# Return to Work After COVID-19 – Focus on Mental Health and Cognitive Limitations

## [Introduction]

**TRACIE DeFREITAS:**

Welcome everyone, and thank you for joining us for the JAN Accommodation and Compliance Webcast Series titled "Return to Work after COVID-19: Focus on Mental Health and Cognitive Impairments." My name is Tracie DeFreitas.

Before we begin, we have some housekeeping items to cover. First, if you experience technical difficulties during this webcast, please do use the question-and-answer option located at the bottom of your screen to submit a question. You may also contact JAN at 800-526-7234 or use the live chat at AskJAN.org. We also offer frequently asked questions about how JAN webcasts work on the JAN webcast registration page at AskJAN.org. This FAQ link is in the email you received with the event log-in information.

Next, questions for the presenters may be submitted during the event by using the Q&A option mentioned previously. Questions will be gathered into a queue and answered during the Q&A period. PowerPoint slides can be accessed using the link included now in the webcast chat box or download them from this webcast event in the webcast series archive section of the training page at AskJAN.org.

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Now let's get started with today's training.

I'll turn the event over to our moderator, JAN Principal Consultant Linda Batiste.

**LINDA BATISTE:**

Thanks, Tracie. Hello, everyone, and thanks for joining us.

Our featured speakers for today are going to be two JAN consultants, Melanie Whetzel and James Potts. Melanie has been a consultant with JAN since 2008, and currently she heads up our cognitive/neurological team. James has been with JAN since 2015 and is now a senior consultant on the same team. Melanie and James have fielded most of our questions related to accommodating employees with mental health and cognitive conditions throughout the entire pandemic. So they have a wealth of knowledge to share with you on today's topic, and moving on to the next slide, I'm just going to go ahead and turn it over to Melanie to tell you the plan for the presentation today.

**MELANIE WHETZEL:**

Okay. Thank you, Linda.

Right. We're going to talk about real-life situations. All our examples are from real cases that we get daily. We're going to talk about relevant ADA rules and then talk about best practices and our COVID-related accommodation examples, we've put into sections by topic, and we have case-by-case basis or individualized, telework, essential functions. We're going to talk about fear and anxiety, service animals, and Long COVID. And then we're going to have breaks in between for questions, and then we'll have time at the end for question and answers, as well. So let's go to the next slide, and we'll just dive right in.

All right. Here we have publications related to the pandemic, and you can find those at the link there at the bottom. We have that on our website. We have a COVID-19 page. We have "Coronavirus, Stress, and Mental Health Conditions," "Engaging in the Interactive Process," "ADA and Managing Reasonable Accommodation Requests." We have a publication on masks for COVID-19 management, teleconferencing accessibility, accommodation strategies for returning to work, and then we have one on COVID-19 long-haulers and the Americans with Disabilities Act. We're going to call that just "long COVID" today when we talk about it.

Okay. Next slide.

## [Case-by-Case Basis]

Okay. Well, we're going to start here talking about individualized accommodations, and when we talk about accommodations at JAN, we always stress that each case is an individual case. We do it case by case. It's really important to look at the individual, what they're going through, what their limitations are right now, and what their job tasks are, what they're having difficulty with. You could have three or four people with the same disability, and they have totally different needs in different jobs. One size does not fit all, especially when we're talking about bringing people back to work after COVID. We'll have people that will call and say, "Hey, what are some accommodations for someone with bipolar?" We can talk about common accommodations, but they really need to be -- and that's a good place to start. Our publications all have common accommodations, and they're really good ones, and that's a good place to start, but we really like to talk about the individual and what their limitations are and what issues they're having on the job.

So let's go ahead to the next slide.

We're going to -- with our first situation here. After returning to work during the pandemic, an employee with panic disorder requests a private office and no interactions with the public or coworkers because she fears catching COVID. The employer denies the request, stating that sufficient safety precautions are in place.

