

Essential Employment and Labor Law Issues for Government Contractors: Navigating Compliance and Best Practices

ACC National Capital Region

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Presenters



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Agenda

- Introduction
- Choose Your Own Adventure
- Scenarios

Introduction

- High Scrutiny, high risk
- Most demanding of customers
- Contractual obligations
- FAR, DFARS
- Wage Orders
- Executive Orders
- All that PLUS all the obligations every other employer has

Introduction (cont.)

- What does this mean?
- Your job is hard!
- There is often tension between your legal obligations and what the government customer does or tells you to do.
- And that is what we are here to talk about today.
- What are the best practices and strategies for navigating employment tensions with the government?

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Pick a Topic, Any Topic

- (A) EEO Complaints
- (B) Government Interference in Your Employment Decisions
- (C) Accommodations and the Government Customer
- (D) Offboarding/Onboarding
- (E) False Claims Act / DOJ Civil Fraud Initiative
- (F) Wage/Hour Issues
- (G) Workplace Safety & Health



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Question slide

Choose Your Own Adventure

EEO Complaints

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Government Interference in Employment Decisions

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Accommodations and the Government Customer

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Onboarding/Offboarding

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False Claims Act / DOJ Civil Fraud Initiative

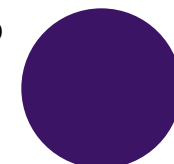
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Wage/Hour Issues

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Workplace Safety & Health

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Results slide

Choose Your Own Adventure

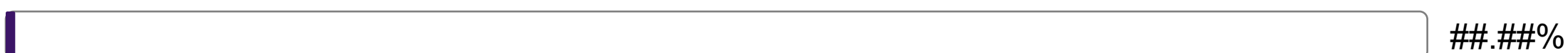
EEO Complaints



Government Interference in Employment Decisions



Accommodations and the Government Customer



Onboarding/Offboarding



False Claims Act / DOJ Civil Fraud Initiative



Wage/Hour Issues



Workplace Safety & Health



RESULTS SLIDE

EEO Complaints

EEO Complaints – Scenario 1

Your employee complains about perceived harassment by a government employee...

Issues

- Legal duties pursuant to federal/state laws and company policies.
- Risk of liability (level/authority of alleged bad actor).
- Joint employer issues.
- Need for demonstrated accountability and exercise of reasonable care.
- Government customer sensitivities.

