# ADA Update 2021

## [Introduction]

**TRACIE DEFREITAS:**

Welcome, everyone, and thank you for joining us for the JAN Accommodation and Compliance Series Webcast titled "ADA Update." My name is Tracie DeFreitas, and I'll be your moderator this afternoon. This webcast is an annual update hosted in July in observance of the anniversary of the signing of the Americans with Disabilities Act.

We're honored to have Jeanne Goldberg, Senior Attorney Advisor with the Office of Legal Counsel, the U.S. Equal Employment Opportunity Commission, as our featured speaker today to offer insight on the latest developments in the application of the ADA in the workplace. I'll introduce Jeanne in just a moment.

But before we begin, we have some housekeeping items to cover on the next slide. First, if you experience any technical difficulties during this training, please use the Q&A option at the bottom of your screen to submit a question or use the live chat at AskJAN.org. We have an FAQ that might answer some of your questions at the link provided here. This FAQ is also linked in the e-mail you received with the event log-in information, so you can certainly look at that as well.

Next, questions may be submitted during the event by using the Q&A option located at the bottom of your screen. Questions will be gathered into a queue, so don't be concerned if it appears as if your questions -- if it was deleted or dismissed. We have gathered that information. Time permitting, questions will be answered at the end of the presentation, so we'll just see how that happens at the end.

To access the PowerPoint slides, please see the link included in the webcast chat or download them from the webcast archive on our training page linked on the AskJAN.org home page. To access captioning, use the closed caption option at the bottom of the webcast window. A copy of the captioning transcript will be available with the archived webcast. This presentation is being recorded and will eventually be available on the AskJAN.org website.

Finally, at the end of the presentation, an evaluation will pop up automatically on your screen in another window. We really appreciate your feedback, so please do stay logged in to complete the evaluation.

Now let's get started with today's training. I'm pleased to introduce our guest speaker, Jeanne Goldberg, Senior Attorney Advisor in the Office of Legal Counsel at the U.S. Equal Employment Opportunity Commission headquarters in Washington, D.C. Jeanne has been generous with her time and her expertise by offering this ADA Update for JAN for many years now. We do appreciate you, Jeanne, and we thank you for being here today. I'll go ahead and turn the presentation over to you now.

## [Definition of Disability]

**JEANNE GOLDBERG:**

Thanks so much, Tracie. Glad to be here. We're going to start off today talking about some of the new federal court decisions involving reasonable accommodation from the past year. And then we're going to spend part two of our session discussing current ADA accommodation issues that are arising in connection with COVID-19.

So, turning to slide five, we'll start with the ADA definition of disability for those who need accommodation for either an impairment that currently substantially limits a major life activity or a past history of a substantially limiting impairment where accommodation is still needed. Believe it or not, it's already been 12 years since the ADA Amendments Act, the ADAAA, took effect when Congress clarified that the ADA's definition of disability is to be construed broadly and should not demand extensive analysis. The EEOC's ADA regulations note that under this broad amended definition of disability, lots of impairments such as epilepsy, diabetes, cancer, HIV, bipolar disorder, and many others will virtually always, or should easily be concluded to, substantially limit a major life activity. And also that many less-limiting conditions will also meet the definition. For example, EEOC's regulatory appendix provides the example of a back impairment that results in a 20-pound lifting restriction, expected to last for several months, and the appendix states that would be an impairment that substantially limits the employee in the major life activity of lifting. But remember that the amended statute and regulations did not achieve this change to a broader standard of disability or a broader definition by adopting a list of conditions that are disabilities. There is still an individualized assessment of each person's case required under the statute and some basic rules of construction that are followed by employers and courts.

### [Harrison v. Soave Enterprises]

And our first case today involves some difficulty still being encountered in making sure those new rules are recognized and applied. In the case of Harrison v. Soave Enterprises, the 6th Circuit held that the lower court had mistakenly relied on the superseded disability standards from the pre-ADAAA case law. The lower court had cited old ADA decisions, stating a condition had to be long-term or permanent in order to substantially limit a major life activity. And, you know, of course while an employer is free to simply decide to provide employees assistance without determining if they have a disability under the ADA definition, if you are making this determination first, you have to remember these, you know, now not-so-new-anymore ADAAA rules that substantially limit does not require a severe, significant, or long-term restriction. That major life activities include not just things like standing, breathing, and concentrating, but also major bodily functions, such as normal cell growth, respiratory, circulatory, brain functions, musculoskeletal functions, et cetera. That the limitation is evaluated without the benefits of any mitigating measures the person might use. So we look at the employee's underlying condition without the benefit of insulin or antidepressant medication or therapy or a prosthesis or hearing aids and so on. And that episodic conditions or conditions that are in remission are conditions that are considered substantially limiting if they would be when active. So, for example, epilepsy during a seizure or cancer if it recurred.

