# Accommodation Solutions: Substance Use Disorder

## [Introduction]

**LINDA BATISTE:**

Hi, everyone. Thanks for joining us for this month's JAN Accommodation and Compliance Series called "Accommodation Solutions: Substance Use Disorder." I'm Linda Batiste, and I'll be copresenting today with Melanie Whetzel, Principal Consultant and Team Lead for JAN's Neurological/Cognitive team, and James Pot — Potts, sorry, James — Senior Consultant on the Neurological/Cognitive team.

Before we jump into our program today, we're going to cover just a few housekeeping items starting on the next slide.

So first, if you experience technical difficulties during the webcast, the webcast series FAQ hopefully will answer some of your questions. The link to the FAQ is included in the log-in email that you hopefully received today, or you can go to the webcast series page at AskJAN.org. If that FAQ doesn't answer your questions, you can also use the Q&A option located at the bottom of the screen, and that's going to connect you to our wonderful tech team, or you can access our live chat at AskJAN.org, or if you want to go old school, you can call us at (800) 526-7234.

We hope to leave some time at the end of the presentation to answer any questions that you might have, so if you want to submit a question about today's topic, you can use the Q&A option that I mentioned before at the bottom of the screen.

On the next slide, our PowerPoint slides for today, you can download using the direct link found in that log-in email that you hopefully got today. The link is also posted in the webcast chat, or you can go to this webcast event from the training page, again, at AskJAN.org.

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

This presentation is being recorded and is going to be available later this month on the JAN site, so if you miss anything we say or if you just want to share the presentation with somebody else, you'll be able to download the recording.

Finally, at the end of the webcast, we really appreciate your feedback, so we hope that you'll stay on and consider completing our evaluation. If you're seeking HR CEU and — for this program, the HRCI approval code will be provided after the webcast evaluation is completed.

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## [Agenda]

That takes care of our housekeeping, and now we're going to jump into our presentation. Again, we're going to be talking about substance use disorders. We've decided to focus specifically on drug addiction and alcoholism.

I think James and Melanie would agree since the pandemic and even after the pandemic, we have seen a big increase in the number of questions that we're getting related to employees with substance use disorders, and again, especially drug addiction and alcoholism. We're not really seeing any end to that either. So this is a very timely topic that we thought we would share our knowledge with. The three of us handle most of the cases that come into the JAN office, so we hear a lot of issues in this area.

What we plan to do, we divided up the presentation. We're going to start with information about how to apply the Americans with Disabilities Act to substance use disorders, specifically determining whether someone with drug addiction or alcoholism or someone who's using alcohol or drugs meets the definition of disability, and then we're also going to talk about applying conduct policies to those individuals as well. And we've combined these sections because they tend to go hand in hand.

The next section we want to talk about is medical inquiries and examinations. Honestly, I find this area to be a source of confusion for employers, even outside of drugs and alcohol issues. Medical inquiry and exam rules under the ADA tend to be kind of confusing. There are some quirky rules related to drug and alcohol testing that we'll share with you.

And then finally we want to talk about accommodating employees with substance use disorder.

For all of these sections, our plan is to talk about the general rules under the ADA and then those quirky rules that can come into play with drug and alcohol issues, and Melanie and James are going to share some real-life examples they've had recently to try to illustrate what we're talking about with these rules and these exceptions to the rules. And then throughout we like to share practical ideas about how to move things along, how to understand these rules, how to apply them, so that's kind of going to be our approach today. And again at the end we hope to leave some time for your questions.

Next slide.

## [Applying the ADA to Substance Use Disorders]

All right. So our first section is applying the ADA to substance use disorders. Again, definition of disability and conduct policies.

On the next slide, let's talk about the general definition of disability. I'm sure almost everybody on here is probably familiar with it, but we really like to make sure that we're all on the same page. The definition of disability is always approached on a case-by-case basis. There's no list of conditions that are always going to be covered. We get a lot of questions about that. People want a list of things that are covered, and there is no such list. Always case-by-case.

So the definition of disability that you have to apply on a case-by-case basis is two parts. First part is that someone has to have an impairment. The second part is that because of that impairment, they have to have a substantial limitation in at least one major life activity.

So on the next slide, let's apply that general definition to substance use disorders. So the first thing that you need to keep in mind is that someone who's using drugs or alcohol isn't necessarily going to be covered at all under the ADA, because they may not have an underlying impairment. So if they're just using it casually or recreationally, that's not an impairment. And again, that doesn't meet that first part of the definition, even if they're limited when they're using. If they don't have an underlying impairment it doesn't matter if they're substantially limited in a major life activity, because they're just not covered. If someone has actually been diagnosed with drug addiction or alcoholism, those are both impairments. So they may be disabilities if, again, there's individuals that are substantially limited in a major life activity. But as I mentioned earlier, there are some quirky exceptions, and we're going to talk about those starting on the next slide.

So the first exception is related to illegal drug use. If someone is currently illegally using drugs, they can lose their coverage under the ADA, even if technically they meet the definition of disability. So even if you have someone who's been diagnosed with drug addiction, even if that person is substantially limited in a major life activity, that individual can lose coverage if the employer acts on the basis of current illegal use. And I want to emphasize that sentence right there. An individual's not protected when an employer acts on the basis of current illegal use. We're going to come back to that. We're going to illustrate it through examples, and we're going to talk about it throughout. For now just remember that there is that little language there that — It makes a big difference when you're applying the ADA.