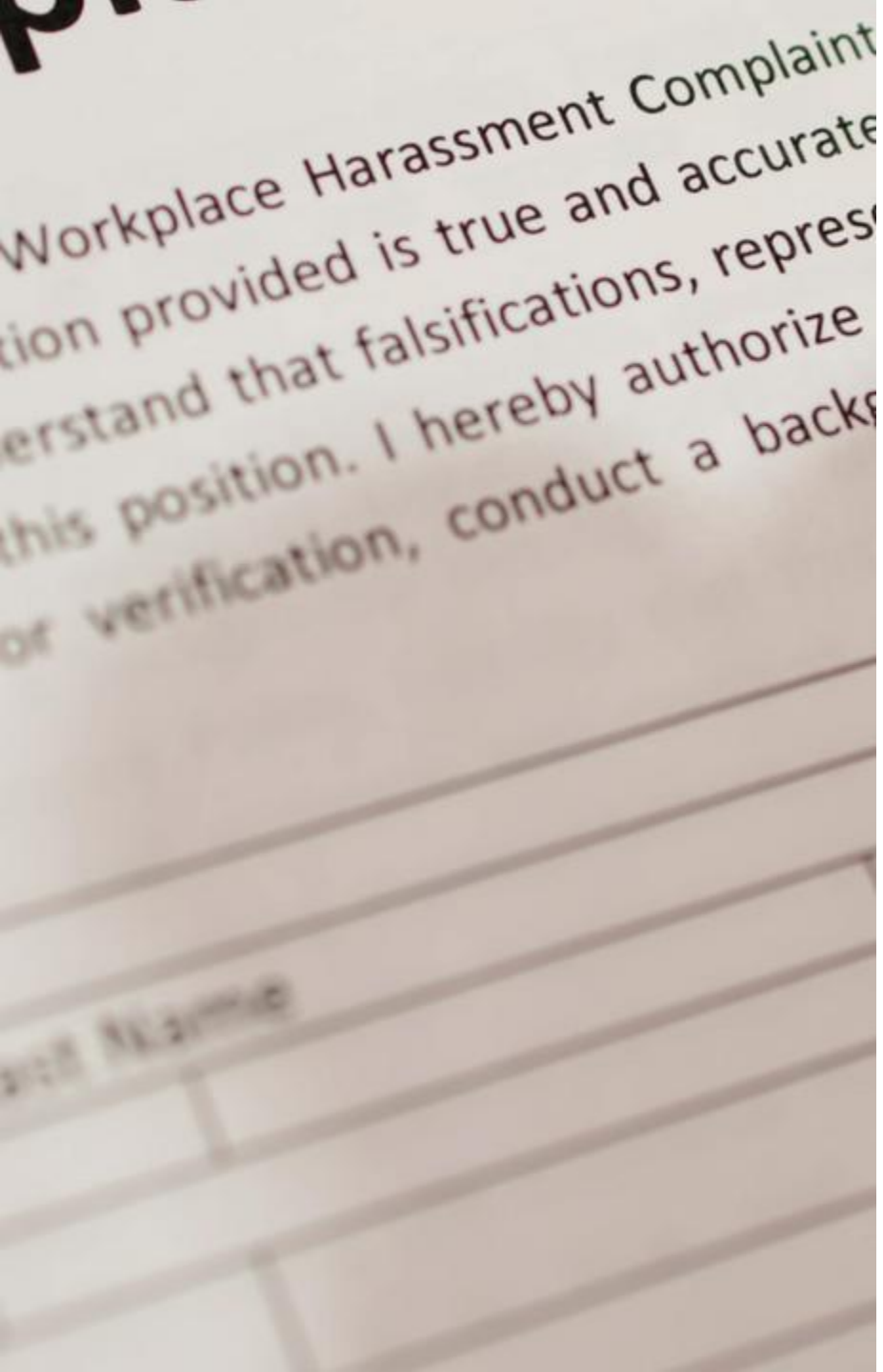


Best Practices

- Remember your own legal duties.
- Communicate in writing with government personnel and contracting officer.
- Coordinate with government's EEO Office on investigation
- Consider a direct, written appeal to agency's office of general counsel.
- Memorialize findings and share them with the government customer.
- Know your customer's EEO guidance and workplace policies.
- Understand any contractual obligations and responsibilities you may have.
- Make joint employer issues clear to government customer.

EEO Complaints – Scenario 2

A government employee complains about harassment by your employee....



Issues

- Again, remember your legal obligations.
- How to investigate?
- Whose responsibility is it to investigate?
- Potential retaliation.
- Confidentiality, need to know.

Best Practices

- Investigate and take action if necessary.
- General duty to other employees; non-harassing workplace, though you are not in control of what gov't customer does.
- Prevent retaliation.
- Cooperate with government's investigation and conduct your own.
- Keep the number of individuals aware of the complaint to a minimum.
- Written findings, consider sharing with the government.
- Consider paid leave of absence for the accused.

EEO Complaints – Scenario 3

Your employee files a complaint
with the agency's EEO office...

Issues

- How much to share?
- What information to share?
- Potential retaliation.
- Customer relations issues.



Best Practices

- Treat it just like private-sector EEOC.
- Cooperate fully.
- Balance efficiency with effective advocacy.
- Ensure the information you share aligns with government regulations/policies and contract terms.
- Avoid retaliation.
- Ongoing discipline kept on separate but parallel track.

Government Interference

Government Interference – Scenario 1

Government customer requests
your employee's removal from the
contract....

Issues

- “Cat’s Paw” liability.
- Potential CBA issues?
- Performance or conduct issue?
- Will a replacement be necessary?
- Can the issue be resolved without removal?
- Liability if employee files claim against company?



