# ADA Update 2022

## [Introduction]

**TRACIE DeFREITAS:**

Hello, everyone. My name is Tracie DeFreitas. Thank you for joining us today for this JAN Accommodation and Compliance Americans with Disabilities Act (ADA) Update 2022 with our expert guest, Senior Attorney-Advisor with the U.S. Equal Employment Opportunity Commission (EEOC), Office of Legal Counsel, Jeanne Goldberg.

Jeanne has graciously offered her time and expertise to provide this update for the JAN audience for many years. We have been so grateful for this collaboration, and we really look forward to learning about the latest developments in the application of Title I of the ADA, some practical tips for workplace compliance, and answers to tough ADA questions. So thanks for being with us today, Jeanne. We really appreciate you.

Before we begin, let's quickly cover some housekeeping items on the next slide. First, if you experience any difficulty accessing this webcast today, please use the question-and-answer option located at the bottom of your screen to connect with our tech team. You may also contact JAN at 800-526-7234 or use the live chat at AskJAN.org. That's A-S-K J-A-N dot O-R-G.

We do offer an FAQ that may answer some of your questions. See the login email you received for the FAQ link. You can also find it at the AskJAN.org webcast registration page.

Questions for presenters may be submitted using the Q&A option I mentioned. All questions will be gathered into a queue and, time permitting, will be answered at the end of the presentation.

The link to download the PowerPoint slides can be found in the webcast log-in email you received earlier today, and it has also been shared in the webcast chat. And you can also find it via the training page -- excuse me -- at AskJAN.org, so look for this event on that webcast registration page, and you will be able to access all the materials.

To access live captioning, use the closed caption option at the bottom of the webcast window or view captions in a separate browser by accessing the link shared in the webcast chat now.

This presentation is being recorded and will be available at the AskJAN.org website and our YouTube in about a week or so.

And finally, at the end of this webcast please complete the evaluation, and the CEU approval code will be provided after the webcast evaluation is submitted.

Now let's settle in for an informative ADA update. We have a lot of information to cover today, so let's get started. Jeanne and I will be discussing a variety of ADA topics offering common pitfalls, training issues, and some interesting case law. Jeanne is going to do most of the heavy lifting today, I would say -- and I am grateful for that -- but we're going to address topics centered around the ADA and understanding the definition of disability as it relates to being qualified to receive reasonable accommodation, issues related to the "regarded as" part of the definition of disability, what it means to be qualified or a qualified individual with a disability, and some training reasonable accommodation topics and issues as well. So we will be talking -- Throughout the presentation you'll hear us talk about some common pitfalls and ways to avoid those pitfalls.

## [Definition of Disability]

So let's get started with the ADA definition of disability and coverage issues, determining worker eligibility to receive a reasonable accommodation. We know that the duty to provide reasonable accommodation is a fundamental statutory requirement of the ADA. While an individual with a disability may request an accommodation due to a medical condition an employer isn't required to automatically provide the change before engaging in an interactive process with that individual.

Often before deciding whether an accommodation can be provided an employer will need to decide whether that individual has an ADA disability for accommodation purposes, and this means that the individual either has what's considered an actual disability (a physical or mental impairment that substantially limits major bodily function or other major life activity), or a record of such an impairment. But in both cases, an individual may be entitled to receive an ADA accommodation if it's reasonable.

Note that there's no comprehensive list of ADA-covered disabilities. A case-by-case determination must be made. The inclusive ADA definition of disability that was restored in the ADA Amendments Act, this extends coverage to many individuals who may not have previously been covered, and because the definition of disability is to be interpreted broadly, requiring little analysis to figure out if somebody has a disability, employers are really encouraged to kind of err on the side of caution and process accommodation requests without placing too much emphasis on determining disability. Rather, focus on determining whether the accommodation they're requesting is something that actually is reasonable and something that you are able to provide.

Ultimately, when a modification is requested, an employer does have the right to assess eligibility based on knowing that accommodation is needed due to a disability-related reason. So for example, for a disability-related limitation, for side effects that may result from medication that would affect the person at work, things like that.

Now an accommodation pitfall in assessing ADA coverage to provide accommodations is failing to apply that amended ADA definition of disability per the ADA Amendments Act, which states that the definition of disability should be interpreted in favor of broad coverage of individuals. Now, the ADAAA didn't change the definition of disability, but it did change the meaning of some of the words used in the definition and the way they're applied. So for example, there's no specific definition of the term "substantially limits." Instead there are rules of construction that are used to determine if a person is substantially limited in performing a major life activity.

What do you need to know about the ADA Amendments Act's definition of disability in order to avoid this pitfall? Well for starters, remember that an individual's medical limitations, they need not be permanent, long-term, or prevent or severely or significantly restrict a major life activity in order to be considered substantially limiting in some way. The determination of whether an impairment substantially limits a major life activity, it actually requires an individualized assessment, so you want to look at that situation very uniquely, in an individualized way.

Also know that the ADA Amendments Act expanded coverage by adding the operation of major bodily functions to the definition of major life activities. There is a long list of those functions, but some examples are functions of the immune system, digestive, cardiovascular, endocrine, musculoskeletal systems, and also reproductive functions as well.

When you are determining whether a person is substantially limited in a major life activity, you of course want to ignore the beneficial effects of mitigating measures like medication or prosthetic limbs, mobility aids, oxygen, even assistive devices, things like hearing aids. So for example a person with epilepsy who takes medication to control seizures will most likely be substantially limited, because we will consider their limitations without that medication.

Also the fact that a person's limitations go into remission or come and go is not really relevant in determining whether the impairment substantially limits a major life activity. So that means that something that might be episodic or in remission is going to be something that could be substantially limiting if it would be when active. Examples can include multiple sclerosis, cancer, hypertension, diabetes, asthma, mental health-related conditions like bipolar disorder and major depressive disorder. So these of course are just examples to keep in mind.

And finally, to help make it easier to determine whether someone has a disability under the ADA, in the ADA Amendments Act regulations the EEOC provides examples of impairments that should be easily found to be substantially limiting in some way. These are known as "predictable assessments," so impairments that will virtually always be substantially limiting. Examples might include epilepsy, diabetes, cancer, HIV, and bipolar disorder. So again, these are examples, but they certainly provide some good information for employers to use to kind of get past getting too bogged down in that definition of disability.

Another common pitfall is assuming that short-term impairments are not substantially limiting in some way. There is no minimum duration an impairment must last to be considered substantially limiting under the ADA, meaning that there's no automatic cutoff for the duration an impairment must last before it can be considered a disability. Yes, generally impairments that last only a short period of time -- you could say a week or month -- they're typically not covered, but a short-term or temporary impairment may be covered if it is sufficiently severe. So note that duration is only one factor in determining whether someone is substantially limited for ADA purposes.

Also you want to avoid dismissing an accommodation request from a worker with a short-term impairment that may be an ADA disability by knowing that the effects of an impairment lasting fewer than six months can be substantially limiting if sufficiently severe. So for example, if an individual has a back impairment that results in a 20-pound lifting restriction that maybe lasts for several months that person could be substantially limited in the major life activity of lifting even though the impairment and the limitation are not permanent. So don't just simply disregard something that might seem short-term or temporary in some way.

All right, Jeanne, I'll turn it over to you now to get us started with that ADA update on relevant case law.

**JEANNE GOLDBERG:**

Thanks, Tracie. So we're turning to slide nine.