So on the next slide, exception for the current use of alcohol is a little different. And you may have guessed that the reason this is different is because illegal drug use is illegal. Alcohol is not illegal. So someone who is currently using alcohol may still have coverage under the ADA. But employers can discipline individuals who use alcohol when it negatively affects job performance or compliance with conduct policies. And again, we're going to go over some examples that illustrate this, because sometimes that can be a little bit tricky to apply.

Next slide. So the general rule for applying conduct rules — Remember we're talking about the definition of disability, and we're talking about applying conduct rules kind of together here. So the general rule related to applying conduct rules is that employers are allowed to have and enforce uniformly applied conduct policies, including policies about the use of illegal drugs and alcohol. Another word I want you to focus on is "uniformly applied." We'll be talking about that in just a few minutes.

The ADA does not interfere with an employer's efforts to ensure that the workplace is free from illegal drugs and alcohol use. And I just have to say, I remember — I actually started with JAN in 1992 when the ADA went into effect, which gives you an idea how old I'm getting now, but one of the first things that we started hearing from employers was how much they disliked the ADA, because now they were going to have to allow individuals who have addictions to come into the workplace drunk or to use drugs out in the parking lot or whatever, and it was very clear that was not the case. But that was one of the main things that we were hearing from employers that was floating around in the media. So be very sure that the ADA does not require you to do that. Individuals can be held to whatever policies you have related to illegal drugs and alcohol.

On the next slide. The tricky thing when you apply conduct policies to individuals with substance disorder is to be careful about unevenly applied conduct policies. Remember we said "uniformly applied." You don't want to discipline employees with substance use disorders more severely than you do others. And I know we've got some examples that illustrate this very well, because I think some of these rules when you hear them are kind of confusing, but when you actually hear some real-life examples I think that makes it a lot clearer. So with that I'm going to turn it over to Melanie and James to share some of those examples that they have on the next slide.

### [Examples]

**JAMES POTTS:**

Okay. Thanks so much, Linda. That was very helpful and kind of sets the stage. Hopefully what we can do is use those terms and weave them through these examples to kind of show everybody what we're talking about and kind of show you what we do here at JAN. We have JAN reps sitting here waiting at our computer answering emails from people but also waiting on those calls and chats to take questions like these.

And here in this example, we have an employee who discloses they are addicted to cocaine and asks for leave time so they can seek treatment. And we get callers, the employer, they want to know what do they do? What can they do? What do they have to do?

And what I'm seeing already in just this short example is some key ADA terms or kind of concepts. First one would be disclosure. This employee is disclosing that they have an addiction. And we all know that for an employer to be obligated to provide accommodations under the ADA, an employee has to disclose. If an employer doesn't know there's a medical condition, then kind of hard to provide solutions related to it. But then the second part is the employee has to connect the dots between that condition to the change or accommodation in the workplace. And they did so. They requested leave. So here, I mean, we're seeing some important components of an accommodation request regardless of the disability type. And that is disclosure and a request for help. But as Linda mentioned, current illegal drug use could lose coverage.

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This is an example of current illegal drug use. Technically, this individual just told their employer that they are using an illegal substance, and the employer is within their rights to act on that disclosure, and that could potentially result in a drug screening. And like she mentioned, if there's universally applied policies related to a drug-free workplace, then the employer's within their rights to take action based on that current illegal use of drugs. So this isn't like the employer hearing through the grapevine that somebody or an employee was addicted to opiates back in college. This is current. There's a specific reason the employer is acting on this policy, and that's because the employee disclosed, and now they're going to have proof through that drug screen. That's kind of a cold look at just what an employer can do if the situation is current illegal drug use.

Next slide, please.

Here's a warehouse worker who's taking prescription painkillers but became addicted to the drugs. He asked his employer for leave for treatment. Similar: disclosed a disability, addiction, and asked for help.

Next slide, please.

But here's an example where it's possibly current illegal drug use. we don't know. Here the employer's probably going to be within their rights to seek some more information so they can make an informed decision. It is possible to abuse prescription medication. So we could think of either abusing what you're legally prescribed, taking more of the dose than you're instructed, or potentially using somebody else's prescription drugs. That is going to fall under illegal use, so the individual's not going to be covered in the ADA in that situation and would not be entitled to the accommodation of leave.

But there are other situations where let's say this individual may have just ran out of their prescribed medication, they used it as directed, but now they're having withdrawal effects or other related difficulties that may require accommodations under the ADA. In that situation they may meet the definition, are not illegally using, and be entitled to accommodations.

So this is just kind of to show that employers, probably within their rights to find out and ask more questions, get more information to determine whether the use of drugs is illegal or not.

Next slide, please.

An applicant for a pharmacist position discloses that she was fired from her previous job for illegal drug use. She went through rehabilitation two months ago and is no longer using drugs.

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So JAN, we really can't get into the specifics related to licensing or qualifications or anything like that for every specific industry. What we're really trying to drive home with this slide or this example is what the heck does "current illegal drug use" mean? We've been spouting it off here for about 15 slides, but what does it mean? There's nothing really specific under the ADA or within the EEOC guidance. It talks about "current" meaning it's been used recently enough to give the employer a reasonable belief that the ongoing use is impacting the job. It's not limited to the day, so like, "Oh, I haven't used drugs since Tuesday." It's only Thursday. I don't know if you're going to say that you're not an active user at that point. Or even weeks. "Oh, I haven't done it in two weeks." Well, the passage of time in and of itself sometimes doesn't do a whole lot.