So, continuing to slide 6, relying on the pre-ADAAA standard in the Harrison case led the lower court to wrongly conclude that the employee's knee injury could not meet the ADA's definition of disability, because the court was relying on old case law that said the impairment, the limitations from the impairment have to be long-term or permanent. And so the court reversed that. And the bottom-line takeaway is that determining if someone has a disability under the ADA is now often quite straightforward. So, make sure to recognize and apply all those changed rules that result in a broader definition of disability.

Slide seven.

## [Essential Functions]

There were also some cases this year parsing what it means to be qualified for a job under the ADA. An individual with a disability can be considered qualified even if they need an accommodation to perform those essential functions of the job, the main duties they were hired to do. And of course, an employer never has to provide an accommodation that would pose an undue hardship, never has to lower its production or performance standards as an accommodation -- in other words, does not have to lower its standards for the quality or quantity of work -- and the employer never has to eliminate any essential functions of the job. But the employer may have to allow the job task to be performed in a different way than usually performed in the past or with special equipment or some other accommodation.

This year's cases address a number of questions that arise when an employee asks to be excused from performing a particular job duty as an accommodation for a disability.

### [Vargas v. DeJoy]

The first case we're going to look at, Vargas v. DeJoy from the 7th Circuit 2020, involved sort of the basic rule. This involved a letter carrier who requested accommodation that was not reasonable. He wanted to only perform collecting the mail from the mailboxes, but that would have left essential functions of his job to others to do. Carrying heavy mail bags and delivering their contents -- that would have to be assigned to someone else. So, you know, the court said an accommodation is of course not reasonable if it would require a coworker to perform one of the employee's own essential functions, because an employer never has to remove or reallocate to another employee an essential function of the job as an accommodation.

### [Tonyan v. Dunham's Athleisure Corporation]

Now, turning to slide eight, an employer also does not have to allow a manager to delegate essential functions to someone else as an accommodation. And this is illustrated in the Tonyan v. Dunham's Athleisure Corporation case from 2020, which also shows how the particulars of an employer's workplace can be relevant to deciding if an accommodation is reasonable. In this case a store manager had to do frequent reaching, lifting up to 40 pounds, other physical tasks for 30% of the time, because the owner's business model was to have fewer staff by having managers pitch in. And also to have a smaller footprint, less floor space, there were elevated shelves of stock. So, there was lots of physical labor involved putting stock up, taking it down, et cetera.

And continuing on slide nine, the court said the fact that the manager in the Tonyan case could delegate some of these tasks to his subordinates, he could tell them to do this or that, that did not mean that these were not essential functions of the manager's position. And the court acknowledged it's important that in some cases tools to assist with lifting, devices, could be a reasonable accommodation, but not in this case, because there weren't any that would have permitted this manager to do the type of lifting of the items in question.

### [Conners v. Wilkie]

Slide ten. An employer may choose to temporarily excuse essential functions. That's certainly something an employer could decide to do. The ADA doesn't get in the way of that. In Conners v. Wilkie, 2021, a nurse had an accident that left her with a lot of limitations. And her supervisor allowed her, for some period of time, not to perform a number of her essential functions. She was allowed not to treat patients, respond to medical emergencies, perform immunizations, manage the front desk. To help her out, the supervisor allowed her to only do clerical duties and teaching. And then, when upper management put an end to that, the employee asserted she was entitled to it as a permanent accommodation. And the court held no, the employer is not required to continue to excuse the employee from performing essential functions, even if the supervisor initially went above and beyond what the law requires by permitting the employee to be excused from essential functions.

Continuing on slide eleven, the court in Conners explained that having allowed these essential functions to go unperformed for a period of time was not a reasonable accommodation, so it was legally irrelevant whether it would have posed an undue hardship to continue the arrangement. The employer did not have to do it in the first place. It was fine if they did, great, allowed to go above and beyond what ADA requires for whatever period of time the employer chose, but since it was not a reasonable accommodation, it was something additional the employer chose to do by excusing performance of essential functions, it was not required to continue the arrangement.

### [Bell v. O'Reilly Auto Enterprises]

Slide 12. An employee can be entitled to accommodation due to medical symptoms even if the employee could perform the essential functions without the accommodation. In Bell v. O'Reilly Auto Enterprises, First Circuit, 2020, a store manager began having to work almost a hundred hours a week due to staffing losses, and this aggravated symptoms of his disabilities, but his accommodation request for a regular schedule was denied. And one of the arguments the employer made in litigation was that the employee could not show he needed the accommodation, because the employer was fully satisfied with his performance.