Okay. So let's just kind of break this apart a little bit. So the employer is saying, "Hey, it's safe, you just need to come back to work." Well, just because the employer thinks it's safe and they may have gone to every length to make it safe, this employee does not feel safe. And so they need to talk to this employee. And I say this a lot, but I really believe that a full conversation with the employee is really a good idea, to find out what the employee needs, what they're thinking, because if the employer thinks they've made it totally safe, then they need to find out what this employee needs. And maybe they're able to do that. Maybe they come to a solution to where the employee will feel safe to come to work. Maybe they can provide a separate space if there's no office. Maybe they don't have to have interactions with the public or coworkers. Maybe they do. If that's an essential function of their job. But knowing what it takes to make that employee feel safe can go a long way in helping that employer know how to accommodate.

All right. I'm going to turn it over to James for the next example.

**JAMES POTTS:**

Thanks, Melanie.

So here we have a union employee, and he was required to attend in-person training. This kind of training is required of all employees in this job position, and he was pretty used to it. However, when the employee arrived, he noticed that there was a 100% mask policy for entrance into the building. He's unable to wear a mask. So the employee went into the building, found his classroom, and then explained to the trainer he has limitations related to PTSD and cannot wear a mask. The trainer told him to wear the mask or get out. Of course, this upset the employee, and he left training with the intent on informing HR and his union about the interaction.

So I think we can all know that this situation could have been handled better on all fronts. Let's talk about some points here. This is good in general, but especially now in the current world state, employers should provide as much information as possible to employees about alternative work locations and specifically those location's policies and procedures. So he may have been there before, but things have changed, and he needs to be made aware of those changes.

Let's take a second about the trainer. You know, it could have been handled more tactfully. That's for sure. Trainers and supervisors, they should be aware that accommodations may need to be made in some situations, and they definitely need to know how to handle those requests professionally.

So in this scenario, could the employer accommodate the employee on the spot? They could, but for the employee, it's always better to have this stuff set up beforehand. When a disability and need for accommodation are not obvious, an employer -- in this situation it was the trainer or the building site operators -- they're within their rights to request sufficient documentation, and they're within their rights to refuse or deny an accommodation until such documentation was provided.

But again, it was a mess. Nobody walked away from that interaction happy, and the employee didn't get the required training that he needed. And JAN's here to think about solutions, so what sort of solutions would enable that employee to get that training completed?

The first thing we thought about was maybe virtual training. Could they Zoom in and still participate in the same way? Could there be increased social distancing? This employee was very adamant that there was no ability to wear a mask but seemed receptive to at least wearing a face shield when in common areas. So these are just things to consider versus wear a mask or get out the door.

Next slide.

Okay. Questions. Linda, we got anything rolling in?

### [Q&A]

**LINDA BATISTE:**

We do. I'm going to just do a few of these, and then we'll move on to the next topic just to keep us on track here, but I'm going to throw a few of them out here to you.

The first one is from an employer. They say they have an employee who developed panic attacks after being told that she must return to work full-time. She wants to take leave, because any time she thinks about coming in to work, she has a panic attack. So the employer wants to know can we ask her to work until we get the medical documentation?

**MELANIE WHETZEL:**

Ok. I will answer that one. You know, the ADA would say yes, that an employer does not have to provide an accommodation until they go through the process, until they have medical documentation that substantiates the need for that accommodation.

Let's look here, if the employee's working from home, has she been successful? And if she's been successful, then allow her to continue to work from home through the process would not be any kind of disruption. I think one of the things to think about here are the panic attacks. You don't want to get that started in an employee, because that could really mess up her life, her productivity on the job. If she has panic getting to work, she may not be able to get to work, She may not be able to travel.

So if you're thinking, "Hey, we're going to stick to rules, and we're going to go through the process," you might just want to rethink. Err on the side of caution, say, "Okay. You know what? You get that medical information to us as quickly as you can, and we'll provide a temporary accommodation of allowing you to work from home, because we know that's going to be the best thing for you. You're -- and you're going to be able to be more productive."

**LINDA BATISTE:**

All right, great.

And the next question, also from an employer. How do you address an accommodation request to telework, but we're concerned that allowing one employee to telework will cause other employees to want to telework, which in turn could cause disruptions for those that are still going to the office in person?