So, while JAN cannot determine if a person is or is not considered an active user, some things that I like to talk about with employers is something to consider at least. What has this individual or this person been doing during the period of nonuse? An individual who's not using and can prove it like through drug screenings, is undergoing inpatient or maybe if they graduated to outpatient therapies at this point, attending NA or AA meetings, and they're just basically actively working on their sobriety. What really more can they do at that point? They're doing everything they can to be a non-active user. I think we could all wrap our heads around getting back to work is not just a necessity for most of us, but it can also be helpful in recovery. Vocational rehabilitation is all about helping people through gaining and maintaining employment. Not only because we've got bills to pay, but it's like having that purpose, something to get you out of bed, something to drive you forward. So not only could it ultimately help the employer, but it is helping that individual who's now kind of taken the reins and is trying to make a change.

Next slide. I think I'm kicking it to you, Melanie.

**MELANIE WHETZEL:**

Okay. All right. Thank you, James. So in this example we have an office worker who was reprimanded for tardiness discloses they have alcoholism and sometimes cannot get up on time because of drinking the night before. They ask not to be reprimanded.

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Employees can certainly ask for whatever they want. It's up then maybe to the employer to determine what to do. And Linda had said earlier, employers can have and enforce uniformly applied conduct policies, including policies about the illegal use of drugs and alcohol. So in this case when the current use of alcohol is negatively affecting the employee's conduct and/or performance — Not being able to get to work on time could be either of those or both — the employer can apply their usual discipline policies, without considering accommodations. And in this case the employee is not entitled to reasonable accommodation.

Next slide, please.

Here we have an example of a doctor who discloses he has alcoholism and has recently relapsed because of personal and professional stress. He asks for leave time for treatment.

Next slide, please.

So, in this example, it appears that the doctor's use of alcohol has not been affecting his job performance or conduct. We see that a lot of times when an employee will disclose something and the employer's surprised, because they had no idea. It didn't affect their performance or their conduct. And so the idea that the employee has a medical condition or disability going on is often surprising to the employer. So the employer in this case can consider accommodations that won't cause a hardship such as the requested time off for leave that's needed for treatment.

Now we like to talk about alternate accommodations too. If the leave request were to cause a hardship, the employer would be obligated to continue the accommodation process to determine if there are other accommodations that could be effective in lieu of the time off. Not to say, "Hey, we think this is better treatment," because employers can't dictate treatment, but if it really is impossible for a leave at that time.

All right. Next slide, please.

In this example an employer hears that an employee has alcoholism and starts watching them for signs they're drinking on the job. One day the employee comes back from lunch smelling of alcohol, and the employer fires them. However, other employees have alcohol at lunch and are not reprimanded.

Next slide, please.

This goes back to those uniformly applied policies. In this example, considering possible discrimination, the employer did not uniformly apply their own policy prohibiting drinking at lunch by singling out one employee for firing. This one employee, who they heard was an alcoholic, was treated differently based on that assumption that they had a disability or substance use disorder. Other employees who similarly drank on the job were not reprimanded or fired. It's really important for employers to apply their policies equally and fairly across the board so that something like this doesn't happen where one employee's treated more harshly than others for the same offense.

All right. Sending it back to Linda at this point.

### [Summary]

**LINDA BATISTE:**

Thank you. Great examples. On this slide we just want to summarize some of the things we've talked about, try to condense this into hopefully a little easier to understand and approach issue.

And one of the things that when someone calls us with an issue about "We have an employee who's using drugs or alcohol in the workplace. "What are we allowed to do?", one of the first things we would suggest an employer do is check your policies. Do you have any policies that cover this situation? If the answer is yes, then you can follow those policies.

As I mentioned earlier, the ADA does not prohibit employers from having those policies and enforcing them. So like we had in one of the examples I think James gave of an individual is illegally using drugs, disclosed that, asked for leave, if the employer has a zero-tolerance policy for illegal drug use, the ADA is not going to prohibit that employer from following that policy.

Now just one note of caution. We are only talking about the ADA, and we are only providing guidance from the Equal Employment Opportunity Commission. We are not saying there might not be other laws that could apply to this situation. You may have a different interpretation by a court in your area. So always check with your legal. But if you want to err on the side of caution, the EEOC guidance is typically a really good source for information on how to deal with these things.

So current use of drugs and alcohol, you can follow your policies if you have them. If you don't have a policy that addresses the situation or there's no performance or conduct issue, then you look at step two, is this employee potentially entitled to an accommodation? And we had the situation with the doctor who had been drinking alcohol, no problems at work that the employer knew about and evidently there was no issue with someone using alcohol, because it is legal. That person was entitled to at least go through the interactive process to see if they had a disability and were entitled to accommodations. Like Melanie mentioned, maybe not the exact accommodation that was requested, but you engage in that process, and you try to come up with a solution.

If this individual is not entitled to an accommodation, you apply your usual policies, but the issue that comes into play is what if you don't have a policy that addresses this issue? That's a question we get all the time. "This person's using drugs and alcohol at work. We don't have a policy. We never thought that would happen." The ADA is not going to prohibit you from developing a policy at that point and applying it uniformly, moving ahead. The issue of whether you apply it to this individual without any notice that there is a policy, because there wasn't one, that's an issue outside of the ADA that we can't really address. But the ADA is not going to prohibit you from coming up with a policy just because you didn't have one when the first issue occurred. So keep that in mind if it's really important that you keep drugs and alcohol out of the workplace, then maybe you want to go ahead and develop that before you encounter a problem.

