# What to Do When Performance and Conduct Factor into the Accommodation Equation

## [Introduction]

**TRACIE DeFREITAS:**

Hello everyone, and happy Pride. Thanks for joining us for this JAN Accommodation and Compliance Series webcast titled “What to Do When Performance and Conduct Factor into the Accommodation Equation.”

I'm Tracie DeFreitas. I'm the Director of Training, Services, and Outreach for JAN. Today's training will be presented collaboratively by me and my JAN colleagues: Melanie Whetzel, Principal Consultant and Cognitive/Neurological Team Lead, and Lisa Mathess, Principal Consultant and ADA Specialist. Thanks for joining me today, Melanie and Lisa.

As you all might expect, we have a lot to talk about today, so let's start with the housekeeping items and get right to it.

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Questions for presenters should be submitted using the Q&A option. All questions will be gathered in a queue, and, time permitting, we'll go ahead and address some of those later today.

A PowerPoint is available for this webcast. Please download the PowerPoint slides using the direct link that's found in the login email that you received today. The link is also posted in the chat, or go to this webcast event from the training page at AskJAN.org.

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The presentation is being recorded and will be available later this month at AskJAN.org.

Finally, at the end of the webcast, please do complete the evaluation. We appreciate your feedback. If you're seeking an HR CEU, the HRCI approval code will be provided after you complete the webcast evaluation.

## [Discussion Points]

Now let's get started with our discussion points. This training will include a high-level overview of the basics of the Americans with Disabilities Act and applying performance and conduct standards when disability is a factor in the employment situation. This is a big topic, and we have limited time, so we'll offer some basic ADA principles and interactive process takeaways along with some illustrative examples of accommodation and performance and conduct issues.

We'll talk about steps that are appropriate when disability is or seems to be causing a performance or a conduct issue. We'll talk about when employers may raise the issue of an employee's disability as part of the discussion about performance or conduct and also when a medical inquiry in response to poor performance or conduct violation may be appropriate under the ADA.

This presentation will kind of follow a sort of mathematical terms theme as we explore managing performance and conduct issues when disability is a factor in the accommodation equation.

 A quick disclaimer — JAN does not provide legal guidance. This training is based on the Equal Employment Opportunity Commission guidance on “Applying Performance and Conduct Standards to Employees with Disabilities,” which is linked from the PowerPoint.

## [Applying Performance and Conduct Standards]

Now EEOC's introduction to this topic includes a quote that kind of hones in on the importance of setting expectations and applying fair standards related to performance and conduct. EEOC states “…employees work most effectively when they clearly understand what is expected of them and know that their performance will be measured against a standard that is fair and applied evenhandedly. The same principles apply to workplace rules concerning employee conduct.”

I think we can all agree that when employees are aware of their employer's expectations for performance and they know the standards against which they'll be measured, they're more likely to succeed and perform effectively. Expectations plus fairer standards equals effective performance. So you want to keep this in mind as we talk today.

But what relevance does the ADA have to this topic that we're talking about? The ADA does not restrict employers from defining jobs or choosing qualification standards or evaluating all employees, including employees with disabilities, according to consistently applied performance and conduct standards.

Performance standards can be qualitative or quantitative, meaning related to how well one performs and/or how much one produces. Conduct standards are generally workplace rules for acceptable behavior. Performance issues can occur for many reasons, but sometimes develop due to disability-related limitations.

Establishing and uniformly applying performance and production standards and conduct standards, it allows employers to consistently evaluate all employees and to readily identify and respond when standards are not being met. This may include engaging in the accommodation process, when it's known that disability is a factor in a situation. When you're engaging in that process to maybe gather information, there are some ADA rules concerning disability-related inquiries, or requesting medical information in response to performance or conduct issues. I'm going to talk a little bit more about that in a moment. These are just some things to keep in mind.

Quantitative and qualitative production standards can be applied to all employees in the same job category, even employees with disabilities. Good practices related to these standards include informing all employees about the required quantity and quality of work, so clearly stating expectations for performance or productivity, maybe laying out what the attendance policy is to meet, or the number of cases to close, or the products to sell.

It also means accurately and consistently assessing performance and addressing, not ignoring, those performance issues that might occur. So sharing what's been observed and explaining the consequences of not meaning the required standard. Explaining what must be added or removed or changed to improve performance and productivity and asking what, if anything, can be done to support the employee in meeting those requirements.

Now performance evaluations, they sometimes lead to disability disclosure when an employee recognizes a disability-related connection and chooses to share information about their health condition or their limitations or request an accommodation. So when it's known that a disability is a factor affecting performance, reasonable accommodation may be required to assist an employee with a disability in meeting a quantitative or a qualitative standard.

Thus when an employee is aware or an employer is aware that an employee is not meeting the production standards and either knows or has good reason to know or believe that it's due to a disability-related reason, that's when, in tandem with the performance discussion, it's important to engage in the accommodation process under the ADA to identify reasonable accommodation solutions to assist the employee in meeting those standards. So we really have to remember that.

Similar principles apply related to conduct standards. The ADA allows employers to develop and enforce conduct rules, and employers may hold employees with disabilities to the same conduct standards applied to all other employees, but a conduct rule must be job-related and consistent with business necessity when it's applied to an employee whose disability caused them to violate that rule.

