# JAN Monthly Webcast Series – May 2021. Q&A with the Cog/Psych Team: Challenging Mental Health Scenarios

## [Introduction]

**LINDA BATISTE:**

Hello everyone, and thank you for joining us today for our monthly JAN Training Series. My name is Linda Batiste, and I'll be your moderator. Today's event is "The Impact of COVID-19 on Mental Health Accommodations" and will be presented by Melanie Whetzel, who is the Lead Consultant on JAN's Cognitive/Neurological Team, and James Potts, a Senior Consultant on the same team.

Before we begin, we have just a few housekeeping items to go over. First, if you experience technical difficulties during the training, please use the question and answer option at the bottom of your screen or use the live chat option at AskJAN.org. Second, questions may be submitted during the training by using the question-and-answer chat located at the bottom of your screen. Questions will be gathered into a queue, so don't worry if you see that your question was deleted or dismissed.

To access the PowerPoint slides, use the link included in the chat or download them from the webcast archive on AskJAN.org. To access captioning, use the closed captioning option at the bottom of the webcast window. A copy of the transcript will be provided with the archived webcast, and this training is being recorded and will be available on the AskJAN.org website.

And finally, at the end of the training, an evaluation will automatically pop up on your screen in another window.

We really appreciate your feedback. So please stay logged on to complete the evaluation.

And now let's get started with our training. Melanie, I'll turn it over to you.

**MELANIE WHETZEL:**

Okay. Thanks, Linda.

And we're going to just go over the agenda here.

We have divided this webcast into -- or this session into areas where we've received the most inquiries, and we invite you to submit questions in these and other areas. We'll be answering questions at the end of each section related to that topic.

Those topics are masks, performance and conduct, telework, service animals, and then we have some additional examples, and then we'll hold all other or general questions until we get to the end.

We hope you can learn much during this next hour. Thank you for joining us.

And now I'm going to turn it over to James.

## [Masks]

**JAMES POTTS:**

Okay, thanks, Melanie. Thanks, Linda. Thanks everybody for tuning in today.

We're going to start talking about some disability situations and accommodations related to masks.

So many individuals are reaching out because of their inability to wear a mask. One of the more frequent reasons consumers have been stating, at least to me, is claustrophobia.

Now my first round of accommodation ideas is always is there a face covering that this individual can wear and is going to be effective?

For individuals who are claustrophobic unfortunately there's usually no ability to wear a face covering of any kind. So just some quick reasonable accommodation ideas there would be spacing, physical spacing; restructuring of either times, arrival start times; or restructuring of physical equipment within the environment, putting Plexiglas barriers up, or even work-from-home options.

Then we have other disability types. Let's think about anxiety or PTSD. These individuals can sometimes wear facial coverings either for short durations or maybe non-traditional or the non-cloth face masks. We're thinking a face shield or a gaiter. If they can wear a face mask in high-traffic or communal areas as they are going to a private area or office, that could be enough. Also, allowing more frequent breaks to take off masks could be a type of solution.

And then we have individuals with sensory difficulties. Even migraines. Some ideas that have been tossed around are threads that tie around a person's head instead of an elastic band. Typically it's the snugness that's an issue. Also they make face shields that wrap around the neck instead of across the head, again taking that snugness issue away.

If no coverings are possible, then we're kind of going back to that initial, what other options or ideas are there?

Let's talk about Kara.

Kara is a sales representative at a high-end boutique, and she's requested to wear a face shield, a face mask, and additional PPE such as a gown and gloves while performing her customer service duties. Now I included this example really to illustrate how far we've come through all of this pandemic stuff. Here we have Kara as an individual with a mental health condition, and she is requesting as much PPE or Personal Protective Equipment as possible to protect herself. More recently, you know, we're hearing a lot about individuals not being able to wear masks or PPE. But this is just the opposite.

Unfortunately for Kara, her employer pushed back hard on this request. The business had multiple complaints from customers that the PPE made them feel unsafe. It was like Kara was already sick or that the building was contaminated or something like that. And this was at the very beginning of the shutdown. So there wasn't much guidance about mask-wearing.

Here the employer did take that hard stance that this wearing of PPE impacted their business negatively. It was, you know, a small customer clientele that did most of the buying there. So if you lose customers, they felt it would negatively impact them. The employer denied the use of the mask, the shield, and the gown, you know. They did allow for the gloves but that wasn't effective for Kara.

We talked about modifying schedules. Maybe even working when less customers may be present. But ultimately, in this situation, leave was the only solution that would meet both party's needs.

What about Shelly? Shelly's PTSD did not impact her from performing the essential functions of her job prior to the pandemic. However, since her employer mandated that everyone must wear masks in the building, she has called off and exhausted all of her leave benefits. Now Shelly offered to wear a face shield, which didn't impact her negatively, but her employer refused.

So here we have another situation where the specific PPE being requested was denied. In this situation, the employer said they were following CDC guidelines and that a face shield alone may not be enough to deter the spread of COVID. However, the employer didn't -- wasn't really considering any alternatives at this point.

So when we talked to Shelly, again, we went back to modified schedules. Could it be break times so you minimize your physical interaction with others? Could you arrive slightly later or leave slightly earlier to minimize those interactions?

Now here telework was also thrown out, but it wasn't possible full time, so it was kind of a joint accommodation. They offset schedules to allow them that flexibility with breaks and arrival times, but they also allowed telework to do the duties that could be done alternatively.

Here the employer did stand fast that no shield would be allowed, but they only forced a face mask when around others.

Melanie, I'll put it back to you.

**MELANIE WHETZEL:**

Okay, thanks, James.

In this example we have Wren, who had concerns when her husband, who had been exempt from wearing a mask at work, was suddenly required to when policies and mandates changed. Her husband had medical documentation stating that he was unable to work while wearing a mask. His supervisor had called him on a Sunday evening when the state and local mandate changed requiring masks.