All right. Next slide.

## [Medical Inquiries and Examinations]

Now we're going to talk about medical inquiries and examinations, and like I said, I think this could be a tricky area of the law. The reason I think it's tricky is because there are different rules at different stages of employment. There's different rules for the application stage, for the post-offer, pre-employment stage, and then once an individual is working, there are different rules. So it could be a little tricky to remember all those rules and apply them correctly.

But on the next slide, the broad general rule for current employees — We're going to focus on current employees now; I think we're going to talk about applicants in one of our examples. But for now the general rule for doing a medical inquiry or exam for current employees is that that inquiry or exam must be job-related and consistent with business necessity. And there are some things that fall into this like if someone asks for an accommodation, if you have a reasonable belief based on objective evidence that an individual's known disability will interfere with job performance or will create a direct threat or if you're required by other laws like federal laws for over-the-road drivers, those kind of things, those are examples of job-related and consistent with business necessity.

The ADA rules about medical exams and inquiries apply to all employees, not just employees with disabilities. And this is a little tricky, because one of the things we hear is, "Well, this person is having these conduct problems and stuff. I don't know if it's disability-related, so I'm not doing a medical exam or inquiry with a known disability." It doesn't matter. They apply to everybody. If you think about it, that makes sense, because you can't go on a fishing trip just to see if somebody might have a medical condition or disability. So it doesn't matter whether you know or not. These rules apply to all employees, so what we're talking about is across the board.

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So applying the general rules to substance use disorders, starting with illegal drugs, and this is where it gets a little bit tricky. A test for an illegal drug is technically under the ADA not a medical exam. We all know that it's probably going to be technically a medical exam, but for ADA purposes, Congress decided that we're just going to say that illegal drug tests are not going to be medical exams. So you don't have to follow those rules that we just talked about when you decide whether to test an employee for illegal drug use.

So what that means basically is that you're not limited by the ADA for doing drug tests. You can do random tests. You can test people. It's just not going to fall under those rules, with one exception, and that's when it's done on the basis of drug addiction. This is a tricky concept that I find, even when we feel like we're explaining it really well, that people come away sometimes with some confusion about what we're talking about. We are going to provide some examples here, and then we'll go over it again in a little bit. But be aware now that there is this large rule out there that tests for illegal drugs are not medical exams, so they don't fall under the ADA restrictions, but there is this one little exception.

The other tricky thing about doing tests for illegal drugs is that you may come up with some legal use of prescription medications in your test results. And that's one of the reasons that you probably don't want to do these without really thinking it through and maybe getting a plan about how you're going to do it, because you're going to get some information that maybe you shouldn't have had.

Next slide.

The other issue is tests for alcohol. Tests for alcohol use are considered medical exams, so it's different from illegal drug tests. Here we're talking about situations where you do have to follow those ADA rules that we brought up earlier, and that means you can't randomly test for alcohol. In order to do an alcohol test you have to have a reasonable belief, as I mentioned this rule before, based on objective evidence, that an employee is under the influence of alcohol or is going to pose a direct threat in the workplace because of that use of alcohol. And that's kind of a tricky little thing to apply. I think we're going to have a couple examples of that. I think with that, James and Melanie, you're back up with some examples.

Next slide.

### [Examples]

**MELANIE WHETZEL:**

All right. That's me. So in this example we have after offering a job to an applicant, the employer finds out that the new hire has a history of drug addiction but has been in recovery for ten years. The employer goes ahead with the hiring but decides to drug test the new hire periodically.

All right. Next slide, please.

So in this example of inappropriate drug testing, the employer based the decision to test the newly hired employee periodically on the knowledge that they had of the history of addiction, not on any current information, as the employee had been in recovery for ten years and was not a current user. This decision did not seem to be job-related and consistent with business necessity, either, rather based on the knowledge of the disability.

All right. I'll kick it over to James at this point for the next examples.

**JAMES POTTS:**

Thanks, Melanie. So here an employer allows employees with drug addiction who have a relapse to take time off for treatment but test them for illegal drug use for six months after they return to work.

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And this is an example of potentially appropriate use of drug testing. So let's try to hit some of those concepts that Linda talked about. Remember, drug testing is not prohibited under the ADA, and a test for illegal drugs is not considered a medical exam or inquiry. And here the main point is that testing is being, again, based on the fact that it was recent drug use. It's not on a belief that they may; it is on the actual "You admitted to drug use, you went through treatment, and we're allowing you to return, knowing that you're no longer going to use." And I like this because it almost sounds like the employer's building in a last chance agreement into their existing policies. Like if we looked at that first example I gave where it says, "Hey, if you have a policy that enforces a drug-free workplace and they test positive, you may have the right under the ADA to discipline accordingly." This employer is trying to say, "Hey, we understand that people may have relapses or difficulties, and we want to try to set something in place to help them retain or maintain the employment. So go through treatment, and then whenever you get out maybe that continued employment is hinged on taking drug screenings for a period of time to ensure that you're not currently using."

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What about an attorney who has been off from work in a residential alcohol treatment program for six weeks, but they have been cleared to return to work, no restrictions or anything like that. Her supervisor wants to perform periodic alcohol tests to determine whether this attorney has resumed drinking.