Continuing to slide 13, on appeal, the court in this case rejected this argument by the employer and held that an employee who can, with some difficulty, nevertheless perform essential functions of his job without accommodation is still eligible for accommodation if it's needed due to the symptoms of the disability.

### [Exby-Stolley v. Board of County Commissioners]

Slide 14. An unlawful denial of accommodation is independently actionable. Exby-Stolley v. Board of County Commissioners, 10th Circuit, 2020, was one that was closely watched among lawyers across the country who follow EEO law. In this case, a county employee had lost use of an arm in an accident, and she alleged that she was unlawfully denied appropriate accommodations. In the lower court, the employer prevailed by arguing that she could not challenge the denial of accommodation where she hadn't been discharged or suffered some other adverse employment action. And on appeal, en banc, the 10th Circuit ruled that an employee can challenge an unlawful denial of accommodation, regardless of whether or not it led to a termination or some other adverse employment action, that denial of accommodation is an independently actionable claim that the employee could bring.

## [Interactive Process]

Slide 15. Let's turn to some cases about the interactive process. You know that there is no violation of law just only by failing to engage in the interaction active process. The legal violation under the ADA, if there is one, is of failing to provide an available reasonable accommodation absent undue hardship. But where courts look at a situation in hindsight and they see there was an available accommodation that could have been provided without undue hardship, in some cases they have to determine well, who was responsible for that accommodation not having been provided? In other words, was it the employer whose actions led to the breakdown of the interactive process? Was it the employer's fault that that accommodation was not provided? Or was it the employee who failed to cooperate somehow and that's what resulted in this available reasonable accommodation not having been offered?

### [Aubrey v. Koppes]

In Aubrey v. Koppes, the 10th Circuit, 2020, the employer may have itself been responsible, the court said, for a breakdown in the interactive process, where it had allowed an employee to be on leave as a disability accommodation, but, before the date her doctor had estimated for return to work, she was called into a pre-termination meeting and given no advanced notice that she was expected to bring to the meeting a fitness for duty form already signed off by her doctor for return to work. And the employer denied her even a short time to go obtain this paperwork that would show she was cleared to medically return to work on the expected date, even though she already had the scheduled neurologist appointment, so it would have been several weeks out.

The court said that the employer may have been responsible for the denial of accommodation here at the completion of the period of leave needed or the extra time to obtain that documentation. So, something to be sensitive to when you are conducting an interactive process and exchanging information with an employee, whether it's while you're deciding on what accommodation to provide, or when leave or another accommodation is concluding.

### [Elledge v. Lowe’s Home Centers, LLC]

Slide 16.

The Elledge v. Lowe's Home Centers case, the 4th Circuit, 2020, a case about a number of disputed points of law that courts debate regarding reassignment as an accommodation, but there was this language in the court's decision that I thought was instructive. The court said: “What counts as a reasonable accommodation is sensitive to the particular circumstances of the case. A particular situation may not have a single solution but rather many possible solutions. The actor responsible in the first instance for reducing this wide solution space to a concrete accommodation is not the judiciary or even the disabled employee. It is the employer. To the extent an employee may be accommodated through a variety of measures, the employer, exercising sound judgment, possesses ultimate discretion over these alternatives.” So, this language underscores that, if there's more than one effective accommodation, more than one effective solution for the employee's disability-related needs, the employer has the discretion, the choice, about how to accommodate, which of these multiple options to offer. But the flip side of that legal prerogative the employer has is a legal responsibility to find and offer an effective accommodation if there is one.

### [MLSNA v. Union Pacific Railroad Co.]

Finally, slide 17 is a good illustration of this principle in action. In the Union Pacific case, the employer was facing a complex accommodation issue where the solution was not necessarily obvious. The employee was a hearing-impaired train conductor who'd always performed his job successfully while wearing hearing aids. To comply with a new federal regulation, the employer was requiring him to wear a hearing protection device for all employees who perform this job, a new hearing protection device. But for this employee, the device did not fit over his hearing aids. He proposed a custom-made device, and the employer did not approve it for a variety of reasons. It did not think, in fact, that it complied with what this regulation dictated, and his employment was ended.

Continuing to slide 18.

Now as we just discussed, if there's more than one possible effective accommodation, the employer always has the discretion to make the choice of which accommodation to offer, or accommodations. But here the court agreed with the plaintiff and the EEOC, which was amicus in the case, that the employer's obligation in the interactive process does require it to look for alternatives if it is rejecting the employee's proposal, because the employer legally has to offer an alternative reasonable accommodation if there is one that would not pose an undue hardship.

So here the employer was rejecting the custom-made device the employee proposed, but the employer was obligated to offer an alternative if there was one. And here in this case the employer said it might have looked for alternatives, but it had no information about what it had done to look, what options it had considered, who it had contacted. No information and no documentation to show that it had looked for alternatives. So, the court sent the case back to the lower court for trial, and in fact the plaintiff just prevailed at trial in this case two weeks ago.