And you remember it was changing very rapidly back in the beginning. Things were changing rapidly. We weren't sure always what was going on.

And the supervisor suggested that the employee, the husband, stay home the following morning so that they could get things worked out If a mask was required and he couldn't work with a mask, he couldn't come in the building. So the supervisor was saying, "Hey, let's work it out, and you just stay home in the morning until we get it worked out."

Wren called JAN wanting information on how to file a complaint. She felt her husband was being discriminated against. She felt because he had medical documentation that stated he didn't have to wear a mask at work that he was covered.

Consultants at JAN can certainly give out information about who somebody contacts when they feel they have been discriminated against, but we can also talk to them and help them see the situation and what may be going on.

You know, medical documentation is good. That's how employers base their accommodation decisions on. But medical documentation doesn't mandate to the employer what the employer has to do. There are lots of things that go into that.

So the employer was -- She said the employer was talking about different things like looking at distancing, putting up Plexiglas. The employee was not able to work from home, but they were willing to look at different ideas. And she was just set on no, that nothing is going to work unless he can go to work without a mask. And so we can talk to employees and help them understand. Maybe not dig your heels in. You want to work with your employer, as best you can. Especially in these situations like this when things are changing rapidly.

Okay. I think now we're going to questions.

**LINDA BATISTE:**

Great, we have a couple of questions. I'll start with this one.

We have an employee who says he can't wear a mask because he has anxiety and panic that he developed during the pandemic. But he hasn't been to a doctor yet. Are we allowed to just take his word for it? Or do we have to get a doctor's note?

Great question.

**JAMES POTTS:**

Yeah, I can take that one. Absolutely.

An employer is entitled to sufficient documentation when an employee requests an accommodation and when that disability and need for accommodation are not obvious. So they are within their rights, but they are not required. You can just have a conversation with your employee. Especially during the pandemic, it's just harder to get to medical appointments or to see a doctor. So, you know, being flexible and temporarily accommodating individuals until they can even get documentation is certainly a work-around.

**LINDA BATISTE:**

All right. Great.

And this one follows up on one of your examples, James, about somebody with sensory issues like migraines. They want to know what happens when you have an employee who has sensory issues and wearing a mask causes them to overload. They get irritable. They might even have behavioral issues. What do you do in that kind of situation?

**JAMES POTTS:**

Well, I still think I would start with that question is there any type of face covering that is effective for them? Can they wear a gaiter if it's not as compressing? Can they wear these face coverings for short durations of time?

An employer is probably going to require some sort of PPE when around others. You know, there's a safety component there. But what about putting this person in situations where they don't have that -- they don't have the mask on or they can have it as -- the least amount of time as possible. Whether that's providing a private work space to take off their mask, allowing them to take breaks, maybe lesser in duration but more frequently to take off the mask.

Even if they do start to feel their anxieties or frustrations boiling over the ability to call somebody and maybe have some de-escalation or practice some stress management to help with their situations, too.

**LINDA BATISTE:**

All right. Great. We have several other questions, but I want to ask this question to follow up on the discussion that we had about getting medical documentation.

This individual said that they have an employee who does not want to wear a mask, and they do require medical documentation for accommodations. He doesn't go to the doctors and doesn't believe in modern medicine. The school is complaining because he isn't wearing a mask. So they are basically asking, "Do we have to allow this?" "Should we allow it?" So if you could just clarify that one more time, James, about whether they have to allow it or whether they can insist on medical documentation. I think it's a really important point.

**JAMES POTTS:**

Sure, and I would point back to some of the most recent EEOC guidance on that. It does state that employers are within their rights to require individuals to wear PPE or Personal Protective Equipment right now.

If there are accommodations that could meet everybody's needs, they need to be explored, but then I also have to push back that employers are within their rights to that sufficient documentation. Technically, if an employer is requiring sufficient documentation and is not provided that information or documentation, they can deny the request.

So you know, we would hope that maybe informally they can work around it, but by the letter it states you can deny an accommodation if you don't have enough information to make that informed decision.

Does that help at all?

**LINDA BATISTE:**

Yeah that's perfect, thank you.

**JAMES POTTS:**

Great.

**LINDA BATISTE:**

Why don't we go ahead and move on to the next topic.

We do have a lot of questions. Hopefully we can get to those at the end.

## [Performance and conduct]

**MELANIE WHETZEL:**

Okay. Our next topic here is performance and conduct. And under the ADA, employers can hold all employees to the same standards of performance and conduct, but they would need to consider accommodations to help employees with disabilities meet those standards. Employers do not have to excuse an employee from performing essential job functions as an accommodation but can do so if they choose.

And we know that during the pandemic, some employers relaxed those standards as employees were sent home to work. Many of them could not perform the essential functions of a job. And just because an employer excused them for a time during the pandemic doesn't mean that the essential job duties were permanently changed.

Let's look at our examples here to illustrate these issues.

We're going to go back to James.

**JAMES POTTS:**

Okay. So here we have Olivia, and she was well known for her professional tone and superior work performance. Now, over the last several months, her supervisor has noticed concerning language during Zoom Meetings and that some assignments are being turned in late.

Each time the supervisor did reach out just saying, "Hey, Olivia. Can we help?" but she responded she was just adjusting to new work from home, and it would take some time. After the most recent incident resulted in a written warning, she did disclose her mental health condition had worsened from working at home, feelings of isolation, and asked for some help.

So according to the guidance, again employers can hold all employees to universally applied performance and conduct standards. Olivia's supervisor was absolutely fantastic in offering help when the situation arose. But ultimately the employee does have to accept help and engage in the Interactive Process for any changes to potentially occur.