Best Practices

- Gather information regarding the reason for the request.
- Request confirmation of decision in writing.
- If they will not confirm in writing, then memorialize in writing back to customer immediately thereafter.
- Consider creative and compromising solutions.
- Assess risk if removal is last resort.
- If removal is necessary, reassign employee whenever possible.

Government Interference – Scenario 2

Terminated employee files a charge, you tell the EEOC the government demanded their removal, the EEOC requests documents and information about the decision and decision makers...

Issues

- Contractual obligations.
- Cleared environment limitations on information sharing.
- Perhaps nothing in writing.



Best Practices

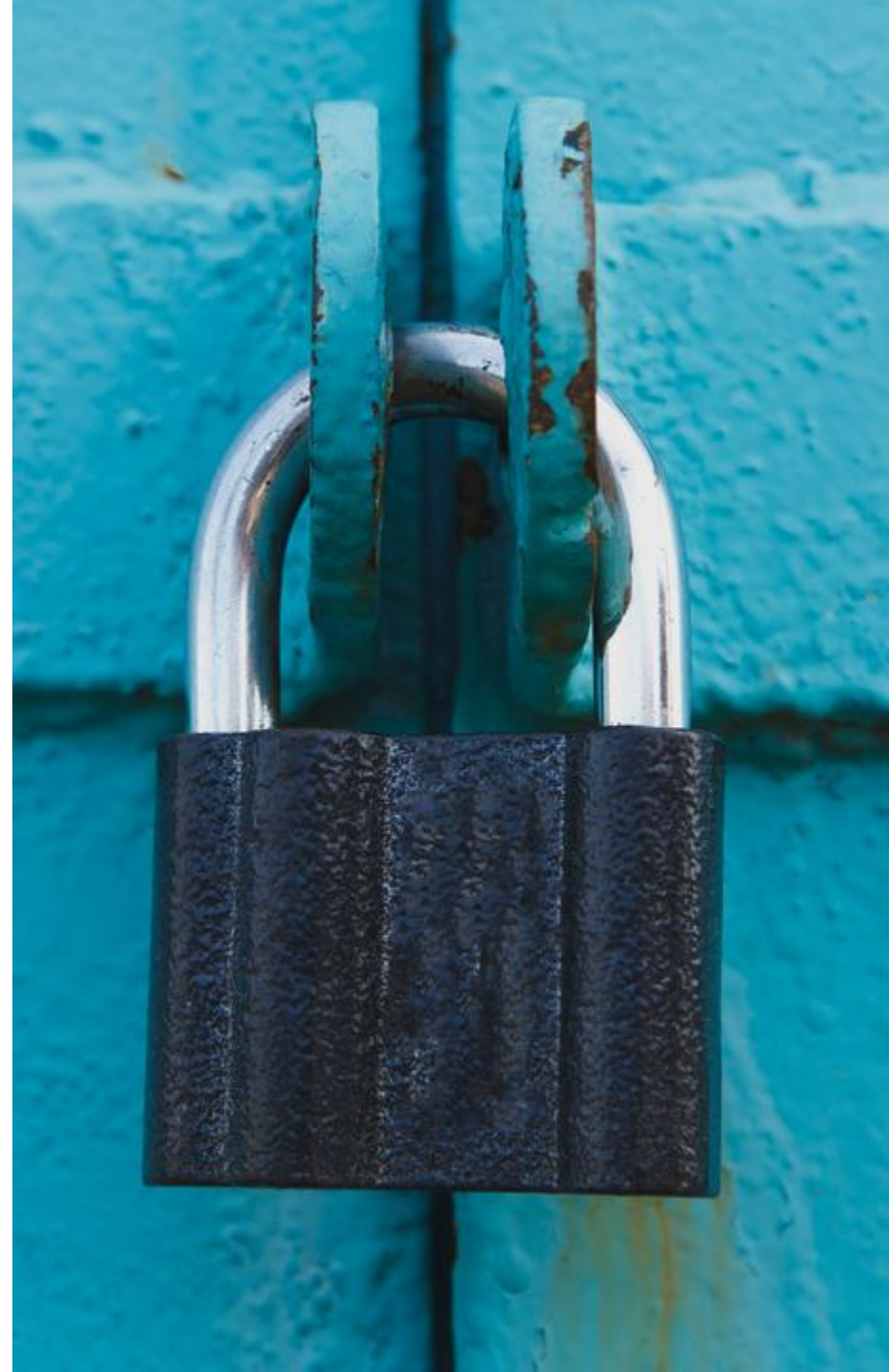
- Attempt to obtain permission to share information from customer.
- Make a clear proposal rather than blanket permission.
- Send them copies of precisely what you want to provide.
- Tell the EEOC about your contractual obligations.
- Make it clear to the EEOC that you will do the best you can.
- Consider customer relationship and whether settlement is viable.