### [EEOC Resources]

So, as a tie-up to this section, I'll call your attention to some key EEOC reasonable accommodation resources, which are listed on slide 20 with hyperlinks that go right to the documents on our website. These are frequently asked about by callers. They contain a lot of the answers to the frequent ADA accommodation questions we get. The “Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA,” a technical assistance publication called “Employer-Provided Leave and the ADA,” and finally, a publication called “Applying Performance and Conduct Standards to Employees with Disabilities” that talks about a number of issues where performance or conduct standards or rules might intersect with accommodation requests that are made and how you sort through those situations.

On slide 21, I also wanted to mention some new technical assistance publications that EEOC has just issued in the past year. The first two are "Use of Codeine, Oxycodone, and Other Opioids: Information for Employees" and "How Health Care Providers Can Help Current and Former Patients Who Have Used Opioids Stay Employed." As you know, the ADA has a statutory exclusion from coverage under the definition of disability for those who are engaged in the current illegal use of drugs as defined under the Federal Controlled Substances Act. But this does not bar ADA protections for those whose impairment is an addiction to a lawfully prescribed drug or who are using a lawfully prescribed drug for treatment of another disability or who have a past addiction and have gone through rehabilitation or are in that process. So, these two publications address this topic as it applies to opioids.

The first talks about how ADA non-discrimination and accommodation issues come up where you have an employee with current or past opioid addiction. And the companion piece for healthcare providers explains the type of supporting medical information that healthcare providers can offer to employers to help make accommodation and fitness for duty decisions.

The third publication on this slide, "EEOC Efforts for Veterans with Disabilities," is actually a link to several publications, one geared toward employees and applicants, the other toward employers. But this is an updated set of publications about veterans and the ADA that focus on explaining rights for those who -- ADA rights – for those who have left service and are returning to a civilian job or seeking a new job. And there's a lot of examples provided about types of workplace accommodations that might be relevant.

## [COVID-19]

Okay. So now we're going to move on, slide 22, to part two of our ADA update, and we're going to talk, of course, about COVID-19.

Slide 23 is a link to an additional new, extensive technical assistance publication that was of course dictated by circumstance, EEOC's publication called "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws." Everything that EEOC has issued relating to COVID, by the way, is on our website at EEOC.gov/coronavirus. This "What You Should Know" or WYSK publication is our main COVID publication. It was originally issued at the outset of the pandemic in late February, 2020, and it's been updated more than 10 times, most recently May 28, 2021. And it now has more than 80 questions and answers that reflect what we're most frequently hearing about in terms of inquiries from employers and employees. Everything from not just ADA issues, but also issues under Title VII and the other statutes we enforce, everything from employer workplace screening to reasonable accommodation and so many other issues. And I'm going to try to sort of walk you through some of the highlights, focusing on the practical questions we're getting from stakeholders right now.

Slide 24, just a sort of introductory point about these materials. They only focus on the EEO laws. Of course, there are other laws that might apply, other federal laws, state and local laws. And one thing that has been asked of us from the beginning of the pandemic is "Is there some sort of special pandemic exception? This is all so exceptional. Do the EEO laws, does the ADA still apply in the usual way?" And EEOC has said from the start, from March 2020, the EEO laws continue to apply during the time of the COVID-19 pandemic, but they don't interfere with or prevent employers from following the guidelines, the suggestions made by the Centers for Disease Control and Prevention, the CDC, or other public health authorities about what steps employers should take regarding COVID-19.

And I've given you the link on the bottom of slide 24 to where CDC has on their website all of their workplace and business resources. They have a frequently asked question guide there and a number of other publications, some of which are general, and some of which are geared toward specific industries. So, that could be very useful for you to reference if you haven't accessed it yet.

### [Accommodation Requests]

Slide 25.

Some examples of pandemic-related ADA accommodation requests that come up for employers. First, accommodations that would allow someone to be in the workplace. This might be a relocated workstation in an unused conference room or an unused office or a further-away cubicle that allows the employee to be more socially distanced in order to protect themselves. There might be similar accommodations involving Plexiglas barriers that are installed. We've certainly seen cases where employees -- instances where employees request a schedule change so that they are commuting at a time that involves fewer people on the train or on the bus. Different hours so that they are less likely to be exposed.

And, you know, these examples I just gave all involve people who might have underlying disabilities that place them at higher risk of severe illness if they do contract the virus. But also seen other kinds of accommodations relating to being in the workplace, for example, someone who uses the paratransit bus service to commute, and the hours and the schedule have been cut back due to fewer people commuting during the past year. So, the individual needs a schedule change in order to use the paratransit bus service. That would be another example of a type of disability-related accommodation that might be related to the circumstances of the pandemic to allow a person to be in the workplace.