So what this means is when an employee's disability contributes to misconduct, they may be disciplined when the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard. Conduct rules are job-related and consistent with business necessity when the standard is a legitimate measure of an individual's ability to perform the essential duties of the job. Some conduct rules will meet the standard, and others will not. So for example, on the next slide conduct policies that are sometimes job-related and consistent with business necessity could include requirements like complying with a dress code, expectations to behave appropriately, meeting attendance and tardiness standards, prohibiting animals in the workplace, prohibiting eating at workstations, or limiting personal calls during work time. These are just examples, of course.

When these types of rules are not job-related and consistent with business necessity, it might be necessary to modify the policy as a form of reasonable accommodation. For example, modifying an attendance policy to allow a certain number of occurrences that are related to the disability, or allowing access for a service or emotional support animal, or maybe allowing calls to a support person throughout the day.

In some cases, even if the employee indicates that a disability is causing a conduct problem, the employer may be able to apply its usual policies. This will be when the conduct standard is clearly considered to be job-related and consistent with business necessity, so those times when it might be a standard that almost always meets this requirement.

Some examples of that might be conduct rules that prohibit violence or threats of violence or stealing. It could be prohibiting insubordination or inappropriate behavior between coworkers, prohibiting sending inappropriate or offensive emails, using the Internet inappropriately, using the work equipment inappropriately, requiring employees to observe safety and operational rules, and prohibiting drinking, use of alcohol, or illegal drugs in the workplace. Employers have no obligation to modify these types of rules, even when a disability causes the misconduct. So these are those types of rules that are almost always going to be considered job-related and consistent with business necessity.

## [Inquiries about Performance/Conduct and Disability]

Now we've established sort of a foundation very quickly for applying performance and conduct standards, let's talk about inquiries related to performance and conduct issues and disability. At JAN we often receive questions about what to do when it's believed that a disability is a factor affecting performance or conduct. Sometimes it's not clear whether is it appropriate to ask disability-related questions when assessing performance.

One note of importance: Sometimes an employee may not know or be willing to acknowledge that there's a problem requiring accommodation, until the employer kind of points out some sort of performance issue. Employees, they certainly may ask for accommodation before or after being told a performance or conduct problem exists, but an accurate assessment of an employee's performance — Oftentimes this will alert the employee that a disability is contributing to the problem, and ultimately, this might lead to the employee disclosing their disability or requesting accommodation.

Of course, we always say at JAN it's best to request accommodation before such issues arise, because EEOC does make it clear that an employer does not have to rescind discipline, including termination, or an evaluation that is warranted by poor performance. Best to do it before performance or conduct suffers, of course.

Of course, employers may raise the issue of an employee's disability as part of a discussion about performance or conduct under certain circumstances.

This might be when an employee states their health condition or their disability is the cause of the issue, so they're making it very clear to the employer, or when the employer has a reasonable belief, based on objective information, that disability is in fact a factor.

This could be because somebody has an apparent disability or limitations and it's fairly obvious that those limitations are connected to the performance or conduct issue. When it's known that disability is a factor, an employer may ask whether accommodation is needed. For example, when disability is mentioned for the first time in response to counseling or a low performance evaluation or a conduct violation. In those types of situations, the employer is in the know, and you're pretty safe to go ahead and ask about the need for accommodation, and there are different ways to go about that, of course.

So what can be done when an employee discloses that a disability is the cause of a performance or conduct problem? You want to follow through with the performance discussion or the conduct discussion but also initiate the accommodation process.

So what can you do? Well maybe make clear what level of performance or conduct or productivity is required in this situation, for that employee in the job that they are in. You might want to ask why the employee believes disability is a factor. Maybe get their understanding of the connection to the performance issue. When it makes sense, ask whether there's an accommodation the employee believes may help, or you could simply ask, “How can we help? What can we do?” This should help create a safe space for open communication, and it will also facilitate the accommodation discussion.

Sometimes employers aren't really sure whether to say, “Do you need an accommodation?” I think if you just sort of open up that opportunity for the individual to share more information, you'll get to that part of the discussion. Offering to help is a good way to get that started. JAN offers resources that kind of help you along through that process. One is called “How Can I Help?”, another is “May I? Must I? Should I?” And then of course we have the interactive process resource that kind of helps employers walk through those steps to kind of figure out whether you can provide accommodations.

Now it might be necessary to gather disability-related information as part of this process. When the disability or the need for accommodation isn't known or obvious, reasonable disability-related information may be requested from an employee.

Medical documentation isn't required under the ADA to provide accommodations, but employers have the right to request disability-related information to establish ADA coverage and provide accommodations, under those circumstances where the information isn't already readily available to them. As an alternative, of course, to requesting this type of documentation, an employer may simply discuss with the person the nature of their disability, their functional limitations — The process should really be about learning if the employee has an impairment, what the limitations are, how they're affecting job performance, and why the accommodation is needed. So discussion is okay.

JAN offers a sample medical inquiry form that can be used as a guide in requesting disability-related information for ADA purposes, so you can see that simple medical inquiry. Do note that all disability-related information must be kept confidential and separate from personnel records. This includes information that's shared in response to a poor performance evaluation. So if an employee shares disability-related information or requests accommodation in response to a performance or conduct issue, this information should be kept confidential in a medical record.