### [Shields v. Credit One Bank, N.A.]

The Shields case is one of actually three appellate court decisions in the past year that made that very point that Tracie just made about duration, that a condition may be substantially limiting even if the limitations are not long-term. In Shields the employee had bone biopsy surgery to check for cancer in her right arm and shoulder, and there were a lot of post-surgery limitations that lasted more than two months. The doctor said, "Don't work at all for eight weeks," and then extended it three more, so it was a total of 11 weeks, because during that recovery period she couldn't use her right shoulder, her right arm, or her hand to lift, pull, or push things, to type, to write, to tie her shoes, or even to lift a very lightweight item, and the court held that that was sufficient duration and impact to be substantially limited in the major life activity of lifting. Again saying, as Tracie just did, duration is one factor, and that there's no categorical rule excluding short-term impairments. And the Court cited as a guidepost that EEOC regulatory appendix example that Tracie just mentioned of a back impairment causing a 20-pound lifting restriction lasting or expected to last for several months, that is substantially limited in the major life activity of lifting.

A lot of lower courts continue to get this duration point wrong, I think for two reasons. One is they might inadvertently rely on pre-ADA Amendments Act case law that did require a long-term or permanent impact, or they might mistakenly incorporate into this actual disability/substantially limited analysis the transitory part of the "transitory and minor" exception to "regarded as" coverage which does not apply under prong one for what's an actual disability under the ADA. So duration's only one factor in determining substantial limitation, and there is no bright line length of time limitations have to last to meet the standard.

Now of course, if the employee's situation is that they've just been diagnosed or the limitations are ongoing, you may not know how long it will last yet, but the employee or their treating physician can tell you how long the limitations are expected to last, and that's information the employer can learn during the interactive process in evaluating the accommodation request, both for purposes of whether the condition seems to be a substantially limiting impairment, meet that definition, and also for purposes for determining whether the accommodation, the length of these limitations, the length of time the accommodation will be needed is an accommodation that can be provided, whether or not it would pose an undue hardship, in other words.

Next slide.

### [Hamilton v. Westchester County]

Another case illustrating that temporary injuries or impairments may be covered is Hamilton v. Westchester County. This was a title II case under the ADA, so not employment, but the same definition of disability. It involved a painful, dislocated knee and torn meniscus, not properly treated and then aggravated, and the Court held that could substantially limit major life activities. The defendant had argued, "Well, the injury had only occurred 19 days before the discrimination that is alleged supposedly occurred," but the Court said the circumstances permitted an inference that the limitations were likely to last longer and emphasized this point that limitations lasting or expected to last fewer than six months can nevertheless be substantially limiting. They don't have to be permanent, chronic, or long-term.

Next slide.

### [Skerce v. Torgeson Electric Company]

The third example on temporary injuries from this year is the 10th Circuit decision in Skerce v. Torgeson Electric. Due to an elbow injury, an electrician had a 2-month, 10-pound lifting restriction, but after that he was cleared to return to full duty after fewer than three months altogether. And again here the Court of Appeals held the District Court incorrectly dismissed this case as involving a merely temporary condition. They said this could be a substantially limiting impairment, citing the EEOC regs as well as post-ADA Amendments Act decisions from the 1st, 3rd, and 4th Circuits holding that temporary impairments lasting fewer than six months can be substantially limiting. Duration is one factor. We look at duration and impact, and there's no bright line. So keep this in mind as you are assessing accommodation requests and that broad amended standard of what's substantially limiting in a major life activity.

Next slide.

### [Felix v. Key Largo Management]

Let's move to identifying the major life activity affected. An interesting case from this year was Felix v. Key Largo Management from the 11th Circuit. The employee requested a schedule change as an accommodation for diabetic retinopathy. As a result of the condition, he couldn't do any night driving, so he couldn't commute home if he got off work once it was already dark, so he asked for a schedule change.

The district court erroneously limited its analysis, looking just at the major life activity of driving. They said that's not a major life activity and concluded that was the only activity impacted so ruled for the employer. The Court of Appeals reversed and said even though this employee could see to work, the employee could nevertheless be substantially limited in the major life activity of seeing, because her retinal damage caused faulty night vision. So the major life activity doesn't have to affect the employee all the time, constantly, for it to be substantially limiting. Here it was at night that the vision limitation affected the employee.

And look at the lesson here for when you receive an accommodation request in real time. If the employee says, "I’m seeking this accommodation because I can't drive due to a medical condition," that does not mean that driving is the only potential activity at issue. It could be vision. It could be a restriction on how long the individual can sit, sitting as a major life activity. It could be neurological function. The employer needs to unpack what possible major life activities might be implicated by the limitation that the employee and their treating physician are describing.

Next slide.

What about COVID-19? When is COVID-19 itself a substantially limiting impairment? EEOC this year has provided many examples in its main COVID-19 publication. I've linked to the particular section about disability coverage and COVID-19, section N, here on this slide, and here's just a few examples: ongoing but intermittent multiple-day headaches, dizziness, brain fog, and difficulty remembering or concentrating that the doctor attributes to the virus. That could be substantially limited in neurological and brain function, concentrating, and/or thinking, among other major life activities. Another example from the EEOC: shortness of breath, associated fatigue, and other virus-related effects that last or are expected to last for several months. That is substantially limited in respiratory function and possibly major life activities involving exertion such as walking. Or a third example, COVID-19-related intestinal pain, vomiting, and nausea, these GI effects, that linger for many months, even if intermittently. That is substantially limiting in gastrointestinal function and other major life activities. So you get the idea. There are many more examples, but these are three that I think give you some good guideposts for what is substantially limited in a major life activity when it comes to COVID-19.

Next slide, 14.

What about the opposite? A person has COVID-19 but has no symptoms, or it's a mild, regular case? Well, EEOC has also said in section N of its COVID technical assistance publication that an individual who is asymptomatic or has mild symptoms similar to the common cold or flu that resolve in a few weeks with no other consequence will not meet the ADA definition of having an impairment that substantially limits a major life activity, and they've said that's true even if the individual is required to isolate during their period of infectiousness as required or recommended under CDC guidance. That does not make you substantially limited in a major life activity.

Next slide.

### [Cupi v. Carle BroMenn Medical Center; Baum v. Dunmire Property Management, Inc.; Champion v. Mannington Mills, Inc.; Payne v. Woods Services, Inc.]

Well, what are courts saying? Here are some examples of decisions finding the individual's case of COVID-19 is not substantially limiting.

Cupi v. Carle BroMenn. The Court held the fever alone, whether or not it's caused by COVID, does not constitute an actual disability, a substantially limiting impairment.

Baum v. Dunmire Property, the Court said acute short-term COVID-19 is not a disability, but I will note that in that case the Court only analyzed at duration, not severity. The individual at issue died within 15 days of being diagnosed with COVID. I think many would argue that, given the severity of the case, notwithstanding the short duration, that that could be substantially limiting.

Champion v. Mannington Mills, a case rejecting the argument that disability is shown simply because the individual has COVID-19 or is subject to isolation or quarantine. It's going to take more than that.

I also wanted to mention the Payne v. Woods Services case. This was a case where the ADA claim was dismissed for failure to allege sufficient facts in the complaint about COVID-19 symptoms and what major life activities were affected. So for the litigators out there, remember many courts will require that kind of detail in the complaint to defeat a motion to dismiss.

Next slide.

## ["Regarded As” Individual with a Disability]

Let's move on to our section on "regarded as" an individual with a disability.

Next slide again, slide 17.

The new "regarded as" cases that I want to mention today are about "regarded as" ADA coverage and COVID-19, just since that's been such an area of interest this year.