There are also, of course, accommodations that have come up, frequently requested or provided for those who cannot be in the workplace due to a disability. And that might be, for example, telework, if it's feasible for the position -- and I'm going to be talking more about telework in a few moments, reassignment to a different position that is in a less-populated work space or is outside or that lends itself to telework. And those are some of the primary examples that have come up.

Accommodations related to an employer's screening process. One of the early last summer questions I got was from an employer who said, you know, "I have an employee with a cochlear implant. We're taking everyone's temperature at the entryway, want to know if the employee is asking for us to take the temperature in a different way, not an ear thermometer, because the cochlear implant raises the temperature for that individual." And of course, yes, an alternative means of taking the temperature would be a reasonable accommodation. There could be other accommodations, of course, that's just one example. If an employer is doing some sort of entryway screening for those physically entering the workplace to determine if anyone has COVID or symptoms of COVID, they need to be excluded under the current CDC guidance during the period they need to quarantine or isolate, there might be the accommodations that individuals need to go through the employer screening process. It could even be if the employer is doing questions about current symptoms or exposure that an employee needs a sign language interpreter for that interaction, depending on how it's being done.

Accommodations relating to an employer's infection control rules. So, employers who require masking or frequent handwashing or social distancing or other kinds of infection control procedures, there may be accommodations that relate to that. We've certainly heard of a number relating to protective coverings and PPE that are needed in order to fit over religious garb under Title VII or with respect to ADA to accommodate an individual's disability. There are special gowns for somebody who uses a wheelchair, for example. JAN has all kinds of vendors listed on their website for particular items that have been frequently needed, for example, masks that have a clear panel in the front for -- clear plastic for those who need to communicate with employees or members of the public who lipread. So, all kinds of accommodations that might be needed relating to infection control rules that an employer might impose.

And finally, an accommodation request related to an employer's COVID-19 vaccination requirement, if an employer is requiring vaccination, and I'm going to talk about those when we talk about vaccination at the end of this segment.

Turning to slide 26.

I would say that in terms of pandemic-related ADA accommodation requests for any of the kinds of accommodations I've just described or others, these days there's mainly three groups of applicants or employees from whom we're seeing pandemic-related accommodation requests. And this may be similar to what you're seeing.

The first is those who have a disability, as I said earlier, that places them at higher risk of severe illness if COVID-19 is contracted. In other words, they're not at greater risk of contracting the virus, but at greater, higher risk, CDC has said, of severe illness if they do contract the virus. And that would include a bunch of examples CDC has given such as people who are immunocompromised either due to certain drugs they take or medications or due to a condition like rheumatoid arthritis or prior cancer, people with diabetes, heart conditions, et cetera.

There's also those -- So that's the first category, those who are at higher risk of severe illness if COVID-19 is contracted and that due to an underlying condition, and they come to the employer and say, "I need accommodation for that underlying condition that's a disability.”

And then there are those who have a disability that may have been exacerbated by the pandemic situation. For example, an anxiety disorder. Employer may or may not have even known before that it existed, but now the employee has a need for accommodation and informs the employer that they are requesting accommodation due to this underlying condition for some circumstances related to the pandemic.

And finally, requests that might relate to COVID-19 itself. In particular, if there's an individual who has been diagnosed with what they're now calling long COVID. But certainly there could be all different kinds of COVID-related symptoms for which an employee ends up requesting accommodation.

The EEOC itself -- so, those are three common categories. The EEOC itself has not addressed in the WYSK when COVID-19 itself might render someone an individual with a disability under the ADA, but employers are sorting through that, applying the usual rules like from the Harrison case that we began the session discussing.

Turning to slide 27, we're still getting questions about -- from employers about those who are designated as "essential" or "critical" workers. Can they request accommodation? Well, yes. They are employees like any other. They still retain ADA rights and may be entitled to accommodation for a disability if it's feasible and does not pose an undue hardship.

And also common questions about an employee who does not themselves have a disability but lives with someone who does and seeks accommodation because they fear infecting that individual who they live with who does have a disability and might be at higher risk of severe illness if they contract the virus. The ADA does not require accommodation based on an association with an individual with a disability. So that ADA associational discrimination provision is limited to protections from disparate treatment based upon your association of someone with a disability, or no harassment on that basis, but in order to be entitled to an ADA accommodation, the employee him or herself must have the disability.

Turning to slide 28.

A common question we are getting as employers transition who have had their workforce on mandatory full workforce or partial workforce telework and now are transitioning, recalling employees back to work, they're receiving accommodation requests to continue the telework. In other words, now to continue it as a disability accommodation.