Here we are thankful -- the progressive discipline in the situation, it didn't warrant termination. So Olivia and her employer worked toward some solutions. Here since Olivia felt isolated, she was reminded about employer-provided EAP services, Employee Assistance Program. Additionally her supervisor asked if weekly Zoom Meetings with the team or just the supervisor could be helpful.

Olivia was willing to try, so they started having one-on-ones weekly just about expectations and general check-ins. Also, when possible, group work was explored between the team. And Olivia was always encouraged to participate when she wanted.

Let's do another one.

Jay's employer referred him to Employee Assistance Program after a brief discussion about his performance and conduct. Jay was relieved. He was expecting to be terminated.

So I don't know about you, Melanie, but I have certainly seen an uptick in alcohol and substance abuse questions over the past year.

**MELANIE WHETZEL:**

Uh-huh.

**JAMES POTTS:**

Yeah, what's been interesting or encouraging, hopeful, whatever you want to use is that a lot of my employer calls related to addiction, they're not wanting to start from a disciplinary standpoint. Really I'm getting a lot of calls about, "Hey, we're seeing some issues here. We don't know what's going on. What can we do to help?" And like I said, some employers, they are just merely suspecting. They see a conduct issue. They see a performance issue. And they want to know, like, "What can we do?" Other employers have a specific disclosure from the employee and are proactively seeking ways to help. They are calling in to say, "What questions can we ask? Is this too much?"

Most accommodation solutions come down to leave for treatment, but also some schedule flexibility for appointments can be helpful. There's even talk within the EEOC guidance about last chance agreements, so really trying to even go a step above and beyond the ADA requirements to help individuals with addiction issues.

Again, with all of that said, employers can still hold employees to universally applied performance standards. While it's great hearing this approach from employers, "Hey, we know these issues. We want to let you know about EAP. What can we do to help?" That's great. But there's still that second component which is without improvement action may be necessary and that sometimes does lead to a separation or progressive discipline.

So it goes both ways, and I have to tell employees and employers that. An employer is obligated to help when they can, but the employee is also required to do their job.

So, okay, what about if there are no performance issues?

Logan is a top sales performer, but he reached out and asked for 30 days of leave due to a medical situation. He disclosed an addiction problem that's significantly increased since working from home.

The employer was perplexed. They saw no problems and asked if this request was required as an accommodation.

JAN's answer is yes. The leave is for a disability reason. Think about it. The overall objective of this leave is to prevent a further relapse or to minimize the potential negative impact that this relapse has on their performance and personal health moving forward. Another way to think about this is let's think if Logan didn't receive the leave. If the employer denied the 30 days of leave maybe the behavior and the performance does worsen. The performance would suffer to the point of discipline potentially.

So they can't -- an employer cannot deny an accommodation request solely based on, "Oh, you don't have a performance issue." They still have to look at “Is this a disability need? Is it going to enable you to perform your job long-term?”

Melanie, I think we're going back to you.

**MELANIE WHETZEL:**

Okay. Now it's time for questions.

I was going to add to what James said there, if he was a top performer and had no issues while he was having addiction problems, then I would say he's a valued employee. And employers really want to try to help employees who are valuable, help them out as they can so they don't lose them.

**JAMES POTTS:**

Absolutely. And it kind of goes with disability or invisible disabilities, too. In general a lot of times you just don't see the struggle going on behind closed doors.

**MELANIE WHETZEL:**

Exactly.

**JAMES POTTS:**

And some people can fake it until they make it really well. It took a lot for this individual to actually reach out and ask for that help. And to feel like they are kind of not entitled to it could be rough, so I'm glad that was able to get worked out in that situation.

**MELANIE WHETZEL:**

Okay, Linda. Do we have any questions on performance and conduct?

**LINDA BATISTE:**

We do.

The first one is about something James said about EAPs, and I think this employer wants to know how do you promote programs like EAP if the employer doesn't have that kind of program? What do you do if you don't offer that? What other options can you do to try to help an employee?

**JAMES POTTS:**

It can always be more broadly like, "Hey, there's potential community resources." But you can't really force an employee or kind of guide them to a specific type of treatment or anything like that. I would think it would be more that "Hey, what can we do internally in the workplace to potentially help?" You know, do you need to communicate in a different way? Do you need to have a mentor or a support person or the ability to reach out to a support person in those situations?

**MELANIE WHETZEL:**

And I think you could talk, too, about some flexibility in scheduling if the person wanted to go to any kind of treatment, therapy or anything like that.

**JAMES POTTS:**

Uh-huh.

**LINDA BATISTE:**

Okay.

Next question is an employer has an employee who has been approved for attendance issues, to have some absences, but now has exceeded what was approved. And the employer feels that regular predictable attendance is essential for the job in a call center.

The employee doesn't know of any other accommodations that would help except being able to take the leave whenever needed, is missing a lot of work. So the employer wants to know if there's no other accommodation the employee or the medical doctors can identify that would help the employee on their job. What other actions should be taken before disciplinary action? Or maybe even termination.

**MELANIE WHETZEL:**

Well, I can take that one. I think, you know, can they look at any other type of position? Is reassignment possible? If there's no possible accommodation that can help get the employee to work or staying at work, to be at work more frequently, and the job requires that they be there, can they look at a reassignment? Is it possible for the employee to work from home in any kind of capacity?

You know, I think during the pandemic a lot of employers found that "Hey, we can allow employees to work from home. And they can be highly productive where we didn't think they could." Is that a possibility?

Under the ADA there's what's called a modified workplace policy that says they can change a policy for someone with a disability they don't change for others. They could allow someone to telework that has a disability if that were to be effective.

I don't know in that case if it were. But that's something to think about. Reassignment to another position. Sometimes people aren't qualified for other positions that might be open. But that's certainly something for the employer to consider and document, because they want to make sure they've made a good faith effort to accommodate before they would start disciplinary action.