Now if the employer's actions in addressing a performance or conduct issue are connected to the interactive process in some way — maybe you've chosen to delay the implementation of a performance improvement plan — there may be some reason to communicate this via the performance evaluation to those who are on a need-to-know basis. Which again, you want to make sure that's not in just a personnel record. It might be useful to devise an anonymous coding system that doesn't reveal specific disability-related information, but it informs authorized personnel that additional information can be found in a confidential medical record.

This could be a color-coding system or a number code of some kind that could be used to flag the documentation. For example, code number two indicates that pertinent information can be found in the employee's medical record. So it doesn't give any specific information, but it does indicate that there is some connection in some way.

## [Reasonable Accommodation Takeaways]

To summarize, here are some reasonable accommodation points as takeaways. Reasonable accommodations should assist the employee in meeting the standard, but there's no requirement to lower or change performance or production standards.

For example, if someone is having difficulty completing casework in a timely manner, is it possible to eliminate marginal job tasks or to schedule uninterrupted focus time to enable the employee to document case notes? In turn, to ultimately help them meet that standard. The standard doesn't change, but how or when the tasks are performed — that might change. Also a conduct rule might need to be modified when not job-related and consistent with business necessity.

Of course JAN offers many resources to help facilitate the accommodation process and handle performance and conduct issues where disability is a factor. We've listed just a few here. If you go to our A-Z section of the site, you can look for key accommodations by disability, but then also we have some topic resources on performance and productivity and conduct that might be helpful in managing these types of situations.

Also some logical expectations to take away when an employee does not give notice of the need for accommodation until after a performance or conduct problem occurred.

Reasonable accommodation doesn't require the employer to tolerate or excuse poor performance, to withhold disciplinary action including termination where it's warranted, or to raise a performance rating, or give an evaluation that doesn't reflect the employee's actual performance. All important things to keep in mind here. For more information, do see the EEOC's “Applying Performance and Conduct Standards to Employees with Disabilities,” Question number six addresses that.

Finally, I will wrap up the technical piece of this training by offering a simple performance or conduct management algorithm for what to do when a disability is causing or seems to be causing a performance or conduct problem.

First, identify the problem. Establish your standards and apply them uniformly and consistently. You want to communicate with the employee. So inform the employee about any observed issues, explain the consequences of not meeting the required standards or following the rules.

Establish clear expectations and a timeframe for improving. Also engage in the accommodation process. Recognize when disability disclosure or request for accommodation in response to poor performance or counseling is triggered, to engage — It triggers you to engage in that accommodation process.

Finally, modify or apply your usual policies. Explore and implement accommodations to improve performance, productivity, to address the conduct issue, monitor for effectiveness, and then ultimately reevaluate with the accommodations in place.

Those are just some simple steps. Those other resources that I mentioned earlier can go into a whole lot more detail around that. So with that in mind and through laying out the foundational part of the ADA and how it applies, let's get to some illustrative examples in this training by talking about situations and solutions. I'm going to hand it over to Melanie to lead the way in that.

## [Situations and Solutions]

**MELANIE WHETZEL:**

Okay. Thank you, Tracie. All right.

Our first one here is going to address tardiness. In this first situation, we have an employee, John, who calls JAN, and he's extremely upset because his employer has written him up for being late, and he says the next occurrence will result in termination. He states that his employer knows he has ADHD; he disclosed it during the interview. John feels that if his employer knows he has ADHD, they should know that he's unable to be on time and cannot be held accountable for tardiness. All right. Lots to unpack in there.

Let's go to the next slide, please.

First of all, an employer does not have to assume anything about tardiness or any other conduct, as Tracie said. Because he disclosed that in an interview, it doesn't even mean that that information would have trickled down to a supervisor.

Employers are advised in interviewing to not put a lot of emphasis on the disability information. If someone doesn't need an accommodation during the hiring process, they do not ask a lot of questions. Employers are told not to regard somebody as having a disability, and it's not the employer's job to say, “Oh hey, we noticed you're late. We think you might have a disability.” That would be regarding someone as a disability. As Tracie said earlier, it is up to the employee to notify the employer that there's a disability involved.

And when we talk to employees, we say, “You know, you really want to do that maybe the first time it's brought to your attention.” There are times that there are people with cognitive/neurological disabilities that may not realize that their performance is low, or they may not realize that an action that they took or something that they did in the workplace could be an issue.

And so it's really important for the employer to bring that to their attention so that it can be corrected, and when the employer does that, it's important for the employee to recognize, “Hey, they're bringing it to my attention that I'm tardy, and it's because I do have ADHD. I need to talk to them about that. I need to disclose that and come up with some solutions.”

At least talk about that, and this employee didn't do that. He waited, and he waited, he and waited. And so — He should have done that — What we would say is he should have done that the first time or the second time, not waited until the end when it's gotten to the point of termination. We would say that you want to disclose that as early as possible and talk about accommodations.

Tardiness very likely is going to be job-related. Let's say somebody's half an hour late for work every day. That could be missing 2, 2-1/2 hours of work every week. That could be performance; that could also be conduct issue.