Government Interference – Scenario 3

Government customer informs you that a new hire is not going to obtain a security clearance...

Issues

- Are there holes in our hiring process?
- Truly contingent offer?
- What do we do in the meantime?
- Can the application be resubmitted?
- How do we communicate this to the new hire?
- Potential national origin or bankruptcy discrimination/retaliation?



Best Practices

- Immediate assessment
- Temporary reassignment
- Possibility of applying for non-cleared position as alternative to termination.
- Review clearance process
- Evaluate hiring policies and practices
- Think about potential estoppel claims, especially in the District.
 - Brody Long v. Ass'n of Cath. Colls., 2018 D.C. Super. LEXIS 499, 12-13 (D.C. 2018)

Accommodations & Government Customer

Accommodations & Gov't Customer – Scenario 1

Government customer denies an employee's accommodation request...

Issues

- Have we engaged in the interactive process?
- Who has responsibility of approving/denying accommodations?
- What if the employee appeals or grieves this decision?
- Do we agree with the government's decision?

Best Practices

- Remember, as the employer, it is your obligation to engage in the interactive process.
- Stick with your established procedures.
- Advocate for your employee with the customer, if appropriate.
- Document all decisions, memorialize in communication with government if they will not confirm in writing.
- Think creatively about solutions.

Accommodations & Gov't Customer – Scenario 2

You have an employee who is a new mother, the requested accommodation is for a private room to express breast milk, the agency says they have no such rooms available to contractors...

Issues

- PWFA/ADA Compliance.
- Undue burden?
- Any possible alternative accommodations?
- Interactive process concerns.
- State/local laws



Best Practices

- Ask the government customer what they do for their pregnant/nursing employees.
- Explore alternatives.
- Consider paid administrative leave while you work with the government.
- Document decisions and denials.
- Push back on customer if appropriate.
- Consider in-house counsel to OGC direct communication.

Accommodations & Gov't Customer – Scenario 3

An employee requests telework as an accommodation in a cleared environment...

Issues

- Undue burden.
- Contract requirements.
- Security concerns.




Best Practices

- Remember, it may not be possible.
- This could be an undue burden even under more lenient standard.
- Essential functions of the position could include physical presence. But be sure.
- Document interactive process.
- Have clearly articulated position descriptions that include in person work as an essential function.
- Document government decision.

Onboarding/Offboarding

Onboarding/Offboarding – Scenario 1

Your employee refuses to return government funded equipment...



Privacy

Issues

- Contract obligations.
- FAR compliance to safeguard government information.
- Privacy concerns.
- Criminality.

Best Practices

- Physical, in person termination meeting.
- Make it as easy as possible for employee to return equipment.
- Document efforts.
- Understand contract requirements.
- Consider demand letter, law enforcement.
- Software enabling remote deletion.
- Measure threat of litigation vs. criminal prosecution

Onboarding/Offboarding – Scenario 2

You are considering bringing on a former government employee to work in a similar role as a contractor...

