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**Transcript of Webinar**

**Identifying Discrimination: Information for Apprenticeship Sponsors**

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JONATHAN VEHLOW: Welcome to "Identifying Discrimination: Information For Apprenticeship Sponsors." So without further ado, I'd like to turn things over to our moderator today, Zach Boren, division chief of the Office of Apprenticeship, Employment and Training Agency for the U.S. Department of Labor. Zach?

ZACH BOREN: Hey. Good afternoon. Thanks for joining us for our webinar. We're really excited to talk about what sponsors need to know about discrimination. I'm joined by my colleagues, Nick Beadle, special assistant to the Office of Apprenticeship, and Donna Lenhoff, who's a consultant with INS Group and a subject matter expert on equal employment opportunity.

We're going to cover quite a bit of territory here today. This presentation will help you learn more about discrimination and how to avoid it in your apprenticeship program. To refresh your memory, the federal apprenticeship regulations on equal employment opportunity have been in place for decades, and it's been long since those regulations have been updated.

But in 2016 our office revised those regulations to bring them in line with today's workforce and the realities of the labor market. The updated regulations really streamline sponsors' EEO obligations and provide straightforward methods for ensuring that all qualified applicants have the opportunity to enter apprenticeship programs.

Our presentation will cover the groups and characteristics protected from discrimination by the updated EEO regulations, the types of actions that are considered discriminatory and are prohibited by the regs, and understanding how discrimination is proven and, therefore, how sponsors can detect and avoid discrimination in their apprenticeship programs.

First, we'd just like to get a sense of who is in the audience today, and we have a selection of four options. Hopefully, they cover all four, what type of organization you are, whether you're an apprenticeship sponsor, an intermediary, or an education or workforce partner. And if you're other, please let us know that one too. It looks like most of you all are apprenticeship sponsors, which is really great because this is critical information for you all to get ahold of.

Let me go ahead and turn this over to my colleague, Nick Beadle, to get us started.

NICK BEADLE: Thank you, Zach, and good afternoon, everybody. As you can see from this slide we just put up on your screen, the apprenticeship EEO regulations protect apprentices and applicants for apprenticeship from discrimination on several bases. The old reg included race, color, religion, national origin, and sex, and the new reg added – including and clarifying that sex also includes pregnancy, added sexual orientation, genetic information, disability, and age.

As you can overt (sic), the characteristics in the right-hand column were added when the regulations were revised in 2016. Now, in case you aren't familiar with the term genetic information, it means, for example, information from tests to find out if an apprentice or applicant could have a medical condition or disorder that could affect them in the future. Sponsors may not request such tests, and they may not base employment decisions on such information.

When people think about discrimination, they might think about hiring and firing, but the apprenticeship EEO regulations list many different ways an apprentice might be affected by discrimination in the workplace. For example, a sponsor can't give the best trainings to only white apprentices or give the most rotation opportunities to only male apprentices or only recruit applicants without disabilities.

Basically, and as you'll tell by the last bullet here, all apprentices and applicants must receive fair treatment for any type of adverse employment action. And again, I draw your attention to that last bullet which notes any other benefit, term, condition, or privilege associated with apprenticeship. There cannot be discrimination on those points.

I'll now turn it over to my colleague, Donna Lenhoff.

DONNA LENHOFF: Yes. Next slide, please. Hi, everybody. I'm really glad to be able to join you today. We're going to dive now a bit deeper into what constitutes discrimination, and there are two broad ways that discrimination can manifest itself.

One is called disparate treatment, which is where an apprentice or applicant is treated differently specifically because of his or her race, sex, color, religion, national origin, age, sexual orientation, disability, or genetic information, that is because of any of the prohibited characteristics.

This form of discrimination may involve direct evidence like a memo advising human resources to not bother interviewing women or other words or actions that make it clear that management is intentionally excluding individuals with a protected characteristic. Disparate treatment discrimination is deliberate and intentional.

The second form of discrimination, disparate impact, is where a policy is not directly discriminatory but ends up having a discriminatory impact on one or more protected groups. For example, an insurance claim apprenticeship program requires applicants to have a driver's license. If the job does not really require driving, the result is that this policy may screen out some individuals with disabilities from the program without proper justification.

In other words, disparate impact discrimination is not intentional but happens when employment practices have an adverse effect statistically on members of a protected class and are not otherwise justified by a business necessity. And we will get into more detail on this to help you understand these concepts. So next slide.

We're just going to talk about the first type of discrimination, disparate treatment. These are the situations, as I said, in which an apprentice or applicant who is in a protected group may argue that the sponsor took an adverse employment action against him or her because of the individual's protected characteristic.

