



Mental Health Issues in the Nonprofit Workplace: Questions Raised by the Germanwings Air Disaster

Wednesday, July 15, 2015, 12:30 – 2:00 pm ET

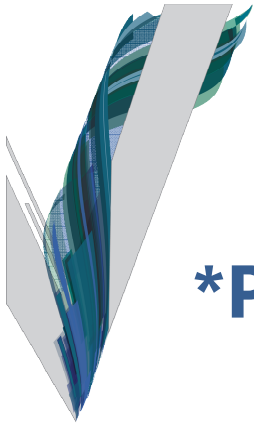
Venable LLP, Washington, DC

Moderator

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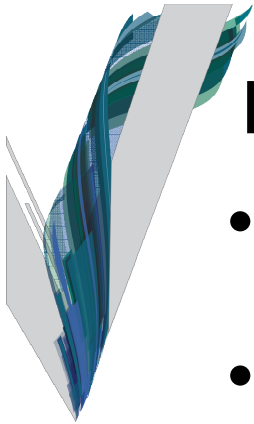
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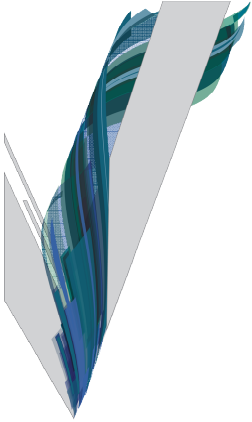
Register Now

- **August 6, 2015** – [Top Ten "Must Have" Provisions for Nonprofit Meeting Contracts](#)
- **September 10, 2015** – Somebody's Watching Us: Considerations for Nonprofits Operating under Increased Government Scrutiny (*details and registration available soon*)



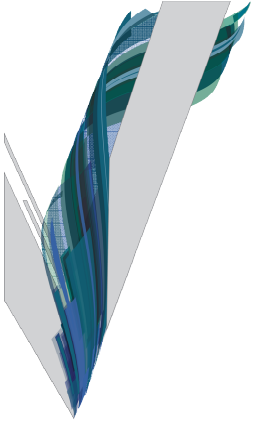
Mental Health Issues and Employment

- Mental health issues can be deceptively difficult
- How does an employer identify a mental health issue?
 - Is profiling acceptable?
- What obligations exist under the Americans with Disability Act?
 - Is accommodation required?
 - What if there is a threat of harm?
- What obligations exist under other laws, such as the Occupational Safety and Health Act?
 - General Duty to provide safe workplace?
 - Specific standards?



A Tricky Balance

- Balance obligation to hire competent employees with obligation to protect employees from discrimination
 - Duty to provide competent employees
 - Common law—hire reasonably competent employees
 - OSHA—duty to provide workplace that is safe
 - Workers' Compensation—creates liability for workplace injuries
 - Duty to protect from discrimination and accommodate disabilities
 - Americans with Disabilities Act

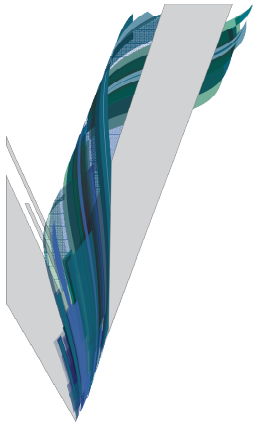


Hiring Individuals Who Might Be Dangerous: What Can You Ask?



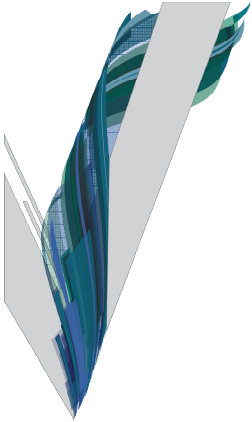
Potential Liability for Hiring and Retaining Dangerous Workers

- Old Rule—"Respondeat Superior"
 - Employer liable for employee's wrongful acts only when committed within scope of employment
 - Usually meant employers would not be liable for violent acts
- New Concerns Increase Chance that Nonprofit May Be Found Liable
 - OSHA—Citations and penalties
 - Workers' Compensation—Liability for Injuries
 - Negligence—Tort liability
- ADA—Liability if discrimination is due to disability



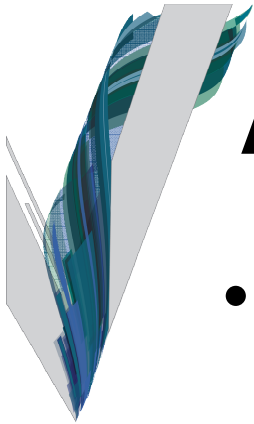
How Do You Protect Your Nonprofit and Its Employees?

