# Next-Level Accommodation and ADA Challenges

## [Introduction]

**TRACIE DeFREITAS:**

Welcome everyone, and thanks for attending this JAN Accommodation and Compliance Webcast titled "Next-level Accommodation and ADA Challenges." My name is Tracie DeFreitas, and I'm a Principal Consultant and ADA Specialist for JAN. I'm also your speaker for today.

Before we begin, let's cover some housekeeping items on the next slide. First, if you experience technical difficulties during this webcast, please use the question-and-answer option located at the bottom of your screen to submit a question. You may also contact JAN at 800-526-7234 or use the live chat at AskJAN.org.

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Now let's get started with today's training. I'm going to share some next-level accommodation and Americans with Disabilities Act challenges because, as many of you likely know, the ADA compliance bar has risen to expert level, requiring a higher level of competence, ADA analysis, and engagement in the interactive accommodation process. This training is meant to enable HR professionals, managers, supervisors, and those providing legal guidance to sort of level up your ADA and accommodation game. As I work through this training, I'll share some practical ways to master complex accommodation and ADA situations related to various topics, including engaging in the interactive process, managing leave and attendance, addressing performance and conduct issues, modifying workplace policies, and providing reasonable accommodations in a pandemic world.

We have a lot to cover. Something to keep in mind. This training strategy today, for each discussion topic, I'll share some common ADA challenges along with examples of those challenges. Then we'll explore a situation, and I'll talk about what might be considered a novice-level or maybe a not-so-great practice in response to that situation. And finally, I'll offer next-level, practical solutions for addressing the ADA situation. Keep the strategy in mind as we work through each situation. The objective is to sort of point out what not to do and to focus on solutions that will lead to more successful accommodation and ADA compliance outcomes.

## [Engaging in the Interactive Process]

So let's begin with the topic of engaging in the interactive process. To help determine effective accommodations, the Equal Employment Opportunity Commission does recommend that employers use an interactive process, which simply means that employers and employees with disabilities who request accommodations work together to come up with accommodation solutions. We know that the success of the interactive process often hinges on effective communication and collaboration between the parties involved, which can be the individual with a disability, the employer, maybe an accommodation team. It can also include healthcare or other appropriate professionals who can provide information to support that process.

Some of the challenges of the interactive process are when communication breaks down. Maybe there's a lack of engagement or no cooperation on one side or the other. For example, when the employer is stuck in that waiting place, waiting on medical information to be provided by the employee, or when an effective accommodation was offered, but maybe the employee refuses that accommodation. Also, we hear about employees who are out on leave of absence and maybe fail to communicate their plans to return to work or who won't respond to the employer's attempts to engage them in that interactive process. And sometimes, uninformed decisionmakers can stall or disrupt that interactive process by making decisions that put the employer at risk of falling out of ADA compliance.

So let's break down a few of these examples on the next slide, starting with that waiting place. So interactive process situation 1. Sometimes, employers end up stuck waiting for that medical information to be provided by the employee or their healthcare provider, and they're unable to make ADA decisions or explore accommodations as a result.

A novice-level response in this type of situation might be to simply deny the accommodation due to a lack of sufficient information. This response can be appropriate when the employer has made a good-faith effort to obtain the information, but it shouldn't be the first response.

So take it to the next level. First, decide what information is absolutely needed to proceed with the interactive process. This may be information about the impairment and related limitations and need for accommodation. If you don't have this information, then maybe detail what's needed to move the process forward and offer a deadline extension. And yes, this could be more than one extension when an individual offers a good reason for that delay. Maybe they can't get in to see their specialist for a month, for example. It may help to list the job-related questions that address the specific concerns. This makes it easier for the individual to obtain the necessary information.

For example, would Bob be able to return to work on a reduced work schedule of six hours a day for a temporary period and, if so, for what duration? So you can get specific about the information you need in order to move forward. A way out of this waiting place when there's a breakdown on the employee's side is for the employer to demonstrate good faith in giving the individual an opportunity to obtain the information. For example, detailing what's needed, offering those extensions, granting a temporary accommodation even until that information is provided, and documenting your effort. JAN offers a resource that goes into much more detail around this topic. It's called "Avoiding 'The Waiting Place' After Requesting Medical Information." So I encourage you to take a look at that for some more guidance on this topic.

The next interactive process situation, when an employee refuses an effective accommodation. Sometimes, people don't agree on the best accommodation. The ADA allows employers to choose among effective accommodation solutions, but the key is the accommodation must be effective in enabling the employee to perform essential job duties. Technically, when an effective accommodation is refused by the employee, the employer may choose to end that interactive process and not provide any accommodation at all.

While this may be appropriate if the accommodation is effective, this may not be the best approach. Take it to the next level. We suggest finding out why the employee believes the accommodation won't address their limitations and the work-related barriers. This may be because the chosen accommodation hasn't worked for the employee in the past. Sometimes, past accommodation experience can inform accommodation decisions, so learn more about why the accommodation was refused before you just sort of end that interactive process.