And to prove that point the apprentice or applicant would have to show that another similarly situated apprentice who is not a member of that protected group received more favorable treatment. The sponsor in this case would then need to or would likely try to provide a legitimate non-discriminatory reason for the action, and if that legitimate non-discriminatory reason proved to be true, then that would be a successful defense against a charge of disparate treatment discrimination. Next slide, please.

So now, we're going to talk about disparate impact. With disparate impact discrimination the employment policy or practice affects one or more protected groups in an unfair way. A finding that a practice has a negative result or adverse effect for members of a protected class does not by itself mean that the practice is unlawful. Rather, that is the first step in the inquiry. If there is an adverse effect, the next step is the sponsor would show that the rule or policy creating the adverse effect is related to the job and consistent with business necessity.

So using our previous example about the insurance claim apprentices, the rule or policy is neutral. It says you have to be able to drive. So it's not explicitly discriminatory, but it has a discriminatory effect on individuals with disabilities because they are less likely to be able to have driver's license and be able to drive. So then the inquiry turns to whether this neutral rule is job-related and consistent with business necessity. Because there is no need in our hypothetical for insurance claim apprentices to drive anywhere to do their job, it would be hard for the sponsor to prove that the requirement is job-related.

However, if the apprenticeship was for insurance claims adjusters, that's a job that does involve driving to different locations to estimate damage to cars or homes. So requiring apprentices to have transportation or a driver's license to each of the job sites would be job-related and consistent with business necessity. While there may be an adverse impact on individuals with disabilities who are unable to drive or to provide their own transportation, the practice would not be unlawful discrimination against those individuals.

Another example of disparate treatment would be a joint labor management program that has mostly white apprentices and recruits new apprentices simply by asking its existing apprentices to refer their friends and family. This practice may very well – although it sounds neutral, again, but it may very well result in a disparate impact in that few or no minorities would seek to join the program or even know about the program.

So while the sponsor may not intend to discriminate, the practice could result in disparate impact discrimination based on race and color. Whether that would be found unlawful or not would depend on whether the recruitment method of the word of mount, friends and family recruitment method is job-related and consistent with business necessity. And I think my gut reaction to that is that probably it wouldn't be. But when looking at any particular situation, the sponsor would have to think about that, and that's really the point of disparate impact discrimination. Next slide, please.

So just want to talk about sort of the process that goes on if there is a discrimination complaint by an apprentice or applicant for apprenticeship. The EEO regs provide that those complaints must be investigated. The individual has to file the complaint with the agency that registered the apprenticeship program, which means either the U.S. Department of Labor or the state apprenticeship agency, and then that is the agency that will conduct the investigation.

In investigating the complaint, the registration agency will talk with the person lodging the complaint and with the sponsor, get both perspectives. The investigators will want all information that could be related to whether the sponsor's practices, actions, or words are or are not deliberately discriminatory in order to show disparate treatment discrimination or whether they are or are not job-related and consistent with business necessity if the concern is disparate impact discrimination.

So the bottom line is that sponsors should review their policies and practices on a routine basis to make sure that they're not discriminating against any protected group. This is sort of a proactive thing. Don't wait until a complaint is filed. Just keep an eye on your policies and practices.

And in fact, those sponsors that are required to have affirmative action plans must do this review annually. That's part of what an affirmative action plan is. Doing this review will also help sponsors avoid complaints of discrimination and enforcement actions that could result from investigations.

Also, apprenticeship staff will help sponsors review their policies and the results of those policies during EEO compliance reviews. So you should be sure to ask for help in doing that if you're not sure how to do it. That's something that OA and SAA staff should be able to help you with. Next slide, please. And I'm going to turn this back to Nick, who's going to talk about disability discrimination specifically.

MR. BEADLE: Thanks, Donna. So protection for individuals with disabilities is a little bit more complex than other protected characteristics. So for that reason we wanted to give you a little bit more information about how this area of the law works.

The apprenticeship EEO regulations us the Americans with Disabilities Act as a guide for disability discrimination. The Americans with Disabilities Act or the ADA, as you probably know it, and its amendments protect a very broad range of disabilities. That includes any physical or mental condition that substantially limits major life activity or major bodily function.

A major life activity includes walking, talking, seeing, hearing, or learning. Examples of covered bodily functions include the body systems, the immune system, the digestive system, the respiratory system, the circulatory system, the endocrine system, and reproductive functions. Covered disabilities may or may not be obvious to an observer. Next slide, please.

If an apprentice or applicant has a covered physical or mental condition, he or she is protected from discrimination on the basis of that disability. Additionally, if the individual has a history of a disability, this is also protected. For example, if an apprentice has had cancer and is now in remission, a sponsor cannot discriminate in any employment decisions due to this past condition.

Finally, if an employer sponsor thinks an individual has a disability, whether or not a disability is in fact present, the individual is protected from employment discrimination on the basis of disability. So again, even if you don't necessarily have the disability, if the sponsor thinks you have a disability and discriminates on the basis of it, that is also barred.