- Easy to articulate the obligation to hire and employ competent employees
- Devil is in identifying those workers, particularly when the concern is mental
- To understand, need to consider obligations imposed by federal and state laws



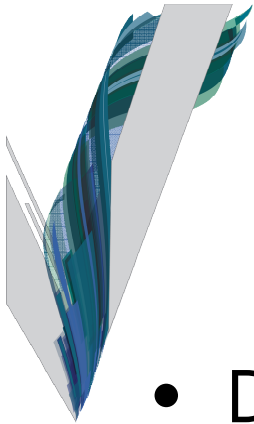
Hiring the Right Person, Legally

- Step back and consider, why hire the right person?
 - Need to get the job done
 - Avoid the time and expense of training the wrong person
 - Avoid expense and anguish of terminating a wrong hire
 - Comply with obligation to hire/retain competent employees
 - Avoid litigation
- Many federal and state laws affect questions employers can ask applicants
 - W/R/T mental conditions, principal law is Americans with Disabilities Act of 1990 (ADA)
 - Americans with Disabilities Act Amendments of 2008 (ADAAA)



Americans with Disabilities Act

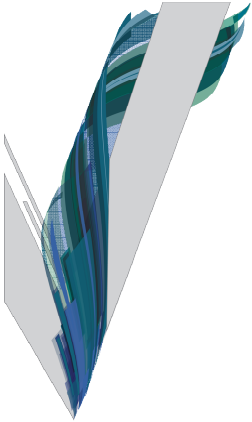
- The ADA prohibits discrimination against qualified individuals on the basis of disability
 - The ADA protects only “qualified individuals with disabilities”
 - Employers must provide a reasonable accommodation to QIWDs unless doing so would impose an undue hardship
- If the individual is not a QIWD under the ADA, an employer has no obligations, including to afford accommodations



ADA Terminology

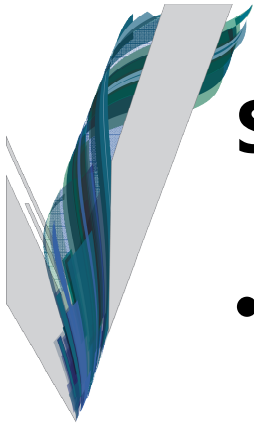
- Disability
- Substantial Limitation
- Major Life Activity
- Essential Functions
- Reasonable Accommodation
- Undue Hardship





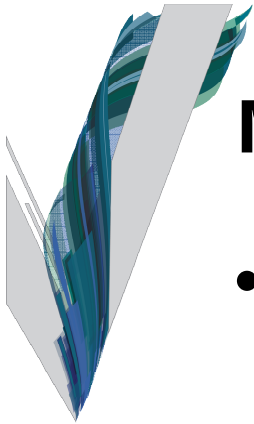
Disability

1. Physical or mental impairment that substantially limits one or more of the person's major life activities;
2. A record of such an impairment; or
3. Being regarded as having such an impairment even when no such limitations exist



Substantial Limitation

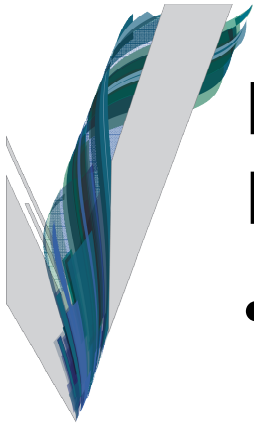
- Individual is unable to perform, or is significantly restricted in his/her ability to perform, a major life activity compared to an average person
 - EEOC: Impairment is disability if it substantially limits ability to perform MLA compared to most people
 - Impairment only needs to substantially limit one major life activity to be a disability
 - Episodic impairments or those in remission covered if they substantially limit a major life activity when active



