Division of Risk Management

Transcript for Webinar Series: “Employment Screenings & Prelitigation Process”

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Speakers: Rachel Terry (Director – Risk Management), Dennis Flynn (Assistant Attorney General) and Jaqualin Peterson (Employment Law – Utah Attorney General’s Office)

Welcome and Overview of the Employment Screening Program

Rachel Terry: For this webinar, uh, I'm so happy to be sharing Wednesday morning with you. Uh, thanks for carving out time to be with us. The purpose of these webinars is to make sure that we provide you the information to help you better do your jobs.

A few years ago, Risk Management started a program to, uh, provide legal support to you in dealing with employment cases and some civil rights cases called the Screening Program. Today we're going to talk about that—how it works, what it does, and how it can impact coverage for certain claims.

So, the agenda for today is I'm going to give a very brief overview, and then our Assistant Attorney General and General Counsel, Dennis Flynn, is going to talk to you about the coverage impacts of the program. Then we're going to hear from Jaqualin Peterson from the Attorney General's Office. She's going to talk about the nuts and bolts, how it works, and then we're going to answer any questions you might have. If you do have any questions, please put them in the chat, and we will answer them before the end of this webinar. These webinars are designed to be short so you can get the information you need and get on with your day.

I will go ahead and jump in. So, a few years ago, Risk Management started a screening program. What we found was that there were quite a few employment cases where mistakes were made in employee discipline or terminations that could have been avoided. These created liability for our agencies and our covered entities, and thus for Risk Management because we pay for those costs.

So, Risk Management now pays for you to consult with an attorney from the Attorney General's Office Litigation Division to talk through the implications.

Clarifying Misconceptions: Your Decision-Making Authority

Rachel Terry: Now, Dennis Flynn will talk to you more about coverage, but let me share this with you: there are some misconceptions about the program that I just want to clarify. You are not required to consult with the Attorney General's Office before making an employment decision. The coverage agreement, as Dennis will explain, does talk about consulting with an attorney before taking discipline or termination of an employee, and he will cover those.

But if you consult with your General Counsel or if you have outside counsel you like to work with, that's fine. You are welcome to have access to the Attorney General's Office to make those decisions. One thing we want you to know is that at Risk Management, we do not tell you what you can and cannot do in employment decisions. We know that there are more risks that you need to consider as part of any employment action, not just litigation risk. Sometimes there's reputational risk. Sometimes there's institutional risk. Sometimes there are situations where keeping an employee is more untenable than any litigation risk that you might face. We are not here to balance those for you or to tell you how to navigate those. We are here solely to support you as you make those difficult decisions.

You are not required to take the advice of the Attorney General's Office if you seek it. Their job is to provide you their legal advice and their evaluation of the situation. Your job as the decision-makers is to weigh that advice and make the decision that makes the most sense for your institution. We're very sensitive to the fact that there's a lot happening, and particularly in the employment arena, there's a lot of issues that you have to consider. Sometimes you know that if you terminate an employee, you will be sued, and that's for you to weigh. Sometimes you know that if you keep an employee, you are actually putting your institution at greater risk than if you terminated that employee and navigated the litigation.

So, please know that we are here to support you. We are not here to tell you how to do your jobs. We're here to help you navigate a complex situation as much as we can. And so, with that, I am going to turn this over to Dennis to talk through the coverage issues. So thank you again for being a part of our Risk family and for participating in this webinar.

Coverage Impacts: Claims, Wrongful Acts, and Deductibles

Dennis Flynn: Good morning to everyone. I'm Dennis Flynn, I'm the Assistant Attorney General and Counsel for Risk Management, and I think I have interacted with most of you, typically on coverage issues, which I handle for Risk.

As Rachel indicated, the employment screening and pre-litigation consultation program is intended to help you with your employment issues. Risk had seen, for a number of years, an increasing number and amount of costs in defending employment litigation. So, we worked with our partners at the Attorney General's Office to devise a system, a program, where you, as risk-covered entities, can consult with the AG's Office before litigation to ensure that proper steps are taken in accordance with employment laws. The goal, of course, was to reduce the number and the cost of claims.

Risk observed over the first several years of the screening and pre-litigation consultation program a successful shift of costs to support the program and a reduction in the number and costs of defending employment claims.

