State ADA Coordinator’s Office

2023 Virtual ADA Conference for State & Local Governments Session 1B

Georgia Finance and Investment Commission

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JOHAN: Good afternoon everyone or good morning for those on the West Coast. We appreciate you joining us again. My name is Johan Rempel with the Center for Inclusive Design and Innovation a Georgia Tech. I will assist with the rest of the conference. A few housekeeping items we try to practice what we preach. We are offering both captioning, live captioning as well as ASL services.

With the live captions that is the Streamtext link that has been dropped into the chat. This opens a third-party application that provides additional choices for individuals that benefit from captions. There is a second method of accessing. It is found on the toolbar and there is a bright red arrow pointing to the CC. If you are unable to click on that with your mouse, it is also keep keyboard accessible by pressing the tab key.

Here is a few other features within Zoom that can also be considered accessibility. Spotlighting and pinning. The host or cohost can spotlight someone. Whoever is spotlighted will appear in Speaker View. Any participant can pin any participant's video at any time and it only impacts the participants display. It is pretty straightforward on how to spotlight or pin. Simply hover over the participant or panelist you want to spotlight were pin and select the…. From the menu choose spotlight for everyone.

This is a very recent feature built into Zoom. Sign language interpretation view. It has made life easier for the host and the panelists as well as participants. In the advanced section, the host must select the sign language interpretation view to enable. Zoom desktop version must be used by the host to manage and initiate the interpretation.

This allows participants to access sign language interpreters shown in a dedicated video channel. Participants can resize or relocate the video window as needed. Interpretation options exist on the Zoom toolbar where the bright red arrow is pointing in order to enable the ASL interpretation. That is fully keyboard accessible as well you can access it in that manner.

A few other housekeeping items. The Zoom chat feature is disabled for participants. We ask you to submit questions using the Q&A feature found on the Zoom toolbar. There will also be a brief Q&A section following the presentation and all questions submitted during the registration process has also been provided to the respective presenters ahead of time.

The Virtual ADA Conference team will monitor the Q&A throughout the presentation. As time allows, the team will adjust as many questions as possible. If the team is unable to get to your question during the session they will make every effort to follow up after the conference.

As a reminder, please do not place any private or confidential information in the Q&A. All presentations are being recorded and will be housed on the state ADA Coordinator's Office website in the weeks following the conference. For any technical issues related to Zoom, you will have access to the Zoom support link in the chat.

If it is not already posted there it will be in a moment. We invite the presenter to turn on your camera temporarily while being introduced and during the Q&A at the end. I will now pass it to Barbara Tucker ADA administrative service coordinator. She will serve as moderator and will introduce the next presenter.

MODERATOR: Thank you Johan. Good afternoon everyone. Welcome to session 1 B entitled ADA Title I Interactive Process and Reasonable Accommodations. The presenters for today are Jeanne Goldberg and Tracie DeFritas. Jeanne Goldberg is senior Attorney Advisor and the Office of Legal Counsel at the US Equal Employment Opportunity Commission. In Washington DC. She has also served as acting Assistant legal counsel.

Tracie DeFritas is a principal consultant in Americans with Disabilities Act specialist for the Job Accommodation Network. The leading national authority on job accommodation in disability employment issues. With more than 25 years of experience, providing expert consultation and practical guidance regarding a broad range of Americans with Disabilities Act and job accommodation issues. Tracie DeFritas is one of JAN Senior Consultant. You can find a complete bios in the registration. Welcome to Tracie and Jeanne.

TRACIE: Thank you for that introduction Barbara. Welcome everyone and thank you for attending ADA Title I interactive process and reasonable accommodation session. We have a lot of information to share with you today. We know the ADA reasonable accommodation mandate can be challenging for employers. Establishing an effective approach the reasonable accommodation issues through policies and procedures that apply vigorous ADA analysis and engagement in the interactive process is essential.

Today we will share some common and complex accommodation in ADA situations and offer some techniques for approaching these situations through the accommodation process. This training will include key legal points and important takeaways. We know these might spark the question so please hang onto them and we will leave time at the end hopefully to go ahead and address those questions.

Let us get started. We know there are many accommodation in ADA challenges. This training is really meant to enable managers and supervisors and accommodation coordinators and HR professionals and those providing legal guidance to benefit from learning practical ways to master complex accommodation and ADA challenges related to various topics.

We could cover a lot of different topics but we have chosen a handful of those to work through today. For example requesting and evaluating medical information, selecting accommodation, addressing performance issues, modifying workplace policies, handling leave and attendance issues and also managing unexpected implementation challenges.

As you might expect we have a lot of cover so let us begin with requesting medical information. To help determine effective accommodations, we know EEOC recommends that employers use an interactive process. That simply means employers and employees with disabilities request accommodation work together to produce accommodation solutions.

This process begins when an applicant or an employer questions an adjustment or a change to a medical condition. For example, an applicant says, I am neurodiverse 290 interview questions in advance or an employee says they need to flex their schedule to attend therapy appointments or they are having difficulty performing a specific job duty because of a medical restriction.

Once a request is recognized, the employer should start the interactive process which commonly includes requesting medical information or documentation. Wanted accommodation request is received and recognize, the employer should gather whatever information is necessary to process the request. Necessary information might include documentation of the disability, need for accommodation.

Of course in some cases, the employee’s disability and need for accommodation are obvious and no additional information is needed. It is important to keep in mind I think the employee who requested the accommodation is often the best source of information about their disability and possible accommodations. But when the employee cannot provide the necessary information, that is when the medical document documentation can be useful.

We know the accommodation process can get complicated when communication breaks down while requesting medical information. Or maybe there is a lack of engagement or no cooperation on one side or the other. Let us consider some common challenges related to requesting medical information. Then Jeanne will enlighten us on some key legal points related to these common scenarios.

Common scenarios we hear are when an employee box that implores request for medical information. This is typically because the employee may believe the employer does not have a right to ask about their personal medical information. Or does not have a need for the request in details. The employee might believe the information is protected not just at the healthcare provider's office under HIPAA but also at work.

Another challenge is when an employer requests reasonable documentation but the employee does not obtain it. Maybe the employer is stuck waiting a long-time weeks or months for medical information. They are not able to proceed in that accommodation process without it. Or maybe the employer or healthcare provider refused to communicate with the employer. They do not respond to emails or calls for details or clarification on information that is already provided.

We hear about situations where the employee says their healthcare provider requires a medical appointment before they will complete the documentation. But the employee is not able to get an appointment for months. Or it is taking the healthcare provider a long time to prepare or send the requested information. We are sure you have all experienced similar challenges before. What are some key legal points related to the ADA requesting medical information in these common scenarios?