There could be accommodations such as a flexible schedule. “You come in when you can get here, and then we'll have you work late. You know, have you work to make up that time.” There could be other accommodations put in place. The important thing is to alert your employer that it is disability-related the first time it is brought to your attention and also for the employer to bring that to the employee's attention so they're aware that it is an issue, because sometimes they may not be.

Next slide, please.

Okay. This example, this situation two is addressing direct threat. Here we have a 911 dispatcher who begins to have panic attacks on the job that cause him to leave his workstation and the phone lines to take a walk outside the building to calm himself down. The episodes can last anywhere from 20 to 45 minutes, and they started to increase in frequency. What started out as a couple of episodes a month have progressed to several daily ones.

Now the employer viewed this as a direct threat, not to the employee themselves but to other people. We have somebody calling in, we have emergencies to address, and we have no one to answer the phone. It could also be addressed as a performance issue. He's not at his desk. He's gone 20 to 45 minutes at a time. If it's several times a day, that can add up. Who's taking the phone calls? Who's helping out in that case of an emergency?

Next slide, please.

So because the supervisor viewed it as a direct threat, even if he viewed it as a performance issue, he can get medical information, and that's what they requested to show that the employee was able to safely do the job. They shared a job description with the employer's healthcare provider for review, and then the supervisor also asked for strategies to help keep the episodes from happening on the job. And this is really important, because you want to reduce the incidents — If it's a direct threat, you want to provide accommodations to reduce the incidence of that.

So how do we do that? Let's talk about what's causing those incidents or what caused those incidents to be exacerbated so that we can remove some of those triggers or things that cause those incidents and so the employee can be able to work from his workstation, answering phone calls more, and be off less.

Okay. Next slide, please.

All right. In this situation, number three, we have applying an overtime requirement. A long-term employee with bipolar disorder has begun to have difficulty completing the mandatory overtime recently instated by the employer. The employee is fatigued, inattentive, and has trouble getting through his regular schedule at times, so the overtime really just was not going to work. So he discloses to his employer, and he asked to be exempt from the overtime.

Now, he was having some trouble getting through his regular schedule at times, but he didn't need to disclose. His employer hadn't brought any performance issues to his attention, but the overtime is what did it. And we find that's what happens. Sometimes things are added or something changes in the job, and that's when somebody starts to have difficulty and may need to disclose.

Next slide, please.

After much discussion with the employee and the consideration of medical information from his healthcare provider, the employer agrees to exempt the employee from some of the overtime but isn't able to completely take him off the schedule.

And let me say that that “After much discussion with the employee” is very important. Employers should try to have a full conversation with the employee about what's going on. That's likely the best source of information. The person knows their disability; they know the difficulties they're having; that may really be the best way to work out solutions.

If the overtime was an essential function, which it turned out it was, we can't take that away. We need to have all hands on deck when it's really busy. But we're going to work to reduce some of that overtime for you. But here's what is really important in this case is that the employer did not stop the process there and say, “You know, here you have to do this, this, and this. Too bad. Suck it up.” He said, “Let's explore alternate accommodation ideas to see what can help you so that you can complete the overtime when needed.”

They looked at ideas such as extended breaks, eliminating marginal functions that were contributing to the employee's fatigue. Also it could also look at ideas like is there any kind of ergonomic equipment or tools or something that might help to reduce that fatigue so that the employee can work more efficiently.

All right. And next slide, please.

All right. I think this is my last slide here, and then we're — my last situation and solution; we're going to go to Lisa. This is managing productivity. This is one of my favorite examples for years and years. Let's just jump into it.

We have an example here of a mail clerk who belonged to several coffee clubs at work. As he would collect mail first thing in the morning, he'd have a cup of coffee with each department, each coffee club that he had joined. He is very personable, and he would get involved in the conversation and forget what he was doing. By the time he was finished with his first round of collecting mail, it was lunchtime. The same thing was occurring during the afternoon mail run. This employee had an intellectual disability, and I don't think he really understood that he was not getting his work done. He was very personable; people liked him. “Hey, let's just have some coffee. I'm going to sit down here and talk.” He was getting his mail runs done, but he wasn't getting his other work done.

Let's go to the next slide, please.

The employer decided, “Hey, let's just accompany the employee and time him as he picked up the mail with no coffee stops,” so that they would have an idea of how long to allow for the mail run each morning and then each afternoon. The supervisor set a timer, showed the employee how to pace himself, and indicated where he should be halfway through the pickup so he could keep himself on time. By helping the employee to manage his time better, the supervisor was able to get a lot more tasks completed from this employee, not just the mail runs.

What I really love about this example is the employer, I think, went a step further. They limited him to only two coffee clubs a day, but they helped him set up a schedule so that he could rotate through those clubs, so he wouldn't be left out, or he wouldn't leave anybody out. They would set up a schedule: “Go to this one this morning and this one this afternoon,” so he rotated through all of them. They got their work done, he got his job completed, and he still had the opportunity to visit in the coffee clubs.

So we'll go to the next slide there, please. And that's where Lisa is going to jump in.

**LISA MATHESS:**

All right. Thanks Melanie.