If an employer recalls an employee to work, the request to continue telework as a disability accommodation does not have to be granted unless the ADA requirements are met. So, it's treated just like any other accommodation request even if during the past year the employer has allowed that employee to telework just because of the pandemic, not as a disability accommodation. So, it's a new request for accommodation. It's treated just like any other would be at the outset.

A common question we've gotten is what happens if the employer has allowed the employee during the past year to not perform all of their essential functions in order to facilitate mandatory telework? Can the employer restore the essential functions that comprised the individual's job pre-pandemic?

Yes. The employer could restore those essential functions if they were temporarily altered due to mandatory telework during the pandemic. So the question is now, this individual who has requested continued telework as a disability is accommodation, can they do those essential functions remotely? Is it feasible? Would it pose an undue hardship? If there are certain functions only that need to be performed at the workplace and some can be performed remotely, it's possible that partial telework could be a reasonable accommodation? For example, for an individual whose doctor says, you know, they're immunocompromised, we need to reduce the time that they're potentially exposed and at risk, and partial telework would be better than none at all.

Now, whether telework was effective for an individual during the pandemic could be relevant for sure to deciding the employee's requests for continued telework after the workplace reopens. Some employers have said, "You know, tasks that I thought never could have been performed remotely, turns out it went very well. Others that I thought could be performed remotely, turns out they can't be, or for this individual employee, they couldn't do it properly." And that experience, the EEOC has said in the WYSK, is relevant to determining whether continued telework would be feasible after the workplace reopens.

Slide 29.

Of course, an employer is permitted to use the usual process to handle pandemic-related ADA accommodation requests. Whether it's requesting medical documentation if the disability or medical need for accommodation is not obvious or already known; having that discretion to choose among effective accommodations; the obligation, of course, to look at an alternative reasonable accommodation if the one that's been requested would pose an undue hardship or if the employer just doesn't prefer to offer it, no matter what the employer's got to look at an offer of a reasonable accommodation if there is one that could be provided without undue hardship.

And sometimes, you know, the solutions are obvious, what the options are. Sometimes it's not clear what accommodations might be appropriate. And it really may be helpful to consult JAN's COVID-19 resources on their COVID web pages for types of accommodations for different situations.

Turning to slide 30, lots of questions about pregnancy-related accommodation requests during COVID. So, two different laws come into play here. First, under the ADA, pregnancy itself is not a disability under the ADA. Not. But reasonable accommodation could be available for a pregnancy-related medical condition. A pregnancy-related medical condition could be a disability under the ADA. So, someone could be entitled to ADA disability accommodation for one of these pregnancy-related medical conditions if the other ADA requirements are met.

Separately, under Title VII of the Civil Rights Act of '64, which prohibits sex discrimination and has been amended long, long ago by the Pregnancy Discrimination Act to say that pregnancy discrimination is sex discrimination, pregnant employees have a right to be treated similar to those – the same way as those who are similar in their ability or inability to work. It's a disparate treatment protection for pregnant employees. And so that, in some circumstances, can entitle a pregnant employee to job modifications if the employer is providing a lot of other employees with similar limitations that type of accommodation. So make sure the supervisors know how to handle those requests, as well, not just ones relating to the ADA.

And I've given you a link here to a short publication we have called "Legal Rights of Pregnant Workers under Federal Law" that brings together the ADA and PDA obligations of employers in one place.

Slide 31.

Information or inviting advance requests for accommodations. Some employers have said, "Wow, I'm going to be overwhelmed when I suddenly call my workforce back in full with a lot of accommodation requests all at once. Is there a way I can manage this?" Well, yes, EEOC has said an employer is free to provide information to the whole workforce about who to contact to request accommodation or other flexibilities the employer is offering in advance. And it could invite employees, should they choose, to make their accommodation requests in advance, even before the workplace reopens, for those who might choose to make an early request. And then the employer can start the interactive process on those requests. If somebody chooses not to request accommodation in advance and instead makes it at a later time, of course the employer has to still consider the request at that time. But this can be a really helpful planning tool to take note of if an employer has a large workforce, they've been on full-time telework, and now they're going to bring everyone back, let's say, you know, in two months or in a month, nothing that stops you from inviting those requests and beginning to process them in advance.

### [Confidentiality]

Slide 32, medical confidentiality of course required under the ADA for all applicant and employee medical information, including that what you might gather from pandemic-related accommodation requests. So follow that usual rule, limited exceptions that allow an employer to disclose this information. It includes, in EEOC's view, not just the diagnosis or treatments but also the fact that an individual has requested or is receiving an accommodation, and that medical information can't go, remember, in the usual personnel file. Medical records have to be kept separate. This has also come up in a very pandemic-specific way, where some employers might be notifying the workforce that somebody in the building has tested positive for COVID-19, been diagnosed with COVID-19, or been sent home with symptoms of COVID-19. Don't reveal the identity of the individual. You can of course inform the officials within the workforce who are designated to handle the response on that individual, and public health authorities can be informed. But if you're informing the workforce, other employees, or customers, you cannot disclose the employee's name. You need to use some generic descriptor like "someone who works on the fourth floor." And that will enable individuals to know what they need to know in case they need to take steps to protect themselves.