We also know that the EEOC says employers should consider employee preference when choosing accommodations, when it's reasonable. So if you're making a choice between two effective reasonable accommodation solutions, consider the employee preference first. Maybe even give it a trial period to see if it's effective. If not, then you can go back to the previous solution. Another consideration, if the employee refused the accommodation but didn't offer another solution, maybe explore alternatives, if you're willing. This can demonstrate good faith, and it may lead to a better accommodation outcome overall.

And, of course, in some situations, an employer may have a valid reason for offering one accommodation over another. If it's truly an effective solution, and the employer believes the accommodation offered will be effective, the employer can stick with that decision. For example, maybe one ergonomic chair was chosen over another. The employee insists on one brand, but both have the same features. One might be less costly, and maybe that's why the employer chose that one. So document that the employee refused an effective accommodation and explain why the interactive process is complete based on that decision. All right.

## [Leave and Attendance]

Now, let's move to another topic, leave and attendance. What are some of the challenges? Well, intermittent leave with unpredictable absences, extended leaves, and, of course, navigating multiple federal, state, and local leave requirements. Some of the most common examples of these challenges are when there's a frequent -- when there are frequent unplanned disability-related absences, but maybe an accommodation wasn't requested. Or when an employee exhausts Family Medical Leave Act leave and still needs time off. There could be repeated extensions of leave, and then of course, indefinite leave requests can also be difficult to manage. For example, indefinite leave from work to avoid exposure to COVID-19.

So let's hone in on some of these on the next slide. Situation one: frequent, unplanned disability-related absences. The intermittency and unpredictability of these kinds of absences can be complex to manage, but it's important to consider whether the ADA applies and if it's reasonable to modify an attendance policy and allow absences that are reasonable. This can be particularly important for employees with chronic medical conditions that flare up unpredictably.

Now, a novice-level response to addressing this kind of attendance issue might be to only apply the attendance policy and not consider whether the ADA applies. Whether an accommodation is needed, because of absences related to a disability. What's another one? Of course, maybe address the attendance issue, but ask, "How could I help?" To open the door for the employee to disclose a medical condition and discuss whether the ADA, or FMLA if it applies, you really want to kind of make it a situation where it's comfortable for that person to kind of talk about their disability.

You don't have to completely disregard time and attendance, but it may be possible to modify an attendance policy to allow a limited number of unplanned absences due to the disability. So seek information from the employee's healthcare provider when it's necessary about the estimated frequency and maybe the duration of future absences in order to decide if there's a way to somewhat plan around absences moving forward. Of course, when applicable, use FMLA to provide intermittent leave before granting leave as an ADA accommodation. I say this because FMLA is a leave law, unlike ADA. But you always want to look to ADA when FMLA is not an option or when it's exhausted. The time used under FMLA can be considered when evaluating whether leave is an undue hardship under the ADA as an accommodation.

Another suggestion, maybe explore whether there are accommodations that could enable the employee to be more present. Maybe additional breaks, reducing stress, changing a work schedule, or even working from home could improve their attendance. So you always want to remember to think about accommodations.

All right. Leave situation number two: indefinite leave requests. This particular example is more specifically related to COVID-19 requests. Over the past two years -- hard to believe it's been two years -- in response to various COVID-19-related situations, some employers have allowed employees to be out on leave indefinitely to avoid exposure if they're a person with a disability who's at high risk for serious illness. Maybe not the best solution during a pandemic that seems to have no end in sight, but it's something we've seen happen.

The flipside novice-level response might be where leave wasn't even considered at all. So we've heard -- we've heard both sides of the spectrum on this particular situation.

Next-level strategies, check employer policies and practices related to leaves of absence that may apply and be consistent with those practices. Some employers actually created COVID-19-specific leave policies. Also look at any applicable federal, state, and local COVID-19 requirements to make sure you're in compliance with those as well.

Now, we know that indefinite leave is not required as an accommodation under the ADA, because the EEOC says it's not reasonable. An employer can allow it, but consider the impact of a never-ending or unknown absence duration. So rather than approving an indefinite leave, consider approving leave maybe for an increment that seems reasonable at the time, and this will be case-by-case, of course. You can later assess whether an extension is needed and reasonable. This will likely depend on the course of the pandemic and also whether alternative accommodations could be provided to enable the employee to safely work instead of being out on leave. If indefinite leave is allowed, it's possible to choose to end that leave at any point, because the ADA doesn't require it as an accommodation, so there's a lot to think about when you're in that type of situation.

## [Performance and Conduct]

Let's move to the next topic. Performance and conduct. A significant challenge related to performance and conduct issues is balancing ADA compliance with meeting performance and conduct standards and business needs. Employers may have expectations for performance and conduct, but when a standard isn't being met due to a disability-related reason, this is where the ADA may come into play. Some examples of challenges related to this topic include when an employee discloses their disability for the first time in response to disciplinary action or counseling and makes a last-minute request for accommodation. Or when there's a history of unaddressed performance issues and maybe a new supervisor comes on board. Also, when maybe there's some strange behavior that's exhibited at work and there needs to be some explanation for that. And finally, when there's a telework accommodation request from an employee who maybe isn't the best performer, but they're asking to be able to telework as an accommodation.