Please note that for an individual to be protected from disability discrimination, the person must be qualified to perform the job for which he or she would be hired with or without a reasonable accommodation. Nothing in the law or EEO regulations requires a sponsor to hire someone who is not able to do the job just because they have a disability, but sponsors are required to provide reasonable accommodations to help an individual with a disability perform the job. Generally, this requirement is triggered by a request by the apprentice for a reasonable accommodation. We'll discuss reasonable accommodations more in a moment.

Moving to the next slide, which talks about two types of disability discrimination. We talked earlier about disparate treatment, that is treating an individual differently because of a protected characteristic, in this case treating someone different because the individual's disability, past or perceived, is the protected characteristic. To argue against a charge of disability discrimination on the basis of disparate treatment, the sponsor would have to show there was a legitimate non-discriminatory reason for the action.

There's another type of discrimination that can occur with disabilities. Employers and other sponsors are required to provide reasonable accommodations to help an individual with a disability perform the job. Not all workers with disabilities will require or request an accommodation to do the job, but for those who do, employers must assist them.

Moving on to the next slide, we talk about examples of reasonable accommodations. Reasonable accommodations are specific to each individual's needs but are just that, reasonable. An individual with a disability may request an adjustable desk so her wheelchair fits properly at her work station.

Someone undergoing treatment for a condition may ask to work a different schedule so he can go to required therapy. An apprentice who has injured his knee may request to sit rather than stand while performing the job until his knee heals. Reasonable accommodations typically cost the employer little or no money and can make all the difference in the world for an apprentice.

The process of reasonable accommodation is typically started by apprentice requesting a modification. The sponsor is not required to ask if an accommodation is needed. In other words, don't assume that because an individual has a disability he or she will need a reasonable accommodation. The individual will ask you for an accommodation if it is needed.

And moving on to the next slide, we talk about undue hardship exceptions. Employers and sponsors are not required to make all modifications that an apprentice with a disability may want, if doing so would require a significant difficulty or expense for the sponsor. Another exception is for safety concerns.

That is sponsors may require each apprentice to perform the job without posing a direct threat to the health or safety of themselves or others in the workplace where that risk cannot be eliminated or reduced by a reasonable accommodation. Considerations for the safety exception include how likely it is that the harm will occur, the nature and severity of the potential harm, and how quickly harm could occur and how long it would last.

Whether or not an accommodation creates an undue hardship is figured out on a case-by-case basis. Providing an accommodation might be easier for a large employer but very difficult or expensive for a small company. Factors like the size and resources of the employer and the impact an accommodation would have on the employer's operations and other employees are considered in determining whether or not a reasonable accommodation would cause undue hardship.

Now, the next slide offers up a few examples and asks, which of the accommodations listed below would be considered reasonable, and asks you to choose all that apply. To kind of move through this, accommodations one and two would likely be considered reasonable for many sponsors, and four may be reasonable, if the sponsor can have the equipment modified without causing undue burden and if it will allow the individual to perform the essential functions of the job.

The combination number three is asking the employer to spend a lot of money so the apprentice can store her insulin. It would be acceptable for the sponsor to offer to provide the apprentice with a cooler and cold packs to keep her insulin cold while at work, but, however, again, the combination number three could be asking the employer to spend a lot of money or more than necessary for the insulin storage.

This brings up an important point about reasonable accommodations. If there are two possible accommodations and one costs more or is more burdensome on the employer than the other, the employer may choose the less expensive accommodation or the one that is easier to provide, provided it is as – it is effective for the employee. And now, I'm going to hand it back over to Donna, and she's going to talk to you guys about harassment.

MS. LENHOFF: Next slide, please. Harassment is another form of discrimination. It's actually, I think, technically a form of disparate treatment discrimination, but it's another one that we think is worth talking about in some depth, partly because it's – people don't always understand what it is and what it isn't and partly because it is so common and of course it's been in the news a great deal lately.

Harassment is unlawful when it is unwelcome, is directed to an employee or apprentice based on one of the protected characteristics, and either putting up with the conduct becomes a condition of continued employment – this is known as quid pro quo harassment – or the conduct is sufficiently severe or pervasive to alter the conditions of employment.

And I just want to pause and say there can be harassment that doesn't meet all of these requirements, all these tests. That might not be unlawful, but it might be something that sponsors and employers want to say is not – well, is not permitted in their workplaces as well. But the – in order for there to be liability under the discrimination laws, harassment has to meet these tests. So next slide.

So we're going to go into some detail about each of these – the elements of these tests. So first, the conduct must be unwelcome. If the apprentice says that she or he is uncomfortable with a joke told or with a supervisor putting his hand on her shoulder or knee, that would show the action was unwelcome.