Major Life Activity

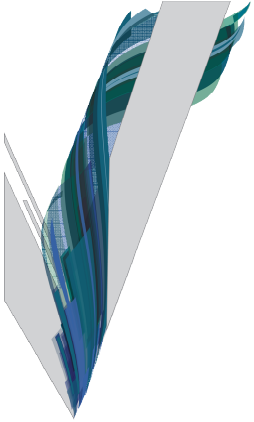
- A function that the average person can perform with little or no difficulty
- Examples:
 - Bending
 - Breathing
 - Caring for oneself
 - Communicating
 - Concentrating
 - Eating
 - Hearing
 - Learning
 - Lifting
 - Reading
 - Seeing
 - Sleeping
 - Speaking
 - Standing
 - Thinking
 - Walking
 - Working
 - Performing manual task
 - Operation of major bodily functions, such as normal cell growth, endocrine functions, neurological functions, digestive functions, respiratory functions, and reproductive functions





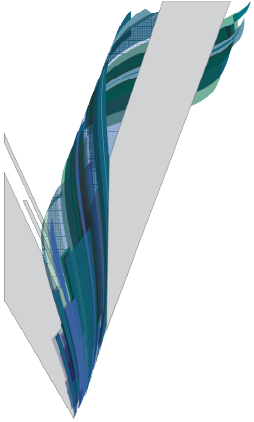
Reasonable Accommodation and Undue Hardship

- **Reasonable Accommodation**—A change in the work environment or in way things are customarily done that enables a QIWD to enjoy equal employment opportunities, and that does not constitute an undue hardship
- **Undue Hardship**—Significant difficulty or expense when considered in light of the nature and cost of the accommodation and the resources and size of the business
- **Direct Threat**—The reasonable accommodation duty allows an employer to:
 - Require that an individual not pose a direct threat to the health and safety of the individual or others



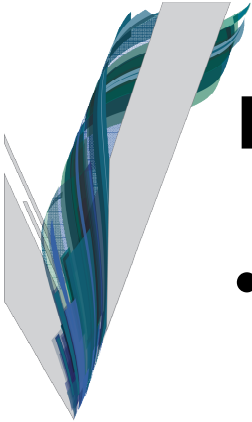
Hiring the Right Person

Putting the Law to Work



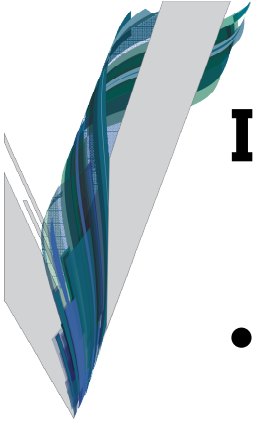
Hiring the Right Person

- Pre-employment Inquiries
 - Applications
 - Background Checks
 - Interviews
- It is presumed that you use the information that you ask for. Therefore, only ask for information you need and will use.



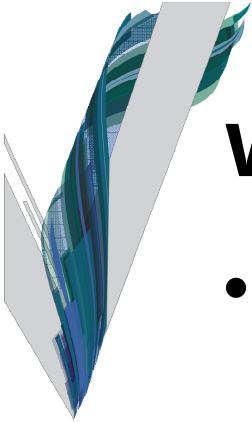
Pre-Employment Inquiries

- Application Forms
 - Application forms should be checked to ensure they do not ask illegal questions, or legal questions in an illegal way
- References
 - May check references, but may not ask a reference for information that it would be unlawful to ask the applicant, such as:
 - Whether worker's compensation claims were filed
 - Whether there was excessive sick time
 - Whether there are any disabilities



Interviews

- Can state job requirements and inquire about ability to perform, but cannot ask about disability or questions likely to elicit information about disability such as worker's compensation
- Can ask about ability to perform job functions, but cannot ask follow-up about disability, even if disclosed



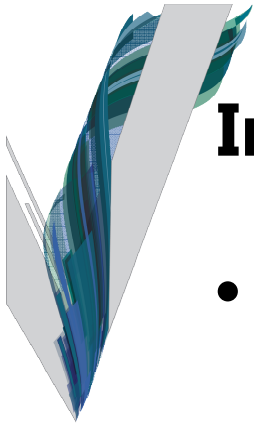
What Can You Ask?