### [EEO Laws & COVID-19 Vaccination]

Turning to slide 33, our last subject segment here, I want to talk a bit about the EEO laws and COVID-19 vaccination. I know we've been getting a lot of questions about this. The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the reasonable accommodation provisions of Title VII, for religious beliefs, and the ADA for disability-related accommodations, and some other EEO considerations that are discussed in the WYSK. And this general rule, these principles apply whether or not the employer is saying to an employee, "bring me in proof that you got vaccinated in the community at a pharmacy or healthcare provider or community vaccination site" or whether the employer is itself administering a vaccine to employees. But I'm going to talk about those two distinct situations and some different ADA rules that apply in a moment.

So, just to emphasize the EEOC's role in addressing vaccination like anything else, any other topic, is limited to the application of the federal EEO laws. There are of course a number of other federal agencies that give recommendations or guidance or might even have requirements in this space. You know, FDA, OSHA, CDC. So, the information that we're providing is of course limited -- It goes without saying -- to the EEO laws. And there could be other state or local laws that apply, as well. And I'm sure you've read about some of those that employers need to be aware of. I'm going to focus in today just on some of the ADA issues, the ADA issues only, that we've gotten particular questions about.

Turning to slide 34.

So, what about employer vaccination policies that require, require someone to be vaccinated? So there's two different ways that these arise, and different ADA rules apply. The first way this comes up is an employer is requiring someone to bring in proof of community vaccination. "Bring me in a form from the state, from the CVS, from wherever it is, copy of your white card or fill out this attestation, you know, that you have been vaccinated." This is not considered an ADA disability-related inquiry or a medical exam by the employer. So the employer does not have to satisfy any of the ADA rules for requesting employee medical information or doing an employee medical exam in order to have this requirement. They can just go ahead and require that employees bring in proof of community vaccination or represent that they've had community vaccination, however the employer chooses to do it.

By contrast, if employees are required to have a vaccination that's actually being administered directly by the employer or the employer's agent, that's different. Because then the employer would itself be asking the CDC-recommended prevaccination screening questions, which include some disability-related inquiries. So, the employer would be making disability-related inquiries there of the employee where it's requiring that the employee submit to an employer-administered vaccination. So there the employer would have to satisfy the ADA direct threat standard in order to have that requirement.

Turning to slide 35.

What about ADA and employees who cannot be vaccinated due to disability? If a particular employee cannot be vaccinated because of disability, how do we analyze that? Well, the requirement that employees be vaccinated is what we call under ADA a qualification standard. A rule that an employer has. "You must possess this attribute in order to be employed here." "You must be vaccinated." We call that a qualification standard under the ADA. And if someone comes forward, an employee, and says, "I can't meet that qualification standard because of my disability. I can't be vaccinated because of my disability," under the ADA we say well, that qualification standard, if it's screening out the employee based on their disability, their disability is the reason they can't meet the employer's qualification standard, and it's a safety-based qualification standard, which a vaccination requirement would be, then the employer, in order to justify imposing the vaccination requirement on that employee with a disability who is screened out is going to have to demonstrate that it would be a direct threat to the health or safety of that employee or others in the workplace and that there's no reasonable accommodation that would reduce or eliminate the threat. And I'm going to talk about some examples of those accommodations in a moment.

Turning to slide 36.

When you get these or anticipate that because you have a mandatory vaccination policy, you may be getting requests to be excused -- and again, although I'm focusing on ADA, those might be related to a sincerely held religious belief, they might be related to pregnancy -- but, you know, in particular with respect to our focus today on disability-related accommodation requests, if you're going to have one of these mandatory vaccination programs, you can probably anticipate there may be some request to be excused. And so as a practical matter to ensure EEO compliance, if you're going to have a vaccination requirement, it is helpful for employers to give managers and supervisors the advance information and support they need to make sure they know how to recognize an accommodation request and who in the organization to contact about it. And this, you know, as I said, goes, of course, not just for disability issues but for accommodation requests that might come up with respect to religious beliefs or pregnancy, for example, as well.

Another way to say that is you don't need to make every individual, every manager or supervisor on the front line in your organization an expert in the EEO laws, but they do need to know how to recognize a request for a change or an exemption that might trigger the application of the EEO laws and who to phone home to, whether it's in HR or a designated manager or whoever it might be who is either going to handle that request themselves or give the manager or supervisor advice about what to do.