JEANNE: Here is what the ADA allows an employer to do if it chooses. The employer is allowed to request supporting medical information for an accommodation request for 2 reasons: One if it is not obvious or already known that the person requesting accommodation has a disability under that ADA definition that would potentially entitle them to ADA accommodation.

They are not entitled to accommodation under ADA unless they have a physical or mental impairment that substantially limits a major bodily function or other major life activity, where they have a past record or history of impairment.

While that is a legal definition the employer might need the medical facts to plug into that legal definition to know whether the employee is entitled to accommodation that they are asking for. So if it is not obvious or already known the employee has a disability under ADA definition, the employer is entitled to ask for supporting medical information.

Secondly, if it is not obvious or already known the employee has a current need for the accommodation they are asking for, the employer can solicit supporting medical information about that. The employer does not have to provide an accommodation for a current or past substantially limiting impairment if the accommodation is not needed due to the disability.

Do you have a disability? Do you need the accommodation you are asking for due to that disability? Both are legal questions that an employer may be entitled to supporting medical information for. The employer is also allowed to ask for supplemental information if the initial response is unclear or incomplete.

If there is a doctor's note you might say to get the initial doctor's note and it says has bad condition, needs to sit. The employer would be allowed to ask what the diagnosis and limitations are. For example, to clarify can the employee never stand? Let us face it all the time is it intermittently and how often and for how long, etc.

There is no prescribed limit on the number or form of communications that the employer can have with the employee or the treating physician about this. Some of you may be familiar with FMLA. It is very prescribed in terms of the form and number of times the employer can ask for medical information. It is very limited.

Under ADA as Tracie will describe in more detail, the employer is allowed to have a back and forth and not only about what I just described if they have a disability, do they need the accommodation they requested, but also to ask the training physician about alternative accommodation ideas and whether they will be effective to meet the employees restrictions instead of the accommodation the employee requested.

That is all fair for the employee to discuss with the employer and the treating physician as long as it has not already obvious or already known. There is a narrative that walks you through what I just described these rules for medical information the employer can ask for in support of org accommodation request. Questions 5 through 9 in the enforcement guidance on reasonable accommodation and undue hardship linked on the bottom of the slide.

As a practical matter how does an employer get the information I just described? How did they ask for this medical information and receive it? They can ask the employee and describe what is needed. Bring the information from the healthcare provider, here is what we need something to describe your diagnosis or limitations explaining why you need the accommodation you requested. Or the employer is allowed to ask the employee to sign a limited release that would allow the employer to contact the healthcare provider directly.

Either way, the employer should explain whether it is to the employee or the doctor, what information is needed. I need to know what the type of impairment is and what the limitations are and what accommodation would help the employee and what accommodations are possible. If it is relevant describe the job duties. That may increase the likelihood of getting accurate and complete information.

Some employers in fact like to include the job description when writing to the doctor and the accommodation for performing those duties so the doctor can get a sense of the job. But remember, you are only permitted to seek medical information that is reasonably necessary to determine if the employee has a disability under the ADA definition. And they need the accommodation they requested.

You can have a back-and-forth to clarify and get complete information, to ask the doctor about alternative accommodation ideas. We are thinking of this other way to accommodate the individual, would that meet their medical needs? That is all fine but it must be limited to what is reasonably necessary. In other words, asking for the kitchen sink or the entire medical records would likely run afoul of the rule. Tracie?

TRACIE: Thank you. What are some key takeaways as it relates to requesting information? We know as part of the interactive process you want to explain to the employee that the employer is permitted to request medical information under ADA and why that information is needed. Sometimes employees are not familiar with what an employer is permitted to do. Having that communication and explaining the process I can be helpful and is a simple way I would say to avoid misconceptions about request for medical information. Informing the employee so they understand.

I think also tailoring the information sought to the accommodation request. Decide what information is necessary to provide an accommodation. Information about the medical condition, the related limitations, the job duties that are affected, how the accommodation will help. If this information is not available, detail what is necessary in order to move the process forward. Remember the objective is to get to the next step to ultimately decide whether an accommodation or what accommodation can be provided.

It might be helpful to provide the employee with a list of job-related questions that address the specific concerns. This makes it easier for the individual to obtain the necessary information. For example, a question, would Robin be able to return to work on a reduced work schedule of six hours per day for a temporary period and if so what duration? It is okay to specify. Get the direct information that is needed to move the process forward.

Do not ask the employer for I am sorry employee for the entire medical record or for records from unrelated providers. A good policy for employers is only to ask for what is absolutely necessary. Asking for all medical records will rarely if ever meet this test and can violate the ADA. If the information received is incomplete or unclear, explain to the employee what additional information or clarification is needed. Allow them the opportunity to provide it.

It can also be possible to contact the healthcare provider directly as long as you have the authorization to do that. As long as the healthcare provider has the authorization to communicate with you as well. Sometimes that is an effective way to get some questions answered. In some situations, the employer might need additional information.

For example, when considering an alternative accommodation to what the employee requested, maybe the employer need some guidance on whether the alternative would be effective. If it is not clear, as the employee and/or the employees’ healthcare provider whether alternative accommodations to what the employer requested will also meet their disability related limitations.

For example, where an employer is may be considering accommodations that would enable an employee to work on site instead of at home. The healthcare provider might weigh in on whether alternatives can be effective in that situation.

Where an employee has provided information timely, it seems they are trying, is extending the deadline feasible? Maybe consider a deadline extension for providing the information. This can be more than one extension with an individual when they share good reason for the delay. Maybe they cannot get into see a specialist for a month. So we know it will take a bit of time for them to get that information.

Another way of dealing with the medical documentation waiting place where you are waiting for the information is when there is a breakdown on the employee side for the employer to demonstrate and document good faith in giving the individual the opportunity to obtain that information. That is where that extension can come in.

You do want to document dates; you want to document communication and the effort that is made to obtain the information on the employer and the individual’s side. Also any interim accommodations that perhaps will provided while waiting on the documentation.

There is certainly no harm in making what would be temporary accommodation or interim accommodation if it is possible to do that. That does not mean you're going to provided forever or you are guaranteeing it is something that can be provided long-term, but it might be possible to make small adjustments while waiting for more detailed information if that is reasonable and it makes sense.

JAN offers a resource that goes into more detail around the challenges for waiting for medical documentation and offers practical tips. See avoiding the waiting place after requesting medical information. Even when medical information is received by the employer, challenges can result when processing or evaluating the information.

For example, perhaps a supervisor or manager receives a medical note but are not sure what their responsibilities are. Or who to contact with that information. Maybe they have not been trained or informed. Or maybe there is no accommodation procedure to follow in their not sure what to do. Or the person has signed assigned to process the request makes a mistake. Maybe they denied the request because the medical information is incomplete. Or it is unclear.