So let's explore some of these examples, and, you know, see where we can go with this and some next-level solutions. Situation one: when there's a last-minute request for accommodation or disclosure in response to performance counseling. This is an issue that we hear about a lot at JAN, and I'm sure a lot of you have experienced this type of situation. Let's say that it's final warning situation.

Maybe a novice-level response would be to disregard the disclosure or request for accommodations and terminate the employee, maybe because the manager doesn't recognize the need to engage in the interactive process, or they terminate to avoid providing accommodations. Neither is an advisable approach. Rise to that next level. Proceed with a performance discussion, but when disciplinary action is meant to lead to something other than termination, engage in an interactive process and gather information to understand whether, and how, the disability affects performance or conduct.

We do suggest postponing a performance improvement plan, that PIP, if one was planned to explore and implement reasonable accommodations that may improve that individual's performance. The PIP can of course be reinstated after accommodations are in place, and there's a period of adjustment. Something to keep in mind: Don't include information about disability or accommodations in the employee's performance evaluation or the PIP. Maybe consider devising some sort of anonymous coding system that doesn't reveal specific disability-related information, and only those who are privy to the system, maybe the HR director, for example, will recognize that system if the information is needed to be accessed at some point. So you want to be real careful what you include in those performance evaluations.

All right, so situation two: unaddressed performance issues in a new supervisor. Historically, unaddressed performance issues can cause all sorts of problems, especially when a new supervisor comes on board. Recognizing the issues, the new supervisor may make changes that can lead to the employee with a disability maybe being unprepared and feeling discriminated against. Issues might continue to be ignored, so that could be one response with a new supervisor or worse, the employee may be terminated and not understand why. It's not fair to anyone to ignore performance issues, because then there's no recognition of the problem, and there's no opportunity to improve, so you always want to follow through and make sure you're applying performance and conduct standards uniformly and consistently.

So if you're the new supervisor, you want to review, maybe review that job description, talk about the essential functions with the individual, maybe a manager or supervisor who might also be involved, and make clear what standards have to be met. You can proceed with that performance discussion and document the process, but also engage in that interactive process under the ADA to gather some information, if it's needed, to explore and implement accommodations. Monitor those accommodations and the performance and, of course, hold that person to the required standards just as you would anyone else. Hopefully those accommodations will make a big difference.

JAN's resource "Out with the Old, In with the New...Supervisor" addresses this issue in more detail, but we also offer more on managing performance and conduct through the A to Z section of the AskJAN.org site, and the EEOC guidance on addressing performance and conduct standards is an excellent resource. It's linked at the end of the PowerPoint.

Okay. Situation three: Telework accommodation requests from a poor performer. This is a situation where some managers may not recognize the potential positive impact of telework. Naturally, there's a reluctance to allow telework when an employee isn't performing well, but consider handling this situation at the next level instead of automatically denying the request. As a start, consider gathering some information about whether the employee believes telework will improve their performance.

Sometimes limitations can make it difficult to work at the work site. Various distractions, working conditions can make it difficult to concentrate, which affects performance, but telework may enable the employee to remove those distractions to focus and improve their performance. It's possible to explore alternative effective accommodation solutions that will keep the employee on site, but maybe consider implementing telework as a trial accommodation.

At JAN, we suggest trial accommodations all the time. The accommodation isn't locked in forever, and it's really an opportunity to test it for effectiveness, so we certainly suggest that a lot. To support success in this situation, set some goals, expectations, create a supervision plan, and then monitor the accommodation and review the person's performance. Hopefully, it will end up in a successful outcome, and that will be a good accommodation situation.

## [Policies]

All right. Our next topic is policies. The challenge when modifying or creating policy as an accommodation can be difficult. The accommodation may be apparent, or it may affect others in some way, so it's one of those little accommodation areas that's a little bit tricky, because other people are probably going to notice. Some examples of these challenges in this category include modifying a no-animals policy to allow access for a service or emotional support dog with the complication of maybe concerns about employees who may be severely allergic to dogs or maybe have an extreme fear of dogs. Another is implementing a no-fragrance policy and that rights controversy that ensues because employees believe they have a right to wear fragrances at work. Modifying a policy related to where work is performed to allow telework as an accommodation is a noticeable change, or implementing a policy banning certain foods due to life-threatening food allergies. So these are just some examples of those types of challenges. So let's hone in on a few more.

Situation one: modifying a no-animals policy to allow a service dog access or an emotional support animal. A common response is "We can't allow dogs. What if people are allergic or afraid of dogs?" Well, this is a novice-level response, because there's a lack of awareness that saying "no dogs allowed" for this reason is like saying, "We can't accommodate you, because other people may need accommodations, too." This situation should be taken to the next level, because an employer cannot deny access for a dog needed as an accommodation solely based on the idea that other employees may have an issue with the animal.

So what do you do? Well remember that the ADA requires an individualized assessment of accommodation needs. You want to explore accommodation solutions on a case-by-case basis to address individual needs and circumstances. So consider the job duties, consider the environment. It's possible that the employees' paths will never even need to cross if you can explore ways to create maybe set paths of travel, using different common areas, allowing remote attendance at meetings, or even working from home for some parties in that kind of situation.