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This is an example of potentially inappropriate testing. Why? As Linda said, alcohol testing is a medical exam, and there's nothing about this situation involving the attorney that is meeting those standards for medical testing, meaning what is job-related or consistent with business necessity about this periodic alcohol testing? There's been no evidence of direct threat in this situation. There's no evidence that the employee's ability to perform their essential functions has been impacted by drinking. Basically that just means before they went out on treatment they weren't showing up to work under the influence or they weren't nursing a hangover, there was no difficulties in the workplace. They just requested leave so they can go and get ahead of this issue or whatever the case may be. So, since drug testing don't have to meet that standard but alcohol does and there's no reason to, probably be inappropriate, maybe singling this person out based on their addiction versus actual conduct or behavior or observed issues in the workplace.

Melanie, I think that was quick for me. Back to you already.

**MELANIE WHETZEL:**

Okay. All right. So in this example a recently hired bus driver disclosed that he has alcoholism and asked for leave to seek treatment. After four months of treatment, he was cleared to return to work.

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So, remember Linda said earlier that tests for alcohol use are considered medical exams, and employers cannot randomly test for alcohol, so they have to have a reasonable belief based on objective evidence — James just went through that too — that the employee's under the influence or constitutes a direct threat. Given the safety risks and the job as a bus driver, the driver's short period of employment and his recent completion of treatment, the employer would be within their rights to subject the driver to frequent periodic alcohol tests following his return to work.

All right. Next slide, please.

So, let's talk about accommodation requests. So, once an employee with a substance use disorder requests an accommodation, the employer is obligated to follow the usual rules, go through the interactive process the same as they would for any other accommodation request for any other type of medical condition or disability. The employer can require medical documentation to show that the employee has a disability and needs the requested accommodation, particularly when the need for the accommodation is not known.

And again, we just like to stress that it's a process that should be followed and not shut down real quickly, and if the employer is unable to provide the requested accommodations — And we hear frequently, you know, when we talk about to employees they'll say, “Can I ask for this? Can I ask for that?" We'll say, "Sure." It's up to the employer to determine what's reasonable or not, and it's done on a case-by-case basis with a lot of factors involved in that. So if the employer is unable to provide this specific requested accommodation, they should always continue through that interactive process to determine if there are other effective alternate accommodations that they can provide.

Okay. Linda, back to you.

### [Summary]

**LINDA BATISTE:**

Thank you. So, let's wrap up this section by just giving you some what we hope are helpful ideas on how to process these. So the first question, when you receive information about somebody using illegal drugs or alcohol or whether they have a substance use disorder, the first question you want to ask is the medical exam or inquiry related to the current use of illegal drugs? If the answer is yes, you can follow uniformly applied policies. And I think the example — I think Melanie gave it early on there — of an employer deciding to test someone because of drug addiction is a really important example, because as Melanie illustrated, in that situation, the employer doesn't appear to be focusing on illegal drugs.

We mentioned that tests for illegal drugs are not medical exams and you could do them any time you want. So that's true. What you cannot do is discriminate on the basis of disability in anything that you do related to employees. And that is discrimination based on the fact that the employer found out this person had drug addiction. It's not about that use of illegal drugs, because that hasn't happened for years and years and years. So that's the one caveat that we brought up earlier about testing for illegal drugs. Yes, you can do them any time you want, but not in a discriminatory manner. If your focus is on the fact that someone has a history of drug addiction with no current illegal use, don't do it, because that's discrimination based on disability. It's not an illegal test because it's not a medical exam, but you're treating that person differently on the basis of a disability.

If it's not a test for illegal drugs, let's go to step two. If it's a test for alcohol, you want to ask does the medical exam or inquiry comply with ADA rules? And you heard both Melanie and James and me talk about what those rules are related to current employees. So if you meet that, you can proceed with the medical exam or inquiry. If you don't, then you don't want to do the exam or inquiry. You don't want to be violating the medical exams and inquiry rules. I know there are a lot of cases involving those rules, because a lot of times employers just jump to, "Let's just test somebody for alcohol "just because we heard they have alcoholism," and you want to be really, really careful about doing that.

All right. If you have any confusion about anything we're talking about, I just want to emphasize that you all can call us any time for a one-on-one conversation about any of the stuff we're talking about today. Some of it does get a little confusing when you're trying to process it in an hour that we have together today.

So on the next slide. Now we're going to move into kind of what we feel is the heart of JAN, and that's accommodation issues. Here we're going to talk about accommodating employees with substance use disorders.

On the next slide.

The general rule related to accommodations is that employers must provide reasonable accommodations for the known limitations of an employee with a disability unless doing so poses an undue hardship. That's a very, very broad rule. Melanie and James are going to share some examples of cases that they've had recently that illustrate what is possible when you're accommodating employees with substance use disorder.

On the next slide.

## [Accommodating Employees with Substance Use Disorder]

**JAMES POTTS:**

Thanks, Linda. Yeah, so we want to talk about some accommodation issues that we see frequently with this population. To be honest, these accommodation ideas can be generalized to a whole variety of disability types, so a lot of times you can use the general JAN concepts and base them off of your specific situation.

