

# Essential Employment and Labor Law Issues for Government Contractors

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# Presenters



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Amentum

# Agenda

- Introduction
- Choose Your Own Adventure
- Scenarios
- Best Practices

# Introduction

- High Scrutiny, high risk
- Most demanding of customers
- Contractual obligations
- OFCCP
- 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?

# Choose Your Own Adventure

## POLL INSTRUCTIONS

Text **ACCNCR** to the number **22333**

# Pick a Topic, Any Topic

(A) EEO Complaints

(B) Government Interference in Your Employment Decisions

(C) Accommodations and the Government Customer

(D) Offboarding

(E) Potpourri

# Choose Your Own Adventure



A - EEO Complaints 0%

B - Government Interference in Your Employment Decisions 0%

C - Accommodations and the Government Customer 0%

D - Offboarding 0%

E - Potpourri 0%



# 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.

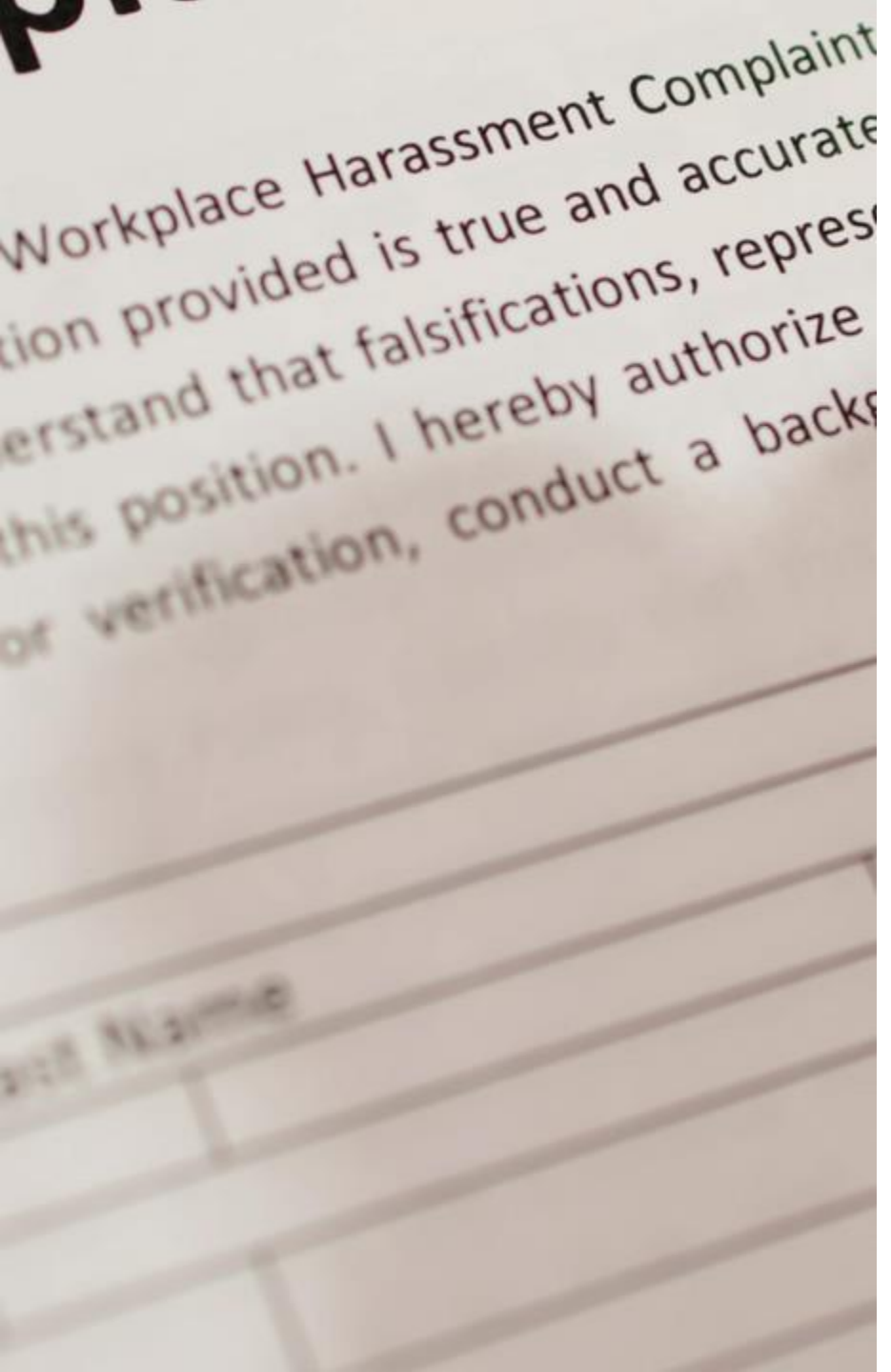


# Best Practices

- Remember your own legal duties.
- Communicate in writing with government personnel and contracting officer.
- 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.
- 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.