JAN does offer several resources related to handling accommodation requests for service and emotional support animals. If you go to AskJAN.org, including accommodation ideas for those -- these types of complex accommodation situations where you have the allergies and the fear-related situations coming into play. So, for example, see "Service Animals and Allergies in the Workplace" and also our A to Z by topic section on service animals. Lots of resources there. It's a tricky topic. It's one where you won't find a lot of other resources elsewhere, but JAN certainly has you covered in that area.

All right. Situation two: implementing a no-fragrance policy and that rights controversy I mentioned. Employees with fragrance sensitivity often need a fragrance-free work environment to avoid triggering symptoms. It can be difficult to completely eliminate fragrances, though, in some workplaces, but there are accommodations that may help. When an employee asks about a fragrance policy, some employers will say they can't tell employees not to wear fragrances at work, and employees may believe they have a right to, but nothing prevents an employer from implementing a policy of this nature.

Rather than say no to the request, consider what's possible. Employers implement dress, grooming, and hygiene policies all the time. A no-fragrance policy can fit into these policies, or it can stand alone as its own policy. It's true this is one of those policies that can be difficult to enforce, but that's not necessarily a defense for denying the request outright. A place to start is educating the workforce about the health effects of fragrances so that people recognize the issue as a health and safety matter, not an infringement on their freedoms necessarily. When dealing with fragrance sensitivity, there are really three main options to consider as accommodations. We often talk about removing the offending fragrances, removing the employee from the area where the fragrances are located, or reducing the employee's exposure to those fragrances.

JAN can help with exploring solutions in this type of situation, but if it's not reasonable or plausible to implement a fragrance-free policy, maybe consider at least a fragrance-free zone. See JAN's "Can't Ban Fragrances, Consider a Fragrance-free Zone" for more information on that topic. You can also go to the A to Z section of the JAN website to look for fragrance sensitivity, get some other ideas around how to tackle this difficult topic.

Okay. Situation number three: modifying a policy related to where work is performed. Telework, ah telework. We all look at telework a little differently these days, but telework has always been a form of accommodation under the ADA. Let's look at it as an accommodation for this example and not just as an ordinary way of working. So this is when telework is not ordinarily allowed, maybe because a manager or the company owner doesn't want employees to work at home. Again, this isn't a defense for denying the accommodation of telework. You're going to have to step up your game here a little bit. Engage in that interactive process and, if needed, gather information about why telework is needed as an accommodation for a disability-related reason. The EEOC does make it clear that telework may need to be considered as an accommodation even when other employees aren't allowed to telework, so long as telework is reasonable, and what that means is if the employee can perform the essential duties of the job at home without it creating an undue hardship for the employer.

As I mentioned before, it's possible to explore and choose other effective reasonable accommodations to enable on-site work, but again, maybe consider that trial accommodation situation or even just a temporary accommodation when maybe it's just needed for only a short duration of time, for example, while recovering from medical treatment or maybe an injury or while someone's on bed rest due to pregnancy complications, and, of course, this is provided the employee is capable of working at home. It's not just a, you know, something to do so someone doesn't have to take leave.

The challenge here, of course, is that other employees will know when employees are teleworking, if it's not a standard practice, and they may ask questions. So an employer can't share that telework is allowed as an accommodation under the ADA, because this, of course, reveals confidential information. It could be explained, something like the employer has policy of assisting any employee who is having difficulties in the workplace, and that job-related issues can be personal, and the employer respects employee privacy by not discussing those matters with coworkers. So that's one way to kind of address those questions from others.

## [Pandemic Issues]

All right. So still a good bit to talk about here. Let's move to the topic of pandemic issues. Of course, these days COVID-19 and pandemic issues are certainly at top of mind in a lot of situations. It goes without saying, but I will, of course, say that pandemic challenges are, of course, multifaceted and difficult. They affect people at work, at home, at school, throughout our daily lives. With the continuous evolution of the pandemic, it's hard to keep up, especially with ADA accommodation requests. To add to ADA compliance, there may be federal, state, and local requirements that impact workplace decisions. And yes, worker safety places an added layer of complexity with these particular challenges.

Some examples of pandemic issues may be related to job restructuring and removing essential functions in a pandemic, managing mask-related accommodation requests, understanding telework, isolation and mental health conditions, and the challenge of the past several months, processing accommodation requests related to COVID-19 vaccination requirements. So these, of course, are just some of the examples that come in play, but, you know, let's just talk about a few of them.

Situation one: removing essential functions in a pandemic. I'm sure some of you can relate to this situation, because over the course of the pandemic, more so in the beginning probably, we've heard about essential job duties being removed. This was for various reasons, of course. For example, to enable employees to avoid exposure risk, maybe to enable employees to work remotely, or because operational changes made certain functions unnecessary or unable to be completed. There were and continue to be requests to remove essential functions as a form of accommodation when a disability-related reason affects performing job duties. Some employers made this change without considering how long the pandemic would last and the impact on business operations for making this type of change. So here we have an indefinite restructuring of job duties.