### [Rice v. Guardian Asset Management, Inc.]

The first, Rice v. Guardian Asset Management, the 11th Circuit affirmed the dismissal of a complaint by the lower court where the employee alleged that they were entitled to telework as a reasonable accommodation for a perceived impairment because the employer required them to quarantine due to COVID-19 exposure, and they asserted they should have been allowed to telework during that quarantine period. The Court held that, even if this was regarding someone as an individual with a disability, requiring them to quarantine -- in other words, what's regarded as? An adverse action because of an actual or perceived impairment -- the Court said even so, the ADA does not require accommodation if you are only regarded as an individual with a disability. An employee is only potentially entitled to accommodation if they have or had an impairment that substantially limits a major life activity. "Regarded as" coverage alone can't get you accommodation.

### [Cupi v. Carle BroMenn Medical Center]

In Cupi v. Carle BroMenn, the case I mentioned earlier, also reached the "regarded as" issue. The employer made the employee quarantine following exposure to someone else with COVID. The employee did have a fever. We didn't know if it was COVID. The court was unwilling to hold that the employer had regarded her as an individual with a disability, taken an adverse action based on an actual or perceived impairment, simply because the employer followed CDC guidance for quarantining following exposure and having a symptom, here a fever.

Next slide.

Some practical takeaways here as to how to avoid "regarded as" coverage as illustrated by these COVID-19 cases. First, don't worry that by following CDC recommendations that you would follow -- run afoul of the ADA. EEOC and courts have repeatedly said ADA is not violated when an employer during the pandemic keeps an employee with COVID-19 symptoms, or exposure from COVID, or tested positive for COVID but it's asymptomatic, from physically entering the workplace during the CDC-recommended period of isolation or quarantine. And remember, at this time as we meet today, July 14, 2022, the CDC still recommends immediately isolating if symptoms and quarantining if you have had that certain level of exposure, with protocols for being released after a certain number of days or a negative test result. So that's the first point.

The second point, though, is to realize that, depending on the facts, an employer may risk a potential ADA violation if it relies on myths, fears, or stereotypes about a disability to disallow an employee to return to work once the employee is no longer infectious and is medically cleared to return.

Next slide.

## [Qualified]

Our next topic is qualified.

And next slide, 20.

### [Blanchet v. Charter Communications, LLC; King v. Steward Trumbull Memorial Hospital., Inc.]

The Blanchet case is a good illustration this year of how qualified can be shown, even if the employee needs leave as an accommodation. Our general rule, of course, is that an employee is qualified under the ADA if they meet the skill, experience, education, other job requirements, and can perform the essential functions of the job with or without reasonable accommodation. In Blanchet the employer argued the employee is not qualified -- was not qualified because on the date they were fired, they were unable to work at that time, they needed leave that they'd requested as an accommodation. The Court in Blanchet rejected that reasoning, holding instead that, when leave is the reasonable accommodation at issue, the employee is qualified if they would be able to perform the essential functions upon returning. The leave will enable them to be qualified, so with -- qualified with the accommodation of the leave. The same holding was reached this year also in the King v. Steward case, both Blanchet and King from the 6th Circuit.

Next slide, 21.

What about someone who does not need leave but asks instead to be excused from performing certain duties of the job as an accommodation? Now we know if those duties are essential functions, the main things they've been hired to do, they are entitled to accommodations to help them perform those duties, but the employer does not ever have to eliminate those duties, essential functions, as an accommodation or hire or assign other people to do them for the person as an accommodation.

### [Thompson v. Microsoft Corporation]

In Thompson v. Microsoft from the 5th Circuit this year, there was a senior-level executive. His job description tasked him with being able to do all kinds of coordination and communication with clients, manage multiple complex projects in a fast-paced environment, and he requested accommodations for autism spectrum disorder, including having other employees prepare his written materials and perform most of his administrative tasks. The Court held that he was not qualified, because accommodation does not require removing essential functions or assigning them to others, and in this case, these administrative and communication tasks were part of -- part and parcel of his essential functions, so he was not qualified.

Tracie, I'll turn it over to you to start us off on reasonable accommodation.

## [Interactive Process]

**TRACIE DeFREITAS:**

Okay. Now let's address some pitfalls related to requesting and providing reasonable accommodations. The duty to engage in that interactive accommodation process, we know it's triggered when a request for reasonable accommodation is received or when an employer has a reasonable belief that an employee may need accommodations due to a known disability. Generally, that responsibility to request accommodation, it falls on the individual, because employers are not expected to assume that someone has a disability or to guess what accommodations are needed, but because the ADA doesn't require that reasonable accommodation be requested in a formal way or at a particular time, it can sometimes be difficult for employers to recognize a request and to know when to engage in that interactive process.

So let's take a look, you know, about -- let's think about accommodation requests and recognizing them. You know, sometimes there is no clear sign, no flashing light indicating that someone needs an accommodation, and this is why it's really important for management staff, human resource professionals, to be trained to recognize accommodation requests.

When an individual makes it known that an adjustment or change is needed at work due to a medical reason, this is a request for accommodation under the ADA. The request, it can come orally, or it can be in writing. It can come from either the individual directly, which is typically the case, or it may be somebody who is a family member, a healthcare professional, or some other representative acting on the individual's behalf. So just know that it is possible that that accommodation request can come from somebody else for the individual when that's necessary.

Of course accommodation requests are not required to be formal or documented in any specific way under the ADA, and there is no requirement for the individual to assert their rights under the law, so to mention the ADA or to include the term "reasonable accommodation" in their request. Of course, it can be useful to be as clear as possible about what's being requested and why and to document the accommodation request just to make sure that there is no dispute over whether or when a job accommodation was requested in connection to somebody's disability. But from the ADA standpoint, it's not a requirement.

An accommodation can be requested at any time in the employment lifecycle, so that might be upon hire; it might be after three months of working; it could be after 6 or 20 years of working. So and even when somebody hasn't requested an accommodation upon hire, they can certainly request that later on. So there is no requirement to do it at a specific time. The timing of a request can of course be important, because it is always better to disclose a disability and request accommodations before job performance suffers or conduct issues occur, because employers are not required, they have no obligation to rescind discipline, and that can include termination or a poor performance evaluation simply because an employee has disclosed a disability or requested an accommodation at the final hour. So do keep all of that in mind from the standpoint of an individual requesting accommodation and recognizing when somebody is asking for something they need at work.

This leads us to our next common pitfall, frequently overlooked ADA accommodation requests. This is where an employer may not engage in the accommodation process because they don’t recognize a need to do this. And there are many examples of this pitfall.

So consider requests for unpaid leave for an employee's own medical condition beyond leave available under the Family and Medical Leave Act or where an employee maybe isn't eligible for FMLA leave. So when an employee requests leave or additional leave beyond FMLA for a medical condition, the employer should treat that request as one for a reasonable accommodation under the ADA. So that means engaging in the interactive process to determine if the ADA applies and whether leave is a reasonable accommodation. So don't miss those requests. Understand that you might need to move forward in that interactive process and figure out if leave is a form of accommodation.

Another example is where a request for a modification at work could impact both ADA -- or it could implicate both ADA and other types of requirements, like an employer light duty program or workers' compensation. By engaging in the interactive process while discussing a modified duty assignment for an occupationally injured worker, it may be determined that the worker has an ADA disability as well and that perhaps alternative or additional accommodation solutions may be helpful. So just keep in mind that you could have a situation where both the ADA is implicated as well as workers' compensation or other programs that might be in play.