**JAMES POTTS:**

I'll take that one, Melanie. So, I mean, we get this a lot, and kind of the reason for this topic. You know, I tell each employer that they must review these requests individually and determine on that case-by-case basis if telework is possible for this given situation. I also tell them denying because others may want a similar modification is probably not going to be enough, and then usually point them towards EEOC guidance that talks about should an employer or can an employer deny accommodations because of the impact on morale or feelings of fairness in the workplace? And again, that's probably not going to rise to the level of undue hardship.

But practically speaking, I mean, the employer can certainly engage this current employee or future employees' request to telework and discuss alternative solutions that may meet their needs in the workplace. So yes, some employees, the only effective solution could be work from home, but for many others, there may be workable alternatives at that physical location. And then also kind of take that a step further and say realistically, is every employee going to be able to go to a medical professional and have them confirm they have an ADA disability and substantiate that they need telework? That's probably not realistic.

So again, you take them as they come. And it's ongoing. So if you approve five employees to telework, that may impact that sixth person's request, because business needs may change. And all those factors play a role. So again, just looking at that, others may want something similar. It's not a good enough reason to deny. And you just take them as they come.

**LINDA BATISTE:**

All right, excellent. Let's do one more in this section, and then we'll move on.

Can you please help with how far the employer should go with the interactive process? For example, the doctor is not returning their calls, there is not enough information to provide a reasonable accommodation, we've been reaching out weekly to the doctor with no success, and also if the doctor is not willing to provide the information needed, what do we do next?

**JAMES POTTS:**

I'll do that one, Melanie.

**MELANIE WHETZEL:**

Okay.

**JAMES POTTS:**

So we touched on this a little bit when the disability need for accommodation are not obvious and by the book, an employer can insist on getting that information, and they could deny or pause the process or the accommodation process until such information is provided. Practically speaking again, you know, if the accommodations are simple, they make sense, they're straightforward, then maybe consider putting them in place. Or maybe temporary solutions that could assist until that documentation can be provided. What we do recommend is, you know, if employers are going to insist on paperwork, be consistent from request to request. If you give 15 days to submit documentation, and the employee doesn't have a valid reason for delay, I mean, that would pause the process.

So you know, if the employee is having a performance or conduct issue and documentation is not being able to be provided, maybe at no fault of the employee, but still an employer is within their rights to hold it or request it, and that employee could potentially result in disciplinary actions related to that performance or conduct.

Again, we try to think about this flexibly. The employee is trying to meet their side of the bargain here. It's a difficulty with getting information from the medical provider, but there's still a business to run, so that always tends to take or hold a part of the equation.

And again, EEOC says yes, an employer is within their rights for documentation, but it's not required. You really can just talk about their limitations, of what accommodations may help. So if you insist, be consistent. If there's something that can be done, we always suggest trying to work with the employee.

**LINDA BATISTE:**

All right. Great.

With that, let's move on to the next slide and the next topic, which is telework.

## [Telework]

**MELANIE WHETZEL:**

Telework. Ok. All right. So telework, before the pandemic, had a really good history of being effective for people with mental health conditions, cognitive issues, lots of different impairments and disabilities. When somebody can work from home, they can manage -- much better manage their symptoms, their environment. If the commute to work is stressful, someone who has panic when they drive or difficulty driving, if they have to take public transportation sometimes, they have to get off one mode of transportation, get on another one, it can take quite a while, and they're exhausted by the time they get to work. So telework can be very effective for people. It can start out their day working from home with a lot of energy, which is not wasted on a commute.

And then during the pandemic, telework became just nationwide, I think. I forget the statistics, I was going to try to remember that, how many people were teleworking during the pandemic, and still are, because, you know, we're forced to go home and work, and we talk about, you know, if an employer is not sure about an accommodation of telework, you could always do it on a trial or temporary basis to see if it works. Well, the pandemic was a perfect trial period, because people could see, they're forced to be at home, they could see how well it worked, how well it didn't work. What people might need for accommodations or what they might need to be successful.

So let's just jump right into our first example there on the next slide. Okay. In this situation, we have an employee with panic disorder who asks to continue teleworking after her employer calls all employees back to the workplace after mandatory telework related to the pandemic. The employer tells the employee she will need to come to the office until the interactive process is complete.