So, the purpose of screenings—they are intended to be a brief review of an employment issue. Typically, we like to see those occur and resolve within about 30 days. Pre-litigation occurs where there's a pending or expected claim that has not yet been filed as a legal action. When these issues arise, they may be referred to the AG's Office by me, or oftentimes Susan Nagata, who is the primary risk adjuster. She handles employment claims for Risk. Covered entities may also, from time to time, reach out to the AG's employment section with a question, but we like to see if it's a screening or a pre-litigation consultation that may take longer than just a quick question to come through me or through Susan.

Now, employment matters are covered under Risk's General Liability Policy. It's Coverage F: Employment Coverage. I'm just going to briefly touch on some of the terms as defined in that coverage.

What a "claim" is: A claim means a written demand against any covered entity for monetary damages. It also means a civil proceeding against your entity seeking monetary damages, which is begun by the service of a complaint or a similar proceeding. It could mean a binding arbitration proceeding, but only if Risk has provided prior written consent to such proceeding against any of your covered entities seeking monetary damages.

A claim also means a civil or administrative proceeding against a covered entity commenced by the issuance of a notice of charge or a formal investigative order, such as before the EEOC or any other similar federal, state, or local governmental authority. Or, it means a civil or administrative investigation against any covered entity commenced by the service upon or other receipt by a covered entity of a written notice or subpoena from the investigating authority that identifies the covered entity as an individual against whom a civil or administrative proceeding is to be commenced.

This obviously includes any appeal from these types of claims. What a claim does *not* include is a labor or grievance arbitration proceeding. It also does not include any liability—including the reimbursement of attorneys' fees and expenses—that arise out of a criminal proceeding or occupational licensing proceedings that are brought against covered persons.

What is a "wrongful act"? A wrongful act, when it pertains to claims brought or maintained by any employee or somebody who's applying for employment with a covered entity, means a wrongful employment practice that is committed or attempted by the covered entity or any covered person in his or her capacity as such on behalf of the covered entity. And with respect to all other claims, the wrongful act means a violation of discrimination laws, and that would mean—but not limited to—violations based on race, color, religion, creed, age, sex, disability, marital status, national origin, pregnancy, sexual orientation or preference, military status, or violation of a natural person's civil rights relating to such discrimination or sexual harassment, whether intentional or unintentional, committed by a covered person in his or her capacity as such on behalf of the covered entity.

Well, wrongful employment practices are covered in that wrongful act definition. So, what's a wrongful employment practice? That means any actual or alleged wrongful dismissal, discharge, or termination—whether it's actual or constructive. It includes employment-related misrepresentation, any violation of employment discrimination laws, sexual harassment, unlawful workplace harassment, wrongful deprivation of a career opportunity or demotion, failure to employ or promote, wrongful discipline, retaliation, negligent evaluation, employment-related slander, libel, defamation, humiliation, invasion of privacy, giving negative or defamatory statements in connection with an employee reference, failure to grant tenure.

So, these are the types of wrongful acts, these are the types of claims that you may see, and if you see something on the horizon that's a potential claim, you may want to get a screening. You may want to contact the AG's Office and see whether you are taking the proper steps to avoid a claim. Or if you have a claim that's not yet been filed as a legal action, then the program is intended to guide you through the proper steps, hopefully to avoid or mitigate against litigation.

Policy Incentives and Avoiding the Deductible

Dennis Flynn: Now, I want to cover the incentive, the deductible, and co-insurance provision under the coverage agreement because this is sort of the analysis that you're going to be going through to determine whether you want to take an action on a screening or a pre-litigation consultation. And that is because there may be a deductible and co-insurance that applies to your situation. I'm going to share with you that term from Coverage F, and you should all have your copy of your general liability policy.

[Visual: Dennis Flynn shares his screen, displaying a document titled "Coverage F - General Liability: Employment Practices Page 11", highlighting the "Deductible/Co-Insurance" section.]

This just comes from that. So making sure my screen looks like it's presenting...

So, when there's a judgment or a settlement that exceeds $50,000 payable under the coverage, that's subject to a deductible per claim of $15,000 that your covered entity would be expected to pay. And in addition to that, there may be a co-insurance of 25% of the amount of any judgment or settlement that goes above the $15,000 deductible.

