware if you are not asking these questions you can and also if you are not aware of the overlay and the overlap, that you can make sure that you understand kind of some of these nuances so that you are informed and aware of that.

>>ANTHONY KAYLIN: We have a question for you. What documentation if any should we ask related to high risk family members's medical? Are we required to making accommodations based upon a family member?
>>LAURA MITCHELL: Under the FMLA, that is part of a protection right that an individual can take leave to address or take care of a family member. So I think again it would be your normal protocol as to what is required under the FMLA for that leave.
There has been additional guidance under Covid that concern about getting sick is not necessarily a protection, but I would caution that employers, to the extent that you take a position that is broader than what is actually minimally required under the law, that you make sure you can consistently make those decisions for everyone and that it's something that potentially you can continue to make going forward. I think everybody wants to be accommodating and we really feel for our employees who are undergoing all this, but we want to make sure it's not causing undue hardship on the employer. But I would say follow your normal processes and be really understanding as to what is actually going on. Is an individual actually sick or are they just

high risk? Right now the biggest question that we are getting is what if someone thinks that they potentially have Covid-19? They are awaiting test results so that we don't and the employee kind of falls in this gray area. Do we still -- are we still required to give them protection under the law, grant them leave? I think the answer to that question is yes until we know that they are not sick. That is the most conservative approach. But this notion of high risk individuals I think you have to tread very, very lightly around presuming that they need special treatment, denying them access to the workplace, the EEOC has come out with guidance around that, so it is nuanced, but it's developing at a rapid pace. Just like employers are trying to manage and figure out and deal with all these fact patterns coming their way so is the legislature, the law makers trying to get guidance out as fast as they can in this rapidly changing word. I don't have a definitive answer other than check on EEOC's guidance. Check with your legal departments outside counsel. Everybody has their finger on the pulse of what seems to be changing on a very rapid basis right now.

>>ANTHONY KAYLIN: One other question for you.
What do you believe are the best practices for employers when dealing with employees who are caregivers for children, but do not qualify for FMLA and do not have a disability during Covid. May be in a state where this protection for parental status as well.
>>LAURA MITCHELL: I think the best practice is to one look to see if you have other leaves available in your workplace. Just because they may not qualify for FMLA, do you provide other types of leave. Also I think this notion of protection for parental status is really important because you don't want to discriminate against individuals because of the obligations they have as being a parent. Remember, that goes for men and women. We cannot treat women differently or men differently because of any kind of perceived notion about parental obligations or responsibilities. But I think the best practice is to come up with a best practice that you can consistently apply across the organization that would not cause undue hardship to the business that actually takes into consideration those rights and obligations and it could be that you have to create a new type of leave for the

organization to cover this.
Certainly under -- right now at least until the end of 2020, that expanded FMLA does require that you give employees who have child care needs time off to address those in certain circumstances. So you want to look at those federal obligations as well in line with your local or your state obligation.
These are all really great questions. Do we have anymore Tony along these lines.
>>ANTHONY KAYLIN: No. Go ahead. I'm going to leave FMLA and move to the FLSA. I challenge myself to work in as many acronyms. I think I'm doing pretty good. I hope you guys agree. So the FLSA is the Fair Labor Standards Act. We're on slide 24.
And this governs the rules around wages and pay for workers. So we have -- we know there are laws that define who is an employee. The FLSA does that as well as what we're saying out in the NLRA. But the FLSA goes further.
Inaudible. Of employees or how we classify employees based on their pay. And with a number of the laws kind of that we had talked about, there has been a fair amount of drama surrounding recent changes to the FLSA classifications really around who is considered exempt or non exempt for being entitled to over time pay. I know a number of you heavily on the phone remember that start and stop we had a couple years ago when we thought that there were going to be significant changes, increases to the threshold levels such that big portions of our population who were previously non exempt were now going to be exempt or vice versa on their level of pay. So everybody was kind of rushing to make changes and make sure they were in compliance and then that stopped.
What do we have now? What are we currently operating under? Slide 25, Tony if you want to advance, talks about how we look at pay for establishing whether our employees are exempt or non exempt. And we did see these thresholds increase. But not nearly as far as they would have under that kind of start and stop that we had a number of years ago. We actually saw 50 percent increase in the current level of pay. Before I think it was around 23 -- if that was your annual pay you were considered to be exempt. Or $455 a week. It's now $684 a week where you