Looking at situation five, managing telework and performance issues. Telework, it is still having its moment in the spotlight, and so now as employers were kind of trying to wade through the waters of if someone is not performing, should we pull telework and bring them back on site? How do we balance those needs of telework and then performance and conduct issues?

So looking at the first example that I have here, we have a paralegal who had a kidney transplant years ago. She is teleworking to limit exposures that are in the workplace that could contribute to the spread of COVID-19.

COVID-19 reasonable accommodations are still prevalent. People with disabilities may still need accommodations related to the spread of COVID. So, you know, we're still in it; we still need to be mindful of those issues.

The specific employee, she did take an immunosuppressant because of the transplant. It's a daily medication, but that medication has the side effect where so it doesn't fight off that kidney transplant, it now makes it hard for her to fight off contagious diseases. With coworkers and worksites open to the public, there can be a lot of moving parts and contagion, so she was teleworking due to that kidney transplant.

So she happened to have some performance issues. Those deadlines were not being met, performance started to drop, and the employer said, “Clearly telework's not working out. “She must not be doing her job. She is distracted. She must have her kids at home. Is she even at home? Is she at the Starbucks? We just need to bring this person back on site.” Is this best business practice?

At JAN we'd probably say it's probably not best business practice. You probably do not want to automatically assume and quickly withdraw an accommodation as a punishment for unsatisfactory performance ratings. Simply withdrawing telework, or we see it a lot with modified schedules. Someone has a flexible schedule, well now as punishment for poor performance we want to put them back on that solid 9-to-5. That's no different than discontinuing the use of a sign language interpreter for someone that happened to be deaf or pulling someone's assistive technology that had a disability. You wouldn't pull those types of accommodations for poor performance, so why should telework or a modified flexible schedule be any different?

We also don't want to assume that the unsatisfactory performance means that telework as an accommodation is not working. We want to figure out what is the root cause of those performance problems. Is the telework — Is it working as it was intended?

You want to separate those issues. Like Tracie brought up this tandem dialogue of performance expectations but also need for accommodations. You might have these two parallel paths that you have to address separately. So you're really separating the unsatisfactory performance and determining, “Is telework is still an effective accommodation?”

The employer in this situation, they might bring the employee on-site. And guess what? Those deadlines and that performance still might suffer. So really outline those expectations and see what the employee needs to meet those expectations and meet those requirements while still maintaining telework as a reasonable accommodation if it is still needed.

So looking at this next slide here, so here's the solution.

And this is what JAN explained — exactly that. Separate that need for accommodation and that unsatisfactory performance rating. They might have nothing to do with one another. We wouldn't — Like I mentioned, we wouldn't pull an interpreter if someone who happened to be deaf wasn't performing, so why would you pull telework just because of poor performance? Might have nothing to do with one another. So really separate those needs and performance issues.

All right. Next situation here, we're looking at managing a performance improvement plan.

Here we have an employee who is a marketing manager. She has breast cancer and depression. She is written up after several verbal warnings for inappropriate conduct in the workplace. She's put on a 30-day plan of improvement and said, “Hey, if this behavior doesn't improve within that timeframe, you're going to be let go.” The employee decides to disclose her disability and ask for accommodations to assist her in responding more appropriately, more conducive to workplace policy, with communicating with her coworkers.

This is a common question. How do we manage a performance improvement plan, or a PIP, when, in a counseling session with the employee, they relate those performance issues with a disability? I think in this case we kind of advised, “Let's put that performance improvement plan, let's put that PIP on hold.”

EEOC guidance does have some language that they talk about, well, you're not necessarily removing or excusing that performance improvement plan, or you're not excusing that behavior in any way, but you're simply saying, “Okay. We're going to put this on pause, because we're now going to engage in that interactive process, because it's been triggered, because you brought up that disability and related it to performance. We're going to take some time and determine if accommodations are warranted and reasonable and if those accommodations could bring up performance, once we identify if you're a person with a disability.” Putting the PIP on pause could be beneficial.

So let's look at the solution here on this next slide.

In this case, that's exactly what they did. They put it on hold until they could receive some documentation to support that need, and then that way they could put the accommodations in place. They didn't rescind, they didn't remove the PIP, but at that point, once accommodations were put into place, they were able to resume that performance improvement plan, and that way they're able to see, “Are those accommodations effective in improving that behavior?”

We know we don't have to lower the performance or productivity standards, but we might have to accommodate to enable someone to meet those standards. So there's no specific timeline for holding off on applying a performance plan. The timing is most likely going to depend on the implementation of accommodations, and we know it's important to engage in that interactive process as soon as possible and avoid those unnecessary delays in implementing effective accommodations for those people with disabilities.

Okay. Moving onto my next situation here. We're looking at a response to a disability disclosure.

So now we have a probationary employee. They disclose that they had multiple back surgeries due to degenerative disc disease after their employer noted, “Hey, you're not meeting productivity requirements.” They had one of those probationary, those six-month reviews. “You've not been there the whole year, but we're going to assess your performance thus far.” So this person disclosed, “Hey, I have a back impairment.”