Okay. We've sort of talked about this with another example and then what James just talked about, and I'm really going to say the same thing. We're just going to reiterate that the general ADA guidance would say that the employer doesn't have to provide an accommodation until the interactive process is complete, but let's look here at somebody who's been working from home and, if they were working effectively, why not just allow that to continue and not be a disruption? For someone with a panic disorder, it could really be a disruption to their life and their work. If there's an issue with a person teleworking, that should have been addressed before now, not wait until somebody asks for an accommodation.

We didn't have an indication of that in this example, it's just that "Hey, everybody's coming back, you need to come back, too, and until we get that process finished." So I think again, you know, you want to err on the side of caution. The employer has the right to say, "We don't have to provide that." But look at what's best for the business and best for the employee, and if the employee can continue working without the disruption of coming to work and possibly causing panic attacks, which could affect production or performance, then allow that accommodation to be a temporary one until the interactive process is complete.

All right. Now, we're going to go to the next example, and that will be for James.

**JAMES POTTS:**

Thanks, Melanie. Those were really good points.

Here, I have Tom. He was requesting telework, but his supervisor wasn't wanting to approve the accommodation based on some performance concerns. Now they do have a company policy that allows telework, but that benefit is based on performance. Tom and his medical providers tried to explain they feel his performance will improve from working from home. Specifically because Tom's anxiety is heightened in the workplace, being around others is difficult, and the workplace in itself was a distracting environment, all of which was impacting his ability to focus.

So let's think about some points here. There are concerns over performance, or the employee's maybe not eligible for this benefit. There's still the accommodation obligation. So they should engage about what accommodation ideas can assist the employee in the physical workplace, and some of the ideas may be a private workplace or private workspace. This could lower anxiety, not being around others. Could also remove distractions, a modified break schedule to practice stress management, noise cancellation technology, reminders and to-do lists could help with focus difficulties. And, you know, then being paired with a mentor could potentially assist with meeting performance standards, too.

But let's say, you know, these solutions that aren't possible in the physical workplace or they're just not effective for Paul. Well, the employer could consider modifying that telework policy if the employee can effectively manage their condition from home, and the reason being is because they can control their own environment. And a thing for the employer to remember here is the employee is still going to be held to universally applied performance standards. So if they work from home, maybe that does limit distractions, and, you know, if it's successful, then that performance is going to improve. Heck, yeah, the accommodation process worked. But if performance is suffering, working from home, and it was not that great in the office, then that's just a performance issue at that point. The accommodation may have been effective, but there's still a performance issue, and the employer is always within their rights to address that.

Let's go to the next slide.

Back to some questions. Linda?

### [Q&A]

**LINDA BATISTE:**

All right, great. I'm going to throw out a couple here.

First one is an employee with anxiety or depression works full-time remote. She says her manager reaches out to her up to 50 times per day and asks what she's doing. She says this causes her panic attacks and distracts her. She is requesting an accommodation for frequent breaks throughout her work day. She reports her manager is the main issue.

**MELANIE WHETZEL:**

Ok. I will take that one. Now, I'm going to say wow, I hope that's an exaggeration and the manager is not really contacting her 50 times a day. That could cause disruption for anybody.

I would suggest that the employer talk to the supervisor and employee separately, at least at first. If the supervisor is causing her panic attacks, you don't want to make that worse, but you need to find out what's actually going on there. What's the supervisor's goal in that? Does she have performance problems and he's following up with that? Does she need that support? I mean in his mind maybe, because evidently she doesn't or she's saying that's the problem. Does he do that with everyone or is he just doing it with her? I think it's good to drill down and find out what's going on there, because that seems very excessive to me, and if it's causing her panic attacks, that needs to be changed.

And under the ADA, you know, there's changing of the supervisory method, which this seems a perfect example of that. Maybe they could have a happy medium where they meet every day but at a set time where she can be prepared for that and it wouldn't cause her a panic. If you have any kind of trouble with concentration, and you just get started working, and you get interrupted, and then you start back, and you get interrupted, that would cause a performance or production problem I think for just about anyone. And so I think if that's the reason, because there are performance issues and he's trying to find out exactly what she's doing, then that needs to be addressed with accommodations other than those that are happening that aren't effective and that are causing her to panic.