Rather than notifying the employee or the provider more information is necessary to move forward. Maybe they do not ask follow-up questions or clarifications. Or the person is not trained on ADA including not knowing the definition of disability and how to determine whether the employee has an ADA disability in order to receive reasonable accommodation. They may not quite interpret the information appropriately as a result it becomes an issue.

Finally, maybe the person disregards the healthcare providers assessment altogether. Based on their own personal experiences or subjective opinions about the employee's medical condition. This is where the idea of what it might mean to have a certain type of disability can play into that situation or biases can come in.

Maybe if Susie has the same medical condition and that person thinks they understand it without looking at that person as an individual and how their specific disability is impacting the situation. In this scenario, Jeanne what would you say would be key legal points to consider around definitions of disability for example?

JEANNE: Sure. As Tracie said, you might have someone simply hand a medical note from their doctor to their manager or supervisor. That begins the request for reasonable accommodation. Make sure managers and supervisors know what their role is and what they are supposed to do in medical information when it is handed to them directly by the employee.

In support of vacant accommodation request. If they are charged with evaluating and processing the request, they need to have training about what the standards are, the legal standards they are supposed to apply. If they are supposed to pass on the information to you and ADA Coordinators Office for review, they need to know from advanced training that is what they are supposed to do and do it promptly.

Whoever ends up on the receiving end ultimately of the employee’s medical information for review, of course they need to understand the definition of disability under the ADA. But also, that it is to be construed broadly. Congress instructed in the ADA amendments act that it should be construed broadly, not a lot of time should be spent on deciding if somebody has a disability within the ADA definition.

More time should be spent on seeing whether someone can be accommodated. But if you are looking at that broad definition of disability, keep in mind as the reviewer of the medical information the limitation does not have to be significant or severe in order for it to be substantially limiting as required within the ADA definition. Substantially limiting does not mean a significant or severe restriction. Something less than that.

Duration of the limitation is one factor but it does not have to be a permanent or long-term impairment. The ADA regulations say something fewer than six months can be substantially limiting and in fact, there are various court decisions from the past several years involving things that last two or three months and could be substantially limiting if they are sufficiently limiting on the individual. During the duration.

Duration is only one factor. Do not get thrown off by the time frame alone. We look at whether the person is substantially limited in a major bodily function or major like life activity without the benefit of any mitigating measures they happen to use the hearing aid, prosthesis, therapy, medications.

Finally, if the condition is episodic or in remission, the question is would it be substantially limiting when active? Even people who have seizures or manifestations of another type of impairment only lasts for a short time, they can still be considered substantially limited of a major bodily function or other major life activity. During the time of the seizure or the flareup for other symptoms. When it is active, would it be substantially limiting?

If there are reasonable doubts about what the employee’s treating physician recommended or what they concluded medically, the employer can discuss that further with the employee, with their doctor. Either with the employee or with the doctor or with both.

Legally, the employer also has a right to have an evaluation at the employer's own cost by their own selected healthcare provider, contract physician The employer might arrange to also review them medical information or examine the individual even. But that is a step that as a practical matter is rarely utilized because it is rarely needed.

Remember where we started? The employer is entitled to get medical information to demonstrate to them the individual has a substantially limiting impairment. And that they need the accommodation requested but that it is reasonable documentation to which they are entitled. What is reasonably needed to satisfy the employer, not anything beyond that.

Some practical takeaways. There are these legal rules for analyzing whether someone has a disability. But remember as I said, the focus should be on whether there is effective accommodation that can be provided. Remember the EEOC. ADA regulations say there are all kinds of impairments that should virtually always be concluded to be substantially limiting.

Things like cancer, MS, epilepsy, blindness, deafness, other kinds of serious vision impairments in all kinds of things listed in the regulations they say should easily, easily be concluded to be substantially limiting. We are giving you the rules, but not lose sight of the fact that the focus should be on whether there is an effective accommodation that can be provided.

If it is incomplete or unclear to you having received medical documentation, whether this person has a disability within the legal definition or whether they need the accommodation they have requested, again you can explain to the employee what additional information or clarification is needed.

Ask them to go to their doctor and have supplemental information provided. Give the employee that opportunity to arrange that or you can re-contact the healthcare provider directly with that release we mentioned earlier. Have the conversation that you need to get the clarification that you seek.

What is critical is ADA training on the rules for evaluating this information for any staff that will be charged with assessing it. Do they know what information they are allowed to ask for? How much? How can they get it? How to evaluate it once they receive it. In other words the training should include information about the amended definition ADA definition of disability. And assessing the needs for accommodation.

The final parting thought on this is, do not freelance as a healthcare provider by disregarding treating providers or physicians’ recommendation based upon personal experiences or opinions. Tracie gave the warning about my Aunt Susie had that condition, she was not able to do this or that job task or she did not have that limitation. That is a surefire route to potentially violating the ADA.

Instead, your training should instruct any staff who are evaluating medical information and support of accommodation request, if they have any thoughts or doubts about what the treating healthcare provider is saying.

They should have follow-up communications with either the treating physician or another healthcare provider whom the employer arranges to review the information with relevant expertise to resolve these doubts. Rather than freelancing oneself as a medical provider who can provide a contrary opinion. That would be a recipe for ADA disaster. Tracie? What about selecting the accommodation?

TRACIE: Thank you. Once the employer has identified the limitation causing a problem and has identified with the work-related barrier is, the employer is then ready to choose accommodation options. Employer should be open to new ideas and ways of doing things. This is the time to brainstorm and consider what might work. Having that solution-oriented outlook so we can try to hopefully produce what is reasonable and effective accommodation.

Let us explore some common challenges related to selecting accommodations. Here are some scenarios: Situations where the employer does not even try. For example, the employee has not proposed a particular accommodation and the employer that is unfamiliar with possibilities but still the employer neglects to consult outside resources like the Job Accommodation Network for example for seeking accommodation solutions.

They just decide not to do anything. Or the employer is considering offering a different accommodation than what was requested but fails to communicate with the employee about why. There is no discussion about why an alternative was selected. For example, whether it is not reasonable or poses a hardship for the accommodation is maybe less burdensome but might still be an effective solution.

They just do not have the communication. Sometimes an employee will try to end the interactive process without providing accommodation if no solutions were offered. That is probably not a good idea. Or an employee might refuse and accommodation offered by the employer because they want their preferred accommodation. Jeanne would talk about some key legal points about selecting accommodations. What do you think about the scenarios?

JEANNE: There are some real pitfalls here. The employer not consulting outside resources, not communicating what the employee about why they are offering an alternative accommodation. Or just dropping the ball at the end of the interactive process without looking at alternatives they cannot give specific accommodation the employee requested.