Approaching this at the next level, we know the pandemic impacts accommodation decisions, and we must adapt with evolving pandemic circumstances, and employers sometimes make changes that keep people working and businesses operating. This includes removing essential job duties, even though it's not a required accommodation under the ADA. But employers may, of course, always go above and beyond the requirements of the ADA in order to provide accommodations for individuals with disabilities.

It's important to note that -- and of course EEOC makes it clear -- that employers can temporarily excuse essential job duties. This doesn't mean that the job's essential functions must be permanently changed or that it will always be feasible to perform these functions or -- I'm sorry -- to not perform these functions or that it will never pose an undue hardship. So basically, you know, these are things that some people might be concerned about in removing essential functions, but the fact is, just making the change doesn't automatically make these things true.

If it's determined that essential functions must be restored at some point, there's no obligation to refrain from doing so, so that means that, at some point, it may be possible to reinstate, even though you've gone above and beyond to remove those functions. Also, it's possible to remove the functions and choose an end date to review whether this modification can continue or whether functions must be reinstated at some point. So this is something that's come up with plans to return employees to the workplace after mandatory telework, for example, so a lot of employers sent people home with mandatory telework. They may have removed certain functions as a way to continue operating. And now people are coming back to work, but there's the ask of "I'd like to continue teleworking as an accommodation."

So employers need to take a look at the job and figure out has the job changed in some way? So it's important to take a look at that and figure out whether or not the job duties have changed in returning people to work. You know, are those duties reinstated now? So that is an issue to really think about. The EEOC guidance "What You Should Know About COVID-19 and the ADA, the Rehab Act, and Other EEO laws," it's a great EEOC guidance that covers this topic and many, many other COVID-related topics, and it's linked at the end of this PowerPoint, so I do encourage you to take a look at that.

Let's hit some more issues around this topic. Situation two: mask-related accommodation requests. Another ever-evolving pandemic issue. At one point in the pandemic, many state mask mandates and employer policies were implemented, which led to exemption requests from people who either didn't want to or couldn't wear a mask due to a medical reason. These issues continue, as masks are still required in some workplaces or are required for those who are unvaccinated.

One response we heard in some cases was "Wear a mask, or don't come to work." There was no further engagement to figure out whether the ADA applied or if there were accommodation solutions, and this is something that I'm sure we'll continue to hear. So what's a more appropriate approach? Well, maybe ask some questions. Engage in the interactive process to understand if a medical reason prevents the individual from wearing a mask. Do check state and local mandates on masking for any rules related to collecting medical information from employees. I know early on in the pandemic when some of these mask mandates were going on, there were some states where they indicated that employers couldn't even ask for medical information, and that then would sort of make it difficult to gather disability-related information under the ADA. These situations were few and far between, but just make sure you're aware of your state or local requirements in that area.

If there is a disability, that duty to accommodate exists, so if someone is unable to wear a mask for a reason related to a disability, then you certainly want to move forward and figure out what sort of duty is there to accommodate? If there is a reasonable accommodation that would make sense and that would be effective. Of course, worker safety is the priority, and in some cases, the employee may be able to work alone and not come into contact with others or may be able to isolate or try other accommodations like wearing a face shield with an air cleaner in the room, using other particle barriers, telework, things like that. So, you know, there could be various accommodations, depending on a situation and the environment.

JAN does offer more ideas in the resource "Masks for COVID-19 Management and ADA Accommodations," so I do encourage you to take a look at that resource for some possible accommodation ideas or contact us, of course. Depending on the facts of the situation, it is possible to exclude someone who cannot wear a mask from the workplace if it is not possible to safely work with or without accommodation without posing a direct threat. And in that case, you want to make sure you cover all the bases and figure out, "Have we looked at every possible solution?" EEOC does offer some more guidance on direct threat issues in that "What You Should Know" document that I mentioned, so I encourage you to go to that for some additional information related to direct threat issues and accommodations.

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All right. Situation three: telework, isolation and mental health. You know, there are many pros of teleworking, particularly for employees with disabilities, but we have also seen the opposite situation, meaning that there might be some cons in some situations. So telework, you know, maybe has exacerbated some employees' mental health and cognitive conditions and created job performance issues. So some who live alone may feel isolated or lonely and unsupported, which could be barriers to productivity. Some may need structure and feedback that may not be present in the home environment. Some managers and supervisors may --they may fail to recognize this or understand the challenges of teleworking in these kinds of situations, so something to really be aware of.

When employees with disabilities have difficulty performing their jobs while teleworking, employers should engage in the interactive process to see whether accommodations might help employees be more productive. We have even seen cases where teleworking employees have asked to return to the work site so that they may be more productive. If employees are having difficulties, be intentional. Talk to them about it. Reach out. Connect with them. Find out specifically what is working and what isn't and what they might need in order to turn things around for them. Maybe set regular check-ins with them. Meet via video. Just connect more frequently so that the person isn't feeling so isolated or create opportunities for coworkers to connect, as well. So some extra steps might need to be taken to ensure that communication remains open and to help employees feel more connected and informed.