Or maybe a disability-related need is identified by an employee, but the employee doesn't propose an accommodation solution. And this certainly does happen. Oftentimes individuals may not know specifically what accommodations will be helpful, but they've maybe made it known that there is a disability-related need. It's important to work together to gather more information, so the employer in that situation needs to find out a little bit more about what is going on? Why is this need identified? What sort of accommodation might be needed? So you want to work together to explore accommodations even when someone hasn't made it clear what specific accommodations they need. So don't just ignore the issue. Figure out what you can do to help.

Finally, be careful about not following through to provide accommodations in situations where there is no specific accommodation request. For example, where the employer is already on notice of the employee's regular need for an accommodation, maybe someone uses a sign language interpreter. The employer is fully aware of that accommodation need. And let's say you have a case of maybe a training that takes place or discussions about work procedures, maybe it's disciplinary action. In those types of instances an employer should know that the individual will need that sign language interpreter when it's been established that that's the accommodation the person will need in order to engage in those types of activities at work. So just be careful, you know, about not following through in those instances and requiring, for example, the person to ask for that sign language interpreter every time for those types of situations, because that won't be necessary, because the employer is already on notice of that need for accommodation.

Now a practical tip for avoiding the pitfalls around recognizing an accommodation request is to simply ask. You know, JAN staff frequently, they receive questions about whether employers may, must, or should ask employees if they need reasonable accommodation, because we know that sometimes it's just not really clear. And sometimes there is some trepidation about asking the question, "Are you requesting an accommodation? Do you need an accommodation?" Employers can be leery about doing this, because the ADA includes rules that restrict employers from asking disability-related questions of employees.

Of course, the EEOC offers enforcement guidance on this topic that's very helpful. You can see questions 40 and 41 in the Reasonable Accommodation and Undue Hardship guidance under the ADA. JAN also offers some practical tools around this within the "Mother May I? Must I? Should I?" resource that we offer. There is some information that kind of approaches this in a practical way.

Ultimately when it's not clear whether an accommodation is needed but the employer has good reason to believe it is, it's okay to simply ask, "How can I help?" Asking this simple question, it can really be a strategic way of creating a safe space for disability disclosure, and it also doesn't make that employer sort of vulnerable to making assumptions about disability or the possible need for accommodation. Rather you're asking, "How can I help?" "What can I do?" or asking that person to explain what they are asking for and why it's needed. It's a smart business practice, and it really kind of gets you out of asking those disability-related questions. So that's certainly one approach that can be taken.

Now once it is determined that an accommodation is needed, both parties should work together in that interactive accommodation process. You want to exchange information, explore accommodations. And then of course the employer has the responsibility to choose and implement reasonable accommodations. As you might expect, there are some common pitfalls to avoid along the way.

So let's start with communication, which, of course, could be the root of many issues as well as the solution. One common problem is when an employer fails to communicate with the employee or the treating healthcare provider to clarify an unclear request for accommodation. So if it's not clear what is being requested or why, again, ask. Start with the individual and engage the healthcare professional as needed.

Employers should specify what information is necessary regarding the disability, its functional limitations, and that need for reasonable accommodation. So it's really okay to come back and say, "I've received this request, I'm not really clear on everything that might be needed or why you are asking for it," so talk with the individual. That process might also include reaching out directly to the healthcare provider or other appropriate professional who's provided some documentation to get some clarification about what that person needs as long as authorization is provided by the individual to have that direct communication.

Another pitfall is failing to consult other resources in the search for accommodation solutions. Remember that you're not alone in the accommodation process. Assemble an accommodation team or experts who can offer input, like information technology or assistive technology professionals who can help. It could be people in safety and ergonomics within your organization, accommodation specialists, and, of course, the people at JAN. We can certainly be your partner by offering various solutions to explore along the way. So just know that you're not alone.

And finally, failing to communicate with the accommodation requester or the treating healthcare provider where it's necessary in order to select an effective accommodation or to ask about alternative effective accommodations. Sometimes employers don't always have to provide the specific accommodation that's requested by the individual with a disability. They can choose to provide an alternative effective accommodation solution. But to be effective, an accommodation has to overcome the individual's disability-related limitations. So, you know, it's important to kind of check in, work together. The employee and their healthcare provider will often be the best resources for figuring out whether the accommodation is going to be effective or whether alternative solutions could be put into place if a particular solution is one that is not going to work.

Now when you're exploring and choosing accommodations, you do want to keep in mind that accommodation situations, they're unique. We should never apply a one-size-fits-all approach when we're engaging in that interactive process, because that person's individual limitations, their job duties, their specific accommodation needs will be unique. And so you do want to approach that situation case by case. Don't get caught up in that spot of making blanket decisions about specific accommodations either. For example, denying all telework requests because the manager wants everybody back to the workplace. Use a case-by-case approach. Look at the unique circumstances to figure out what's going on and whether that accommodation is something that's needed by that particular individual, and is it reasonable?

Another pitfall, don't require an employee to be on leave while exploring accommodations if they're able to safely work during that part of the accommodation process. It may be possible to continue working or to make a temporary adjustment to their job duties while you're exploring effective solutions. This can be a temporary accommodation. It might enable that person to avoid leave altogether and keep them productive until longer-term solutions can be implemented.

Also don't fail to consider temporary or trial accommodations generally. Those of you who have listened to many JAN webcasts know that we talk about that type of accommodation frequently. So sometimes an accommodation, it might only be needed for a short duration of time, so it could be provided temporarily, or it could be a way of really figuring out what is going to be effective as a solution. You're not necessarily locked into it, so think of it as an opportunity to figure out, "Is this an accommodation that could really work?" So don't forget to do that.

While you are exploring accommodations, make sure that the job description that you're using to identify essential functions is accurate. We all know that job descriptions sometimes age out over time, and we fail to come back and keep them updated, but you really want to update them so that they can be an effective tool during the accommodation process and help you identify what would be considered essential to that job.

I mentioned this earlier, but searching for solutions even when the employee doesn't start with ideas or when an accommodation is decided not to be reasonable, you want to look for alternative effective solutions. The process doesn't just end because maybe the employer decided it's not something that can be provided. So remember to look for alternative effective solutions when it's determined that a particular accommodation cannot be provided, maybe it's not reasonable or poses an undue hardship, so don't just end the process because that decision was made.

Sometimes an employee will propose a solution that either the employer can't or won't provide. So as I was just mentioning, you might have that situation where the decision is made by the employer. We know that the ADA does not require employers to do certain things. So when we're looking at exploring and implementing accommodations, just some things to keep in mind. You know, the employer isn't necessarily required to provide an employee's preferred accommodation. If it is possible that there is an alternative effective solution, the employer has the right to choose among effective alternatives. But keep in mind the individual's -- their preference should really be considered when the employer can select from more than one effective solution. So employers are encouraged to look at the preference of the individual where it's possible to do that.

Of course accommodations that pose an undue hardship are not required. This is where an accommodation causes significant difficulty or expense. Costs can rarely be claimed undue hardship. You know, you're kind of forced there to take a look at the overall budget of the employer, not just a departmental budget, for example. So, you know, we would say that cost is usually something you're not going to fall back on in terms of undue hardship.

Of course, it's made clear that personal use items needed in accomplishing daily tasks both on and off the job, things like hearing aids, prosthetic limbs, are not required as accommodations.

And then finally, removing essential job functions, lowering production standards, and creating a new job are not required as accommodation, but an employer can certainly take the steps to make these actions if it is desired, and sometimes employers have good reason to do these things. For example, it might be temporarily removing an essential function while you're figuring out what other long-term solution can be an option. Keep in mind that employers may also go above and beyond ADA requirements to make these types of modifications if they wish to. And generally, they're not going to be held liable for exceeding the ADA requirements to make these types of modifications.