The legal rule is that the employer has an obligation to provide reasonable accommodation absent undue hardship even if the person requesting the accommodation is only able to identify the disability-related that they need but not a solution. They do not have to know the solution to the problem but just put the employer on notice that due to a medical condition, they need some sort of change.

You figured out already through the interactive process of their medical condition it is a substantially limiting impairment. You are looking at whether to him provide an accommodation about what accommodation could be provided? The employee has to cooperate but they do not have to know the solution. Many times they will not.

It is the employer's obligation in that situation to consult Job Accommodation Network or other resources or use their own knowledge to figure out if there is an accommodation that can be provided. On the flipside the employee may specifically request an accommodation but you conclude it is not feasible or poses undue hardship. It is a big mistake to simply stop there and say to the employee, no.

Instead the employer has to provide legally must provide an alternative reasonable accommodation if one is available. What does that mean as a practical matter? The employer must search and look for whether there could be an alternative solution. As a reasonable accommodation that would be effective that would not pose undue hardship.

This is a pitfall for a lot of employers not realizing they have this prerogative to offer an alternative accommodation if they wish to do so that is effective. But on the flipside, they have an obligation to do the search for potential accommodations solutions if the specific being the employee is asking for cannot be provided.

You are never required to eliminate essential functions of the job as an accommodation. If that is what the employee requests, then you need to determine as I just said, is there a different accommodation that would allow the employee to perform the essential functions?

If the request comes in the form of but may not perform duty A and duty A is an essential function, the employer will violate the ADA potentially by saying no. That is an essential function we do not have to eliminate that.

The employer needs to instead explain we do not have to eliminate an essential function as an accommodation but let us look at whether there is an alternative accommodation we can provide that will meet your needs and not pose undue hardship.

If you conclude there is no way to accommodate the individual to perform the essential function in their job, do not forget about the accommodation of last resort, looking at whether there is a vacant position the individual is qualified for that they can be reassigned to. It does not have to be promotion.

You do not have to bump anyone from a job or create a position. But if there is a vacancy at their level or the next one below that that is closest, that they are qualified for, reassignment to that position can be accommodation of last resort.

Remember the employer has to keep all the medical information that we just described being exchanged confidential. That includes not just the doctors’ notes in the diagnosis and the treatment and the limitations but also the fact that the employee has requested accommodation or is receiving accommodation. That is considered by EEOC to be confidential medical information under the ADA and there are limited exceptions where the employer can disclose this information.

Even if you could provide the accommodation, the employee is requesting, it is not that it is legally something you do not have to do like eliminating an essential function. The employer has the discretion to choose among effective accommodations. The employee might request something you are perfectly able to provide that you choose to prefer a different accommodation.

The question is whether it is effective. Does not meet the individual's needs? The employer has the discretion to do that. As Tracie said earlier, you want to make sure you tell the individual and explain why you chose something different. That might really help to conclude the process in a successful way.

You want to know if the alternative accommodation you are considering would be effective given that particular employee's disability, their needs, and limitations. You can ask the employee or their healthcare provider whether this alternative accommodation you are considering would meet their needs. Their medical needs, disability-related

limitations. Remember when you are doing this as in all situations, unpack the request. Let us say the employee says my disability impedes work. For that is what the doctor says. You cannot simply treat that superficially and say the employer has no responsibility to transport the employee to work so request denied.

You must look at what the request is based upon in terms of what disability-related limitations are an issue. What is the barrier? In other words, the doctor or employee might initially say, disability interferes with commuting to work. What is the barrier? I cannot stand for certain period? Or sit for certain period? Do they have a vision impairment or something else related to a disability that interferes with commuting?

That is the disability-related limitations you are looking to explore. Whether there are reasonable accommodations that might address it. Maybe there is a schedule change that would enable them to commute. Maybe it is vision impairment that they cannot commute at night so they need to be sure the schedule is commuting during the day.

Maybe vacant telework. That would overcome the disability-related limitation that interferes with commuting. Make sure you scratch beneath the surface and figure out what the actual disability-related limitations are when you are looking at whether there is an alternative accommodation that can be provided. Tracie I think we will transition to some takeaways about selecting an accommodation.

TRACIE: Thank you. Lots of good information. We have a lot of takeaways to consider related to selecting accommodations. First, do not drop the accommodation process ball. Search for a solution even when the employee does not have a specific proposed accommodation. As mentioned, there is a duty to engage in the accommodation process.

The individual's initial duty is to inform the employer of the need for accommodation. Yours is to lead the process. Make sure you are picking up that ball and moving it forward. If the employee proposed a solution but it is ruled out, search for and offer alternative effective accommodation if available absent undue hardship of course.

The accommodation process does not simply end because we cannot provide what is requested. Keep that purposeful outlook and explore alternative effective solutions together. Sometimes an employer will take it beyond compliance approach and might choose to go above and beyond with the ADA requires as an accommodation.

For example, they might eliminate an essential function or carve out a role for someone. This is a good best practice approach but it is important to document that the employer is willing to go beyond to make the change at this time. To maybe explain for what duration, maybe it is just a temporary accommodation.

To also document what to expect what to expect regarding the employee’s job performance. This type of adjustment is not set in stone so if the employer finds they cannot continue the employer can ended. But it has something to consider when taking that beyond compliance approach. Explore and implement reasonable accommodation to address specific issues.

As mentioned, you want to unpack the accommodation request. So you have a clear understanding of the barrier and can explore reasonable solutions to address that particular barrier. There is a lot to consider when working through the process. Selecting the accommodation.

Finally, document everything as you explore and select solutions. Make notes. Document your effort. Document the individual effort as well. Communicate with the employee and keep the lines of communication open. Including if accommodations offer ultimately refused by the employee. Sometimes you might have a situation where the employer has offered what might be considered an effective solution.

If the employer sorry employee chooses not to accept that you want to document that and ultimately document what the reason was for it. Before concluding the interactive process of course, make sure you have made good faith effort in trying to select the appropriate accommodation. Now if you are going to deny an accommodation due to undue hardship, be sure it is based on overall employer resources.

 Undue hardship is a high threshold for denying an accommodation. Cost is never a good reason for claiming undue hardship unless you want to be forced to open your books in an EEOC investigation. It should never be your first defense when dealing with an accommodation situation. Also employer should consider employee preference as was mentioned. When choosing accommodations when it is reasonable.

If you make a choice between them to effective reasonable solutions, consider the employee's preference. This is kind of important because when you think about it, may be your reluctant but it might be a good idea to give a trial period to see whether it is effective. If not, you can go back to the previous solution but it is a good idea to maybe give that preference a try. The individual may have had previous experience with that kind of accommodation which may be good reason they are suggesting it as their preference. That past experience can be helpful.