But just some common accommodation requests or difficulties in the workplace related to these disability types. Attending work, concentration, meeting deadlines, staying on task, handling stress — whether that be an influx of new stress, sometimes it's related to anniversary dates — maintaining stamina. For our team, me and Melanie, it's more of like mental fatigue maybe throughout the day it gets more difficult. Modified schedules and stuff could potentially help there. And then a big one is trying to avoid exposure to alcohol and drugs. And that's really identifying and either eliminating or reducing the impact the trigger or stressor has on the individual.

And we always throw this out in every situation. Yeah, the ADA may say there's certain things you don't have to do, but you can always go above and beyond. If you want to try and help individuals and maybe the ADA or EEOC guidance doesn't specifically state you have to, you can. No enforcement agency is going to beat down your door for helping or doing too much.

Next slide, please.

Flexible scheduling and leave. If we're being honest, that's the most requested accommodation related to these disorders or these conditions. Time off for treatment or scheduling in such a way that you can go and receive treatment. So here our example is an employee with alcoholism was worried about relapsing and asked for a flexible schedule so they can attend Alcoholics Anonymous meetings. So we could be talking about modifying an attendance policy, modifying schedules, or providing leave, or it could really be a combination of all those ideas. It really just depends on the situation. The goal or the accommodation obligation is to ensure that this individual gets the time off so they can ensure the treatment needs are met, but to do so in such a way that does not create undue hardship on the business.

So just some examples of what could a flexible schedule mean? Arrive early, work late, work through lunch and breaks so you can use that time for your appointment. Utilizing your PTO. If you don't have PTO, maybe using unpaid leave. Sometimes there's even the ability to make up your time on what would normally be a scheduled day off. Like, any of those could potentially work. It's really about how can we meet our business needs while giving you the time off or whatever accommodation you need to meet your own individualized disability needs.

Next slide, please.

Reducing distractions in the workplace. An employee recovering from opioid addiction was having trouble concentrating, and they asked for reduced workplace distractions. The employer provided a cubicle walls and a noise-canceling headset. And to that, I say, "Great!" The employer was looking at reducing both visual and auditory distractions in the workplace.

That's not necessarily the only ideas. What else could be helpful? Maybe a private office or a private area. If that's not available all the time, maybe it's the use of a vacant conference room when that's available. Breaks to walk away so they can practice stress management if distractions get them all flustered or whatever the case may be for them. Telework. An individual can control their own environment and minimize distractions at home. The employer, really all they have to do is just say, "Okay." It's not possible in every situation, but sometimes it's easiest on both parties.

And then let's even take a look at what the employer was doing here. It seems like they were trying to privatize a cube. Let's take it a step further. Maybe in addition to cubicle walls they could use a cubicle door or noise abatement panels, or maybe noise cancellation doesn't work for them but a white noise machine would. So lots of different things you could try to plug and play. It's not a one-size-fits-all. And the obligation is always an effective solution. Sometimes we hear employees that they want to work from home, but the employer can offer an effective alternative in the workplace. So employees, you really want to be flexible and understanding that the obligation is an effective solution and not necessarily the exact one that you want.

Next slide, please.

Reducing stress. An employer with drug addiction was in recovery and had not illegally used drugs for two years. After an increase in his workload, he asked the employer to help explore ways to reduce workplace stress. I probably say this ten times a day, doesn't matter if we're talking to an individual or an employer, but what is causing stress? What's going on there?

Let's go back to our last example. Distractions or the environment causing stress? Let's target those specific issues, those stressors and triggers, to see if we can eliminate, reduce, remove, or help the individual manage their condition when they are subjected to that stress that can't be removed or altered in some way.

Now, this individual, they mention workload. And according to the guidance, there's not a requirement or obligation for an employer to lower or remove performance or productivity standards as an accommodation. But what if there are aspects of the process or the policies or how you communicate with others that are causing stress? The employer may be able to target and manipulate those aspects of the job. Maybe a mentor or a supervisor. Let's sit down and plan out tasks for more consistent check-in so we can change priorities and change on the fly. Leave, you know, it's usually the lesser form of accommodation, but sometimes if you're so stressed out it may be the only effective solution. Go and get rest, go and get treatment, come back and be as effective as possible after a period of time.

Melanie, back to you.

**MELANIE WHETZEL:**

All right. So here in this example, avoiding social events. We have a sales representative with alcoholism who is dealing with stress related to personal issues, is having difficulty attending certain social events with clients. The employer excused him from attending social events until he was able to deal with the family issues he was experiencing.

And I want to say this can be a really great accommodation to help an employee with alcoholism avoid situations where that alcohol's present, where he may be expected to imbibe as part of workplace culture. We hear that sometimes, you don't want to seem like you're not part of the team. so you're going to need to do what everybody else is doing. And it could give that employee a chance to work out his personal issues, family difficulties, but also avoid that exposure to alcohol. And if the accommodation of allowing him not to attend those meetings doesn't cause a hardship, and it's not essential — and maybe there are ones that would be more essential than others — the employer could continue to allow this employee not to attend those meetings, extend that accommodation in order to assist the employee for a longer period of time.

Next slide, please.

And again, like James said, you can always go above and beyond the ADA, and it can be done on a case-by-case basis. "We really want to help this employee right now, here's what we can do to help them. We may not be able to do that in the future or for someone else, but we can do it for this employee right now at this time.”

Okay. So in this example, this is a reassignment. A nurse with drug addiction was restricted from dispensing medication after it was discovered she was using illegal drugs. The employer had a policy allowing employees to participate in rehabilitation. When the nurse returned to work after treatment, she was reassigned to a job that did not require dispensing medication and was given periodic drug tests.