Jeanne, it is time to turn it back to you for some interesting case law related to some mishaps in engaging in the interactive process, starting with recognizing an accommodation request.

JEANNE GOLDBERG:

Thanks, Tracie.

So we're on slide 29, and we'll start with some of these cases on whether the employee's communication to the employer was a legally sufficient accommodation request.

### [Powley v. Rail Crew Xpress, LLC]

In Powley v. Rail Crew Express, from the 8th Circuit, the employee requested to transfer but did not say it was because of a medical condition, so it was held not to be an ADA accommodation request. This employee had previously made other accommodation requests where either she herself had explained or she'd -- a doctor's note had explained on her behalf -- that there was a medical need. Those prior accommodation requests made clear that she was seeking those earlier accommodations due to back pain. But in this instance, when she complained about noise in her new position and asked to transfer back to her old position, she did not make clear it was a medical issue. She told coworkers about headaches she was having due to the noise in her new position, but she did not say that to the employer. So the court held she failed to put the employer on notice that the request to return to her former position was based on medical needs, so the employer's obligation to see if this was a disability-related need that could be accommodated was not legally triggered.

Next slide.

### [Edmonds-Radford v. Southwest Airlines Co.]

Two more examples of an insufficient accommodation request from this year. In Edmonds-Radford from the 10th Circuit, the employee requested training assistance, but again did not link it to medical needs. It was held to be an insufficient request, because the employee only disclosed their learning disabilities to coworkers, not to the employer, so the employer was not on notice that the training assistance was sought due to a medical condition, which would have triggered that interactive process.

### [Evans v. Coop. Response Center, Inc.]

In Evans v. Cooperative Response Center, 8th Circuit, the employee had been granted intermittent FMLA leave for a condition called reactive arthritis, and it had been granted to be used as needed up to the extent the doctor had recommended, which was two full days and two half days per month. What happened is the employee also had additional absences, but she never communicated to the employer that these additional absences were also needed due to the medical condition, so when she argued that she should have those additional absences forgiven, that they should have been granted as an ADA accommodation even though she was in violation of the employer's leave policy, the Court held no, ADA accommodation was not triggered, because the employer was never on notice that these additional absences were due to the reactive arthritis. She'd never mentioned that. She just had additional absences. So the fact that the employer was aware of the medical condition for purposes of the FMLA leave that was being granted up to the approved amount did not put the employer on notice that the additional leave she was taking was needed due to the same medical condition.

Now having noted these cases, I want to emphasize, as Tracie said, that in real time, if an employer is not sure whether the employee is requesting accommodation due to a medical condition or not, the best practice is to ask and clarify, and nothing in the ADA prohibits doing that.

Next slide, 31. Process issues.

### [Smith v. CSRA]

In Smith v. CSRA, the 4th Circuit, the employee was issued a parking pass for reserved accessible parking as a disability accommodation, but the employee argued, even though they got the pass, that the five weeks it took to provide the pass following the accommodation request was an undue delay, tantamount to unlawful denial of accommodation. The court held no. To see if there was an undue delay, we look at what was happening during this period of time the request was pending. And here the employer was actively requesting and reviewing updated medical information from the employee, taking steps to ascertain their legal obligations to this individual who was a subcontractor and making inquiries to assess the lease restrictions on who was entitled to parking passes. So the court held not undue delay. The question is not the amount of time alone but what was happening during that time. Was the employer actively and legitimately gathering information and trying to determine what accommodation could be provided or whether accommodation could be provided?

### [Perdue v. Sanofi-Aventis US, LLC]

In Perdue v. Sanofi-Aventis, another 4th Circuit case, the employer was held not to have violated the ADA simply by failing to engage in any interactive process with the employee because, as it turned out, there was no reasonable accommodation that could have been possible anyway without an undue hardship. The Court held, as every Court has, that the interactive process is, what they said here, "not an end in itself." In other words, a violation of the ADA accommodation provision, if there is one, has to be for unlawfully denying an accommodation to which the employee was otherwise entitled, not simply failing to engage in the interactive process. Here, no liability for failure to accommodate, because the only accommodation the employee said they would accept was creation of a new job share position, and that was held not to be a reasonable accommodation. An employer doesn't have to create a position as an accommodation.

Next slide.

### [ADA and FMLA]

So let's talk a little bit more about leave as an ADA accommodation, because this is often an area where there are lots of questions. And to set the table for a moment, let's just review how FMLA and ADA compare and interact. Under ADA the employee needs to have a disability of their own to be accommodated. Under FMLA the employee needs to have a serious health condition of their own or a serious health condition of a covered relative for which they are entitled to FMLA leave. The employer can request different documentation for FMLA vs. ADA. ADA has an undue hardship defense; FMLA does not, but FMLA has a 12-week limit per 12-month period. If both ADA and FMLA apply to a given situation, the employer has to provide leave under whichever gives greater rights to the employee.

Next slide. 33.

Employees may be entitled to leave under the ADA after exhausting their FMLA leave or because they're not eligible for FMLA leave -- either they have not been employed for at least at least a year or the employer doesn't have at least 50 employees so FMLA does not apply to them. They can be entitled to ADA leave there, or, after exhausting FMLA leave, they could have ADA leave on top of that. But if FMLA leave has already been taken, the employer can consider that, the length of FMLA leave, in determining whether the length of the additional leave sought as an ADA accommodation would pose an undue hardship. And unless there is an undue hardship or a direct threat to health or safety, the employer cannot force an employee with a disability to take a leave due to the disability instead of providing a reasonable accommodation, if one is available without undue hardship, no direct threat, an accommodation that would enable the person to work instead of taking leave where that's what's sought.

So next slide. Let's look at some new cases involving these ADA requirements for leave.

### [Herrmann v. Salt Lake City Corporation]

The Herrmann case from the 10th Circuit address the difference between indefinite leave and an estimated date of return. The ADA never requires indefinite leave as an accommodation. In other words, leave is granted as an accommodation under ADA because the doctor expects, with the accommodation of leave, the employee will be able to return after treatment or recovery or when symptoms are expected to subside, etc.

In Herrmann, the 10th Circuit held the leave sought was not indefinite just because the doctor gave an estimated rather than an exact date of return. In this case the treating therapist provided the employer with what the Court found were sufficient expectations that the employee could return. They gave an estimated return date and tied it to treatment. They referred to the need for enough time off so that PTSD symptoms could subside and stated the hoped-for return would be at some point after the eight weeks of treatment.

The Court also noted -- this is so interesting -- that for chronic conditions, an estimate is likely the best an employee or medical provider can offer, so the employer may have to consider multiple communications from the -- from the doctor as treatment progresses to determine if the requested leave is indefinite.

Next slide. 35.

### [Blanchet v. Charter Communications, LLC]

The Blanchet case again. We talked about this case earlier when we were talking about qualified. This case also offered more guidance on dealing with situations where the treating healthcare provider can only provide -- offer an estimated date of return. In Blanchet the 6th Circuit held a reasonable jury could find the requested leave, again, was not indefinite. The medical documentation said the return date "was unknown at this time" but "expect April." The doctor indicated also that the employee's postpartum depression was being treated with therapy and medications. This was an indication of an expectation that it would improve. And the Court also found relevant that the employer's representative led the employee to believe she had provided sufficient information. The employer never asked for clarification about the anticipated return date, something the employer is free to do if the documentation provided or the information provided is unclear.

Next slide, 36.