So keep that in mind. Also, the deductible and co-insurance payments shall be made to the fund within 30 days of written notice to the covered entity that the fund has paid a judgment or settlement that is subject to the provision. So, Risk has an obligation to notify you and then you have 30 days after that written notice for this to kick in.

And then paragraph three: The State Risk Manager has the discretion not to impose the deductible and co-insurance payment if the covered entity can demonstrate its adherence to the counsel and guidance of legal counsel, the AG's Office, or the Division of Risk Management Liability Prevention Specialist before or during the implementation of any adverse employment action.

So, I just want you to bear these provisions in mind because as you have these needs arise for a screening or a pre-litigation consultation, the motivation of seeking out advice and carefully considering that is that there may be this deductible and co-insurance that will be attached to a judgment or settlement if the claim goes to that point.

And so, the resources available to you—as I've outlined before and Rachel's outlined—are to contact the AG's Office for assistance and guiding you with legal advice. The decision is yours to make what to do with that, but these are some considerations that you'll want to take into account through that process.

Rachel Terry: Dennis, can you scroll down to that bottom section again?

Dennis Flynn: Yeah.

[Visual: Dennis scrolls down on the shared document to reveal the third paragraph in the Deductible/Co-Insurance section.]

Rachel Terry: The, the 'may elect not to'.

Dennis Flynn: Yeah, here it comes.

Rachel Terry: Uh, want to scroll down one more. Right there. So, I think it's important for everyone to note that it says 'guidance of legal counsel, the Attorney General's Office, or Risk Management Liability Prevention Specialist'. Right now, that position is open. We have not filled that position yet. We are still working on it.

And so, right now, that means your legal counsel or the Attorney General's Office. You are not required to use the Attorney General's Office screening ever. But if you want to avoid a deductible, then you should consult with legal counsel or the Attorney General's Office. If you have your own internal legal counsel or you have outside counsel that you typically use, that is covered by this provision. You are not required to use the screening at the Attorney General's Office. That is a very helpful resource that we offer to you, and that we hold out to you for you to use. But you are not required to use it, and if you feel comfortable with the advice you're getting from your own legal counsel, then by all means continue to work with that counsel. We do not want to interfere with those relationships or that advice. We just want to be a support to you, and this is a program that's really helpful. Dennis, thanks.

Dennis Flynn: And so, with that, we'll turn the time over to Jaqualin who's with us today to explain the process of the screenings and pre-litigation consultations, and what she expects and likes to see on her end. Thank you, Jaqualin.

How to Engage the Team: Specific Procedures by Agency Type

Jaqualin Friend Peterson: Okay, can we all hear me now? Thank you. Um, I think most of you have had some opportunity to work with us and have already potentially screened matters with us. So, but I do, I think maybe it's helpful for you to know that we have some internal processes that are slightly different depending on what kind of entity we're dealing with. And that's because of different relationships that we have built up over time.

I had my own little presentation, but I'm going to probably just focus in on a couple of pieces because some of the information was covered. I do want to re-emphasize that the purpose that we are providing here is an opportunity for you to review matters with us and get our guidance and expertise as your, as individuals are making decisions, right? And again, we're not the decision-makers. We're providing options and helping you work through issues on a variety of things.

And just to be clear, those things can range—I thought, you heard Dennis that they can range a bunch of different things, but I just want to highlight some of the most common things that come through our door. Of course, discipline comes through our door to screen to make sure that it's defensible on all grounds. There's justification for it factually, there's a policy violation that's attached to it of some sort that meets your policies. And that in most instances we're looking at proportionality and consistency. So those are some of the key things with discipline.

But the types of things that often interact and other things that come our way are, you know, managing FMLA, accommodation issues, whistleblower kinds of claims that are coming through. Title IX and Title VII processes along with your other abusive conduct processes, and then First Amendment kind of intersecting issues. So I think these are kind of the hotspots that help you—I'm hoping to provide just some key terms so that you understand.

Now, I am going to, if I can, I'm going to project this. I think the primary reason they were hoping that I would come in and tell you how to reach out to us, right? And what we do with that process. And so I do have just a screen here. I'm sorry you guys use Teams and you guys use something else and I'm struggling to find my... Okay, maybe it's not going to happen because I cannot seem... There we are. Hold on. Let's see if I can get my...

Rachel Terry: It's a little arrow on the bottom.