classify as no longer being entitled to over time pay.
These thresholds changed around highly compensated executives and what you actually used to calculate compensation. But importantly how we define what is a duty that makes somebody exempt or not exempt didn't change. We had a change in the pay level, but not in a description of what folks are actually doing. And that's really important especially for us as federal contractors because there is a lot of other areas where what somebody does not just how we label it is important to the underlying liability and determination.
So this idea of what we pay people and needing maybe possibly to adjust pay to align with exempt and non exempt status does have implications for us as federal contractors.
So on the next slide, slide 26, we talk about those. And really what I had in mind when I was coming up with this presentation was this notion of pay equity. Because if we're not changing job duties, if it's still driven on what somebody is doing, but we're aligning pay now to meet these thresholds under whether someone's entitled to over time or not, we have to be cognizant of creating some type of internal potential inequity in our workforce. What if you have someone whose job duties are in line with a non exempt role that they don't really operate with autonomy. They still get direction, but they have been with the company so long that their pay is high. They have a long tenure. So that they jump over into this category of being classified as exempt potentially and not being subject to over time obligations.
Does that create a problem for us from a pay equity standpoint? Potentially. Right? We want to be really mind full of what folks are doing and making sure that folks that are doing similar type of work, similar skill effort and responsibility that goes into our roles are being paid similarly. Not equally. Again you don't have their equal pay. Famous ly. We just have to have fair pay. But this is a consideration that I think may be lost. Sometimes when we're rushing to make sure we're in compliance with FLSA, who is exempt. Who is not exempt. Oh, that has created a problem for us internally. One thing in addition to -- there is lots of reasons why we should be conducting proactive pay equity analyses required under the regulations to annually look at our compensation practices, but again if we're making adjustments to

pay to comply with the FLSA we need to be looking at and testing those proposed adjustments to make sure we're not creating any internal inequity. It's also a good time to be looking at your job duties to make sure that they are accurate. Our job duties we rely on those when we're thinking about accommodation requests, compliance with Section 503. We need to make sure there is no barriers in our job descriptions.

All of these things again as you can see we have been talking through really becomes fabric of the same cloth even though they are called something different it may be handled by a different department. They all kind of have this butterfly effect that can impact other aspects of our employee as lives and our compliance obligations and potential risk and liability. Things that we want to think about.

>>ANTHONY KAYLIN: We have a question for you.

How do you handle job groups which may have a mix of exempt and non exempt professionals? And exempt professionals who may be paid over time after so many hours. For example, engineer who work 45 hours or more start getting over time. How would you handle that in formulating your job group analysis.

>> Right I would say you want to look at that with a very keen eye. Because it would have to be an extremely unique job group in my mind where we have both exempt and non exempt individuals who have the same content to their job, opportunity for advancement and wages. That necessarily impacts that third piece. Because if they are entitled to over time or not, that impacts how they are paid.

It would really be taking a look at that job group to see does it make sense we're actually putting them together. Are they close enough to being apples to apples or oranges to oranges that we should be analyzing them in one group and really is that non exempt population truly professionals.

Do they fit into another category. Are they administrative role. Talking that more skilled role or those technicians. It really becomes looking at again not just what we label them, but what we are talking about what they are actually doing. And it could be that they are miss classified from an FLSA standpoint. I would say you would want to undertake an audit to make sure

those non exempt folks shouldn't be exempt or vice versa that the exempt should be non exempt. I would look very skeptical ly at a job group internally that combines both exempt and non exempt workers together.