I've heard -- I've talked to people who have said that their employer says, "Well, the manager, that's just how he is. He can manage however he wants." Well, I think that with that accommodation request for a change in supervisory method, they would have to look at how this supervisor's working and how that affects the individual and work on a compromise there.

**LINDA BATISTE:**

All right. Great. Let's do one more in this section. When an employee suggests telework as a temporary accommodation for a chronic ongoing condition, how long is reasonable for the trial? We've discussed a quarter of a year and then reviewed it. At what point is it necessary or reasonable to convert a temporary accommodation to an ongoing permanent accommodation?

**JAMES POTTS:**

Well I like the idea of trial periods, so I'll take that one. So there are no hard or fast rules when it comes to trial periods. We definitely want to say -- you want to provide enough time so the kinks can get worked out. You want to fine-tune that solution. If an employer says, "Hey, we'll give you a week," you know, an employee may look at that and say, "Heck, I can't even learn new adaptive processes or get into a new routine within a week. Let's try a month." And I think it's important to discuss a time frame that the employee is comfortable with and go from there.

Something to consider is if you agree to a three-month trial period, and after a month, it's proven ineffective, it's just not working, the employer is not stuck to that. At any time, if an accommodation creates undue hardship for the business or if an employee no longer needs it for their disability, that modification or accommodation could change. And monitoring over time can really be as simple as checking in with the employee saying, "Hey, do you still need this accommodation? Is it still effective for you?" And then leaving it at that. And then when the time comes, if business needs change, you inform the employee about that, explain the reasons why maybe that solution is no longer possible, and then you reengage about alternatives.

**LINDA BATISTE:**

All right. Wonderful. Let's move to the next side and the next section on essential functions.

## [Essential Functions]

**MELANIE WHETZEL:**

All right. So we know under the ADA that employers do not have to remove essential functions, they don't have to reduce performance or conduct standards. What they do have to do is accommodate someone so they can perform those essential functions, not get out of them. There are marginal functions that may be able to be removed from a position, even temporarily or switched out so somebody has more time and more mental focus to do the essential functions.

Sometimes, employers will go above and beyond the ADA and remove some essential functions, and that's usually what we've seen on a temporary basis, maybe when someone's coming back to work, they've been off for a while, help them get back on their feet. And just because during the pandemic somebody's job was they were allowed to work from home, they weren't doing all their essential functions, doesn't mean that those essential functions have been removed permanently from the job.

And so a lot of jobs were done from home where people weren't doing their whole complete job, and now that people are being called back to the office to businesses, that we're seeing, you know, that's changing. We've had a lot of questions about that.

So let's go into our first example here. Ok. We have an employee who was sent home to work at the start of the pandemic and has submitted three different doctor's notes documenting that she cannot return to the workplace. Her employer did not require her to do some of the essential functions while she was at home, but now, it's become necessary for those tasks to be done in the workplace by the employee. And so when they're having the discussion, she brings in a new note, she brings in a new note, she brings in a new note.

I think it's important to get down to why she can't come into the office. What does she need from the employer to give her a sense of safety or security or whatever it is, whatever the reason, she can't come in. I think, too, looking at can she be eased into those essential functions? If she wasn't doing them for 18, 20 months, does she have to start doing them full-time next week? Can they ease her into that? Can she come to work half a day, one or two days a week and still continue to do some of the work by home -- from home? I think that that would be a really good solution to kind of ease somebody back in to it, to get them a little bit more comfortable being in the workplace, and if she truly cannot come into the workplace and she's required to do that, She's really not -- I mean, I don't know -- looking at that, you'd think she's really not qualified for that job, because they need somebody in the workplace to do that, and they don't have to remove that from her position.

All right, next example there. Okay. And that goes back to James.

**JAMES POTTS:**

Okay. I had a peer counselor, and they moved while teleworking. Everybody was teleworking, but they moved during COVID. However, this move was solely predicated on the employee's need to be around their family members, specifically to care for family members with disabilities. Now the employer is recalling all their employees to the physical workplace.