**LINDA BATISTE:**

Okay. And we have one more. We got a couple of questions very similar to this one. But let me just throw this one out there, and then we'll move on to the next topic.

I'm a healthcare provider, and one of my clients didn't know he could request accommodations while working from home, and it resulted in performance discipline. If he discloses and asks for accommodations now, can he ask that the performance issue be removed? From his record, I assume.

**JAMES POTTS:**

Okay. He can ask. I mean I would certainly say that that is a negotiation point or a talking point to say, "Hey, I did not know that this was an option. And, you know, let's -- let me prove to you that with an effective accommodation, these performance or conduct issues would have never happened. Why penalize me for it?"

But as I stated in the conduct component, they don't -- the employer does not necessarily have to do that. An employer does not have to go back and forgive performance before disclosure happened and a request for help happened or occurred. So while I certainly think that that should be talked through, and if I was talking to the employer, I would kind of come from that perspective. Because you know ultimately if the performance -- the negative or poor performance continues, then that's what you're going to be basing this off of. So if the accommodation doesn't work, and three months down the line the same performance issue is going on, you're still going to be able to take action on that.

So again, if there's the ability to be flexible, practical advice would be, maybe even pause that discipline and come back to it later. But the employer would not be obligated to do so in that specific situation.

**LINDA BATISTE:**

Okay. Great. And why don't we move on to the next topic then.

**JAMES POTTS:**

Okay.

## [Telework]

**MELANIE WHETZEL:**

Okay. All right, the next topic here is telework. Telework is one of the biggest accommodation issues I think we've seen since March of 2020. That's roughly about, you know, 14 months ago. Many people began teleworking who had never done so before. Many were able to do their full jobs. Many were not. Plenty of employees thrived from home, working from home. They were successful. They were highly productive. And then plenty of others were not. And they struggled with productivity and isolation. And you'll see from several of our examples how that works out. The first example is going back to James there.

**JAMES POTTS:**

Sure. So here we have Anne. Anne requested to work from home before COVID shutdown started in the U.S., but during the Interactive Process her employer voiced concerns that she would be unable to perform all of the essential functions from home. This resulted in a conversation pivoting back to accommodations of workplace. Basically Anne just dropped it. However, like Melanie was saying, during the pandemic, Anne's entire workplace shifted to work from home, and it was determined that she and the team in general have been successful in that capacity.

Now that same employer of course is wanting all employees to return to the workplace. Anne called us and wants to know if her employer can deny the request for accommodation to work from home permanently. She feels the time everyone spent working from home proves that this is a feasible request, and she still needs the solution to help with her limitations and is willing to provide documentation to prove that point.

Luckily for us -- meaning me and my JAN colleagues – EEOC has addressed this question in their guidance documents, so we could point Anne to some readily available information. Specifically, although employers do not have to automatically grant the accommodation request, all of that context of teleworking being successful and looking at Anne's disability needs is going to be crucial in determining if this accommodation is feasible moving forward.

Luckily for Anne it was. Her employer had no specific business reason to deny the accommodation. So they didn't force her to return to the office.

And I'll pass it back to Melanie.

**MELANIE WHETZEL:**

Okay. And here we have an example, J.T. J.T. never realized how beneficial working from home was on her mental health. Now her employer is requiring her to return to the office. What are her options? J.T. has thrived since her office went fully virtual at the beginning of the pandemic. Now the employer is determined that all employees must return to the office.

J.T. had never considered requesting reasonable accommodation of working from home for her general anxiety and social anxiety disorders. She just tried her best to push on. However, now that she has glowing reviews from her supervisor, she feels that telework is a valid option for her, and she reaches out to request that as an accommodation.

And what I think is so interesting in this example is, until she was working from home, she never realized how much energy it took from her for the social aspects of the job. Once she's working from home, she didn't have to expend that energy on the social aspects of her job so she could be more productive, plus she wasn't exhausted and worn out at the end of the day from all the work things and could have a better balance in her life. And because her performance was amazing, her supervisor was totally for her continuing to work from home because all of her work could be done from home. She requested that. She went through a long and drawn-out process. And her employer did finally agree, I believe, to a six-month extension on the telework and then to review that at that six-month period to see if that was still an option.

But I think it's a good example to show that until someone is at home, they may not really realize how much effort it is to work in the workplace. And how much energy they save from teleworking. You know, I mean, we heard stories, too, about commutes. The commute is such a struggle. And then by the time we get to work, we're just worn out, because we've had this stressful business before we even got to work. Where telework, you know, can eliminate that.

Okay. Next example there. Okay. And I want you to pay close attention to the next two examples. They are very similar, but they have very different accommodation needs.

So in this first one we have JoJo, who is an employee with depression, disclosed to her employer that she was feeling isolated at home, which was causing a flare-up of her condition. She asked for more interaction with her supervisor and her co-workers. And you know when employees are no longer in face-to-face environments with their employers, extra steps might need to be taken to ensure that the communication remains open and thorough, and it helps employees feel more connected and stay informed of the business. Where before the employers could just walk down the hall and maybe say hi to people and check on them, now it requires a much more intentional effort.

Many employers have added phone calls to their schedules so that they can keep in touch and check in with their employees. And some have -- are using video platforms to schedule meetings where employees can get together with their co-workers. And while some employees -- there's a survey -- we attended a conference where there was a survey that stated how many employees were thriving from working at home. They were not missing the social interactions of work. But there are a lot of others who experience isolation and really benefit from that scheduled contact.

And so it's really important for employers to ask, "Hey, what is it that we can do to help you with the communication, help you feel more a part of things?" You know, because people communicate in different ways, and people have different needs. And so I think asking the employee specifically, "What is it you need? How can we help?" can be a great way to get that started. Because you want to keep your employees engaged and informed and performing to their greatest ability.