However, if the apprentice continued to joke or clearly responded positively to the supervisor's behavior, the conduct might not be unwelcome, and the sponsor might make that argument if there was a complaint filed and it was being investigated.

The second element is motivation by the apprentice's membership in a protected group. In order to be unlawful, the harassment must be motivated by some sort of bias or what's called in the legal world, animus against a protected group. For instance, if a supervisor promises a raise in return for sexual favors, that behavior is motivated by the apprentice's sex. That's the quid pro quo kind of harassment that is so common.

Also, if a supervisor promises a promotion or some other kind of employment – something else having to do with employment. If the conduct involves a racial slur directed to a minority, the behavior is motivated by race. The bottom line here is that the harasser must be more than just mean or rude to all employees. The behavior must be motivated by the individual's membership in a protected group or the protected characteristic.

Then the third element is that the harassment must have a concrete result. Something bad has to happen as a result of the conduct. So this could be an action like a demotion, firing, reassignment, or failure to get a promotion. This was – this would typically be a significant change to the employment status of the person who was harassed.

The other type of outcome that can constitute unlawful harassment is where the conduct is so severe or frequent that a reasonable person would find the new circumstances to be hostile or abusive. In other words, the conduct creates a hostile work environment for the apprentice or – for the apprentice or employee. Additionally, if the words or action were physically threatening or humiliating, this also could be an indicator of a hostile work environment. Next slide, please.

Sponsor – we're going to talk about the sponsor's liability for harassment, and as you see on the slide, it depends on who has done the harassment. In general, sponsors have legal responsibility for discriminatory conduct, including harassment, that is done by – is conducted by their managers and supervisors, but they do not automatically have legal responsibility for the conduct of lower level employees.

The higher up in the organization the harasser is, the more likely the sponsor will be found liable for harassment. What is important in determining sponsor liability is whether or not the sponsor knew the harassment was taking place. The sponsor is more likely to be held liable for harassment if it knew or should have known that it happened.

Additionally, a sponsor always has legal responsibility if a supervisor or manager harasses an apprentice and imposes an employment action for not playing along. For example, if a female apprentice is fired or not promoted for saying no when her male supervisor asks her out on a date and all other evidence points to her doing a good job in her program, this is likely to be unlawful harassment. Note that if the sponsor takes immediate and effective action upon becoming aware of harassment, the sponsor may be able to rebut any charges of unlawful harassment that arise. OK. Next slide, please.

We have a little multiple choice slide here. The question is, as a sponsor, what are your responsibilities in addressing harassment claims? And choose all that apply. So take a minute. I see – is there a poll? Yes. There's a poll happening.

I'm just going to read them while you are – read the choices while you are answering them. One is tell the individual accused of harassment to stop and assume that it has stopped. Two, tell the accuser ways in which she or he can avoid being harassed in the future. Three, make it clear to all apprentices and other employees that unlawful harassment will not be tolerated and follow through with appropriate corrective action that will be taken when harassment occurs, up to and including termination of employment. And four, ensure that apprentices and other employees feel safe and secure in their workplace.

So shall we broadcast the results? I think most of you agree, as you can see, that answer number three is one of them, one of the correct answers, at least. 100 percent of those of you answering checked that one off, and that's because number three is your legal obligation as a sponsor of an apprenticeship program.

And number four, which almost 80 percent of you chose, is not a legal obligation, but it certainly is a good practice to keep in mind as a way of both protecting your apprentices from hostile work environments and also protecting your organization from harassment claims.

If you go so far as ensuring that employees feel safe and secure in the workforce, you will be doing things like making it clear that harassment will not be tolerated and following through with appropriate corrective action and providing an avenue for complaints and encouraging employees to talk to one another if problems start. So number four is kind of going above and beyond number three.

As for number one, really one should not assume that a single verbal warning is enough to stop someone from harassing another individual. In fact, without following up, a warning of that nature can sometimes lead to retaliation, and it is incumbent on sponsors to ensure people who report harassment are protected from such retaliation.

And as to number two, even implying to someone who has experienced harassment that they are somehow at fault for the behavior of others is a bad practice and even can put the program in legal jeopardy. Next slide, please.

Actions to prevent discrimination. So there are four actions listed on this slide which sponsors can take to reduce the potential for discrimination. This is not only involving harassment but other kinds of discrimination as well, and these things are set out in the revised regulations. For example, you can take reasonable steps to recruit broadly from the geographic area from which you recruit for your program.

You can and should use selection procedures that result in a diverse workforce and that don't have discriminatory impact. You can ensure that managers and supervisors understand and uphold equal employment rules. You can provide required anti-harassment training. And you should know that the Office of Apprenticeship is developing tools and resources to help sponsors prevent discrimination, including harassment, from taking place and to otherwise ensure equal employment opportunity in their programs.