Jaqualin Friend Peterson: There we go, found it.

Jaqualin Friend Peterson: Okay, sorry. Let's hope that I'm getting you the right thing. Wrong slide... great. There we are.

Okay, hopefully we're sharing the right thing. Do you see "Engaging My Team"? Yes. Okay.

We have some, as you can see, we have some different processes that are put in place, and I want to make sure because we've built some specific ways of approaching us through the state agencies that manage those through DHRM and a process that we've developed with DHRM. And that is that the screenings will come to us through the DHRM rep—the embedded individual—and we already have specific assignments. I have attorneys; they're aware of the attorney who is their screening attorney. And so, I do recommend first, if you're a state agency, that you're walking through your designated employment section... your DHRM rep who is going to speak to the assigned attorney. If they're out or whatever it is, you can always refer that to me or to anyone on the team. And generally speaking, if people are out, they will identify who's going to cover their screenings.

And there are particular forms and things that we have developed that we see that deal with consistency. Usually we get a spreadsheet or some indication of what other discipline has taken place. These are usually in discipline settings. And there is a specific form that comes to us to help us understand kind of the issues surrounding that. That is specific to state agencies, and that's the process that we've developed.

As it relates to higher ed and K through 12, we have a different kind of channel of communication that generally occurs. When it comes to higher ed, we're generally working through General Counsel's Office or the embedded AAG Education Division AAG. And then sometimes in coordination, or sometimes through the Director of HR, to bring these issues to our attention. There is no specific assigned attorney on my team on those matters, and I want you to feel free that if you've worked with one of our people that you can just reach out directly to them for that opportunity to, you know, you can email, just identify you've got an issue.

The other thing is, if you do have questions about whether this is screening versus pre-lit, you can also, like Dennis said, reach out directly to Risk, and they will then forward this to us. But I do want to say that we've had, we often have communications come directly to us, and if in that case, if we, in looking at it, have a concern that it's not really in a screening posture, and it's more in a pre-lit posture, then we will either direct you back to Risk or coordinate that effort back to Risk to make sure that we've got it in the right box.

I, you know, I think Dennis helped you understand that some things, generally it's prior to an action being taken that we're looking at kind of screening types of issues, usually. If you've built a relationship already with one of my team members because they have assisted you in a litigation, you're welcome to reach out directly to them. If they cannot manage it or you can reach out to me like I said and I cannot manage it, it will get assigned and we'll coordinate that effort.

When I'm looking at K through 12 and covered charter schools, if you have a general counsel, that's the way the request normally ought to come to us. But if you do not, often we end up with HR, a superintendent, a director of schools, your business administrator, anybody who's in kind of that same HR/executive level leadership role. And again, in these instances we don't have a specific assigned attorney in my team. Those often come to me. I can route them to an attorney who will then reach out and walk through the process, and we'll talk about that.

But I just wanted everyone to know, like, if you don't know who your AG person is, then you can send it to me, or you can send it through Risk who will then make me aware of the situation. But I did want to cover that because we do have some processes in place.

The Internal Screening Process and Turnaround Times

Jaqualin Friend Peterson: So here's... this is just kind of the internal process, but I'm going to cover things a little bit in more detail.

So again, you can email or call us, and I'll have my number below. If you want a list of the emails, I can provide that. But really, myself or even Daniel Widdison, either of us can get it routed the way it needs to be routed. What will happen is it gets routed to a screening attorney who will reach back out to you. And what I do want you to know is we open a matter, because this is Risk covered, we have a process with Risk in which weekly we open screening matters that come to our attention. We create a file as part of our files, and manage the documentation that comes in and any other correspondence that's coming forward. But also, we coordinate with Risk weekly to identify the screenings that are coming through our office. Particularly since sometimes those screenings then graduate to a different level, so it just helps us understand where it's been in the process and how it's evolved.

And once that matter is open, right, we sit, we coordinate—well, I should say we're going to coordinate with you immediately, but I just want you to know what's happening in the background. Our team is a very collaborative team. I think that in most instances if you have a straightforward screening, you may just hear from one of us. But I do want you to know in the background that almost all of my team will buddy up with another person. If your issues require some... if they're more difficult and they want to see if that issue has arisen elsewhere, so we're very collaborative in managing this. We should be turning around and reaching back out to you within the day, or the next day if it's late in the day when these things happen.