The employer debated if they should ask for supporting medical documentation to kind of prove it? Should they ignore the disclosure completely? So the employer called JAN to learn next steps. Better business practice, I would say you do not want to ignore any disability disclosure. Even if you're not going to ask for supporting medical, let's at least create that safe space that Tracie mentioned to learn what's going on. Is that back impairment contributing to poor performance? Really hone in on what are those limitations or those issues that we're having as it relates to that job performance.

So under ADA, can the employer ask for supporting medical documentation? I would say yeah, probably in this case. The employee disclosed, and the employer has a reasonable belief that the performance of job functions is impacted by that medical condition. So yeah, it probably is job-related and consistent with business necessity to ask for supporting medical documentation to establish that disability and need for accommodation to help that performance.

For this specific case, let's see how it panned out here on the next slide.

The JAN consultant explained that, because the employee disclosed that they have that degenerative disc disease, if that employer has a reasonable belief that the employee may not be able to do the job or might pose a direct threat to themselves or others, the employer may want to start that interactive process. Like I said, can they ask for supporting medical? Probably.

But again, Tracie mentioned, an approach we love at the Job Accommodation Network is the “How can I help?” You're not leading with medical conditions or disabilities; You're not making assumptions that the disability is absolutely tied to performance; you're just opening the stage to hopefully have that interactive dialogue of, “Hey, you know that here is where the performance needs to be, and this is where you are. How can we help as your employer to get you to meet those company uniformly applied policies and standards?”

I think I'm going to pass it back to Tracie now to look at some resources, and then I think we have some time for some audience questions. Thank you.

## [Q&A]

**TRACIE DeFREITAS:**

Thanks to you both. Some really great situations and solutions there.

Just letting everybody know, a lot of the questions that people typically have are going to be answered through those EEOC guidances. We rely on them quite a bit. So that “Applying Performance and Conduct Standards “to Employees with Disabilities” resource as well as the “Reasonable Accommodation and Undue Hardship” guidance, these are go-tos. You should have them at the ready, as far as EEOC enforcement guidance goes and technical assistance resources.

But with that said, let's talk about some questions. So we do have some here. I'm going to put myself off-camera so that you don't have to see me staring at the questions. Let's see. If you haven't sent them in yet, please go ahead and do so, but let's go ahead and get to a few here.

What would JAN recommend to an employer when we suspect a mental health condition or autism, but the employee hasn't disclosed anything, and there are apparent problems with both performance and conduct? I think, Melanie, we're going to throw this one your way.

**MELANIE WHETZEL:**

Okay, sure. That's a great question. And that's a question we get frequently and continuously, because people don't disclose, and employers aren't sure what to do. And what we would say is you want to follow up on the performance and the conduct. You want to address those issues.

Be specific. Sometimes we hear from employees who will say, “My employer said, 'You're having trouble on your job,' and I don't know what that means.” And so it's really important for the employer to be specific. “You're not meeting this requirement. Your reports are late every month,” so the employee knows exactly what you're talking about.

When the supervisor, manager, whoever goes to the employee to talk to them, again, it gives them the opportunity to connect that “My performance is connected to my disability,” or, “My disability may be causing my performance or my conduct issue.”

It alerts them that there is that issue, because sometimes, I said earlier, sometimes they don't know. Because of their disability, they may not be aware of the full scope of their job or what they are or are not doing. And so it alerts them that there is a problem and gives them that opportunity to disclose and say, “Hey, yes, I am having some difficulty. “I have recurring depression, and I'm having some trouble with memory,” or whatever the issue may be.

If they don't disclose at that time, the employer can still hold them, of course, to those performance and conduct standards. They can say, “Here's where you are; here's where we need you to be. How can we help you get there? Because you have to be able to do this. How do we help? What do you need?” Kind of the same thing as asking, “Do you need an accommodation?” without just assuming that there is a disability.

Sometimes people are very intimidated during a performance or conduct meeting like that, and they may not really be wanting to disclose at that time. They may come back around and do it later. Because we'll get calls from individuals who say, “This is what is happened. Now what do I do?” And so we would advise them, you know, this might be the best time to disclose. Of course that's always a personal decision. But we would want to say, “You don't want to get too far in with performance or conduct issues,” because the employer doesn't have to excuse those, and it's really good to disclose that so they can provide the accommodations, and then you can complete the job. The earlier the employer does that with the employee and gets things on track, it's just better for everybody.

**TRACIE DeFREITAS:**

Okay. Thanks, Melanie. I do want to clear something up. There was a question that came in about something I said and some clarification related to whether an employer has to — does not have to rescind a termination or a PIP after a disability is disclosed. So just want to expand on that for just a second.

Just be clear that if you have reached a point of termination with somebody, if they then at that point disclose their disability to you as a reason for whatever action has occurred, the performance issue or conduct issue, an employer's not expected to rescind that termination. If the situation warrants a termination, you can follow through with that. You could also choose not to if you wanted to. If you wanted to revisit and come back and take a look at what could be done, you certainly could do that. But a termination that is warranted does not need to be rescinded just because of that disclosure.