When an employee refuses an accommodation, which we mentioned a moment ago, it is important to find out why. Maybe the accommodation has not worked for the employee in the past. So again the past accommodation experience is relevant also maybe when they are refusing an accommodation. That past experience can inform current accommodation decisions. Learn more about why the accommodation was refused. What is the reasoning behind it?

Of course in some situations, the employer may have a valid reason for offering one accommodation over another. If it is truly an effective solution and the employer knows the accommodation offered will be effective? The employer can stick with that decision. It is okay to do that. For example may be an ergonomic chair was chosen over another or maybe the employee insisted on a different brand.

That both have the same features. Maybe one cost less. Document that the employer refused an effective accommodation and explain why the interactive process is complete if they are really refusing and there is no moving forward with that scenario. Jeanne Goldberg you are next to talk about a few accommodation issues starting with 100% policies.

JEANNE: Thank you Tracie wanted to address some specifics we know often trip up employers and employees. The first is so-called 100% healed rules. This is where an employer has a rule that you cannot come back to work unless you have no restrictions or your illness or injury is over and medically cleared by the doctor with no restrictions.

The ADA requires or allows an employer to require that someone be qualified. You can be qualified even if you have medical restrictions. Even if you have reasonable accommodation, you can be qualified with the accommodation if it is one that does not pose an undue hardship.

The key legal point here is it that violates the ADA requiring an employee to take leave until they are 100% healed if in fact, they could have been back working and able to perform the essential functions of their job with an accommodation if needed. As long as that did not pose undue hardship. Be aware of these rules. The takeaway I want to focus on is what should your analysis be?

An employee says I have been out with this serious illness or injury and now my doctor says I can return. Here are my restrictions. This might happen when somebody comes back after Workers Compensation and they reached improvement or it might be freestanding reasonable accommodation returned to work request.

First, are there reasonable accommodations that would allow performing the essential functions consistent with the person's medical restrictions? If there are, do the accommodations impose an undue hardship? Make sure to consider reasonable accommodations that would enable returning to work or continuing to collaborate with her before you ever require somebody to take involuntary leave. Leave they did not seek to take. Situations where the employee is saying, I can work and I want to work and I want to return to work.

The employer needs to consider the accommodation request and provide accommodation that would allow returning to work. Rather than saying, that is okay we would rather that you just take leave for the duration of your cancer treatment or until that leg is healed further even though the doctor has cleared you.

Now, that is not the right approach. You must make sure if the person is requesting to return to work with reasonable accommodation if those can be provided and they could perform their job with those reasonable accommodations and they do not pose an undue hardship and there is no direct threat to safety, you must allow them to return with those arrangements rather than require them to take involuntary leave.

But if the employer requests reserved parking or reserved accessible parking spot as an accommodation? Employer provided parking might have no reserved accessible spaces. Then the employer is not sure what to do with this accommodation request. There may be no reserve spaces at all or there may be limited accessible spaces.

Or the employer might rent the parking lot from a property owner who actually controls the lot and would control whether additional accessible spaces could be created. Or whether a reserved parking sign can be placed on particular parking spots. The key legal point to keep in mind in the situation is accommodation might nevertheless be required to meet the need of particular employee that needs reserved parking or accessible parking.

They need this as an accommodation. It is not a one and done, over, denied simply because currently, there are not reserve spaces in the lot. Or all the accessible spaces are taken. Or someone else a third party controls the lot.

What you really need to look into here is whether an accommodation can be provided by reserving a space or if necessary, increase the number of accessible spots. Cannot be done without undue hardship? If not, is there a different type of accommodation available?

This should be very familiar because this is the approach we have used with each of the prior scenarios. What about the third-party question if the employer themselves do not control the lot? If needed, discuss the at the accommodation with the third party without disclosing the individual’s names. We have an employee that will be using the lot. They need an accessible space and there is only 2.

We need an additional want to be added or we need a reserved sign to be placed on a particular spot that is closest to the building. The third-party landlord may in fact agree. They have their own obligations under title 3 of ADA to patrons and members of the public who use their lot. The employer of course has the obligation under title one. Often the third party may agree.

Document your efforts especially if the third party says no we will not make the change. At least the employer will have memorialize the efforts that they made. Lots of good practical information and JAN parking publication that is linked at the bottom of this slide.

What if an employer requests a new supervisor as an accommodation? You may know as a legal matter, there is no ADA obligation to assign someone to a different supervisor as a reasonable accommodation. That again does not mean you just deny the request. And do not look at an alternative to the employee if the employer.

If the employee asked for something the employer does not legally have to provide they can say no but still has to look at whether there is an alternative accommodation that can be provided. Here that might be something like changing the supervisory methods to accommodate the disability-related needs. Maybe this employee needs their instructions in writing rather than orally. Maybe they need the assignments to be received in chunks rather than everything for the week all at once.

Of course, as a practical matter, nothing in the ADA prohibits an employer from voluntarily choosing to go above and beyond what would be required under ADA, they can choose to assign a different supervisor that might be more suited to that individual's needs, may be different supervisory style.

They can choose to do that even though it is not required. But the key take away of course is if you are going to deny a change in supervisor requests, you need to look at whether there is an alternative. That you can provide by changing the way the current supervisor manages that individual in terms of the way they communicate.

The way they provide assignments and other things that might be done to accommodate the identified disability related need that gave rise to the request for a change in supervisor. Again JAN has a handy publication called changing a supervisor as an accommodation you might want to consult for more ideas. Okay Tracie let us switch gears and talk about performance issues.

TRACIE: Sounds good. This is a big topic this can occur for many reasons. It can sometimes develop due to disability-related limitations. Of course performance management, it sometimes leads to disability disclosure when employers reckon at a choose to share information about their limitations or may be request accommodation to adjust the performance or conduct issue.

The next scenario is focused on balancing ADA compliance and performance or conduct management. Establishing uniformly applying performance and conduct standards allows employers to consistently evaluate all employees and readily identify and respond with standards which standards are not being met. But when a standard is not being met due to a disability-related reason, this is when the ADA and accommodations might come into play.

Some common challenges related to this topic can include, when an employee discloses their disability for the first time in response to disciplinary action or counseling, may be makes a mess limit minute request for accommodation, I am sure you are familiar with these types of situations where nothing was disclosed and there was no request for accommodation.

The performance issue is acknowledged and now the employee is saying this is why it is happening. Or maybe when there is a history of unaddressed performance issues. May be an individual with a disability has had some performance issues but no one has sort of had the opportunity to correct some of those issues. Perhaps decide whether accommodations can be provided.

Now we have a new supervisor that comes aboard. They recognize that these performance issues are occurring. They want to address the issues. That can make it a challenging situation. May be when maybe some strange behavior cannot conduct is exhibited in maybe the employee is not make an to look contact or behaving erratically. May be some sort of explanation is needed about the behavior.