That was a good question. Is there anything else before we go to the last topic. I wanted to end kind of on where we started with thoughts around religious freedom rights and obligations and the intersection with LGBTQ.

Tony, I don't know if you can advance to slide 27 and actually we can go ahead and move to slide 28.

So here we again have this enter play between case law and executive order obligations. We have new directives from the agency. We have proposed rule making that is pending and really this is a murky area and it's by no means settled with this notion of we have to give individuals the freedom, right, some of you use that term loosely, to practice their faith without fear of discrimination or retaliation.

And that is written very broadly right in the executive order and directive we have from OFCCP directive 2018 - 3. For using formal numbers. And that came out of some of the case law we saw around Title VII protections, you know the in famous wedding cake cases that we had where really OFCCP has made it clear that compliance officers, that the agency itself cannot take an interest or hold it against an employer or employee for exercising their faith. But that seems to but up against and in some instances really conflict with this notion that we have to provide protections for individuals on the basis of sexual orientation and gender identity. That we as federal contractors and now, because of our Supreme Court case have obligations to create work environments that are free from harassment, or discrimination.

So I think it will be interesting to see kind of how this plays out because we do have a long line of cases and some very recently that are reinforcing this notion that employers can make decisions based on their religious beliefs and that there are some employee actions that can be protected based on that, but how does that work in conflict with these other obligations.

So kind of leaving us with this open question, one that I know has been posed to OFCCP to help us understand how we're

supposed to align these obligations, what federal contractor is supposed to do so they don't run afoul of an agency directive or protections under Title VII, how are we supposed to operate.
So this is one that I think is fascinating. I think it's one we're going to see play out this the next month and years. But one I think is raising some pretty big questions for employers and especially for federal contractors.
So with that, that was all of the content that I wanted to share with you guys today. It's kind of fun working through these I thought it was fun sorry working through all the different laws and seeing how they intersect with each other. Tony, do you have any questions that I didn't get to answer or kind of anything else we want to talk about?
>>ANTHONY KAYLIN: We have three questions. Question one is if an employee or if an applicant says they can work a specific schedule, and it turns out when they get hired they say they can't because of religious issues, what should the employer do? Can the employer terminate for lying on an application and lying in an interview?
>>LAURA MITCHELL: Right so I think this is a delicate situation. I think that that is one where you should engage in the interactive process to see if that request can be accommodated. I don't think that OFCCP or the Courts would necessarily look upon that in a positive light if we just out right terminate that employee without going through this process to find if we can actually accommodate that request, provide them undue hardship for that organization. But again, I direct you obviously, to your own counsel to work through that fact pattern because there is probably a lot of nuances. Did that individual's situation change from the time that they applied until the point at which they said they can no longer work that schedule. So there seems to be a lot more we would want to ask, but I would encourage kind of working through the interactive process.

>>ANTHONY KAYLIN: The second question is and I don't know if this is understood or not. What is from the OFCCP standpoint when they came out with the issue of a strongly held belief and the issue of the LGBTQ, how does that enter play with the federal contractor community? How does that enter play with the

strongly held belief versus hiring termination with someone of the LGBTQ community?
>>LAURA MITCHELL: I think that's a really salient question and really kind of what I was just talking about. What is that interplay. What right supercedes the other right. I think for employers especially with our Supreme Court cases right now making it very clear that there are protections for individuals on the basis of gender identity and sexual orientation that employers needs to be really careful about non infringing on those rights and protecting and creating an environment that is non discriminatory and doesn't have harassment. So the strongly held belief is something too fact based an how do you go about evaluating which obligation supercedes the other. I don't think we can make that determination kind of just sitting here. I wouldn't even want to speculate this which one should come out on top. It is very clear we have nondiscrimination. Non harassment obligations as employers under Title VII and under the federal contractor laws and regulations. And then we have this directives around strongly held beliefs. So you think about what is in law, versus what is sub regulatory. That is a difficult situation and one I don't think we have a clear answer to, which is why I kind of its this very open question.
>>ANTHONY KAYLIN: We have a question coming from the audience. Could a religious institution discriminate against females as LGBT.
>> That's a question one that has been raised around is this notion of strongly held beliefs, does that fall under this ministerial exception. I think it depends on what they are wanting to do, what they are claiming that belief is. So again it's going to come down to the factual basis and factual notion, but the ministerial exception and these protections is not just limited to someone's belief around LGBTQ, but it could be around beliefs more about sex, male female race that type of thing as well.