In this situation, the employer has determined that some continued telework for all employees may be possible, so adding that as a benefit of employment, but the employer is requiring employees to perform in-person services when requested by their consumers, and there may be other tasks that can only be done in person. So this is a tricky one. No neat, pretty bow at the end of this solution.

Number one, this individual doesn't have a disability, so they're not entitled to accommodations under the ADA. Caregiving responsibilities, they don't qualify for accommodations. Additionally, let's say hypothetically the person did have a disability. We're looking at the ability to do the essential functions of in-person services, and that doesn't seem to be present.

Now, we can talk practically, you know. There's obviously a work/life balance here. Maybe you could go back to your employer and negotiate. Like, "Hey, I will do an increased amount of virtual clients if another coworker or coworkers could balance out my in-person customers." Probably not something an employer has to do. Again, just kind of that practical "Is there a way to make it work with your employer?" because even then we're looking at potential hardship issues of are there enough employees available to do those in-person tasks?

So like I said, this was a tricky one. JAN doesn't like to just say, "Hey, we can't help," so we do want to kind of talk through those practical tips. But a point to remember: Under Title I, accommodations are for individuals with disabilities.

Next slide? Back to Linda with more questions.

### [Q&A]

**LINDA BATISTE:**

All right. And we have lots of them. Let's do a couple in this section, too.

Due to extreme anxiety about contracting the virus and passing it on to family members, we have an employee who has told us that she can no longer go out into the community to visit the group homes she is responsible for supervising. She thinks she can continue to provide all services by telephone, but we have seen a drop in services due to the pandemic. What do you do suggest we do with this?

**MELANIE WHETZEL:**

Ok. I'll take that one. I think, you know, when we talk about what's a hardship and what an employer can do is reasonable, you have to look at the business need and what's best for the business? And this business is serving clients who live in group homes, and if the services have gone down and they need to work on providing those services, and here's an employee who's saying that she cannot do that, and I think -- again, you know, I think it's worth having a really good conversation with the employee and drill down to why can't she do it?

If it's just about -- and I don't mean *just* about, that's a big thing, fear of contracting the virus and passing it on to family members -- to look at how they can protect her, how they can protect her from exposure to COVID. You know, do they have protocol in the group homes? Do they have spacing? Does she wear a mask? Do others wear a mask while she's there? Have an area -- depending on what she does, you know. Can she sit at a desk or a table, and can they have, like, a little plexiglass wall that they could put up that would kind of separate her when she's talking? Depending on, you know, what her job is there at the group home. And just come to some kind of a solution and again, maybe kind of ease her into that, but if her job -- essential functions of her job are to go physically to that group home, she needs to be able to do that. And so again, I say having that full conversation and finding out "What are the issues? How do we help you so you can do that?"

**LINDA BATISTE:**

Great. Another question, and this is one I think we've definitely been hearing about a lot. Would the in-person managerial supervisor duties of supervising staff be sufficient evidence of a need for in-person essential functions that would make telework unreasonable?

**JAMES POTTS:**

Maybe. Maybe not. I've got this one. I think we've all seen how far virtual communication can take us. Of course, there are some jobs where being physically present is an essential job duty related to supervising. You know, if you're a craftsman and you have to physically inspect a product, then maybe visually inspecting that via camera is just not effective. You're not going to be able to fine-tooth-comb that sort of product. But, you know, the employer's still got to look at whether these duties can be done effectively in a different way. So can the supervisor in this situation have Zoom calls or emails or phone calls or daily worksheets to fulfill their supervisory roles? Or can they implement a hybrid solution so the employees in the physical workplace to perform certain duties that can only be done there, but at home for the other tasks? It may turn out that the job can only be done in the physical workplace. That happens. But I would caution jumping straight to the conclusion without investigating those alternative ideas.

**LINDA BATISTE:**

All right. Great.

Let's go ahead and move to the next slide and the next topic, which is fear, anxiety, and safety concerns.

## [Fear, Anxiety, and Safety Concerns]

**JAMES POTTS:**

Okay. That's me. So fear, fear versus anxiety. What we hear from the ADA or JAN perspective is really fear exacerbating anxiety to unmanageable levels. I think a lot of people have or had some level of fear about COVID, maybe at least during the beginning, because of all the unknowns. Some people have a fear of heights, others enclosed, small spaces.