This is a really good example of allowing a skilled employee to continue to work in another area that would provide fewer temptations and would help her avoid exposure to those drugs and affect her drug use. But it also benefits the employer in keeping an experienced employee working, just in another position with different functions. We hear employers talk about how difficult it is to get new employees, get them trained, get their feet on the ground running, and this employee would be able to do this when she came back, hit the ground running, just in another area.

All right. I'm going to turn it back over to Linda to finish us up here this afternoon.

### [Summary]

**LINDA BATISTE:**

Thanks, Melanie. I love what both of you said. You both emphasized that just because you can have and enforce policies against drugs and alcohol in the workplace doesn't mean that you can't offer assistance to someone with drug addiction or alcoholism and go beyond what you're allowed to do. So if we can help in any way with brainstorming accommodation ideas or solutions, contact us any time. We're always happy to do that and try to help somebody keep their job.

When you're processing accommodation situations, assuming that the person doesn't lose their job because of conduct violations or performance violations, you can look at whether the employee meets the definition of disability. Again, you don't have to do that. If you want to provide an accommodation to any employee that is struggling, you are more than free to do that. If you just want to accommodate employees with disabilities, you can get information that you need to determine whether somebody meets the definition of disability. If they don't and you want to apply your policies, then you are free to do that. If they do, then you want to look at whether they need the accommodation that they've requested because of that disability. And if the answer is yes, again, engage in the interactive process, try to come up with ideas, use our service if you need help. If they don't and you're back to deciding what to do, then go to your policies and apply them uniformly. And again, always remember that you can go beyond if you want to.

## [Q&A]

All right. On the next slide, I believe that we have some time left for questions. And we do have a lot of questions.

One thing I want to address real quick before I toss questions to Melanie and James, somebody asked if the information that we're providing today applies to federal employees under the Rehabilitation Act, and the answer is yes. Both laws have the exact same requirements related to accommodations, medical inquiries, everything that we've talked about today. Federal agencies have other requirements under other laws and executive orders, but for purposes of what we talked about today, yes, all of the information applies.

All right. You guys ready for some questions?

**JAMES POTTS:**

Ready as I'm going to be.

**LINDA BATISTE:**

All right. Good.

The first one, it's from an employer. One of our social workers got a DUI, and his license has been suspended. He asked us to pay for transportation on the job until he gets his license back. Do we have to do this?

**JAMES POTTS:**

I can take that one, Melanie. Probably not. Is driving a disability-related limitation? I mean, I know that if somebody who had seizure disorder and was unable to drive because their license was revoked, then there's a potential argument that they're entitled to accommodations. Maybe not even that an employer provide transportation. There's no guidance that would say an employer has to provide transportation as an accommodation, unless they do so generally for other employees in similar other situations, like, "Yeah, we provide transportation for everybody, so we have to maybe provide modified transportation as an accommodation."

But here the other thing that jumps out to me is — and David Fram stuff is jumping into my mind, Linda, so feel free to clarify or jump in when I'm done — but are they accommodating a disability-related limitation or the consequences of an illegal behavior? So you lost your license, and that was the consequence of your illegal conduct, which was the DUI, and therefore the employer may not have an obligation to work with you there with accommodations.

**LINDA BATISTE:**

I think you hit the nail on the head. I don't have anything to add. That's perfect. And again we go back to doesn't mean you can't help out, but probably no duty to help out in that one.

**JAMES POTTS:**

If you don't want to lose that person, then can we offer some schedule flexibility? Can you access alternative transportation? But if that individual wanted to work from home because they lost their license, the employer may not have an obligation. Under the ADA.

**LINDA BATISTE:**

Yes. Always qualify that.

I like this next question, because I think it gives us an opportunity to talk a little bit more about last chance agreements. You mentioned that, I believe, James, in one of the examples that you had. This employer says we have an employee with ongoing addiction issues who is an electrician, left rehab, and wants to return to work. And I think it looks like the employer's considering that, but they want to know whether they can require the employee to sign a last chance agreement.

**JAMES POTTS:**

Melanie, got anything?

**MELANIE WHETZEL:**

Oh, I thought she — I'm sorry, I thought she was addressing that to you. [laughter] Yes. Yes. A last chance agreement can be a good idea. That can — kind of says to an employee, "Hey, here we kind of had you, you didn't follow the rules, but you're valuable to us. We want to help you out, but here's what we're going to do moving forward." I think again I'll refer to the difficulty with getting employees. Is this a valued employee that's experienced and skilled? Do we want to help them out and keep them? And here's a good way to do that, because it's difficult to get new employees that are skilled and qualified.

**JAMES POTTS:**

And what is a last chance agreement? It's a situation where an employer is probably within their rights to terminate based on the actual conduct of the individual, the illegal drug use. So if they're within their rights to terminate, but they're saying, "Hey, we want to go with a different approach. We want to potentially help this individual and help them keep employment, but it's going to be hinged on some sort of agreement, the last chance agreement." And that is usually to refrain from alcohol or substances, keep your nose clean kind of deal so you can return and basically keep your jobs, where they may have not been required to do so, they are. So I mean, it may depend on that situation, on what they were doing that was a treatment or something like that, like were there workplace issues? What was the specific disability? But, in a lot of situations the last chance agreement would make sense in similar situations. Sorry if I muddied the waters there.