And I do want to give you a sense of kind of the approaches. We... this may just be a matter of you reaching out giving us some factual information. We generally will want to see documentation of things that have come through so that we can understand what information has already gone out, other types of issues at play. If we are dealing with ADA, if we're dealing with FMLA, we're going to want to know about intersecting issues, particularly if you're trying to take a disciplinary action. We'll want to know if there's other intersecting issues. And we'll just want to have a discussion about what is the entity's objective? What are they trying to accomplish in this instance? And do we feel that... what steps do we think can be taken or should be taken given the issues at play?

I also offer this out, because we understand that oftentimes we're not working with the individual who is ultimately going to be making the decision, right? That's the management level team. If you feel it's important for us to hear from the management level team in offering whatever advice, we have done that. This is a collaborative process. We're trying, again, to partner with you and help you achieve what you think will be the objective that you need for your organization and business needs, while still maintaining defensibility and reducing risk in those settings. So our objective is to give you—and sometimes it's just a matter of reviewing a proposed action based on facts and what's occurred and saying, "Hey, this looks good. This looks defensible."

It can be a more robust and involved engagement where we need to see more documentation, have a couple of meetings, and walk through some of the issues and intersecting things. Sometimes you're engaging with an employee who is... maybe you're dealing with ADA and accommodation-related matters and we can help in messaging and building the messaging that moves out through those processes as we do things.
And then like I said, if we need to set up a meeting with the actual management, the supervisor or other leadership who's making those decisions because they would like to bring to bear their concerns or whatever, I want you to understand that we've done that. We're happy to do that and we're happy to be available to do those things.

Just so you know, we usually like to have a completion of whatever is decided. So you'll usually hear something like, "Okay, now that we've moved this through, we've given you our advice, our guidance, can you tell us when you actually issue the final decision and, you know, send that back to us so that we know what in fact happened."

And I should also mention this: If you need help in drafting or messaging disciplinary documents, ADA engagement, those kinds of things. Again, we're helpful in helping and messaging those things on your behalf.

And then, you know, we close the screening once that process is done. And I do want you to know, the majority, I want to say like 90% of our screenings are probably completed within a few days. Like, it's not a long process. It's a "come in, walk through some of the scenarios," and then we give you what we think. Sometimes it's just really a matter of reviewing and giving you like, "Hey yeah, this looks like you covered all the bases and move forward." So... but we do have sometimes screenings that can take a little longer because they're working through a variety of layers and just back and forth. But either way, you know, our office is open to you.

I'm trying to think of other kinds of things that come up in the process. Couple things I did not cover: We do need to tie it to an employee. So these screenings are driven based on what action you might be taking with a specified employee. So the way the file on our end gets opened is through an employee designation and an entity designation. And that's essentially how the internal screening works.

And again, pretty collaborative. If you may hear from more than one of us too, we may pull another of our team members in if it's really tricky. But that's really the screening process in a nutshell.

And I think the primary takeaways that I try to give people is, you know, we truly are here to help you work through and achieve the business objective that you see that you need to make. Sometimes in that process, and I just... as things go, we may recommend further steps are taken before we get to that space. We may recommend that there's a range of, in a discipline setting, if where consistency is really important, we may have to land on a particular space that's different. But if you really feel strongly, or your leadership really feels strongly that there are distinguishing factors, those are important for us to understand.

And so we, again, are trying to aim to partner with you to achieve a defensible business objective and reduce risk. And so we don't want you to feel that you can't—this is not the right term—but you can push back, right? You can ask questions. You can engage with us in helping us to understand the boundaries, the lines that are driving our advice and our guidance. And we're okay with that. We're not going to get upset. We're happy to explain our situation.

And at the end, if you have... we would rather have you come to us if you want, um, and raise issues with us, whether they fit the model that I just said or the topics I just said, we can work with you to help you understand if that fits within the screening bucket or we need to pull risk in and say, "Hey look, this has escalated to a different level." And we're pretty good. We understand how that works, and we have Dennis there and Rachel to help us navigate that line. So we're happy to do that and assist so that you're in the right bucket. But if you have questions, I'm happy to entertain them. I left quite a bit of time so that we can do that. And if anything I just said was unclear, I'm happy to clarify.