In general, fear alone is not a disability. But individuals with anxiety or other mental health conditions, you know, may not be able to handle major life changes related to COVID the same as individuals without these similar limitations. So it's really when that fear exacerbates an ADA-covered condition that a reasonable accommodation needs to be explored. And then, of course, the root of these fears and anxieties is based in safety -- safety for oneself, family members or community at large. And as JAN hears frequently, you know, even though there are vaccines and potential accommodation ideas, the anxiety related to feeling safe in the workplace and everywhere is quite high for individuals with these limitations.

Next slide.

So in a small coffee shop, all employees must be able to alternate between making drinks, cooking food, and serving customers, but an employee with anxiety asks not to serve customers who refuse to wear masks. So this is touching back to those essential functions we just talked about. The employee in one way is saying that they are willing to do all tasks, but there's a caveat of only being able to do that in certain situations.

So, you know, let's take it a step further and look at the undue hardship component of the request. You know, how many -- what's the number of employees working for the shift? Is it even reasonable that somebody could pick up the slack or alternate or rotate in an efficient manner? And then looking at the impact the solution has on business operations. If the lines are getting too long, are customers leaving? How often does this situation come up daily? If there's a mask policy on the door, and five people violate it a day, can you work around that versus half of the customers aren't wearing masks? So and then again, the employer can look at that and say, at some point, is the employee just refusing to serve a customer, which is an essential component of their job?

I like to talk to employees and make them understand that accommodations are individualized to them, and it's not necessarily about changing others and behaviors of others. So what could enable this employee to serve these customers and manage their condition at the same time? My mind jumps to additional personal protective equipment. Maybe this employee is only wearing masks, but if he has to serve a customer who's not wearing a mask, they can use a shield or an apron or gloves in addition, and, depending on the investigation of how often does this happen during the day, or is there others that can help at certain times of day, maybe a modified schedule could assist, too.

Next slide.

**MELANIE WHETZEL:**

Here we have a really different kind of example. I wanted to include this because it seems the opposite of most of them that we have. Here's an employee who's been in the workplace during the pandemic the whole time, pretty much by himself, and is now asking that the employer require others to remain at home, teleworking instead of coming into the office, because he states he cannot tolerate close contact with coworkers.

A good example of drilling down and finding out "Hey, what's going on here?" Because, you know, as an employer, we can require that our employees come back to work, especially if there are things that need to be done in the office. Can this employee be accommodated by moving him someplace where he doesn't have close contact with the coworkers? Is it because of the fear of COVID? Can he be protected like James was talking about, extra protective gear when he's around other people? Can he be put someplace --And I don't mean to isolate him, but that's kind of what he wants, it's kind of what he's asking for. You're not supposed to isolate people with disabilities because they ask for an accommodation. It's kind of what he's asking for. Can he work part time in the office to do essential functions that he needs to do there? Can he work part-time at home so he's not with the big crowd that comes into the workplace? And here's a question, too: Is he doing the essential functions of others who were at home, and now that they're back, they're going to be doing some of those essential functions? So he would be freer maybe to work more from home.

But again it comes down to looking at what are the issues with you not wanting to have contact with the people? How do we make that work? How do we make you more comfortable? How do we look at the essential functions of your job and help you be able to do those?

All right. Next slide, there.

And we're back to questions. Linda, what do we have now?

### [Q&A]

**LINDA BATISTE:**

Great. Let's do just a couple here. The first one is we have an employee, a social worker, who has asked for a flexible schedule that will help her manage the anxiety she feels going to people's homes now that our agency is back to work in-person. We feel that she should just go and do what is required of her. Any recommendations?

**JAMES POTTS:**

I got it. Well, first, remember that this is a request for accommodation, which is going to be something done in a different way, and that to be qualified, you must be able to do what is required of you with or without reasonable accommodation. So recommendation: Engage the employee. Try to iron out what this flexible schedule may look like. How long is it needed? Is it something that is permanent, or is this something where they're going to be gradually working through this anxiety and can fulfill full duties? Or, of course, asking what might reduce her anxiety going into people's homes? Again, can the employer provide extra PPE if that's a component? And then looking at if there are no solutions in this current role that's going to enable her to do the essential functions, are there part-time positions that just more naturally meet both parties' needs?