### [Bey v. City of New York]

A whole other topic. Did you know that the ADA has something called the "other federal law" defense? In Bey v. City of New York from the Second Circuit, the fire department had a clean-shave standard for firefighters, because they had to have a tight fit when they wore respirators. Firefighters who had pseudofolliculitis barbae, a skin condition aggravated by shaving, had gotten an exemption, but the fire department rescinded that exemption, that accommodation, when they realized that it put the department in violation of a federal OSHA regulation that required the clean-shave rule with no exceptions.

The Court ruled for the employer on two separate grounds. They said the accommodation is not reasonable, or it posed an undue hardship under ADA, because it would cause the employer to violate a binding federal safety regulation. The second reason was that the need of an employer to comply with a contrary mandatory federal statute or regulation is itself an affirmative defense under ADA for not doing what ADA would otherwise require That is in the EEOC's ADA regulations section 1630.15(e). The Court said since OSHA's regulations are binding and prohibited the accommodation sought, quote, "That ends the matter with respect to the ADA," unquote.

Next slide, 37.

### [Burnett v. Ocean Properties, LTD.]

How about this? Can an employee be entitled to accommodation even if it would -- even if the employee could perform duties without it? In Burnett v. Ocean Properties, the 1st Circuit opined on a situation where an employee with paraplegia who used a wheelchair requested automatic doors at the public entrance to the workplace as a reasonable accommodation, because they were struggling to open the heavy doors and to hold them open while entering with the wheelchair. The employer stipulated that replacing the doors would not be an undue hardship, but they argued that, because the employee was able technically to get in the door and once inside to excel in performing the job, they were not in need of a reasonable accommodation and therefore not entitled to it. The Court said that the fact that the employee managed to enter the building, despite difficulty, and perform his essential functions did not mean he had no right to a reasonable accommodation or that his request was unreasonable.

Next slide.

I want to talk a bit about telework accommodation requests related to the pandemic. That's a topic that has been coming up frequently as employees who have been allowed to telework ask to continue doing so once recalled to the workplace, or where telework is being considered as an accommodation for someone who cannot be vaccinated or maybe cannot participate in COVID testing or wearing a mask as the employer is requiring. The legal analysis for pandemic-related telework accommodation requests is the same for any other telework accommodation request. Is remote work needed due to disability? Is it feasible for the essential functions of this person's job to be performed remotely? Would it pose an undue hardship?

The employer, if they did during a period of mandatory telework rejigger somebody's duties, including removing essential functions to facilitate full-time remote work due to the pandemic, can restore the pre-pandemic duties. So when we're looking at what are the essential functions, it might be the pre-pandemic essential functions, not the essential functions the person had during the period of mandatory telework. But the pandemic telework experience of performing certain functions remotely is relevant in determining if continued telework as a disability accommodation would be feasible and whether it would pose an undue hardship.

Next slide.

### [Thomas v. Bridgeport Board of Education]

So the bottom line in these cases, if you have established the individual has a disability and needs telework due to the disability, could the employee's duties be performed remotely is usually the question. In Thomas v. Bridgeport Board of Education, the case involved a teacher directed to telework during the pandemic. She was not entitled to continued telework once recalled. The Court said, in agreement with the employer, in-person teaching was an essential function once the students were called back, even though the teacher had been allowed to teach remotely when the students were remote.

### [Maffett v. City of Columbia}

In Maffett v. City of Columbia, a buyer who had had a telework dispute with his employer that arose prior to the pandemic could not cite to his department's telework arrangement during the pandemic as evidence that telework was a reasonable accommodation for him. One of his essential functions was processing purchase orders using specialized on-site printing equipment, had to be done on site. It was true, the Court said, that during the pandemic, for a period of mandatory telework, the employer found other ways to manage for the employees in that department, had certain people going in on certain days to take care of certain things that could only be done on site, but that did not mean that in other periods, other than during that period of mandatory telework, that doing this function on-site was not required. So the employer had a special arrangement during the period of mandatory telework, and that didn't -- that was not proof that telework was feasible for that function, either before the pandemic or once the employer called people back and resumed the ordinary way that it needed to do business printing out using specialized equipment.

Next slide.

### [Brown v. Austin]

Some more cases on remote work. Brown v. Austin, 10th Circuit, a fraud specialist was held not to be entitled to telework more than one day a week where his job required group access to large paper files. So he couldn't take the paper files home. Everybody needed to have access to them. Even if he had been able to scan the files he knew he'd be working on before his telework day, the Court said that he would still lack access to any other files he might be needed -- he might need to answer incoming questions on matters that couldn't be predicted, so there was no feasible way to do the essential functions remotely.

### [Gentile v. County of DuPage]

Gentile v. County of DuPage, the duty at issue was actually performing on-site inspections. The Court said it could be an essential function, even though the employee had been excused from performing it for several months during the period of mandatory telework. If it was an essential function, the Court said the fact questions about whether there could be an accommodation would be, well, first let's look at even if it is an essential function, can it be done remotely? And even if it can be done remotely, could the employer instead offer its proposed accommodation, its alternative? Its idea was, instead of having the employee telework, having the employee wear PPE so the fact issue was whether that would be effective given the employee's disability-related needs. Remember, as Tracie said, an employer has discretion to choose among effective accommodations, where there's more than one that might meet the employee's needs.

Next slide, 41.

### [Peeples v. Clinical Support Options, Inc.]

So the outcomes in these telework cases of course vary based on the facts. A few more examples. Peeples was a case of a rarely heard of preliminary injunction granted in an ADA case temporarily barring termination of an employee who had asthma. And he challenged his employer's denial of telework or alternatively allowing him to wear PPE as a reasonable accommodation to reduce his risks of contracting COVID, because the underlying condition of the asthma would put him at greater risk of severe illness if he did contract the virus.

### [Lin v. CGIT Systems]

Lin v. CGIT, a claim under Massachusetts law largely parallel to ADA, in which the court allowed a claim to proceed by an employee with high blood pressure who alleged unlawful denial of telework as a disability accommodation to protect him from the risks of COVID. He also sought accommodation to protect his mother. As we have discussed, no federal ADA accommodation is available for that. It has to be for the employee's own disability under the federal ADA.

### [Conaway V Detroit Public School Community District]

Conaway v. Detroit Public Schools, denying a preliminary injunction sought by a fully vaccinated teacher with asthma. The employer's offer of working from home three days per work was held to be a reasonable accommodation. They needed her there the other two days, they granted three days telework, and the Court held, in evaluating the merits of the case, the likelihood of success for purposes of a preliminary injunction motion, that the employer's offer would likely be considered a reasonable accommodation.

Slide 42.

### [EEOC v. ISS Facility Services]

The EEOC itself has filed three lawsuits to date involving COVID-19. One involves a telework fact pattern, EEOC v. ISS Facilities, pending in the Northern District of Georgia. The allegations are that the employee had a pulmonary condition that placed her at higher risk of severe illness if she contracted the virus. Early in the pandemic the company required all employees to work remotely four days, then recalled them to the workplace. At that point the employee requested to continue teleworking two days a week to reduce that risk, and the accommodation was denied, even though the allegations state that telework was permitted for other people in the same position, and she was terminated, so that case remains pending.

Next slide.

### [EEOC v. U.S. Drug Mart d/b/a Fabens Pharmacy]

Other EEOC COVID-19 litigation, EEOC v. U.S. Drug Mart, a pending case involving accommodation to allow the employee to wear a mask. In this case a pharmacy technician, at the outset of the pandemic, who had asthma that placed him at greater risk of severe illness if he contracted the virus, asked for permission to wear a mask to reduce the risk. He was sent home twice when he asked to wear the mask, and then the complaint alleges he was taunted and humiliated for questioning management's no-mask policy, leading him to quit. The case alleges unlawful denial of accommodation, disability-based harassment, and constructive discharge.