We might have a situation there where there has to be that has to be addressed. Processing a telework accommodation request received from an employee who is not performing well. We can expand upon that a bit. Are employers required to disregard or change performance standards as a reasonable accommodation?

JEANNE: Generally, no. An employee with a disability has to meet the same production standards and performance standards as other employees in the same position. If the employer's entitlement to require that in other words. As an accommodation you never have to lower those production or performance standards.

We saw a production standards that refers to both quantitative standards how many widgets you have to make per hour and also the qualitative aspects. Meeting the employer's uniform expectations in terms of thoroughness and lack of mistakes in the quality of the work, etc. When people say production standards under ADA, they are referring to the quantitative and qualitative standards.

Reasonable accommodation never requires lowering a production standard but an individual may be entitled to an accommodation to help them meet the standard. This is a situation that may very well presented itself as we described before were legally, the initial request by the employee is for something you know the ADA does not require the employer to do.

The employee says, let me turn in 10 reports per month instead of 20. That is my accommodation request. You know the employer does not have to do this as an accommodation to lower production standards. That is not something you must provide.

But you cannot just say no. Again you can say no to that but you must look for whether there is an alternative accommodation that could be provided to make the disability-related needs that is prompting the request. You cannot refuse to consider or provide an accommodation in that situation. Just because the individual request is for something that is legally not required.

Similarly, and this is very important, you cannot refuse to consider or provide an accommodation because there is a performance problem. Let us say the employee is already getting unsatisfactory grades or they are already on a performance improvement plan. They may ultimately be terminated but they have not yet been for poor performance.

They are still an employee and still entitled to potential reasonable accommodation and meet the standards required if it is the disability interfering with the performance. Whether the disability is interfering with the performance or not, the ADA can require accommodation even if the individual is having performance problems. They do not lose their entitlement to potential accommodation because of poor performance.

We are focusing on some takeaways about this. You want to make sure if there is poor performance, you give the person with a disability the benefit of the same feedback and candid evaluation of job performance that you give to other employees. Some managers are afraid to do that but it is actually that you benefit the individual with a disability as you do other employees by giving that feedback about what is satisfactory and what is not satisfactory about their current job performance. So the individual can improve if there is anything that is wanting.

If there is a performance issue you have identified, and you think it might be related to a disability, lead with the performance issue. Do not assume it is related to the disability. You have been late five times in the last two weeks. What is going on? There were many mistakes in your past reports, what is going on?

The employee may give a disability-related explanation in which case, you will be entering the reasonable accommodation interactive processes zone. They are asking for accommodation to address the problem they are having. But they may not. They may give a secular explanation that has nothing to do with disability and you would treat that as you would any other performance discussion with an employee.

So those are 2 separate things. Lead with the performance issue and separately, address disability accommodation with the employee. If they inform you disability or medical condition is interfering with their ability to meet the performance standard. Very helpful EEOC technical assistance publication on this topic is linked on the bottom of the slide. Applying performance and conduct standards to employees with disabilities. It walks you through this in great detail.

What if the employee says the Disability Culture performance issue and they want the employer to not put them on a performance improvement plan or not give them an unsatisfactory rating. Because it was caused by a disability. The employer is still allowed under the ADA to act in response to any performance that has already occurred.

If the state for the poor performance exhibited is usually termination, it is too late for the individual to request ADA or too late for ADA to require accommodation. Termination is the step that would be taken for anyone who had exhibited that performance. What if the usual step is something less than termination but just the beginning of poor performance?

The employer can still proceed with the usual consequences. May be unsatisfactory appraisal rating or maybe a warning. Document that. Also because the employee has said the disability is what is affecting my performance, the employer will engage in the interactive process going forward for the future. For perspective accommodation if that is needed, to meet the standards in the future going forward.

If you are placing an individual for example on performance improvement plan, they have told you the disability is interfering with their performance. That is what led to this performance problem. You still place them but you would just delay the start date until you have your interactive process put into place any accommodations that will be provided for the disability-related limitation going forward. Tracie, what about modifying workplace policies?

TRACIE: Yes let us get into that next topic. Certainly modifying workplace policy can be a form of accommodation. We know the ADA does not interfere with the employer's way to have workplace policies but employers often times might need to look at making modifications when an individual's disability related limitations interfere with their ability to follow that policy.

It can be reasonable accommodation to do that. Absent undue hardship and when it is reasonable. Sometimes when modifying or creating policy is accommodation, the accommodation may be apparent to or affect others. This can create some challenges. Let us consider some of the accommodation scenarios on this next slide.

Sometimes we might have a case where a decision-maker is relying on an employer's policy to make an accommodation decision without realizing that the ADA might require an exception as accommodation for one or some individuals based upon their disability-related need. It is not really acceptable to lean back on the idea that this is the policy that applies to all and no exceptions.

In those instances where there is a relevant disability-related need for that modification, it may need to be explored as a possible option. We may have a case where management might be opposed to making any exceptions to uniformly apply policies because maybe they are afraid of setting a precedent or coworkers will request similar exceptions.

Again, not reasons to simply deny an accommodation request. Modifying a policy as an accommodation does not mean the employer must modify it for all employees. Only those requiring an ADA accommodation and only when recent reasonable. The employer can still apply the policy to other employees.

A key legal point is the ADA may require making an exception to a policy for an individual with a disability as a reasonable accommodation. If it is possible to do that and it does not create undue hardship.

What kind of policies might these be? Some examples could be a dress code modification. May be allowing someone to wear alternative types of uniforms or wearing a hat or sunglasses in the work environment or a different type of shoes that better suit the individual if they might have some kind of foot impairment.

We could look at dress codes. It can be looking at leave and attendance policies. May be allowing excused absences due to the disability. Or creating additional leave where it is needed as a reasonable accommodation. It can also be schedules. May be allowing a delayed or flexible start time. Maybe your policy is that people arrived to work at a certain time but

there may be disability-related me for some flexibility with that. It could be probationary periods and perhaps making some adjustment to them. Extending a probationary period with accommodations to improve performance. In a situation where we know a disability is a factor.

It could be modifying a no animals policy to allow access for service or emotional support animal. Of course telework policies. This is a modification to a policy may be where work is performed, allowing telework in that instance. It might include allowing telework when it is not necessarily available to others or expanding access to an existing telework policy where.

additional days are needed as an accommodation. As mentioned, per employers are still permitted to maintain these kinds of policies for others whose disabilities do not interfere with their ability to follow the policy. I want to be careful not to fall back on the idea of concerns about precedent or having to do it for everyone.

That is not going to be good reason not to consider modifying a policy as a form of accommodation. The EEOC does offer some information about modified workplace policies as an accommodation in their enforcement guidance on reasonable accommodation and undue hardship which is linked at the bottom of the slide.