- Questions should be directed toward abilities of applicant and job requirements and away from disabilities or protected characteristics
 - What were your duties in your prior work?
 - What type of work do you like best or least?
 - What was the most difficult work for you?
 - Have you ever been disciplined or warned on a prior job? Describe.
 - What experiences have you had working in [this area]?
 - How would you describe your ability to take direction, pay attention to detail, follow rules, organizational skills, etc.?
 - How well do you handle stress?
 - How did you break your leg (but not, do you break bones easily or expect it to heal normally)



Issue—Ability to Do Job

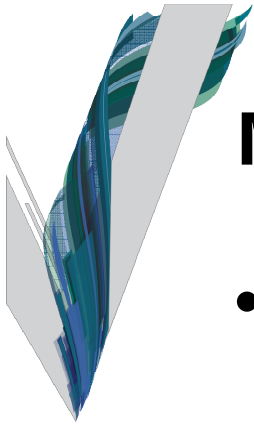
- May ask questions relating to ability to do job
 - May describe job functions and ask if employee can perform them
 - If applicant has known disability, may ask about accommodations. Otherwise, do not ask about accommodations
 - If known disability may interfere with ability to do job, may ask applicant to describe or show how will do job
 - Asking a single applicant (as opposed to all) to describe or show allowable only when there is a known disability



Interview Questions That Suggest Bias

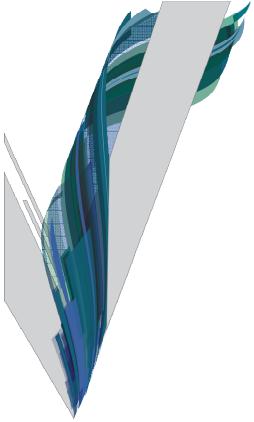
- Disability Bias
 - Have you ever been hospitalized?
 - Do you have any physical disabilities?
 - Have you had any major illnesses?
 - Have you ever received benefits under Worker's Compensation?
 - Information concerning medical history may be obtained after employment but must be kept, along with the result of a physical examination, separate from general personnel files





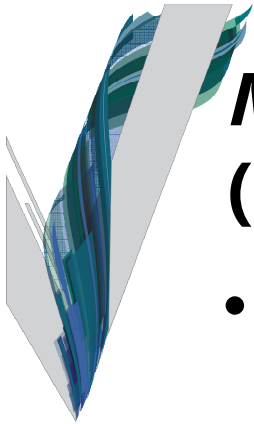
Medical Examinations

- ADA prohibits pre-offer medical examinations and inquiries
- Post-offer, pre-employment examinations are permitted if (and only if) an examination is given to all persons in the same job category
- May not require an applicant to undergo an examination because of a worker's compensation or injury history



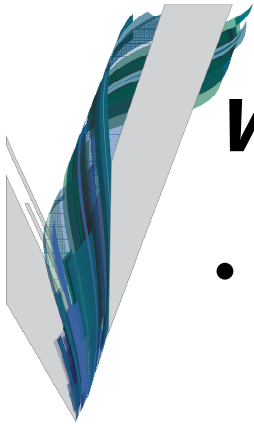
Keeping the Right Employees

What Are the Concerns: Some Case Studies



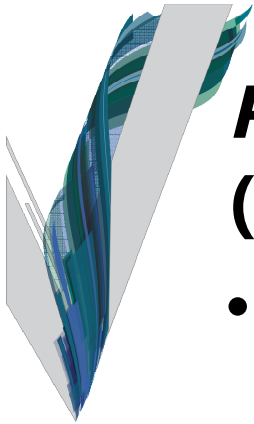
Miller v. Ill. Dept. of Transportation **(7th Cir. 2011)**

- ***“Right there is Arch enemy Number 1. I have never hit a woman. Sometimes I would like to knock her teeth out.”***
- Fired for making threat of violence against employee and for disruptive behavior
- Miller sues under ADA—termination for perceived disability
- Trial Court: Summary judgment for DOT
- Ct. App.: Reversed and remanded for trial because jury could find
 - Statement wasn’t a “threat”
 - “Disingenuous overreaction” to “annoying employee” who asserted ADA rights
 - Comment “we don’t grant requests” could mean company hostility to ADA requests



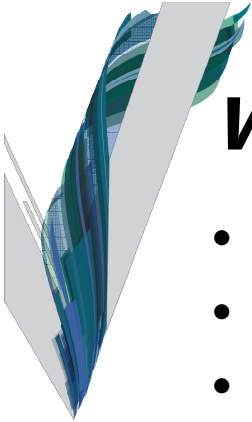
Walton v. Spherion Staffing LLC (E.D. Pa. 2015)