When it comes to a performance improvement plan, a PIP, what you would want to do is take a look at that PIP. You don't have to take it back, you don't have to pretend it never happened, but you might want to put it on hold. I mentioned that; Lisa talked about it as well. You may want to put that performance improvement plan on hold while you engage in the accommodation process and come up with accommodations that will hopefully address the performance issues. Get those accommodations in place, now come back and let's revisit that person's performance, and you can also go ahead and reinstate that PIP at that point. But the key there is to make sure you're exploring accommodations, implementing those, to ultimately enable that person the opportunity to improve. It doesn't have to go away, but you might want to put that PIP on hold.

All right. Let's get to another question here. Lisa, let's see.

If an employee's able to perform all of their job duties but has difficulty commuting to work and indicates they need to work from home, is telework reasonable if driving isn't considered an essential duty?

We kind of opened the telework box here. I have a couple others too around that, but that's a quick one.

**LISA MATHESS:**

I said telework is still having its moment in the spotlight! So I think this — Employers do get hung up on this. They said, “Commute is outside of the work area. That's not our problem.” Changing the location of work can be viewed as that work-related barrier. So while you probably don't have to literally transport employees with disabilities, unless you do so for everybody, changing that location of work might be a form of an accommodation.

There's going to be a couple of considerations. Assuming someone has an ADA-defined disability and the commute is part of their limitations, then changing the location — Do you have a variety of offices? Perhaps there's a closer office closer to their home that limits that commute duration. That might be considered. If they cannot drive at all, cannot commute at all, then yeah, telework, work at home, could be a form of an accommodation.

Then you are looking at is it reasonable, and are those essential functions doable from home, for this employee, this specific job category? Not all jobs are doable from home.

We, as employers, there are a few obligations to provide accommodations even though someone's performing all those essential job functions just fine. We call it “accommodations beyond performance.” So that's so an employee with a disability can meet toileting needs or dietary needs or medical treatment needs, commute obligations. There's kind of a handful of accommodations that we need to consider, even though someone with a disability might be performing their job just fine. Commute is a big one.

**TRACIE DeFREITAS:**

Very good. I will throw one more telework at you — telework-related question at you, and then, Melanie, I have one for you.

Lisa, kind of following up on the scenario earlier, at what point can a supervisor end telework as an accommodation if the employee continues to not meet productivity expectations?

**LISA MATHESS:**

Right. So once we have kind of separated performance and the need for telework, and we've tried to accommodate to continue that telework to bring up performance. We've flexed the schedule, we've given assistive technologies, modified breaks, whatever the case may be. If we've kind of run through the gamut and tried to show that good faith effort and do our due diligence to provide effective accommodations, and we're still not meeting performance expectations, then perhaps a temporary accommodation to bring that person back on site and see if that improves performance might be warranted.

Because it basically boils down to that person's not performing the essential functions from home now, are they still qualified to remain in that position? Now let's look at worksite accommodations to hopefully bring up performance, because we know we don't have to lower performance. I would say document all your efforts, document all the accommodations you've tried to maintain telework, but ultimately if performance and conduct are still not improving then we might need to pivot to worksite.

**TRACIE DeFREITAS:**

Okay. All right, Melanie, you're up next. This is sort of a follow-up to one of your situations.

For the tardiness example, where the employee did not disclose the impact of his ADHD until the disciplinary meeting, should the supervisor still proceed with any planned disciplinary action?

**MELANIE WHETZEL:**

Yes, absolutely. They can certainly do that. They can — Like we said earlier, they don't have to excuse that, because they didn't know about that. It's the employee's responsibility to do that. And Tracie had just said earlier even if it is to the point of termination, they can go ahead and consider that when it gets to that point. There is nothing that says that they have to. They can always reconsider. “Okay. Well, we didn't realize that. Let's talk about that, let's talk about how we can help you so that you can meet those performance standards or, in this case, get to work on time.”

And really, there are employers who have difficulty with that situation, because it's the employee's job to get to work on time. “Once they are here, they are on our time, but it's their responsibility. Why should we help accommodate somebody to help them get to work because that disability is a barrier to them being able to get to work on time.”

I would say yes, they can go ahead and absolutely provide the same discipline they would to anybody else in that same situation. Like I said earlier, in that same situation, that could certainly be job-related. Somebody who's tardy, depending on how late they are, uses up a lot of time that they're not working, so that could certainly be job-related. Yes, they can certainly do that. If they do that — if it's job-related, if they do the same thing for anybody else without a disability.

**TRACIE DeFREITAS:**

Okay. Here's another one. And you both might have some insight on this. Melanie, I feel like it probably falls into your realm a little bit more.

So what if an employee has told us there is a disability, they previously refused the ADA process, so they made a disclosure maybe, but they said they don't need any accommodations. Do we still have to offer ADA or go through that process while addressing a behavior issue? So maybe we realize there's a behavior issue that's going on, it could be related to the disability, but they're just not really accepting that process. What do you do in that case?

**MELANIE WHETZEL:**

I think you sit down and you have a good conversation with the employee and explain to them, “Here's what's going to happen. “Here's what we are doing. We want to help you. We may be able to help you if you cooperate with that, but if you keep saying there's nothing you need, we're kind of limited in what we can do.”