Issues

- Are Deferred Resignation Program restrictions applicable?
- Potential employee's post-government employment restrictions (18 U.S.C. § 207)
 - Lifetime ban?
 - Two-year ban?
 - One-year cooling off period for senior officials? Two-year cooling off period for very senior officials?
- Procurement Integrity Act 41 U.S.C. § 2101-2107
- Section 1045 of the National Defense Authorization Act for Fiscal Year 2018 (lobbying restrictions for former senior DoD personnel)
- FAR Requirements

Best Practices

- If you have large contracts (\$6m+), you must maintain a written code of ethics and business conduct prohibiting violations of post-employment restrictions
- Implement a robust recruiting policy
- Screen for conflicts
- Conduct due diligence
- Require an opinion letter from agency ethics counselor and engage on any concerns
- Maintain a compliance program
- Ensure transparency

False Claims Act/DOJ Civil Rights Fraud Initiative

False Claims Act/DOJ Civil Rights Fraud Initiative

– Scenario 1

Your employee complains about your DEI practices or a particular diversity program...

Issues

- Potential FCA liability.
- Executive Order
- FAR compliance.
- Self-reporting requirements.
- Potential retaliation.
- DOJ Investigation?



Best Practices

- Investigate all claims of alleged discrimination, even if about DEI or diversity programs. Ask employee to sit for an interview.
- Holistically review all DEI/Diversity practices, especially in recruiting, training, development. Conduct a DEI/Diversity audit.
- Consider revising policies/practices to more closely track federal anti-discrimination requirements
- Engage counsel to maintain privilege.
- Cooperate with any government investigation or audit.

False Claims Act/DOJ Civil Rights Fraud Initiative

– Scenario 2

You receive a Civil Investigative Demand
from the DOJ...

Issues

- Potential FCA liability
- Potential inter-agency coordination
- FAR/Contract compliance
- Negative publicity



Best Practices

- Cooperate with investigation.
- Remember CIDs have the full force and effect of subpoenas as if a lawsuit has already been filed.
- Analyze practices/policies at issue, consider affirmatively making changes, suggesting same to government.
- Insulate from retaliation
- Work with counsel to ensure scope of investigation is as limited as possible.

Wage/Hour Issues

Wage/Hour Issues – Scenario 1

An employee refuses to fill out timesheets regularly...

Issues

- Timely and accurate invoices to government customer
- Contractual compliance
- Compliance with the federal Fair Labor Standards Act, for nonexempt employees
- Compliance with state wage/hour laws
- Potential FCA claims

Best Practices

- Have clear policies. Ensure employees understand the contractual and legal consequences of delayed or inaccurate timesheets.
- Impose consequences for failure to timely fill out timesheets – but don't withhold or delay pay.
- Ensure supervisors watch timesheets for timely, accurate completion.

Wage/Hour Issues – Scenario 2

A nonexempt employee secretly works off the clock to finish a big project and you find out weeks later...

Issues

- Fair Labor Standards Act: hours worked include off-the-clock work
- State wage payment laws require payment for all hours worked.

Best Practices

- Have clear policies against off-the-clock work. Confirm your commitment to pay for all hours worked.
- Train supervisors to be diligent about employee hours, time worked, unusual productivity
- Rectify the situation as soon as you learn of it. (Double or treble damages?)
- Have employee sign acknowledgment – wage claims are not releasable.

Workplace Safety & Health

Workplace Safety & Health – Scenario 1

An employee with known mental health issues has been acting erratically off duty and threatening violence...

Issues

- Safety of your facility, government facility
- Medical confidentiality requirements under the Americans with Disabilities Act (ADA)
- Potential defamation claims
- For employees with clearances, whether incident or issue must be reported to customer's security officer.

Best Practices

- Investigate and give the employee an opportunity to explain the situation.
- Alert the customer of the threat but be mindful of medical confidentiality issues – provide no more information than is needed.
- Investigate first, or alert the customer first?
- In an emergency, consider contacting emergency contact.
- Involve law enforcement or consider fitness for duty assessment if warranted based on level of threat.
- Involve your facility security officer. If appropriate, report to customer's security office or encourage self-report



Thank you.