The next slide provides the website where you can find these resources, and also Office of Apprenticeship staff are available to answer your questions and to help you figure out best practices in equal opportunity. Next slide, please. Oops. Can you go back one? Yeah. Thank you.

We encourage you to explore the resources on the apprenticeship EEO website, particularly the first one. That's the one that has the tools available such as a ready-to-use EEO pledge and complaint information poster, resources you can use to provide anti-harassment training, including a video, a PowerPoint presentation, and an interactive quiz to test trainees' knowledge, and a directory of resources to help sponsors expand and diversify their recruitment efforts. These resources are already available on the first website that is on this slide, doleta.gov/oa/eeo. And we will be making more available in the coming months.

In addition, the Equal Employment Opportunity Commission's work – website also has good information to help sponsors understand their obligations under the law, to avoid or effectively detect and address discrimination in their program, and most sponsors are also covered by the laws that the Equal Employment Opportunity Commission enforces. So you're probably familiar with a lot of these concepts already from that, and it's sort of a twofer. If you're complying with our regs, you're probably complying with theirs as well and vice versa.

MR. BOREN: Great. Well, thank you both to Donna and Nick. Really great presentation on discrimination and understanding your obligations as a sponsor.

I just want to point to – to point everyone out that we're going to be taking a few questions. Feel free to enter those questions into the chat window, which is at the lower left hand of your screen. We've received a few questions already. Can we bring some of those up? We'll take a look. How about this first question here?

"If the number of employees is less than the minimum in the Americans with Disabilities Act, does the reasonable accommodation need to be arranged?" I'm going to kick this first one over to our colleagues. We have two colleagues from our solicitor's office that are going to help us answer a few of these questions. We have Keir Bickerstaffe as well as Jenn Fry joining us, which you'll also get a chance to hear from as well today. I'll kick this first one over to Keir.

Keir, the question again is, what if the – "If the number of employees is less than the minimum in the Americans with Disabilities Act, does the reasonable accommodation need to be arranged?"

KEIR BICKERSTAFFE: Sure. So the short answer is that there isn't a number of employees requirement in the apprenticeship rules like there is in the ADA. So the obligation not to discriminate on the basis of disability, which includes in some cases providing reasonable accommodations, does apply to all sponsors.

That said, I will say that, as Donna and Nick went over in the presentation, there is the concept of an undue burden, and it is possible that for a very small program certain accommodations may present an undue burden. Certain – may be more costly than it would be for a larger program. So the ADA looks at that, and so we do as well.

MR. BOREN: All right. Well, we'll take another one of these questions. I'm going to look to Keir and Donna to kind of help us answer this one. "Are protected groups anyone that is not a white male?" I'll kick it over to Donna first to start us off.

MS. LENHOFF: Yeah. I'll take that one. I would not characterize the regulations or the law that way for a couple of reasons. First of all, white males are protected from discrimination as well. If people are being discriminated against because of their race and sex or their race or sex, that is unlawful under – both under Title VII of the Civil Rights Act, which the EEOC enforces, and it could give rise to liability under the Office of Apprenticeship's regs as well. And there are cases like that. So – and that's because discrimination is prohibited on the basis of race and sex. So it applies to people of all races and sexes.

The other reason I wouldn't characterize the regs that way is that white males are also protected if they're over 40. They're protected from age discrimination. If they are LGB, they're protected from sexual orientation discrimination. If they have a disability, they're protected from disability discrimination. If – they're protected from religious discrimination. So I guess the answer – the short answer to the question is no. It is not really – the protected characteristics – those protected groups are not everybody who's not a white male. They include white males as well.

MR. BOREN: OK. That's a good – great answer. Thanks, Donna. I'm glad – I know that I have some protections as well as a white male. So I appreciate that answer.

Let me kick it off to the second question. "What if the job requires to drive a forklift? Do you need a license to drive a forklift?" Why don't I kick that one over to Keir. Could you take that one?

MR. BICKERSTAFFE: Sure. And, Donna, you can feel free to chime in, but, I mean, this gets back to the concept of jobs – of qualifications for the jobs that need to be job-related and consistent with business necessity. It's certainly possible for some apprenticeship programs that the ability and having a license to drive a forklift could be job-related and consistent with business necessity.

The question that the sponsor's going to want to ask is this – is that indeed the case? Is that really something that the apprentices need to do as part of their program or not? And so I think that that is what guides the answer to that question. Donna, do you want to add anything to that?

MS. LENHOFF: No. I think you nailed it, Keir.

MR. BICKERSTAFFE: OK.

MR. BOREN: All right. Great. Let's take another one of these. "Why does harassment only become harassment when it is tied to a protected class? Why isn't harassment enforced no matter what the class, and why isn't harassment in general wrong?" I think one of the critical parts here that we're talking about is unlawful harassment, and I'll let Donna and Keir kind of chime in a bit more on that aspect.