Remember: Employees who are teleworking may still need accommodations to successfully do their jobs, so you do want to keep that in mind. We do offer some more guidance on this topic in the resource "Supporting Employees with Mental Health and Cognitive Conditions While Teleworking," and that's linked at the end of the PowerPoint. You can also find it on the AskJAN.org COVID page.

Okay. Situation four: the impact of COVID-19 vaccination on continuing accommodations. We know there are many workplace vaccination issues, but this one is about expecting that an employee with a disability who is high risk for serious illness can simply receive the COVID-19 vaccine and return to work without worry. Some workers can return safely after receiving the COVID-19 vaccine, but -- and that may be with some additional safety measures in place to limit the risk of exposure to the virus. But others may need to continue working at home if it's feasible or might request access to leave if other accommodations might not be reasonable and effective.

What's important here in this kind of situation, the lesson is that you have to remember that returning employees to the workplace in the middle of a pandemic, it's not a one-size-fits-all situation. Accommodations might need to continue, even though employees may need to be vaccinated. It's possible that some individuals cannot be vaccinated as well, so you've really got to make sure you're looking at individual circumstances. Don't assume that each worker with a disability or a medical condition will benefit from the vaccine or the same accommodations. Also, measures implemented to generally protect workers might not be sufficient for those who are more likely to get severely ill from COVID-19, even when vaccinated.

JAN offers several COVID-19-related accommodation and ADA resources at the AskJAN.org site. Again, see the home page and go to the COVID page, "Accommodation and Compliance Coronavirus Disease 2019." So you'll find lots of resources. We're continually adding -- in fact, we just put some new resources up yesterday, so do go to that part of the site for more information.

Okay. Situation five is one -- it's one really where we've all been grappling for several months; right? Requests for an exception from COVID-19 vaccination requirements for medical reasons. Not going to get into the complexities of federal orders and vaccinations. I can say that we've heard about employers who respond to these requests by saying things like, "Get vaccinated or be terminated." But not so fast.

For ADA- and Rehab Act-covered entities, when employees are subject to a federal- or state-imposed vaccination mandate or an employer policy, you'll need to determine whether a vaccination exception or delay can be granted as a reasonable accommodation. When an employee requests an accommodation and the disability and the need for the accommodation aren't known or obvious or already documented in some way, of course, the employer can require reasonable documentation about why the employee cannot be vaccinated. So that's the road that you may need to go down to figure out is this a case of a disability preventing vaccination, or is there some other reason that you need to take a look at?

So next, determine whether the employee who is not vaccinated due to a disability poses a direct threat in the workplace by doing an individualized assessment of the employee's present ability to safely perform the essential functions of the job. So if you've figured out that it is a disability-related reason that the employee cannot be vaccinated, they're not able to meet that requirement, you have to take a look at what can we do? What's the direct threat situation? Are there accommodations that would be reasonable to help address the issue of working safely, basically.

So the ADA does require that employers offer an available accommodation if there's one that does exist that doesn't pose an undue hardship. This can include having maybe the unvaccinated employee wear a face mask when they're in the workplace, working at a safe distance from coworkers or nonemployees, working in alternative or a hybrid schedule perhaps when there are fewer people in the work environment, teleworking, being tested for COVID-19 periodically. So there are lots of solutions that could be looked at. Some might be reasonable, some may not. So you're really going to have to take a look at that. Some accommodations could include also looking at reassignment to a vacant position when other accommodations are not reasonable or effective in enabling an unvaccinated employee to safely work in their current position. So, you know, we always look at -- remember to kind of come back and look at reassignment as a viable option when you've gone through all the other steps in that interactive process.

JAN now offers a new tool to help employers process these requests. This is one of those resources we've just added to the site. "Processing Vaccination Accommodation Requests under the ADA." This is on our COVID page at AskJAN.org. It's just a quick step-by-step little tool that might help you kind of figure out what to do with these requests, because we know they can be challenging to process. So certainly take a look at that.

Okay. The final pandemic situation is situation six: managing requests to continue teleworking as an accommodation. Many people are teleworking now, including the JAN staff. But many employers are trying to return employees to the workplace at the same time, so you may find that some employees with disabilities will continue to need telework as an accommodation for various reasons, not just COVID-related reasons. And yet even with telework being an ordinary method of operating for many, some employers might still refuse to allow telework as an accommodation, because maybe they just want employees back on site, and they don't want anyone working from home. And that's not the best approach to that. It's not a valid reason for denying a telework ADA accommodation request.

So, you know, next level, don't just say no. Get back -- you can't just say no, get back to the workplace, and kind of forget about it. Once again, you want to engage in the interactive process and gather that relevant information to determine whether the individual has a disability. Is there a valid disability-related reason why this person is asking to continue teleworking as an accommodation? Of course, employees are requesting telework for various reasons during the pandemic. This is including because of being at risk, because of a disability, for a pregnancy-related reason, because of age, or out of concern about exposing an at-risk family member. If the request is related to an employee's own disability, then take the ADA path. So you will need to kind of go down that road and figure out what's possible, whether it can be allowed as a form of accommodation.