Turning to slide 37.

Some examples of reasonable accommodations that, depending on the workplace and the individual, might be reasonable accommodations for employees who cannot be vaccinated due to disability, if they don't pose an undue hardship on the employer's business. Some reasonable accommodations might be wearing a face mask. Working at a social distance from coworkers or from customers, non-employees. Working a modified shift. For example, I mentioned earlier different times that will involve not being exposed to the same number of people or at the same distance. Getting periodic tests for COVID-19, viral tests for current COVID-19 infection. Being given the opportunity to telework if that is feasible for the individual's position. Rr being offered reassignment as the accommodation of last resort to a position, for example, that could be done by telework or that allows the individual to socially distance from coworkers, whatever it might be. So, those are some accommodations that may fit in that situation.

Turning to slide 38.

Requests for accommodation by those who are fully vaccinated. If an employee is fully vaccinated, that does not mean an employer can automatically rescind an accommodation that was granted for an underlying disability due to the higher risk of severe illness from COVID-19. If you do that, if an employer just automatically rescinds an accommodation, that risks violating the ADA for unlawful denial of accommodation, because of course the employer has to know before it alters any accommodation that's been granted whether the medical restrictions for the employee in question have in fact changed. Does the doctor say they still need accommodation?

Just to take one example. If an employee is immunocompromised -- takes certain medications, has had an organ transplant -- the healthcare provider may recommend, for example, a telework accommodation continues to be medically needed because of the degree of the immune response from the vaccination is uncertain. And even the CDC guidance from May on fully vaccinated people says that, in fact, even after vaccination people with those underlying conditions may need to continue taking all precautions. So go case by case, don't make any assumptions.

Slide 39, I discussed earlier ADA medical confidentiality. Of course, remember that confirmation or documentation of COVID-19 vaccination would be medical information that would be subject to those confidentiality requirements.

And then finally turning to slide 40.

**TRACIE DEFREITAS:**

Excuse me, Jeanne. I'm sorry, I was trying not to interrupt, but we just have about 3 minutes left. I didn't find a good spot to say that.

**JEANNE GOLDBERG:**

Perfect. We're turning to the last slide, slide 40.

ADA and employer incentives for voluntary vaccination. In situations where an employer is not requiring employees to be vaccinated but is seeking to encourage and indeed incentivize them to get vaccinated or bring in proof of vaccination or voluntarily participate in an employer-administered vaccination, a number of employers have asked, "Okay, you know, we don't want to require vaccination, but we do want to incentivize employees to do it voluntarily. What are the ADA rules, if any, on the size of the incentive?"

Two different situations.

If an employer is trying to offer an incentive for an employee to receive a vaccination administered directly by the employer or its agent, employer-administered vaccination, then remember I said the employer is going to be making those pre-vaccination disability-related inquiries as part of the screening, pre-vaccination screening. So they're going to be making disability-related inquiries, the ADA rules apply, and therefore the rule is the incentive cannot be so substantial as to be coercive.

By contrast, this incentive limitation does not apply -- ADA incentive limitation does not apply if the employer is offering an incentive to employees to voluntarily provide documentation or some other confirmation that they received a COVID-19 vaccination on their own in the community such as from a pharmacy or healthcare provider or public clinic. There, an employer offering an incentive for employees to voluntarily bring in proof of vaccination or to attest that they have been vaccinated can offer any incentive it wants. There is no ADA limit.

With that, we'll turn to our final slide, which has my e-mail and phone number. Feel free to be in contact with me afterwards if there were in any questions you had that we did not get to in the presentation.

And with that, I'll turn it back over to Tracie.

TRACIE DEFREITAS:

Wonderful. Thank you so much.

Jeanne, you actually covered so many of the questions that did come in through the Q&A, just with the content that you shared today. It's almost as if you just anticipated what the next question was going to be. So we really appreciate your practical approach to explaining some of these complex ADA issues and cases.

With that, we will go ahead and close out the session today. Unfortunately, that's all the time we have. So Jeanne, thank you for another exceptional ADA update. We do appreciate your time and your expertise.

For additional information on the topics shared today, please contact JAN. You can go to AskJAN.org to contact us using e-mail, live chat, or by phone. You can also follow us on Facebook and Twitter.

As mentioned earlier, an evaluation form will automatically pop up on your screen in another window at the end of this event. And we really do appreciate your feedback, so we hope you'll take a minute to complete the form. I want to also thank Alternative Communication Services for providing captioning today.

And finally, join us next month for the "AT Update, What's New in 2021." Once again, thanks, everyone, for attending this JAN Accommodation and Compliance Training Series event. This concludes today's training.