MS. LENHOFF: Yeah. I'll start with that. This is a question I've actually thought about a lot, and people have asked me about a lot, which I think is why Zach is looking at me on this one. Why? This is how the law was written. Congress initially wrote the anti-discrimination law and said you can't discriminate on the basis of race, sex, national origin, religion, and color. Those were the groups that were in the 1964 Civil Rights Act.

But they didn't want to take the position that employers couldn't discriminate on other bases. For example, if an employer has – it's hard to think of examples of other bases because they're silly. But if an employer just doesn't want to hire people who are Libras because of some irrational prejudice against Libras because they're a believer in the horoscope, then that's their prerogative; right?

And so discrimination had to be on – and in order – there were a lot of people who felt like an employer should be able to keep people out whom they didn't like out of their shop or their place of work. And back in 1964 when discrimination law was first written, there were people who said, I don't want to have to work with African Americans or I don't want to have to work with non-Christians. And Congress said, no, we're going to have a limited – we're going to say – we're going to essentially regulate workplace practices, which generally they don't do, for these important reasons.

So harassment, because it's approached as a kind of discrimination, also is based on those protected characteristics. Congress could write a law that says any kind of harassment, as you suggest, is unlawful, but they haven't done so. And the Office of Apprenticeship chose in its regulations to essentially import the same definitions of protected class and the – and harassment really for the same reasons.

It didn't want to create a whole new kind of protections that go beyond what apprenticeship sponsors already have to do under Title VII. And I think also it would be pretty hard to have a code of conduct, essentially, where does rudeness – where's the line between rudeness and harassment and bullying?

And if you have a bad boss, is that really who – what we sometimes call the equal opportunity harasser who is – makes everybody uncomfortable and creates a hostile work environment just in general that doesn't have anything to do with protected characteristics? Is that appropriate for government to get involved in?

That's a philosophical question, but I think – and it's one that essentially has been answered as no. It's not appropriate for government to get involved in. That said, there's nothing preventing sponsors from saying, well, you know what, in my workplace, in my apprenticeship program we are not going to allow any harassment, regardless of whether it is based on a protected characteristic. Of course we prohibit that, but we also prohibit other kinds of broader – any kind of harassment. That is your decision to make.

Keir or anybody else, do you want to take issue with my philosophical meanderings here or add to them?

MR. BICKERSTAFFE: No. I think that's right. I would just add that I think that you do see in – particularly in the corporate world, that most companies have policies that go far beyond what federal law requires. Federal law kind of sets the floor in saying that discrimination on these bases or harassment on these bases is not going to be allowed generally under the law. But for the most part, companies go beyond that in trying to create a workplace that is safe and welcoming to all.

MR. BOREN: Great. Let's take another one here. "What is considered a protected group?" If we can pull slide six up again just as a reminder, I'm going to turn it over to Nick to respond on this one.

MR. BEADLE: Yeah. I think that's the answer to what is a protected group underneath our EEO law. But just to kind of answer it more broadly, a protected class is what the law – what the law says that the government has taken notice of as classes that need protection and the circumstances what the Department of Labor in studying apprenticeship and running its apprenticeship program for the last few decades has determined are bases that need some protection in apprenticeship programs to make sure those programs are run fairly and to make sure that – and to make apprenticeship more available to everybody.

So I think that's the more general answer. As to what's specifically covered, it's these not on the board, race, color, religion, national origin, and sex, which were covered in the rule before 2016 and sexual orientation, genetic information, disability, and age, meaning 40 or older.

MR. BICKERSTAFFE: Yeah. This is Keir, and I think one thing that's – that may be helpful to re-emphasize and I think this is something that Donna just spoke to, is that it's maybe not helpful to think of them as protected groups of people but protected characteristics because the fact that – I mean, everyone has a race. Everyone has a national origin. Everyone has a sex.

And so it is possible for any person to be discriminated against on the basis of those things. So really everyone is protected by the EEO regulations. It's just what the EEO regulations protect are discrimination on the basis of certain things, and that applies to everybody.

MR. BOREN: Thanks, Keir. We're going to go to our next question here regarding driver's licenses. "And what if your trade is – you might say what if your apprenticeship has you in a variety of different places that public transportation cannot reach. Is it fair to ask for a driver's license?" I guess this kind of gets back to that question of job necessity. I'm going to look at Donna to answer that one.

MS. LENHOFF: Yes. Right. Exactly. The touchstone here will be whether having a driver's license – well, the first question is whether having – whether a requirement of having a driver's license has a disparate impact on the basis of a protected characteristic, and we've been kind of assuming that that would have an adverse impact on people with disabilities.