I would just also like to note for some people who were mandated to telework for quite some time now, who maybe never considered telework before, because they just didn't think it was possible, or for those individuals who maybe requested telework but it was denied, you know, now maybe it's something that could really be considered. Some people experienced benefits from teleworking that they didn't really realize would be helpful to them and their disability, so that whole mandatory telework period really is something that, in some cases, it's really benefited people in looking at the future of work. So when it's possible to perform the essential duties of a job at home, an employer might need to consider continuing telework as an accommodation, when it's needed for a disability-related reason.

Of course, it's up to the employer to decide whether it's reasonable, so you want to assess whether the job's changed as normal operations are restored, because when people were sent home, maybe some of those essential functions were removed, but now everybody's getting back to the workplace, so the job is sort of being restored to what it was prior to mandatory telework. Now, when that happens, that may mean that the employer can reinstate those essential duties, and that may mean that perhaps all of the essential functions cannot continue to be performed at home.

So you really want to take a look at, you know, has the job changed in some way? And can it continue to be performed remotely? The employer can reinstate those duties and doesn't have to remove those duties to enable telework as an accommodation. Also mandatory telework because of the pandemic, it could serve as a trial period to determine if telework is effective. This may be useful in those cases where telework was maybe denied pre-pandemic, and now, we see this situation where the person was able to work effectively, and you can use that information to assess is this something that's really possible? Could it be an effective solution?

Finally, consider a hybrid work arrangement that allows partial telework when maybe 100% telework isn't reasonable. You know, I've talked to a lot of people about what I call these middle-ground solutions. So maybe the individual is asking for one thing, and the employer doesn't think it's entirely possible, but can we come to this middle ground and maybe negotiate something that could benefit both the employer and the individual? So think about this middle-of-the-road solution that in this case, for example, maybe could limit exposure risk by reducing the need to commute and also be in the workplace. Maybe it's a hybrid scenario where the person's at home some of the time but in the workplace with other strategies in place to reduce the risk of exposure. So, you know, we have to continue to be flexible and adjust and pivot to make it so that people can continue to be productive as best we can.

We do offer a resource that may help. See JAN's "Practical Approach to Telework As a Reasonable Accommodation During the Pandemic." This is another -- JAN's all about practical guidance, and this is one of those tools that talks about some of the ways to handle telework requests, particularly during the pandemic, so we do encourage you to take a look at that.

## [Miscellaneous]

Okay. Getting to the last category of topics here. I had to throw in a miscellaneous topic, because, you know, there are a few other things I just wanted to throw in here, some extra challenges, like handling situations involving maybe lifting restrictions. We hear a lot from employers about employees with injuries or employees who are pregnant who might have lifting restrictions, and those situations can get interesting and challenging. We hear about situations where there's difficulty interacting with or communicating with supervisors or others in the work environment. And also, you know, there are still access barriers. We know a lot of people have not been at the work site, but people are coming back to work, and so, you know, we're still hearing about issues in terms of access, like parking or commuting barriers that can come up as well, so it's certainly something we're starting to hear a bit more about.

Some examples of these challenges could be accommodating people with lifting restrictions, maybe workers with a back injury or someone who's pregnant who has what's going to be a temporary lifting restriction, of course. It could be employees who have trouble getting along with a supervisor for a disability-related reason. Maybe there are some disability-related limitations that are affecting the person's ability to communicate and addressing behavior and that kind of thing. So that can come in. Or figuring out how to accommodate employees when there's limited access to parking.

So I mentioned the access issue. I bring up parking, because, you know, I always say when people have parking questions, it seems like it should be so simple, but parking issues are really kind of complex. There are certainly challenges in these particular areas. Let's just cover a few of those.

Situation one: back injury or pregnancy and lifting restrictions. I'm still surprised how often we hear that an employer has told someone with a lifting restriction that they have to take leave until they're 100% healed or able to lift. It's really important to keep in mind that ADA-covered employers cannot require workers with disabilities to return to work only when they're 100% healed or released to full duty if it's possible to provide a reasonable and effective accommodation. The idea here is that it's always going to be better to try to keep people working instead of out on leave if it's at all possible. So don't make that mistake of saying everyone has to be 100% healed. That really goes way against the idea of making accommodations when people have limitations, so be real careful.

Also, if a worker is out on leave due to an occupational injury, it is possible to determine if the ADA applies and explore reasonable accommodations to try to return them to work. Of course, you want to pay attention to any workers' comp-related situation or laws that come into play there, but sometimes, there's an interplay with ADA as well, so -- and sometimes, we need to think about is there a way to get people working? And accommodations might be the way to do that. This could, of course, shorten the leave duration if it's possible to make an accommodation, so I think that can be a win-win for both the employer and the individual.

Of course, consider modified duties. So if that is possible, when it's available, and it's reasonable, you can look at modified duty. It doesn't mean the employer is required to create modified or light duty if they don't ordinarily do that or if they don't have light duty positions available. That means you can, you're not precluded from doing that, but that's something to take a look at, as well. And it might just be temporary. So keep in that mind, too. There may also be various accommodation solutions to enable the worker to move items or people if that's what needs to happen.