Okay. Next slide.

So in this one, it's very similar. Here is Ari. He's an employee with depression. He disclosed to his employer that he was feeling isolated at home, which was causing a flare-up of his condition, but he asked to return to the office. And the employer was just a little nervous about that, and they just said, "No, we're not going to do that. You kind of stick it out. The pandemic is not going to last forever. You know, it will get better." And they found that his performance really plummeted, and they had difficulty getting a response from him, and so they kind of got into high gear and sent him information about the Interactive Process and asked him to participate immediately. And the employer determined how they could accommodate Ari, by increasing safety measures that would allow him to return to the workplace as quickly and as safely as possible. And maybe not on a full-time basis. You know, a lot of employers are using like a hybrid kind of a model where some people are working at home while some are in the office, and they are switching back and forth. So they have the least amount of people in the office so they can have more social distancing, and it can be safer.

But you know, as you can see for these two employees, they had similar

conditions, were feeling very isolated, but needed two different solutions.

Okay. Back to James.

**JAMES POTTS:**

All right. Thanks, Melanie.

So I have Gia, and Gia was sent home to work during the pandemic. Now, she was unable to perform her essential functions, but the employer in general modified duties of lots of employees to help everyone just stay employed, keep getting paychecks. So this agreement was not open-ended, and eventually she and all her co-workers were called back into the office. Gia demanded to remain at home due to anxiety of contracting the virus. It seems that had been an effective accommodation for others, and she preferred to stay at home or preferred her work from home.

Unfortunately -- and, you know, kind of a theme for me -- going back to the specific EEOC guidance. Even if an employer temporarily modified duties -- I'm specifically talking about removing essential functions, which is never required under the ADA, but an employer can if they want. It's just not required long-term. So the employer is obligated to explore accommodations that could help Gia return to the workplace and be successful in the workplace. And here it was additional PPE. Additional PPE was provided. And Gia also took it upon herself to reduce her schedule from full time to part time. This helped limit the anxiety from being out in the world and potentially contracting COVID.

As you will see, this is not a perfect solution for either party. But they both worked towards a solution that was doable for the both. And in the interim it's what is available.

All right, Linda, I guess I'm throwing it back to you for questions.

**LINDA BATISTE:**

All right, great, and we have a lot of them. We'll just do a few right now.

How should you handle employees who are concerned about returning to the office because they know some of their co-workers are refusing to be vaccinated?

**MELANIE WHETZEL:**

Well, I'll take this one.

I think it goes to each individual person, how can the employer make them feel safe? You know, if -- sometimes employers feel, "Hey, we have done all we can, and it's as safe as it can be." And that may be true. But I think talking to individuals, "How can we help you?" "What can we do to make you feel safer?" And working things out individually might be helpful. Because everyone I think has the same concerns about getting COVID. But maybe not the same issues or the same fears in how we're going to contract that. So looking at distancing. Looking at fewer people in the office at times. Flexing those schedules. Allowing somebody to be in there as little time as possible. If that's possible. Teleworking. Coming back to the office. I think looking individually at each person and what's going to help them to feel safe.

**LINDA BATISTE:**

All right. Great.

This one says we have a manager who was granted an accommodation to work from home only through December of 2020. And that was based on the doctor's recommendation. However, the employee has refused to return to work since that time, and the doctor has not provided any updated documentation to extend her absence. What can we do? Can we require her to return or terminate her employment? What should the employer do in this kind of situation?

**JAMES POTTS:**

I think the employer can certainly be clear that, you know, as of right now, they don't have documentation supporting the request. And that giving the employee, "Hey, you still have this opportunity to either support yourself or this accommodation is not approved. And what can we do to help you get back into the office and be safe?"

Again if an employee does not provide that documentation, an employer can technically deny the request. And if they deny the request and this individual is basically violating conduct at that point, you know, they are not doing what the employer is requesting. And progressive discipline could take hold. I would also take a step back and look at "Is this employee successfully performing their role right now? Are they effectively doing all of the essential functions of a manager?" It has been proven in the past that this accommodation is needed. Can you offer some flexibility? Is this feasible moving forward? Or are you just getting hung up on not having the documentation part of it?

**LINDA BATISTE:**

All right. Great.

I'm going to combine a few of the questions that we got that kind of have a similar theme. Issues about calling employees back to work and then getting all of these telework requests all at once. How to sort out what to do. And what if we can't -- what if we can't provide telework to everybody without a hardship? What do we do? Do we still get to choose among effective accommodations? Just questions about sorting those things out when you call people back, and all of a sudden you have all of these accommodation requests.

**MELANIE WHETZEL:**

Yeah, I can take that one.

I think first of all, you would want to allow as many people as possible to telework as possible while you're going through that process so that there's no disruption in the work. Those who can have successfully been able to telework and haven't had any of their essential functions removed, those might be the ones you might wait until later to look at, because they can fully do their jobs. If there are others who haven't been able to fully do their jobs, you have reduced or removed essential functions from them, those would be the ones you might want to look at first and how can you work that out with each individual person.

I don't think we can say it enough. EEOC once said in a training I remember: So clearly is the employer should really try to have a full conversation with the employee and find out what's up. "How can we get you back?" "What can we do?" "How do we help you feel safe?" "How do we help you get back to work?" Because if they need to be in the workplace to perform the essential functions and they can, then they are -- they can't then they are really not qualified for that job. So they need to understand "You do need to come back. Here is how we'll help you. Let's have that conversation."

**JAMES POTTS:**

All great points. I would piggyback on the one thing that I heard there, Linda, which is also can employers choose among effective solutions? And that's still absolutely true.