I mentioned in the exception to telework policy which I will talk about quickly. This is a common and timely scenario as I am sure many of you are likely handling telework accommodation requests right now. Let us consider some common scenarios related to exceptions to telework policy.

Maybe an employee with a disability needs more telework as an accommodation in the current policy does not allow as much. Maybe they need full time as opposed to three days per week normally allowed. Or a manager is resistant to making any exceptions to a policy that does not allow telework.

Generally. They just do not want to make any exceptions. They simply want everybody in the workplace and do not want anyone to telework at all. Or as mentioned before we hear from employers that are concerned about allowing telework as accommodation for somebody who is a poor performer. What are some key legal points related to telework as an accommodation and exceptions to the policies?

JEANNE: The ADA can require telework as an accommodation if it is reasonable accommodation and due hardship. Even if the employer rule is ordinarily that no one is allowed to telework. Or the normal rule is people are allowed to telework, for example one or two days per week and the individual has a disability accommodation seeking full-time telework.

The ADA might require this full-time telework as an exception to the employer's ordinary policy. Or an accommodation to somebody with a disability. It can be required even if there is poor performance or where the situation is the employer has a rule that normally if performance is at a certain level, someone can be eligible for telework as a privilege. That rule does not apply or would have to be modified if someone needed accommodation of telework for a disability.

There are situations where the performance issue itself is going to make the telework not feasible as an accommodation or make it an undue hardship. For example, maybe because of the performance, the supervisor needs to provide in person review or instruction to the employee. Or the performance issue only occurs when the individual is teleworking but not when working on site. Those might make the accommodation of telework and undue hardship or not feasible for this employee.

Of course regardless of the work location telework or on site, an employer can and should be holding employees with disabilities to the same production and employment performance standards with the same measure as anyone else. That should be going on across-the-board. There is an EEOC publication link at the bottom of the slide about work at home or telework as a reasonable accommodation. It walks you through the basic analysis.

Some people asked before the webinar question that you emailed in. Now that employers or the federal government will be ending some of the COVID emergency declarations, how does that affect employers that have granted telework accommodations for people with underlying disabilities that put them at greater risk of severe illness if they contract COVID. It is really unrelated.

The accommodations in this case were not granted because of the emergency declaration. They were granted because of the employees training physicians’ assessment of the risk of that person given their underlying disability and the facts about the workplace set up in the transmission rates in the area, etc. The employer has reason to believe anything has changed about the person's underlying condition or about the risks to them in the workplace and the community, they can seek updated medical information to determine if the accommodation is still needed.

You would potentially violate the ADA by automatically resending COVID telework accommodations based upon the end of the government emergency declarations. It is really apples and oranges. The question for employers in the accommodation space is whether the employee still needs this accommodation or not. If so, does it continue to be feasible and not pose undue hardship?

MODERATOR: This is your time check. We are at 2:15 PM.

JEANNE: Thank you. I also want to note there is new accommodation requests that employer see when they do pull back or eliminate universal precautions such as required masking in the workplace because it will be in the absence of those precautions by others around them that some individuals with the now request an accommodation due to an underlying disability that puts them at higher risk of severe illness of or COVID.

For example somebody who is immunocompromised. This is truly a case-by-case assessment with respect to the previously granted telework and other accommodation requests. Also new ones received during that period. Just to get into the weeds a bit more about potentially relevant facts when sorting these telework accommodation requests is it feasible, what it pose undue hardship, what do you want to look at? First employer's ability to supervise the employees work adequately even with their tasks are.

Whatever they are performing remotely. Next, whether they perform any duties that require use of certain equipment or tools or materials that cannot be replicated or accessed at home. Whether there is a need for face-to-face interaction or coordination of the work with other employees that cannot be done through technology if the individual is teleworking.

Whether in person interaction with outside colleagues or clients or customers is necessary to the job. That can only be done on site. Finally, whether the position requires the employee to have immediate access to documents or other information located only in the workplace. You need to be there in order to perform the task. Some key takeaways, be sure managers and supervisors know they may have to make an exception to a usual rule to accommodate an individual with a disability.

This is probably the third or fourth time we have said this in this presentation. The reason of course is it is an easy thing to make a mistake about when you have an HR policy or other workplace rules that say due to XYZ, if it does not also say and remember, you might need to make an exception to it for an individual with a disability as an accommodation. Managers and supervisors might overlook that.

Be sure they know the principal. They might need to make an exception to the usual rule to accommodate an individual with a disability. Remember the employer has that discretion to choose an alternative of effective reasonable accommodation. That could include an alternative accommodation that would enable the person for example, to work on site. Instead of teleworking even if the employee’s preference is telework.

If you are not sure what the essential functions can be performed remotely, consider if it is helpful to implement telework as a trial or temporary accommodation at first to see. Again, hold everybody who is teleworking for any reason not just those for disability reasons to the same performance production and same measure of standards as you do everyone else. Tracie, let us talk about no animals’ policies.

TRACIE: This is a big topic and we hear a lot about at JAN. Common scenarios, you might have a supervisor who reflexively denies accommodation, because of a no animals rule. Without really thinking about whether or not a person might need an exception to the policy on the basis of the disability-related need.

They may have concerns about disruption in the work environment, having an animal in the workplace. They might make this decision because they are concerned about the impact on other individuals. If there is an animal in the workplace someone might have an allergy to it or even a phobia related to dogs, for example. Or they might be concerned about whether this means other employees will insist on bringing their animals to work.

Again, we come back to the idea that it is not okay to deny an accommodation on the basis of these types of concerns. The key legal point, no animals allowed is like any other workplace policy. You might need to modify the rule for the individual who needs the animal due to the disability. Absent any particular undue hardship.

Consider that, an employer cannot deny access for dog needed as an accommodation solely based on the idea that maybe other employees have issue with the animal or there could be allergies or they are afraid people just want to bring their pets to work. Because again apples and oranges when we are looking at pets versus service animals. What do you do in this type of situation? Explore accommodation solutions.

You do want to address individual needs. If your concern is on the basis that this type of accommodation might in some way affect others in the work environment, really kind of evaluate what the accommodation situation is. What is the need? What are the circumstances? What are the job duties? Is the ADA requires individualized assessment of accommodation needs. Explore accommodation solutions case by case, look at the circumstances, job duties, the environment.

It is possible that if you have a case where you are worried about employees coming into contact with each other, maybe there is a way to work around that. Can we look at different paths of travel, using different common areas, attending meetings remotely? Working from home is a solution as well. It is not the case that one person's needs are more important than the other persons.

Be sure you are doing the individualized assessment. JAN offers several resources related to processing accommodation request for service and support animals including accommodation ideas for the complex accommodation situations. We can talk for hours on these service animals or emotional support animal topic but we have limited time today.