And it could conceivably have an adverse impact on the basis of race or national origin as well, although I'm not sure that the statistics hold that up. It could be in a particular circumstance. But if there is, in fact, a disparate impact, then the touchstone is, is this neutral requirement required by – or this neutral qualification that you have a driver's license, is it required – is it job-related and required by business – consistent with business necessity?

That's the legal, job-related and consistent with business necessity. And I would venture that in the hypothetical that you're posing where somebody has to have a car in order to get to work, that's job-related and consistent with business necessity. But of course these things have to be decided on a case-by-case basis, and if a sponsor wants to impose – have this as a qualification, they should prob- – and they're not sure about the disparate impact implications of it, then you could discuss it with the Office of Apprenticeship or your state agency.

MR. BOREN: Great. Great. To go to number six, if we can here, "If an apprenticeship, a JATC, a Joint Apprenticeship Training Center uses a ranking list for its selection procedure and skips over Caucasian males in an effort to bring more minorities into the program to meet affirmative action goal, could that be considered reverse discrimination?" And I'm going to ask, Keir, can you take a crack at that answer?

MR. BICKERSTAFFE: Yeah. I mean, that's something you need to be very careful of. I mean, you would need a few more details, but generally speaking, what this seems to be speaking to is something that the regulations do not permit, which is making selection decisions on the basis of race.

And that is for any race. So what you have to do is you have to make sure that your selection procedure is not discriminatory, and so it is possible that you may have a selection procedure that is weeding out candidates of a particular race more so than others.

And so that may be something you need to look at, but presuming that you have a selection procedure that is fair in that regard and it gives you a list of individuals and in sort of ranked order, it does become very legally problematic if you are skipping over certain people to choose certain people of a particular protected category for purposes of fulfilling goals. That's something that's specifically prohibited in the regulations.

MR. BOREN: Great. Thanks, Keir. Another one comes up that I think is really interesting here about language. This may – and here's this question that we have. "If you have a possible apprentice" – or probably we're talking about a candidate that speaks a foreign language – "and you don't have the resources to accommodate this person – I guess maybe we're talking about translation services – "what is the sponsor's responsibilities in this case?" We're talking about probably reasonable accommodations; right?

MS. LENHOFF: Well, that's the question, whether reasonable accommodations are required, and I would say no. It is not a disability to speak a foreign language; right? So really the kind of discrimination you're concerned about when you are looking at keeping out or not selecting someone who speaks only a foreign language is you're probably concerned about national origin discrimination not about disability discrimination.

So national origin discrimination, you're not – there's no requirement that you provide a reasonable accommodation to prevent national origin – or hire somebody with a different national origin. The reasonable accommodation requirement is just for disability, and actually also for religion there's an accommodation requirement but not for national origin.

So the question is really then just a more basic disparate treatment versus disparate – and disparate impact analysis.

If you're not – I mean, if you say I can't hire you because you don't speak English, that's very clearly because they don't speak English, but you have a legitimate non-discriminatory reason or that's the question. If they speak Spanish and everybody else in the workforce speaks Spanish too, it may not be necessary to accommodate them in any way, and it's not really legitimate to say I can't hire somebody who speaks Spanish because you've already hired other people who speak Spanish.

On the other hand, if they speak Chinese, I don't know. That may be – that may not be possible, and so, I mean, you have a good reason – you may have a good reason if they really need to – if they need to be able to speak the language in order to do the job.

MR. BOREN: So could a sponsor say we need you to speak English in order to do this job?

MS. LENHOFF: So English only rules are a big issue in anti-discrimination law, and in general, it depends, again, on whether it's job-related, whether you really need to speak English. And there are some jobs where probably – that are – that where you don't.

I think in an apprenticeship program where there's teaching going on as well as actually doing the job, you're not just a dishwasher in a restaurant where somebody shows you what dishes to wash and what to do and you do that every day over and over again and there's no advancement, no learning, that might be a situation where English only would – could have a disparate impact on Hispanic people, for example, and would be a problem. So again, it trends on the specifics of the job.

Keir or Nick, you want to add to that?

MR. BICKERSTAFFE: No. I think you got it.

MR. BOREN: OK. Great. I like – really like this question about veterans. I'm going to turn to Nick on this one. It's asking if veterans are a protected group. What do sponsors need to know about discrimination against veterans?

MR. BEADLE: So if you go back to the slide with protected characteristics, you'll see that veterans are not listed on here, which means that veterans are not specifically a protected group underneath our regulation. However, there are other employment law obligations that employers may have or sponsors may have or the employers they work with may have not discriminating against veterans.

There's state laws that touch on that, the Office of Federal Contract Compliance programs and their regulations under the Vietnam Era Readjustment Act, and certain discrimination against veterans. So you should be aware about what those statutes and regulations are and their effect on you and workplace.

MS. LENHOFF: You also may be familiar with a statute called USERA.