- ***“I don’t know why but I wanna kill someone/anyone. Please have security accompany you if you want to talk to me. Make sure, please. I’m unstable.”***
- Walton experiences sudden onset of suicidal and homicidal ideations
- Letter to supervisor: “Lizelle, Please Help Call...Mom...Dad The police I’m scared and angry...I’m sorry Taj”
- Diagnosis of depression
- Tries but fails to contact his supervisor to discuss
- Terminated without comment; Walton sues under ADA
- Spherion moves for summary judgment: “direct threat”
- “This case tests the outer bounds of the ADA in the context of workplace violence”
- Not direct threat
 - He tried to protect others by warning them
 - Three weeks between ideations and termination



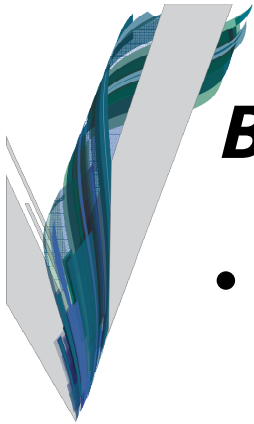
Pence v. Tenneco Auto. Operating Co. **(4th Cir. 2006)**

- ***“When I leave here...[I] will be taking a bunch of people with [me....I’ve got] AK’s and more ammo than Rockingham County.”***
- 30 year employee—“good performer” despite “eccentric” views on federal taxation
- Tells nurse, “When I leave here...”
- Psychologist: Unable to determine if mental illness, but employees should be careful in his presence
- Tenneco fires Pence for threatening statements which violated company rules
- Pence sues under ADA
- Court: Summary judgment for Tenneco
 - Unrefuted evidence that company believed he threatened lives of other employees
 - Even if mental illness, he violated company policy



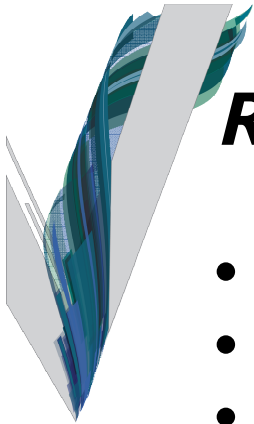
Wolski v. City of Erie (W.D. Pa. 2001)

- ***The Firefighter Who Started a Fire***
- 7 year good employee until death of mother
- Grief-related approved leave for most of following year
- Depressed, anxious, suicidal—seeing psychiatrist
- Attempts suicide “by exposing herself to carbon monoxide through the furnace pipe and some clothes she burned in her bathtub, by overdosing on medication, and by cutting her neck with a buck knife”
- Administrative leave
- Fire Chief: Setting fire at home=presumptively unsuited to be firefighter; ongoing threat to safety of public, firefighters, yourself
- Wolski sues under ADA
- City: Motion for summary judgment for violating department policies, not based on “direct threat” under ADA
- Court: Jury to determine if termination based on past misconduct or perceived psychiatric disability



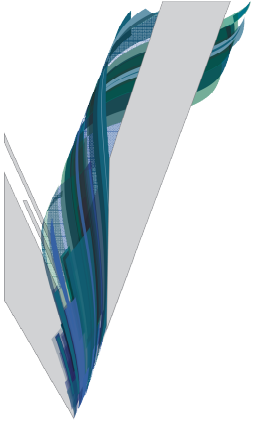
Berkner v. Blank (D. Md. 2013)

- ***Something “really bad” would happen if she didn’t get help***
- PTSD, anxiety and bereavement stress
- Shows paranoia and agitation with coworkers, they feel threatened
- Berkner yells at co-worker: “something really bad...”
- Sister: Berkner asked to borrow a gun
- Berkner: If fired, I’ll kill myself and possibly others
- Terminated for misconduct and threatening remarks
- Sues under Rehab Act (federal employee)
- Court: Termination permissible because conduct violated workplace policy against threats and disruptive behavior



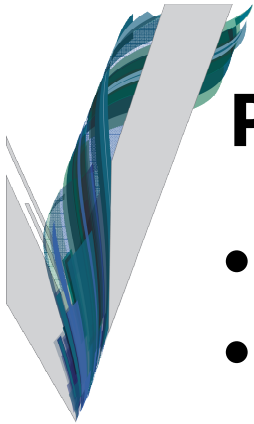
Ray v. Kroger Co. (S.D. Ga. 2003)