So a lot of times when people talk about lifting, I say, "It's not about the lift, it's about the move." So think about how you're going to get something from point A to point B. There may be different ways of doing that. Lifting may be only one method of performing that duty. So sometimes, we've got to think a little bit beyond the specific mode of doing the duty.

And yes, reassignment can be a form of accommodation when an employee can no longer perform the essential duties of their job, with or without accommodation. So remember to kind of come back to reassignment, if it's a case where you've explored viable options, you've considered whether there's a way to get that person to do the duty. Let's say it's a permanent restriction, and light duty is only a temporary option. Maybe reassignment is an option if there's a vacancy, the person's qualified, or where they could perform the essential duties of the job maybe with an accommodation, but don't forget that reassignment solution.

All right. Situation two: difficulty getting along with a supervisor. You know, it's not always easy getting along with others at work; right? Differences of opinion and communication styles can make for a challenging employment situation for some people, especially when those differences are with a supervisor. Oftentimes these differences can be accepted, or they can be worked out, but when they can't, workplace stress becomes elevated, and it makes it difficult for some people to perform job functions effectively.

For example, someone with a mental health condition may find it necessary to discuss job accommodations related to interacting with a supervisor when the relationship is less than cooperative. Changing the supervisor is not always the best strategy. Yes, that could be asked, and that might be sort of an impulse, "Okay yeah, well we'll just go ahead and make that change," because it seems like it's easier, but it may not be the best solution, so you may need to, you know again, go to the next level on this one.

It is the EEOC's position that in most circumstances, -- not all, but most -- an employer does not have to provide an employee with a new supervisor as a reasonable accommodation. Of course, this does not mean that an employer can't change an employee's supervisor if it's possible and if it makes sense in the given situation. What you want to avoid is having to continuously make this type of change, though. So consider whether this is an isolated situation or a pattern where the employee is maybe unable to get along with people who supervise them. If there is a pattern, how do you know this won't continue in the future?

So it's really you kind of want to take a look at it. It's a situation where someone has repeated requests of this nature because they seem to have this happening with multiple supervisors, or is it a one-time situation? And yes, okay, let's investigate to figure out what's going on and see maybe where we can make some changes. There can be some limited circumstances where there's not a way to accommodate the person otherwise.

So, for example, sometimes, we talk about changing supervisory methods as a way to provide accommodations. This is oftentimes a way of sort of changing the way people communicate at work. And, you know, oftentimes will help, because it allows people to communicate in different ways that might be more comfortable or effective, but that might not always work in some situations where it's not just about the communication; it may be another significant situation where there isn't anything that you can do that's going to make it better. So in those situations, maybe it is about changing the supervisor. So bottom line is it's something that can be done, probably shouldn't be the first response, but consider what options really could be available.

JAN does offer more detailed information about this type of accommodation. One resource is "Changing a Supervisor as an Accommodation." We do also on the site offer some other details around changing supervisory methods so that you can kind of get some more details on some tactics for doing that. So if you have questions about that, certainly give us a call or check out the information on the site.

All right. So this is it, the final situation. Situation three: limited access to parking. Parking is a benefit of employment that some employers provide to employees. It's clear that under the ADA, employers must provide reasonable accommodations so employees with disabilities can have access to benefits of employment, such as parking. But accessible parking isn't always readily available.

A novice-level response to a request for accessible parking may be to say that we've provided the required number of spaces, accessible spaces, in the employee parking lot, and there's nothing we can do about it. But this isn't the best approach. The ADA standards, so those standards that dictate, for example, how many accessible spaces there should be in a parking lot, they're a minimum requirement, so additional steps for employers may need to be taken to provide an accommodation to meet the needs of a particular employee. So this means that it may be necessary to explore and implement reasonable accommodations to address the commuting barrier, the access issue. This may include designating a space, modifying a schedule to increase access to spaces, maybe allowing telework to avoid the commute. So things like this. So there can be other kinds of accommodations that you might need to explore.

JAN's A to Z by Topic: Parking covers several complex questions related to parking issues. So remember, it's a tricky issue, but we've got you covered again, because our parking pages cover a lot of sticky issues around this topic. So check it out at AskJAN.org.

## [Conclusion]

There are a lot of other issues that we could address today, but unfortunately, we're just about out of time. So I do hope that this information helps you level up your ADA and accommodation game.

For some additional information on the topics discussed today, please do contact JAN, go to AskJAN.org, that's A-S-K-J-A-N.org to contact us by phone, live chat, or email. Please absolutely consider following us on JAN -- I'm sorry, following JAN on Facebook and Twitter. We do put out a lot of great resources through our social media.

As mentioned earlier, we hope you'll share your feedback by completing the webcast evaluation. Keep that JAN webcast window open when the webcast ends, and the evaluation will pop up in a new window. Again, if you're seeking a CEU for this event, that CEU approval code will be available after the evaluation is completed.

I'd like to say thank you to Alternative Communication Services for providing captioning for this webcast, and finally, please join us again next month for "ADA and Accommodation Lessons Learned, Stay at Work, Return to Work Edition." Do see the end of the PowerPoint for a number of resources that are linked, and finally, thanks so much for attending this JAN Accommodation and Compliance Webcast Series event.

This concludes today's training.