So if an employer's preference is -- an employee's preference is to work from home, but an employer can provide effective solutions in the workplace, they can decide, "Hey we want you in the workplace." So yes, an employee's choice should always be considered obviously. But at the end of the day, employers still have that right.

**LINDA BATISTE:**

All right. Great, and I said that was the last one, but I want to squeeze one more in here, because we got several questions related to sorting out how to deal with requests when employees are expressing fear of getting the virus.

Several people wrote in and said that a lot of their requests to telework are based on fear of getting the virus, and employers are asking, "What do we do with that?" How do we proceed when that's the only thing the employee said is that "I'm afraid to come back to work."

**JAMES POTTS:**

Well, I don't know about you, Melanie, but I'm not quite sure if just fear rises the level of an ADA-covered disability.

**MELANIE WHETZEL:**

Yeah, that's what I was going to say.

**JAMES POTTS:**

So I think that seeking clarification on that, do they have an anxiety disorder? Do they have some sort of phobia or something along those lines that entitles them to those sorts of accommodations? Then they can move forward in the process. I think in general -- and I guess I hate to assume. But I think a lot of the world would prefer to telework in this sort of environment right now. But it's always under the ADA as an accommodation, is it truly needed for a disability?

**LINDA BATISTE:**

All right. Great.

And let's go ahead and move on to the next topic. We want to get them all in here.

## [Service Animals]

**JAMES POTTS:**

Okay that's me again, so service animals.

I'll try to keep this brief, but I'll give you the spiel about service animals. There is no definition of service animal or any animal, so we're thinking emotional support or therapy, within Title I of the ADA. And that's employment provisions, reasonable accommodations, undue hardship. The stuff we're talking about today. There is a definition in Titles II and III, and I think that's what most people are familiar with. That's the "What two questions?" and in public settings, but again we're talking about employment reasonable accommodations.

So really bringing in a service animal can be processed like any other accommodation request. I was just saying, “Does the employee meet the ADA definition of disability? And is the animal in this situation needed to enable the employee to do the job?” Sometimes it comes down to "no pets or animals in the workplace" policy. But really, long story short, an employer is entitled to go through the Interactive Process when an employee requests to bring an animal to work. So that is you know if the disability need for -- disability and need for accommodation are not obvious, providing sufficient documentation to prove that need.

I just kind of like to throw this out there that here at JAN we're advocates of trial periods. This allows an employee a chance to prove their animal is well trained and necessary to meet their needs in the environment. If the animal acts correctly I always say to an employer, "Why do you care moving forward? If nobody even knows the animal is there, it's supported by documentation. What's the hangup?" If that animal acts out within the first 20 minutes, seeks attention from co-workers or has an accident, well then it's pretty good proof that animal is not appropriate. They certainly showed good faith by attempting the solution in the first place.

Let me get to an example.

John is a long-haul trucker with generalized anxiety disorder. He never needed accommodations previously and was always able to manage his condition independently. The pandemic has worsened John's anxiety to heights he has never experienced. He is requesting to bring his emotional support animal on the road with him. So again, emotional support animal, animal, it's still a request to bring some sort of animal into the workplace. It's tough to request a demonstration or trial period when the employee is always going to be on their own here. I remember asking this employer specifically what their concerns are. They seem to be worried about what happens if the animal gets hurt in the accident? We recommended they talk to insurance providers to see if any risk or liability would be on the employer in that situation. Then we also just kind of talked practically. An animal being in the cabin of the truck, taking breaks to use the bathroom, and that, you know, just in general, people take their animals in their cars every day.

Okay, Melanie, back to you.

**MELANIE WHETZEL:**

Okay. In this example we have Randi. Randi asked to bring her newly acquired emotional support animal to work with her after returning from leave. She was recently diagnosed with PTSD after the death of both of her parents she was caring for from COVID. Her employer offered telework instead and left it at that. So Randi asked if they could engage in the Interactive Process so she could explain to her employer that she needed to be in the workplace, even with limited contact with her co-workers, to help her recover. Working from home provided too much isolation from others, And she really needed that encouragement and contact with other people.

And so again, employers are encouraged to have a full conversation with their employees to see what's best for each one. And if there's no reason that having – like James said -- there's no reason not to have the support animal in the workplace, then go ahead and try that and see what happens. They can ask if the dog is trained, find out how the dog is going to behave, and trained for that environment where she worked, and then go for the trial period and see instead of just offering what the employer thinks is going to work and leaving it at that.

All right. Back to James.

**JAMES POTTS:**

Okay. So Victor relies on his service animal for both mobility and mental health issues in the workplace. Unfortunately his service animal has required surgery, but it keeps getting delayed because of COVID complications. Victor indicated that there are no alternatives to utilizing his service animal. The employer looked into the situation, determined that he was ineligible for FMLA, but emailed JAN to discuss if there were any options under the ADA. So you know, one could look at Victor's service animal as a tool. Let's think of it like a wheelchair. Would an employer force an employee to come to work if their power wheelchair was broken? Probably not. Or at least the end result would be the same: The employee probably wouldn't be able to make it in.

So here this leave would be necessitated by the disability or a component of it. JAN did try to talk about telework options. Here both the employer and employee agreed that telework just wasn't feasible, it wasn't doable. So leave was provided until the animal was able to have the surgery and recovered enough to be back into the office.

Tom -- Tom requested to bring his service animal to the job site before everyone went to telework full time. He has repeatedly asked for updates on his accommodation request and wants to have an agreement in place before the office decides everyone can return. His employer has responded it is not the most pressing business decision at this time but that they will provide Tom a response before everybody needs to return. Tom feels that his employer is not acting expeditiously. Tom's employer feels that the employee is currently accommodated because he has the service animal at home and feels that by giving them the answer that “You'll have a response before we force you back or require you back in the office,” that they are within their rights to kind of shelve the discussion.