MR. BEADLE: Yes.

MS. LENHOFF: Uniform Services Employment Re-something.

MR. BEADLE: Reassistance.

MS. LENHOFF: And Employment and Re-employment Act, I think, actually because it was originally written to make sure that, when somebody goes into the service, that their job is available to them when they come back. Then it also prohibits discrimination on the basis of veteran status more broadly.

It is enforced by another office here in the Department of Labor. So the answer is yes and no here. If you discriminate on the basis of veteran status, that is not going to be grounds for decertification or – as a registered apprenticeship program under the Office of Apprenticeship regs, but as Nick said, there are all these other statutes.

MR. BOREN: Great. Now, there's actually a follow up question I'll take a crack at. What about – follow up on the veterans question. "What specifically should sponsors consider about seeking out or targeting veterans for apprenticeships or their apprenticeship program, giving them credit for the program?"

One is you can give credit for previous military experience. That's – or other types of experiences that would provide that this person did something previously and knows something about the occupation that you can give them credit to go into their first year or kind of skip ahead. That's definitely allowable.

As far as seeking out veterans for your apprenticeship programs, it's not part of the protected classes. So therefore, this is allowable. So for companies that want to target veterans because they have leadership skills, because they have the soft skills, because they have that work experience that they're looking for, this is perfectly acceptable under 2930.

OK. Take another question or two here. How about this question here for Keir. Is a back injury, is that a – if you had a back injury, would that be a basis for disability discrimination if they were fired?

MR. BICKERSTAFFE: I mean, so this goes basically back to the general inquiry for disability discrimination. So, I mean, the touchstone is whether or not you are able to perform the essential job functions of the position with or without a reasonable accommodation. And so if there are reasonable accommodations that would allow you to perform the job with an injury and you request those, then the employer has an obligation to give you those.

There may be some instances in which, with or without a reasonable accommodation, that the worker is unable to perform the essential job functions of the position. And in that case the employer doesn't have an obligation to continue to employ that person. The employer could obviously, of course – and I think it would be a good practice to try to see if there are other positions to which the person might be able to be moved, but that is – that's the general legal inquiry.

MR. BOREN: OK. Should we do one more? I'm going to try to understand this last question, and I'm going to go back to maybe Keir and Donna to have a crack at this one. So you have two people in the organization, a white male and a minority, and the boss creates a hostile work environment.

Does the minority have rights but the other person does not? So in effect, the – we're providing additional benefits for the minority but not necessarily the person who is white in this situation? Are you guys able to make sense of that question?

MS. LENHOFF: Yeah.

MR. BICKERSTAFFE: Yeah. Do you want to start, Donna, or shall I?

MS. LENHOFF: Go ahead, Keir.

MR. BICKERSTAFFE: OK. So first of all, that is not what we're saying and so we should make that very clear and we're trying to make that clear. So the fact of the matter is, if a boss is creating a hostile work environment – now, again, as we talked about a hostile work environment, in the context of this – of these regulations and under federal law, hostile work environment is on the basis of a protected characteristic.

So if the boss is creating a hostile work environment because people are wearing orange shirts, that is not a protected characteristic. It is not unlawful under our regulations. If the boss is creating a hostile work environment and targeting the minority because that person is a minority, that is unlawful, and then the minority would have rights. If the boss is targeting the white person because they are white and harassing them for that reason, then that person would have rights to be able to assert.

So both people are protected from harassment. The central question is, what is the basis for the harassment? Is the harassment on the basis of a protected class? And as we tried to go over earlier, everyone is in a protected class. Everyone has a race. Everyone has a sex. So if a superior is harassing someone on the basis of race, no matter what their race is, they are protected under the law.

Donna, do you have anything to add to that?

MS. LENHOFF: No. The one thing I would just add is that, since we often think of harassment as sexual harassment and it so often is, if the harassment is based on sex, then white and minority women would have – would both be protected from that. And you can even have potentially harassment that is based on sex that makes men uncomfortable as well, creates a hostile environment for men, and so then they would be protected regardless of their race as well.

MR. BOREN: Great. Well, thank you to our team for covering all these – and thank you to all of you all for providing such good and thoughtful questions. We enjoyed taking them here, and if you have follow-up questions, you can certainly reach out to myself. I'm Zach Boren. I'm the division chief for Standards and Policy here in the Office of Apprenticeship. You can see my e-mail up there with my colleague, Nick Beadle, who's our special assistant.

You can feel free to contact one of us if you have follow-ups or would like additional information. Of course please, before you contact us, check out our website. There is tons of information on what sponsors need to know, and that is www.doleta.gov/oa/eeo. And maybe we can throw that website out there one more time.

Nonetheless, I want to thank you for joining us, and I want to turn it back to my colleague, John, to wrap us up.

(END)