Next slide.

### [EEOC v. 151 Coffee, LLC]

One other, the third EEOC COVID-19 lawsuit, which has been resolved, involved the question of what if the employer is the one concerned about the health or safety risk to the employee? This was EEOC v. 151 Coffee. Two employees, both baristas with underlying disabilities, were able to work with requested accommodations, but the complaint alleged they were instead notified by the employer that, due to their disabilities, they would not be allowed to work until a COVID-19 vaccine became available. Again, this was early in the pandemic. Remember that unless there's a direct threat to health or safety of the employee or others, an employer cannot involuntarily exclude a qualified employee solely based on disability if they could work with needed accommodation that wouldn't pose an undue hardship. This issue is discussed more in question G.4 of the EEOC's COVID technical assistance publication, and I've given you a link here on the slide.

Next slide. 45.

I want to drill down for a moment on questions that we often are receiving about how to evaluate accommodation requests to be exempt from infection control requirements. Common accommodations, if the employer requires vaccination and the employee requests an accommodation either due to disability, or it might be due to a sincerely held religious belief, practice, or observance covered under the Title VII analysis.

But common accommodations in lieu of vaccination include: wearing a face mask, either a regular one or particular type; modifying someone's workstation, adding Plexiglas for example or relocating it to allow for physical distancing; periodic COVID-19 testing if the individual is physically entering the workplace; modifying their shift or their hours so they're encountering fewer people, both on the commute or in the workplace; telework if that's feasible given what their essential functions are; transfer or reassignment to another position if they can't be accommodated in their current position; perhaps some combination of these accommodations like masking, distancing, and testing was very common this past winter; or some other accommodation.

Note that if an exemption is instead needed or also needed from masking or testing requirements, not just from vaccination, consider that request on its own terms. Consider whether there are feasible alternatives that don't pose an undue hardship. Same analysis.

Next slide.

So what about this question of assessing undue hardship where someone needs to be excused from vaccination or asks to be excused from a testing requirement or -- a COVID testing requirement -- or a masking requirement as an accommodation? What are relevant facts potentially in assessing undue hardship?

The type of workplace. What's the physical setup? Does this person work indoors or outdoors? Do they work alone or in a group setting?

What are their duties? Are they interacting with lots of customers and clients or coworkers as a necessity in performing their duties? Are they doing patient care? Are they shoulder-to-shoulder on a factory assembly line? Or are they in an office, either enclosed or at a desk, where social distancing is permitted from others, don't have much interaction? What do the duties entail?

Is it feasible to reposition this person away from others? Or does that job have to be done in close proximity to coworkers, clients, or customers? How many employees or other people physically enter the workplace?

What's the number of fully vaccinated employees? What's the risk of the spread of COVID-19 to other employees or to other people? For example, is this person working with medically vulnerable individuals as part of their job, or children under five, or people with unknown vaccination status?

The number of employees who are seeking a similar accommodation. That can be relevant. The cumulative cost or burden on the employer of granting the accommodation where it's already granted a certain number of exemptions. But note that an employer can't merely assume that many more employees might seek accommodation. That's not evidence of undue hardship. There has to be actual evidence of many requests or enough that might constitute the undue hardship.

Next slide.

### [EEOC Resources]

EEOC resources on COVID-19. Everything EEOC has issued on COVID-19, all the publications, are available at EEOC.gov/coronavirus, but our main publication, which is regularly updated, and was most recently updated two days ago, on July 12, 2022, is "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws." The most recent updates this week had to do with the standard under the ADA that needs to be met for doing COVID-19 viral testing as part of a screening program if an employer is doing that for those who are entering the work site. That's Question A.6. There were also updates to questions about medical confidentiality, that's K.4; responding to inquiries from employers about what to do with all this testing and vaccination information and records, documentation that is coming into their hands, and who can have access to it in terms of supervisors or administrative staff who need to perform tasks with this information. So those are just a few of many updates. You can go through the document, the "What You Should Know" document, and find all the updated material, because each question that's been updated has the date after it, every question in the document, so if you just look for all those with July 12, 2022, you'll find all the new material.

Next slide.

I just want to also mention a brand-new resource that we have, a separate page on our website where we've collected all the resources we have for workers or employers or applicants on mental health conditions, since it's such a frequent area of inquiry. So all our ADA resources on mental health conditions are pulled together on this new webpage that's linked to here on Slide 48.

### [EEOC v. Ranew’s Management Company]

Also wanted to mention as an example a case we recently settled, the Middle District of Georgia, EEOC v. Ranew's Management. I've linked you to the press release here on the slide. In this case the employee informed his company that he had been diagnosed with severe depression, and he asked to take three weeks of work -- of leave off work for treatment, as his doctor had recommended. The company told him take as much time as you need to get well. Six weeks later, he tries to return to work. He presents a release from his doctor clearing him, and the company told him, no, we can't trust you to perform your job duties given that you've been out for six weeks with a mental health condition, and fired him.

So, you know, no good comes under the ADA from an employer freelancing to substitute its own judgment based on stereotypes rather than relying on individualized medical facts and doctor's assessments of an individual's abilities or limitations. So in this case, EEOC alleged, this was a -- this termination was a violation of the ADA, and the case was settled. I thought that was a good example of how mental health conditions sometimes arise in this context for employers, so return to work following an accommodation request. So an interesting example to keep in mind.

The next two slides, both 49 and 50, have four of our longstanding publications that answer many of the questions we receive on a day-to-day basis, so if you haven't taken a look at them yet, I'd commend them to your attention.

The "Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA." "Employer-Provided Leave and the ADA" goes through all the leave issues and examples that might come up under the ADA.

On slide 50, "Work at Home/Telework" as a reasonable accommodation. It's an older publication, but it walks you through the analysis.

And "Applying Performance and Conduct Standards to Employees with Disabilities." Tracie?

## [Q&A]

**TRACIE DeFREITAS:**

Okay. Thank you so much, Jeanne. So much information. We do have some time left to answer some questions. Just bear with me for a second. I will go ahead and pop in there. We have received a number of questions around various issues, of course telework being a popular issue, some leave issues, looks like a little bit around confidentiality and documentation. So I'm just going to go ahead and pick a few that we can address.

You know, lot of people are requesting 100 percent remote work right now, and I think, you know, a lot of employers are trying to figure out if this is something that is considered a reasonable accommodation. In this one instance this person is asking is 100 percent remote work a reasonable accommodation if the employer does not allow other employees to work remote more than 40 percent of the time? So I'd just be interested to hear your take on how to address that type of situation.

**JEANNE GOLDBERG:**

Sure. That's a good question. This is a common situation where, totally apart from ADA and disability accommodation, many employers have existing policies on telework. They often say, as the one you described does, employees can telework up to 40 percent of the time or with supervisor approval once employed for a year an individual can telework a certain number of days per week or per pay period. That's like any other employer policy.

An employer may have to make an exception to that policy to provide more telework, or telework on a different basis, for an employee who needs that as a reasonable accommodation for disability. So just like a policy or procedure on just about any other matter, an employer might have to allow a different arrangement as a disability accommodation. So all the other employees would be subject still to the policy, the one you described, can telework 40 percent of the time, but an employee, as a disability accommodation under ADA, if the requirements were met, could be entitled to more than 40 percent, even full-time telework.