Oh, boy. So let's think practically. You know, in this situation, specifically, I try to think of is anybody being penalized? You know, is there any punitive action going on? And then what is there to gain if Tom decided to pursue their employer further? He's gotten a response. It's not like the employer is just, you know, not -- blowing him off or anything like that. I totally can get the perspective of wanting accommodations put into place, and guidance does say employers should move expeditiously.

But again, is there a valid business reason the employer is taking care of other matters? I certainly think that telling the employee their concern is not the most pressing could have been worded differently or more professionally. But this is really kind of one of those situations JAN couldn't give a specific answer or point to specific guidance. We really just tried to talk to everyone practically. Take a step back from the situation. Here, since neither side was really hurt in this process, everyone decided to be patient and wait. Tom had his service animal for now. The employer promised to give a response. It kind of just worked out.

And I think I'm throwing it back to Linda.

**LINDA BATISTE:**

Great, all right. Let's do a couple of questions here. Let's see.

What if an animal causes allergic reactions or phobias towards others in the office? Won't this cause a chain reaction of ADA requests?

**JAMES POTTS:**

Potentially, but those individuals would have to go through the same Interactive Process to prove their disability need like the individual with the service dog request did. So if somebody has a legitimate phobia, anxiety, panic disorder, they could request an accommodation to not be around that animal. Whether that be a private area, staggering schedules, using a conference room, work from home, whatever the case may be. The ultimate goal was to accommodate both individuals' disability needs, not just say, "We're not going to allow the animals, because others could potentially have difficulties with it." It should be responded to and handled when the issue arises, if the issue arises.

**LINDA BATISTE:**

All right. Great. Another medical documentation question. We get a lot of those in our day-to-day work at JAN.

This individual wants to know if employees must submit medical documentation for us to allow a service animal while at the workplace. So another question related to medical documentation and how do you document the need for a service animal?

**JAMES POTTS:**

What do you think, Melanie, do you want me to take this one again?

**MELANIE WHETZEL:**

Sure, if you want to. Go ahead.

**JAMES POTTS:**

So the documentation component is still an employer is entitled to sufficient documentation to prove the need. With a service animal, it could be a little tricky. It's really going to be a medical professional's expert opinion that the dog is going to be helping in the workplace while per -- or performing a certain task that enables the individual or employee to be successful in the workplace. Yes, they are going to give one component of "Yes, I feel my patient has an ADA-covered disability. Here is how they are impacted." Then the second part is they feel like the service animal is going to, you know -- hypothetical, a seizure alert dog is pretty straightforward. "Hey, allow this animal. It's going to provide a medical service, which is alerting my patient for seizures so they can protect themselves in those situations." It's not -- I know a lot of times people are asking this, and it's also a component of “Can we see if the animal is trained, or how do we get that documented?” and that's not necessarily the most important component.

Just from the ADA or guidance perspective, it is the "sufficient documentation" component. It's just enough information to prove there's an ADA-covered disability and to substantiate why the animal or any request is needed.

Anything to add to that Melanie? Do you think that was all right?

**MELANIE WHETZEL:**

Yeah.

**JAMES POTTS:**

Okay. Cool.

**LINDA BATISTE:**

Yep, I think it was great, too.

We got a lot of questions related to the whole emotional support animals not being covered under the ADA and the confusion between the different titles of the ADA. Rather than going into that now, I just want to let people know we do have a whole page on service animals on AskJAN.org with a lot of questions and answers that would hopefully clarify that. But if you still have questions after you take a look at that, get in contact with us, and we'll walk you through that.

And let's go on to our last section, Melanie.

## [Additional Examples]

**MELANIE WHETZEL:**

Okay.

Our last section is just some additional examples just here and there, and the first one we'll go to the next slide. The first one is can an employer force on employee who cannot drive due to seizures to utilize public transportation during a pandemic?

Bailey has had a seizure and is unable to drive for the next six months. He's unable to perform the maintenance duties of his job from home, and the employer wanted to know their obligations if he can't get himself to work every day. Specifically can they require an employee to utilize public transportation during a pandemic?

Well, this is a tricky question.

Again I think what the employer wants to do -- I'm going to sound like a broken record here if anybody still knows what records are (laughing). Maybe that's something I need to quit saying. Is that they need to have a full conversation with Bailey and find out what the issues and options are. If he's unable to perform his duties from home, he needs to be in the office, and talk about ways to get him into the office.

I know here where we live, it's not a huge city, but the buses are limited due to the pandemic. So they are limited in schedule, in frequency, and in capacity. So a lot of people may have trouble getting to work at a specific time for that reason if they do not drive.

So one thing the employer can look at is can we flex the schedule? Can we look at --can the employee ride a bus when he feels safe to ride a bus and still get to work? Can he work part time even to be able to come to the office and do that? Is there a reassignment? Is there a job he could temporarily do for six months -- Maybe not -- that he would be qualified that's open and he could work from home? Are there other options that would get him to work? Is there an Uber service, any kind of a car service like that that would be effective for the employee to get to work?

I mean, an employer can't force anyone to ride a bus or use public transportation. What they can say is, "You have to be at work to do your job. We want to help you get there. How do we do that and hopefully come up with some kind of a solution together?"

All right. Our next one here is Greg. Greg works in healthcare and is requesting leave until the pandemic is over. He was told during the beginning of the pandemic that his job could only be done in person. He's used up all of his leave, and his employer is asking when he can return and what accommodations he needs. And Greg requests leave until the pandemic is over, which could be a request for indefinite leave, which may not be reasonable. I mean we don't know when the pandemic is going to be over. I think when it started back in March, all of this happened, we had no idea we would be doing what we're doing now at this time 14 months later.