Check out some resources that we offer on service animals in the workplace and service animals and allergies in the workplace as well. Let us move to another topic. Leave and attendance. We have a little bit of time to go ahead and hit a few more topics.

What are some common scenarios that present challenges around leave? It can be employee requests, maybe they are not eligible for FMLA or they have exhausted all of it. But they still need time. It may be for irrelevant disability or medical condition so Q the ADA in that scenario. Or disability-related absences are frequent or unplanned or unpredictable and maybe it is causing undue hardship concern.

We hear a lot about long-term leave needed for recuperation or treatment in the struggle of deciding what duration of leave is reasonable as ADA accommodation. What about indefinite leave request where a healthcare provider cannot say whether or when an employee is able to return to work. Or similarly those situations where the estimated date of return keeps getting extended. Now we have repeated extensions of leave.

We also hear about the scenarios where there is no communication from the employee when they are absent. Maybe because they do not follow the call off procedures or maybe we just do not know when they are expected to return from leave and they are not responding.

Of course employers have a multitude of state and local leave requirements but also need to be addressed or paid attention to when looking at leave and attendance scenarios. Jeanne Goldberg we can talk about leave and attendance for days but here are some key points.

JEANNE: Sure. The employer I am sorry the employee can be entitled to ADA leave even if they have exhausted FMLA boards not available to them because they have not employed for at least a year for example. But ADA leave is unpaid. You can consider the impact of any FMLA or other leave that has already been taken by the employee when determining whether this additional ADA unpaid leave as an accommodation that they need for further recuperation or treatment was pose undue hardship on the employer.

On the next slide or some key fact to keep in mind when assessing undue hardship. Length, frequency, unpredictability of the leave needed, does it pose significant difficulty or expense? The impact of the leave on the coworkers. Their ability to perform their work in a timely and appropriate manner. Impact on business operations overall.

The employer's ability to provide timely and effective customer service or accomplish other work objectives. Does that pose an undue hardship? EEOC has document on the bottom of the slide employer provided leave and the ADA. We have additional slides on leave that you can take a look at a section on the end of the PowerPoint on implementation challenges where you work with equipment and it has not come in.

Following the contact information, you will find a series of slides but linked to many publications from JAN or EEOC regarding the topics today. Are there any questions in the chat for our last five minutes?

MODERATOR: There are so many questions in the chat. Thank you Jeanne Goldberg and Tracie DeFritas for the information you have provided. Let us start. The first question is how do you legally handle a situation when you assigned remote work to an accommodation due to underlying illness and risk to COVID exposure? Then the accommodated employee post on social media that they are out in the community engaging in what appears to be risk-taking scenarios?

JEANNE: As with any other type of accommodation scenario the information comes to the employer's attention that there may not be the disability-related need that was represented to the employer for the accommodation requested or the need maybe no longer exists.

The employer could follow up with the employee and/or the train treating physician to explore that and determine whether the accommodation is needed or still needed.

MODERATOR: Thank you. The next question is from William. Is the employer based on medical documentation who determines the employee meets the definition of a person with a disability under the ADA, does this place the employer in the position of making a medical and/or legal decision?

JEANNE: Could you repeat the first part?

MODERATOR: Absolutely. Is it based on the medical documentation does the employer determine the employee meets the definition?

JEANNE: It is the employer that determine the back. Based on the medical facts provided by the doctor however the employer has to be correct if challenged. In other words what I mean is, if the employee contends EEO action. After the fact that accommodation was unlawfully denied. Let us say the employer wrongly concluded they do not have a disability within the meaning of the ADA the EEOC.

And a court would evaluate the medical facts provided by the doctor against the legal standard in the ADA to determine if the employee reached the right conclusion or not. In real time, the employer is not looking for a legal conclusion from the doctor they are looking for the medical facts for the employer to then assess based upon a legal definition.

MODERATOR: Thank you Jeanne. Next question is from Tatiana. Can somebody differentiate between an injury and a disability? Is the employer required to provide reasonable accommodation for temporary illness or injury?

JEANNE: Remember I said duration is only one factor. A disability might be caused by injury or by illness. The question is whether the impairment, the physical or mental impairment that the individual has is substantially limiting and a major letter bodily function or major life activity. That can be the result of an injury or illness.

 The fact that something is not long-term or permanent, it is irrelevant. Duration is only one factor. We look at the limitations and whether they are substantial. As mentioned during the presentation, I think three Courts of Appeals decisions over the past few years instructing lower courts that they made an error when they concluded that automatically temporary or short-term impairments that last two or three months could never be disabilities under ADA.

The courts look at all the facts and duration is just one relevant fact. You must look at whether the limitation that is experienced is substantial, applying all the rules we discussed. Remember disregarding mitigating measures, etc. Do not be thrown off I suppose by terms like temporary, short-term, or long-term. Instead, look at the actual limitations and duration as one factor.

MODERATOR: Thank you for the response the next question is regarding medical documentation, I have had employer state they will not grant an accommodation if it is not clearly or specifically outlined in the providers or medical documentation. For an employee that does not have an obvious disability.

Example, employee requests their own microwave in their cubicle area to avoid cross-contamination. Some would say that if they provide or if the doctor does not specifically state this in the ADA documentation or medical letter, they are not obligated to grant this as being a provider did not recommend. Your thoughts?

JEANNE: I think if there is reasonable question by the employer about whether there is disability-related need or a specific or additional accommodation being requested by the employer I am sorry employee, the employer may get additional information.

It sounds like from what you are describing, the provider or doctor describe various accommodations or in more general terms the employee had a specific thing the requested that the employer said, that is not mentioned in the medical documentation.

I guess if the employee thinks if it is covered by the medical documentation, which is a situation where it is unclear and if I were the employer seek to clarify with the physician as part of what the disability-related needs are and whether there are alternatives that would be effective, etc. as part of an interactive process. Tracie?

TRACIE: From a practical standpoint let me add keep in mind a medical provider may suggest accommodation and in that instance is about identifying whether there is a possibility of cross-contamination and how that would impact the individual.

Having a microwave is one solution to address the problem. Just because they do not particularly recommend it, does not mean it cannot be a solution that is entertained. The provider does not have to be the only one to recommend specific solutions. Keep that in mind.

MODERATOR: Awesome. Thank you so much to both of you form your time. We have more questions that we have time for. To each individual that has presented questions, these questions will be sent to our presenters and we will share their answers with all attendees.

The next training session entitled Digital Accessibility Initiatives and Legal Landscape will begin at 3 PM Eastern standard time. Again, thank you Jeanne Goldberg and Tracie DeFritas for your information and the wealth of knowledge you have shared this afternoon. Everybody have a great afternoon and we will see you again at 3 PM.

Session ended.

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