Again, they would have to have a disability, a substantially limiting impairment. You know, they would have to need the telework due to the disability-related limitations. Telework would have to be feasible given what their essential functions are, and it would have to not pose an undue hardship, a significant difficulty or expense on the employer.

You know, referencing there some of the examples we went through about cases from the past year where the courts held that it was or was not a reasonable accommodation to allow someone to telework part time or even full time. So, the policy is not a barrier to potentially more telework for someone as a disability accommodation.

**TRACIE DeFREITAS:**

Ok. I'm going to carry that through a little bit further. So we're kind of sticking to that 100% telework request. But the question is not so much related to the telework, as I would say, it's deciding whether that person's entitled to telework.

So let's say we have those instances where someone has an underlying impairment that would be considered a disability, and there is somebody who's requesting 100 percent telework due to concerns about exposure to COVID, and that underlying impairment that might put them at increased risk of severe illness due to exposure to COVID, in those types of instances, the person is sort of looking at it as the underlying impairment, they don't necessarily need an accommodation because they are have difficulty performing a job duty because of the underlying impairment. It boils down to having that impairment and that risk of exposure. Can you comment on that a little bit?

**JEANNE GOLDBERG:**

Sure. I think the EEOC's view historically has very broad about the potential entitlement to accommodation includes those kinds of circumstances where there is a risk to the individual's health due to the disability that requires the telework or some other accommodation. You can think of a lot of pre-pandemic examples where this came up.

For example, cases where, during the period where an employee was undergoing chemotherapy or other cancer treatment, their doctor advised that they were immunocompromised, and while they could perform their duties, they recommended that they do remote work during this period of being immunocompromised. That was a common pre-pandemic example of the same thing: so a health risk based on the disability that resulted in the need for accommodation.

There certainly are cases that come up in the courts involving employers arguing that the accommodation -- the individual is not entitled to the accommodation unless literally, technically they need it to apply for the job, to perform the essential functions of the job, or to enjoy benefits or privileges of employment. I mentioned the Burnett case today from the 1st Circuit, the individual with paraplegia who needed a way to enter the building as one example of a case dealing with this issue.

There is one pending in the 7th Circuit right now called EEOC v. Charter Communications, a case that EEOC itself brought involving this same question, a fact pattern involving an individual's need for accommodation due to commuting relating to a vision impairment. So the issue does periodically come up, but our -- EEOC's position is clear. And if there are lawyers out there in the audience today who are dealing with this issue in litigation, I'd be happy to provide those cites again and point you to some of the briefs in the recent cases.

**TRACIE DeFREITAS:**

Okay. Very helpful. Let's see here. Let's say there is a situation where someone now realizes they are going to need telework based on a disability that affects their ability to commute to work. (crosstalk) This is something that I think we are certainly hearing more about now after telework due to the pandemic. And I think that the question is that commute to work and recognizing that someone is having difficulty with that and needing an accommodation for disability-related reason around that, would the employer then need to look at telework or other forms of accommodation with respect to the commuting barrier?

**JEANNE GOLDBERG:**

EEOC's position, as I just said, is yes. The Felix case we mentioned in the summaries today involved, remember, an individual whose diabetic retinopathy caused a vision impairment that limited their ability to do night driving, and that's why they sought a flexible -- a different schedule, a schedule change as an accommodation. So that's a common scenario. As I said just a moment ago, it's also the issue in this pending 7th Circuit case, EEOC vs. Charter Communications. EEOC's position on this is long-standing, that the individual could have a right to ADA accommodation in that instance. And, in fact, in the resources that we listed on this last slide -- it's up on the screen -- "Work at Home/Telework as a Reasonable Accommodation," that publication right at the outset gives an example of an individual who uses the paratransit bus provided by the city to commute to work, and the paratransit bus schedule is changed, the hours of it are changed, and the individual seeks as an accommodation a change to their work schedule to align with the hours that the paratransit bus is available for transportation. So I think that makes clear where, you know, EEOC's reasoning and position is on that issue.

**TRACIE DeFREITAS:**

Absolutely. Okay. Let's see what else we have here. We have just another minute or two. Let's see. How much leave is considered reasonable? So we know that leave is a form of accommodation. We know that employers may need to provide other forms of leave before they look to providing leave as a form of accommodation, so under FMLA or other employer leave policies and programs, but does the ADA dictate what would be considered a reasonable duration of leave?

**JEANNE GOLDBERG:**

There is no bright line. The standard is what amount or length of leave would be an undue hardship? In some cases any amount would be an undue hardship; in others it could be a period of many months before it would become an undue hardship. There are some specific examples of undue hardship coming out different ways in the leave -- "Employer-Provided Leave and the ADA" publication that I suggested you take a look at on slide 49. I think looking at those examples they will give you some guideposts, but the basic rule is that there is no specific length of time. The limit is what would be an undue hardship on that employer given their resources, given the setup of their workplace, given the duties this individual performs, what the other individuals in the workplace are able to do. So, it's very fact-specific. And the legal standard that applies is at what point would the length of leave needed pose an undue hardship on that employer.

**TRACIE DeFREITAS:**

Okay. I will throw one more question out there around documentation, seeking documentation. So oftentimes we have questions about how frequently an employer can request documentation to substantiate an accommodation that someone has received for a disability that is long-term and where the accommodation need is ongoing. So any thoughts related to how frequently an employer can request updated or new documentation?

**JEANNE GOLDBERG:**

That's a good question. It really all depends on what the original documentation said. That determines whether the employer has a need for getting updated documentation. If the original documentation said this accommodation will be -- these limitations are expected to last for two months, that is how long the accommodation will be needed. If the employee sought to continue the accommodation beyond two months, then the employer would be entitled to updated documentation showing that --substantiating that the need continued, the disability-related need for the accommodation continued.

In some instances the documentation will -- at the outset establish that the limitations might be permanent, in which case there is not a need for any further documentation that the condition or limitations still exist. There can be changes certainly. We've heard -- I'm sure you have also, Tracie -- of situations where the employer themselves decides to initiate a conversation with the employee, because it appears that the employee is performing duties that they were previously restricted from performing, seems to have improved. The employer can initiate that conversation, determine if the accommodation previously granted is in fact medically still needed. That would be another reason why sometimes the need for accommodation might be revisited, and updated documentation might be obtained.

## [Conclusion]

**TRACIE DeFREITAS:**

All right. So helpful. Lots of good questions. There certainly were more. We don't have time to get to them all today. So I do want to say thank you, Jeanne. It has been a pleasure working with you, of course. If anyone has additional questions that they would like to direct to Jeanne specifically, her contact information has been provided here on the PowerPoint, so certainly you may reach out to her. It's been another great JAN webcast. Again, Jeanne, we appreciate you. We thank you for sharing your time and expertise with us today. We do appreciate this collaboration.

To all of our attendees, thank you for attending this Accommodation and Compliance webcast. this ADA Update 2022. We encourage you to register for the next JAN webcast on assistive technology, so an AT Update, in August on the eleventh at 2:00 p.m. You register by going to the training page at AskJAN.org.

We hope you'll share your feedback with us today, so please do complete the evaluation. Please keep the JAN webcast window open when the webcast ends, and that evaluation will pop up in a new window.

If you're seeking a CEU for this event, the CEU approval code will be available after you complete that evaluation.

Also, thank you to Alternative Communication Services for providing the captioning for this webcast event.

Finally, if you have any questions about today's topics or need additional guidance on the ADA or accommodations, contact JAN. Go to AskJAN.org for those details. Once again, thank you to everyone for attending this JAN Accommodation and Compliance Webcast Series event.

This concludes today's training.