Final Clarifications and Webinar Wrap-Up

Dennis Flynn: Jaqualin, can I just make one request? Thank you for outlining the process of reaching out to your office. And for all state agencies and for higher ed, we at Risk encourage you to continue to do that as you've been doing. If you are K through 12, however, Risk's request is that you contact me and/or Susan Nagata with your screening or pre-consultation, and we'll facilitate that with the employment section.

Jaqualin Friend Peterson: Okay, absolutely. Absolutely.

Rachel Terry: Is there any questions? Go ahead and throw them in the chat and we'll answer them. I want to especially thank Jaqualin for her presentation. Having the screening program has been really useful. Uh, we receive a lot of positive feedback from a lot of different agencies. It's an opportunity for you to talk through, uh, legal risk. And, and you can talk through all those things.

But I do want to emphasize one thing, because I had a conversation with a general counsel about a week ago, and in that conversation, the general counsel said, "Well, we want to get rid of this employee, but we want to assess Risk's risk tolerance for getting rid of this employee." Uh, our risk tolerance is your risk tolerance. We don't get to decide if you keep an employee or don't keep an employee. That is entirely your decision. It is for you to weigh and for you to decide. We offer these tools to, uh, talk through complex employment issues.

But if you are working with an attorney, whether it's in-house or through the Attorney General's Office, and you've consulted and weighed that, um, you know, we, that's your decision to make. And unless you're doing something crazy, like you are firing an employee for obviously discriminatory or non-legally supported reasons, then we don't impose, um, the deductible. If you're making a decision where it's obviously a terrible decision for every possible reason, then that's a different situation.

But this isn't for us to assess, uh, the risk tolerance. This isn't for us at Risk or the attorneys to weigh out the pros and cons of each of these. That is for you as decision-makers. And, um, we are often, um, some of the feedback we get sometimes is, "Well, my lawyer told me I *had* to do it this way." No, no, no. Your lawyers give you pros and cons. They give you legal advice. And it is advice. Then decision-makers have to make that decision. If you need to make a decision and you want to throw us under the bus, I'm fine if you're doing that. Just know that's being done as a courtesy, uh, we don't actually make the decisions. Uh, I'm fine if you need me to be the bad guy, I'll be the bad guy all day long.

But we want to make sure that you know that you are empowered as the decision-makers, and that the screening protocol is an incredibly helpful tool. Jaqualin and her team are very knowledgeable, very kind and helpful, and they're there to work through these issues with you. Um, continue to use the program. If you have your own counsel that you want to use, um, that's fine as well. We pay for the Attorney General's Office to consult on these matters. If you have an outside counsel you would like to or internal counsel you, your general counsel would like to reach out and talk through things, that's appropriate. It's provided for on Jaqualin's screening process.

But my final message to you is: we're giving you tools to make a decision. We are giving you the support you need, and then it's up to you to weigh pros and cons and make that decision. We will support you because that's what we do. That's our job. We're your insurance, we're your backstop. We are here to pay for those judgments when things go south, settlements when we need to because that's what makes sense and the litigation costs for covered claims.

If you have any questions about what is or isn't covered under our policy, you can look directly at the policy, or you can reach out to Dennis. Um, there are certain administrative proceedings like we do not touch professional licensing. Uh, that is not something that is covered. That is not something we participate in. So if you're dealing with a professional licensing issue, that is not a covered claim. And if you ever have any questions, Dennis is your guy on coverage. And Susan Nagata is our handler of all of our employment cases, so you can reach out to her also if you have any questions.

Thank you again to the Attorney General's Office and to all of you for being on here this morning. We greatly appreciate the time you've given us. And I don't see any questions in the chat. So if I missed something, someone please tell me.

[Visual: The speakers look towards their screens to check the chat feature.]

I don't think so. So we'll wrap it up and uh, let you get back to all the other important things that you're doing. We sure appreciate you. And if there's anything else that you think we can or should be doing better, we welcome your feedback. Please send me an email, or Ron, or any of my managers. We really want to better support you as you do the difficult work—educating children, uh, providing human resources support, and doing all the other important things that you do plowing roads, doing everything, you're running the state. Uh, thank you so much for the work you're doing. You're doing great.

So we'll talk to you hopefully next month in our next webinar. And thanks again, Jaqualin and Dennis, appreciate it.