# 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 – 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.

# 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.

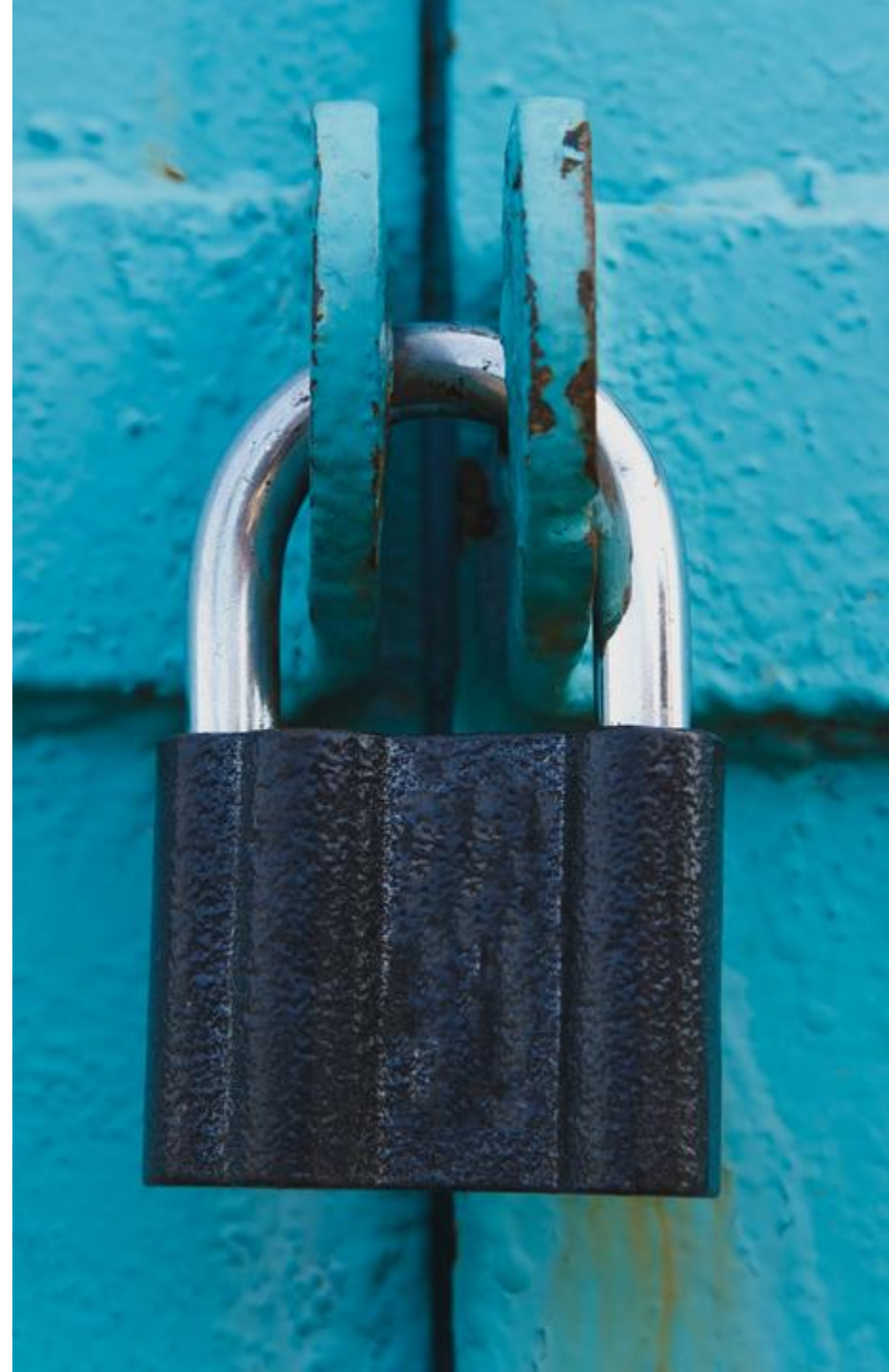
# Government Interference – Scenario 3

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
- 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 & 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 work in a cleared environment, and the requested accommodation is for special software that the three-letter agency will not authorize...

# Issues

- ADA Compliance.
- Undue burden?
- Interactive process concerns.



# Best Practices

- Typically comes up for hearing and/or visually impaired employees.
- Ask the government customer what they do for such 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.
- Document interactive process.
- Have clearly articulated position descriptions that include in person work as an essential function.
- Document government decision.

# Offboarding – Scenario 1

Your employee refuses to return government funded equipment...



# 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.
- Software enabling remote deletion.
- Measured threat of litigation vs. criminal prosecution

# Offboarding - Scenario 2

Your employee complains about harassment during exit process...

# Issues

- What are our obligations at this point?
- Futility?
- Who is the alleged harasser – company or government?



# Best Practices

- Investigate and take action if necessary.
- Use exit interview as opportunity to gather information, may not be able to reach employee again.
- Document efforts.
- Coordinate with government customer if necessary.

# Potpourri – Scenario 1

Your employee complains about fraud, waste, and abuse on the contract...

# Issues

- Potential FCA liability.
- FAR compliance.
- Self-reporting requirements.
- Potential retaliation.
- OIG investigation?



# Best Practices

- Investigate all claims of fraud, waste, and abuse.
- Ask employee to sit for an interview.
- Consider self-reporting if complaints are credible.
- Engage counsel to maintain privilege.
- Propose specific solutions to government.
- Cooperate with any government investigation or audit.

# Potpourri – Scenario 2

Your employee reports to work before the customer will permit them to begin working or works “off the clock” ...

# Issues

- Wage and hour requirements.
- Potential fraud, waste, and abuse.
- Contract compliance.
- Obligation to pay vs. ability to collect.



# Best Practices

- Written timekeeping policies that you actually enforce.
- Discipline for repeat offenders.
- Treat it is a compliance issue, not a wage issue.
- Do not dock pay
- Evaluate exempt vs. non-exempt status.

# Potpourri – Scenario 3

Your newly hired employee refuses to submit to a drug test...





# Issues

- Drug Free Workplace Act requirements
- Accommodations issues.
- Medical marijuana.
- “But it’s legal”
- Cleared environment?

# Best Practices

- Clearly written and enforced drug free workplace policy
- Follow federal and state drug testing requirements.
- Treat as a performance or failure to follow policy issue, as opposed to a disability or accommodation issue.
- Essential functions of position cannot be met.
- Ensure drug test is clearly articulated as a contingency in offer letter.

Thank you.

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