And so really what the employer and Greg should do is have an interactive meeting where they talk about this. Are there accommodations that can get you back to work instead of leave? You know, even part time. Is there a reassignment to a job that Greg is qualified for that he could do from home where leave is not needed? He was just overwhelmed by the trauma that he was seeing in the hospital and said he just couldn't do it anymore. Leave was going to be the absolute only thing that would work.

So the employer agreed, "Okay. We'll continue that. We'll check in in 30 days, and we'll continue the process. And we'll just play it by ear and see if in 30 days there's some accommodations that can get him back to work or where we are at that point if that leave is causing a hardship."

Okay. And our next one is Lucas. And Lucas has trouble attending all of these Zoom Meetings. I mean for those of you who attend a lot of Zoom Meetings, there are a lot of issues with that. I mean, you're on camera. People are looking at you. You're looking at yourself. It's -- it can be very stressful. And Lucas has social anxiety. And since moving to a virtual environment, he's been required to attend Zoom Meetings two to three times per week, and the content almost never applies to Lucas's position. These meetings are the source of extreme anxiety, and he's taken to calling out -- calling off work instead of attending on these days. The supervisor noticed his behavior and asked if there was anything wrong, so Lucas explained his anxiety and that he has a hard time speaking up and asking about accommodations or his rights or not even going to those meetings.

So his boss explained the reasonable accommodation process. And then they worked with HR to set up an agreement where Lucas was excused from those Zoom Meetings. And for those of you thinking, "Hey, why not just turn off your camera?" Well, Lucas felt extreme anxiety being the only one without a camera, so since there were no specific reasons he needed to participate, he was excused.

And we have one more here. And this one the employer required all employees to work a rotating schedule, which included time at a customer window.

Jem asked to be excused from the window because of difficulty interacting with strangers who might have COVID. Well, the employer denied Jem's request, stating that rotating to all positions is an essential function. But the process doesn't stop there. The employer should talk with the employee to determine what can be done to ease her anxieties about contracting the virus. Are there more safety measures required? What specifically is Jem's fear and uncertainty? And how can the employer reduce or eliminate those fears or concerns? What we find is a lot of individuals will say that one part of their job is too stressful, and they just want the employer to remove it.

And as we've said several times here employers don't have to remove essential functions. What they do need to do is look at each individual person to find out what it is that's stressful about that specific task, that specific function, and then look at how we can reduce or eliminate that stress so that that person can continue to do that function.

Okay. I think I kind of rushed through that, but I wanted to just allow -- we don't have much time left to see if there are any questions that we needed to answer.

**LINDA BATISTE:**

Yes, let's get to a few of these at least.

What can an employer do if an employee refuses the accommodation being offered?

**JAMES POTTS:**

Ask why. Seek clarification why. You know, are they saying it would not meet their needs? Are they saying that what they are providing would make things worse? It's not effective? What's going on there?

An employer cannot force an employee to accept an accommodation they don't want. However, the next step is explaining, "Hey, if we're offering you an accommodation that would enable you to meet a performance or conduct standard, and you refuse it, well, the next time you have that that performance or conduct issue, it's going to kind of be on you at that point. We offered a solution that could have prevented that. Or helped you. You're not accepting it. You know, the disciplinary actions are on you at that point."

**LINDA BATISTE:**

All right, great. And I think this is an important question, I'm going to toss this out here.

Responding to some of the scenarios that you presented related to isolation, the question is some of your responses to scenarios indicated that an employer should take into consideration the employee's isolation if the employee continues to work from home. Is it really the employer's responsibility to return the employee to a more social setting? How does that affect the employee satisfying the essential functions of the job? So basically the question is do employers really have to take that into consideration and accommodate that kind of issue?

**JAMES POTTS:**

I think employers want their employees to be working as effectively and efficiently as possible at the end of the day. If they address or if you have noticed performance dipping off, and any sort of social interaction or communication changes is the root of those issues, then I just see a problem that needs to potentially be solved. Do you have to worry about an employee's social life? No, no, no. But I think it really comes down to communication about the job. You know, if a component of that is giving the individuals with anxiety or other disabilities that social component, I just think that's kind of an added plus. I don't know if that's the perfect answer, but that's just kind of looking at it from maybe a couple different sides, a little bit practical.

**MELANIE WHETZEL:**

Right, and I'll just say that, you know, it happened very suddenly. We were at work, then we weren't. And a lot of people didn't have time to adjust to that. For people who have a family and the kids are home and the spouse is home, they might have enough social contact that they have had enough. But people who live alone, maybe in a small apartment, they may have different issues than someone who is around a lot of people. And I think James is right. You need to take that disability into consideration. And an employer -- I don't want to say he wants his employees to be happy, but I think the happier and more well- adjusted people are, they are going to be more productive, and that's going to work for both the employer and the employee.

**LINDA BATISTE:**

All right, perfect.

Unfortunately that's all the time we have today. I want to extend a special thank you to Melanie and James for sharing your expertise with us today. It was a great presentation. Lots of great information. And I want to thank everybody who attended this JAN training. Thank you so much for sending in all of the great questions.

If we didn't get your question answered during the presentation, please contact us at JAN, and we'll provide you some one-on-one information.

Again, thank you. Just wonderful questions. Right on target for these issues that we're dealing with.

If you need contact information, you can go to AskJAN.org and click on "Contact" for all the various ways to get in touch with us.

And as mentioned earlier, an evaluation form will automatically pop up on your screen in another window at the end of the event. We really appreciate your feedback, so we hope that you'll stay logged on to take a minute to complete that form.

And finally, please join us again on June 8 at 2:00 Eastern time for our next JAN webcast. The JAN Motor Team will be talking about accommodating public safety workers with disabilities.

Again, thanks for joining us, and have a great rest of your day.