Again, I don't want to sound like a broken record, but there are disabilities where people just do not understand what they're doing. They may not have a full understanding of the severity of their conduct or the severeness of their performance issues, and they really need to have that explained to them. Sometimes they don't understand the consequences either depending on the disability, and sometimes an employer might need to just say, “Here's what's going to happen. We're going to go down this road, and you could lose your job. We're going to give you three written warnings, you're on number two, and when we get to the third one, you are going to lose your job. And so we want to help you. We want to make sure that does not happen, but we need some help from you. We need you to bring in medical documentation. We need you to give us ideas of how we can help you.”

I think that kind of conversation, again having that full conversation, and I think it's good to document that too. Here is what we did; here are the steps we took; here's the employee response or the employee's unresponsiveness. But I think it's good to explain that, to make sure that the employee understands what is going on.

**TRACIE DeFREITAS:**

All right. Very good. There is a note here about an agency not having managers or supervisors gather medical information. I just want to clarify something, if it wasn't clear earlier.

When we talk about gathering documentation in these types of situations, we agree — Supervisors and managers should not have access to medical documentation. That's really something that should be kicked up to the HR level, or whoever really kind of facilitates that accommodation process.

When somebody discloses a disability in response to performance or counseling, I think that's a good idea to make sure your supervisors and managers are informed and trained to reach out to HR, get them involved in that process. Don't just start requesting specific details about the person's disability in order to engage in the accommodation process, in tandem with the performance situation or the conduct issue.

So if that was misunderstood earlier or misconveyed earlier, please know that we advise that it's not a good idea for supervisors and managers to have that medical documentation. Certainly kick that up, I would say.

## [Resources]

We do have a lot of really good questions here, and of course, this is a topic we could talk about for days. I do want to go ahead and reference some of the resources that we have before we do close out the webcast today, so I am going to go ahead and move to the next slide, just to share a couple of resources.

On the AskJAN.org page you will find — I'm sorry, I should say website, not just page — you will find a lot of resources regarding these topics that I think would help. It is a good idea to look around. Obviously we've linked a lot of those resources here throughout the presentation.

One to point out that seems to get a lot of traction is the role-play training series. One of those role-play videos is related to performance management, so we do have that highlighted here. So I would say it's a good resource to take a look at. With our role-play training series there are several videos there. You'll also find accompanying PowerPoints that can be helpful if you're trying to develop training for your own employees, so certainly take advantage of that.

Then of course the relevant EEOC guidances that we've mentioned throughout the presentation today.

That “Applying Performance and Conduct Standards to Employees with Disabilities,” that particular resource is an exceptional resource. You will find so many questions and also practical guidance that EEOC offers for handling these types of really tricky situations. So I do encourage you to access that information. We have pulled out some of the questions that are relevant to our discussion today on this slide, but the entire resource is a great comprehensive resource for handling performance and conduct issues.

We also would say to take a look at the “Reasonable Accommodation and Undue Hardship” guidance resource. This is sort of the original guidance that we oftentimes turn to for information about how to handle accommodation situations, so it's another great have-at-the-ready EEOC guidance. Within that particular guidance you will find a few questions that kind of get to the heart of some performance and conduct issues. I would say situations where maybe you are not really sure what to do as an employer, for example. When you should maybe ask about the need for accommodation. I think that comes in a lot in these performance and conduct situations, where you're just not really sure whether we should say, “Hey, is your disability a factor in this situation? Do you need an accommodation? How can we help? What can we do?” There are a couple of questions within this guidance that kind of get to whether an employer must ask about a reasonable accommodation when it is needed, but somebody — maybe someone hasn't asked for it or whether or may an employer ask if an accommodation is needed.

These are great guidances to really turn to. So we want to make sure that you have those at the ready. So that's really all the time we have today, but we do hope that, if you have any questions, you'll reach out to the JAN service. We'll be happy to help guide you through these really sticky situations.

## [Closing]

To everyone that joined us, we thank you for attending “What to Do When Performance and Conduct Factor into the Accommodation Equation.” Melanie and Lisa, thanks for your time and your expertise today. Great resources and situations you presented here. We do hope all of this information will be useful.

Don't forget to register for the next JAN webcast, “ADA Update 2023.” We'll have our guest presenter, Jeanne Goldberg, who always joins us in July from the EEOC. She and I will be presenting some information around ADA issues and the accommodation process. That will be on Thursday, July 13, at 2 PM Eastern time.

If you are seeking a continuing education unit for today's training, we do offer one HR CEU through HRCI. To receive that credit, all you need to do is please complete that evaluation. We do appreciate your feedback. It helps us plan for future webcast events. We do appreciate that you take the time to do that. Basically don't close the JAN webcast window when the webcast ends. The evaluation will open in a new browser window. You can also go to AskJAN.org/EvaluationReg.cfm or simply scan this handy-dandy QR code and go ahead and complete it that way. Once the evaluation is completed, you can click on “View your certificate of completion” to get that CEU.

And finally, thank you to Alternative Communication Services for providing sign language interpreting and captioning services for this JAN webcast today.

If you have questions, please do get on the AskJAN.org site, call us at 800–526–7234, or use our live chat at AskJAN.org, Or email us at JAN@AskJAN.org. You can also follow us on social media, Facebook and Twitter, for timely updates and information on accommodation and ADA issues.

With that, enjoy the rest of your day, everyone, and this concludes today's webcast.