>>ANTHONY KAYLIN: Do you have any recommendations as to bathrooms and locker rooms for employees who may have to change clothes.
>> As far as having gender neutral -- is that the recommendation.
>>ANTHONY KAYLIN: Yes gender neutral or the LGBTQ

rulings.
>> I think that's another really great question. I think again the Supreme Court decision could be important and instructive around that just for the claims and the protections. I think it depends whether you have an employee who has raised the concern so that you need to address that or if this is something proactively that you want to look into to be a good EEO employer. Those are two different types of situations, but I think to the notion of if we are really trying to uphold under OFCCP's regulations and requirements and to make sure we don't have barriers to opportunities to conditions of employment based on those protected characteristics characteristics, it should be something that you could consider.
>>ANTHONY KAYLIN: How would you handle the bathroom.
>> I would think if it doesn't cause an undue hardship for an organization and especially if you have an employee request or complaint around it looking to see how you could accommodate that within your facility. But it definitely should be something as a federal contractor if you are looking to uphold your EEO obligations that you should be looking into it. Doesn't mean you have to build a new bathroom, but can you modify an existing one, change signage, make it so it's gender new that. Unisex neutral. Unisex bathroom.
>> Can you direct an employee into a specific bathroom then.
>>LAURA MITCHELL: I would be very hesitant to do so. I think as an employer you should not be telling an individual which restroom to use.

>>ANTHONY KAYLIN: Could a business claim like Hobby Lobby to be religious base and discriminate based on a standard i.e., Christian based company.
For example, Hobby Lobby.
>>LAURA MITCHELL: It would depend on the facts of the situation. The notion. If they met all the conditions as set out in the case law, all of these are going to be kind of fact based questions that you really want to get answers to from legal counsel.
>> Okay.
We have no other questions. Do you have anything else you

would like to add.
>> No, I just really again appreciate the opportunity to kind of come to you all in this situation. Again, I hope I get to see you in person in Nashville next year. I think we're all going to be looking forward to some actual human contact at that point. But other than that thanks to everyone. Sorry for the technical difficulty. Hopefully we overcame those. It was really my pleasure to be able to talk to you guys today.
>>ANTHONY KAYLIN: Quick question. Would working from home be considered a reasonable accommodation during Covid because of school closures.
>>LAURA MITCHELL: I would say yes. Again it's hard for me to sit here and opine on that without knowing the facts and circumstances, but certainly if working from home has been something that an organization or employer has been allowing because of the pandemic and it is a workable alternative to address an employee's needs, it could potentially be a satisfactory accommodation.

>>ANTHONY KAYLIN: I want to remind everybody next year we're going to be live. We're assuming there will be vaccines available. We'll be live August 1st through fourth at the Omni National Hotel. We already have a winner for the first round of registration. Who attends one of our sessions they will be up for a free three and a half day for registration. The more times you attend, the more entries you get. This is going to be a great conference next year. Some of the speakers from this year, think about what next year is going to be like. We want to thank our sponsors. We really do appreciate it. Without them we couldn't have this webinar. We want to thank you all for attending today. I want to make sure you see this. We do have the PDC and HRCI credits for you. It's always the last slide. So thank you very much. And thank you, Laura.
>>LAURA MITCHELL: Thanks so much Tony. Good-bye everyone.