**LINDA BATISTE:**

No, that all makes great sense. I think it's a great tool to help balance the employer giving somebody a chance but also protecting themselves for incidents that might occur with a relapse.

Next question. I think both of you talked about that an employer doesn't necessarily have to give leave as an accommodation if they want to explore other options for someone that has requested leave for treatment. Somebody asked what are some of those accommodation ideas that we could explore instead of leave for someone going through treatment? Do you have any suggestions on what kind of things they might look at?

**MELANIE WHETZEL:**

Well, I'll jump in there. I think that depends on what has been recommended by the doctors. We do talk to people who do not go to, like, a live-in weekly — or for extended time rehab. You know, employers cannot dictate medical treatment. They say, "Well, we don't think you need that, We think you need to work and go to counseling." But those could be options that they can get back with the doctor and say, "Hey, we really can't allow this right now. Are there some other options that would be effective for this employee?" It's not just what works for the employee, but it's not just what works for the employer either. It needs to work for both. And if the employer can be flexible and look at, "Okay. Let's go back and get some information that might clarify what our options are, because the doctor would be the one to dictate that treatment. Are there other treatments that would work at this time that wouldn't require that much leave away from the workplace."

**JAMES POTTS:**

Yeah. I would just say how are you impacted on the job? Are you in a situation where you have to be in inpatient treatment and you're actually unable to perform any essential job duties? If you are unable to perform your essential job duties with or without accommodation, you have to take leave. That's just really the only option for you unless the employer wanted to lower productivity or performance standards or temporarily restructure your job or something like that.

So I kind of go back to maybe some of those last examples that me and Melanie talked about, and it's really looking at the specific limitations. Like are you having stress in the workplace? Are you more distracted right now when you're dealing with this or when you're outside of treatment hours? Is there the ability to work from home? And maybe that will limit your interactions with others or going past your triggers or something like that. So it could be different for everybody. If treatment's the only option right now, then it's probably going to be leave or some sort of modified schedule. But outside of that, it's really just trying to dig in how are you impacted at work? Because that's really going to open the conversation to, well, what can the employer change? What's going to help you out in those moments or instances?

**LINDA BATISTE:**

All right. Great. We're almost out of time. I want to cover a question that several people asked related to an employee's duty to disclose addiction. We had a lot of questions that said, "We can't ask for a diagnosis; right? So how are we going to sort out whether someone's got drug addiction or alcoholism and whether they are using illegal drugs or not?" And I'll just quickly take this, and then you guys can jump in if you want.

As far as we know under the ADA, you are allowed to request a diagnosis. We've kind of struggled with that for years, because the EEOC wasn't clear on that, but there have been some documents lately from EEOC that indicate that yes, you can in fact ask for a diagnosis as part of determining whether someone has a disability under the ADA. So with the issue of addiction and whether it's something that someone could lose coverage for, our understanding is that yes, you can ask for that diagnosis. I think one of you said maybe an individual who's going to ask for an accommodation from an employer maybe just wants to start out saying addiction and see if the employer will accept that and not get into whether it's illegal drug use or alcohol, but technically an employer should be able to ask for that as part of their documentation.

You guys have anything to add to that?

**JAMES POTTS:**

I mean, I see people just say, "It's a mental health impairment," and talk about their limitations and not put anything related to addiction and to see if the employer will accept that. I don't know. I kind of take the stance of sometimes it's regardless or doesn't matter what the disability is. It's can you help? Or what's the actual conduct or performance issues on the job? Like if there's limitations that you can accommodate, well then that's great, but if there's performance and conduct that warrants termination or discipline regardless of what the disability name is, it's really taking action based off that performance and conduct. So I don't know. That's probably not really helping more than what Linda said, but sometimes I think we get too hung up on the specifics. But disclosure's important.

**LINDA BATISTE:**

I agree. I think that's a great note to end on. Don't necessarily worry about focusing on disability, let's all just see if we can accommodate. That's our dream at JAN, and we can help you try to do that if you need help doing it.

## [Conclusion]

Unfortunately that's all the time we have today. Thank you, James and Melanie for those great examples and for answering all these tough questions. Again, if you have any further questions, please give any of us a holler, and we'll be happy to help you. We hope the webcast was useful. Anybody submitted a question, again just give us a call. We're happy to help.

In case you haven't signed up for it yet, our next webcast is called "The Way I See It: Accommodation Process Perspectives from Different Points of View," and it's going to be on Thursday, October 12, at 2 p.m. Eastern. So if you haven't signed up, please sign up for that.

On the next slide, if you're seeking continuing education credit for today's training, we do offer one hour credit through HRCI. To receive the credit, please complete the webcast evaluation. That evaluation will open in a new browser at the end of the webcast, so don't close the JAN webcast window when the webcast ends and you'll get that evaluation. Alternatively, you can scan the QR code provided on this slide or go to AskJAN.org/evaluationreg.cfm. Once the evaluation is completed, click on "View your certificate of completion."

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Before we end the program I just want to briefly mention National Disability Employment Awareness Month or NDEAM. In case you're not familiar with NDEAM, it's observed every October and celebrates the contributions of America's workers with disabilities. This year's theme is "Advancing Access and Equity." You can learn more at DOL.gov/NDEAM.

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Finally, I want to thank Alternative Communication Services for providing sign language interpreting and captioning services for this JAN webcast. And I want to thank everybody again for joining us. And this concludes today's webcast.