- ***Tourette's Syndrome***
- Clerk at Kroger, interacting with customers
- Unpreventable twitches, vocal tics, outbursts of profanity and racial slurs
- Complaints from customers, coworkers and contractors
- Moved to night shift
- Suspended after incident with African American contractor
- Ray sues under ADA
- Kroger: Not disabled; use of slurs made him unqualified
- Court:
 - Disabled—inability to communicate with others
 - Not qualified because no job would not require that



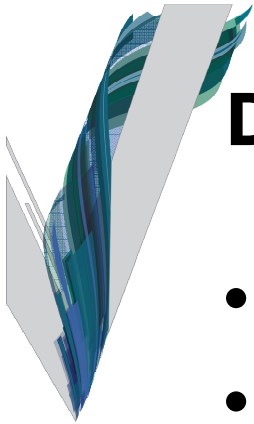
Separating Employees Who Prove to Be Wrong

What's a Nonprofit to Do?



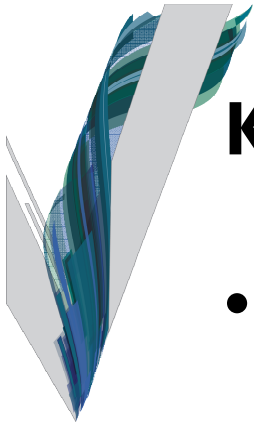
Profiling of Employees?

- Making direct or veiled threats
- Deterioration of work performance
- Fascination with guns, weapons
- Serious personal or family problems (divorce, death, bankruptcy)
- History of violence
- Mood swings, outbursts
- Substance/alcohol abuse
- Loner
- Paranoia



Develop Work Rules

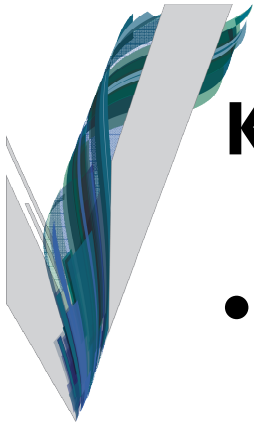
- On threats, fighting, harassment, horseplay
- Communicate those rules to employees
- Enforce those rules consistently
- Maintain accurate performance appraisals
 - Investigate questionable employees
 - Beware of ADA, state laws



Keys—ADA

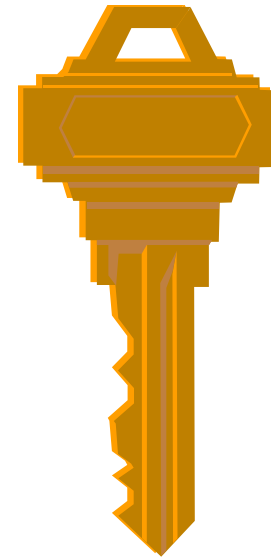
- Treat the behavior
 - Not the condition
 - Can enforce neutral policies
- Consistency
 - Disparate treatment
 - Essential functions

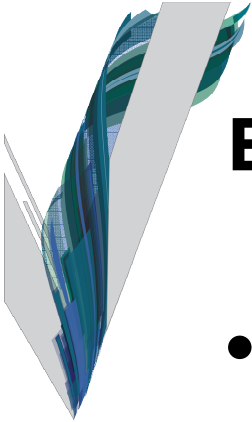




Keys—ADA

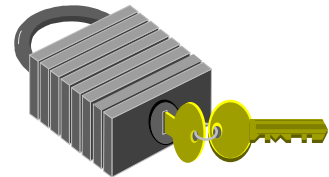
- Consider accommodations
 - Time off—modified schedule
 - Transfer
- Don't lose the paper trail
 - Return the serve
 - Continue the volley
 - Timely!!

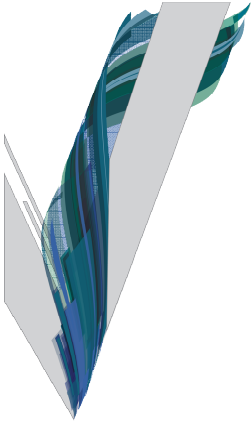




Evaluate Physical Facilities

- Consider training in emergency procedures
- Consider appropriate steps to reduce risks from nonemployees/off-duty employees
 - Cameras
 - Limit access
 - Guards
 - Locks





Questions?

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