But the feeling that the employee should just kind of go and do what is required maybe isn't necessarily looking really at the employee's disability-related needs or the employer's ability to provide effective solutions in that situation. So again, talking to the employee, trying to find something that may work for both, and if it comes down to it, maybe it's not this particular role but still a role that will meet the employee's disability-related limitations.

**LINDA BATISTE:**

Great. Okay. Great. Another question in this section. This is from an individual. If my employer offers the accommodation of telework, could I ask for that accommodation if driving again after almost two years of not driving is causing panic attacks?

**MELANIE WHETZEL:**

Ok. Sure. I'll take that one. Absolutely. I think it's a good accommodation to consider, and a good accommodation to request, and I would say you would want to provide your employer with sufficient medical documentation that would substantiate that. You know, an employer can look to provide accommodations for someone who has difficulty getting to work because of a disability, and that could -- it's the employer's privilege, I guess, to set where the workspace is, what the work hours are, all those types of things, and so if getting to that workspace or getting there in a certain amount of time presents a barrier to the individual because of a disability, then an accommodation can be requested to overcome that barrier or remove that barrier, and I think asking to telework in this situation is a good one, if the person can do their job from home, absolutely.

**LINDA BATISTE:**

All right, great. Let's move to the next slide and one of my favorite topics, and that is service animals.

## [Service and Emotional Support Animals]

**JAMES POTTS:**

Okay. Service and emotional support animals. I'd like to give a bit of general information before we get into examples here. Specifically because there is no language about animals in Title I of the ADA. So it doesn't say service, it doesn't say therapy, it doesn't say emotional support, anything about animals. There is a definition of service animal under different parts of the ADA. However, JAN talks about Title I, and that's the employment provisions. So if an employee requests to bring an animal to work, it's an accommodation request, and it usually falls under a request to modify a "no animal in the workplace" policy, And whether that's written or unwritten, you know, unless generally employees are allowed to bring animals, it's typically a policy or something that needs to be discussed with the employer.

Like any other request for accommodation, an employer is going to be entitled to that sufficient documentation, especially when the disability and need for accommodation are not obvious. However, this is one part of the equation with service animals. So medical documentation will confirm the disability and a need for accommodation or that accommodation is needed, but it's not going to give an employer a whole lot of information about what the animal's going to be like in the workplace or what to expect.

And here, JAN often recommends a demonstration or trial period. See, I told you I like the idea of trial periods, and this is specifically when handling requests for animals in the workplace. And the idea is if the animal was allowed, and it acts appropriately, number one, the employer made a good faith effort, and they're probably going to be more comfortable approving the animal long-term. Now, if the animal is allowed and it acts out, and it's inappropriate, then again, the employer definitely made a good-faith effort, but it turned out to be inappropriate for that particular environment.

And one reminder is that just if the animal is deemed an undue hardship, the accommodation obligation and process isn't over. It should pivot, and then continue to alternative solutions, whether that's making accommodations in the current workplace, work from home, or whatever the case may be.

Next slide, please.

Okay. Telework is being phased out. That example is coming up a lot today. Telework is being phased out as an employer returns all employees to the physical workplace. During COVID, an employee with anxiety obtained a dog and formed a deep connection. Being around the animal has greatly improved the employee's mental health, and he wants to continue working from home so they can be with their animal. So kind of an interesting one to work through.

Again, it's been a unique two years. Think about people are home, they've obtained animals or they became dependent on animals that they didn't need before because of their disability-related issues. Think about social withdrawal, not being around coworkers, being able to visit family and friends has probably impacted some of us to at least some degree.

So accommodations. Can the employee continue to work from home? Regardless of what is enabling him to be successful or manage his conditions at home, is it possible? He's been doing it for a while. Can they be done from home? And is it effective? Can the employee bring the animal to the workplace? This may be tricky. There's definitely no formal training for the animal. Is it more of a pet behavior? So in the workplace it would be seeking affection or just not appropriate? We don't know.

The employer is always within their rights to talk about accommodations that would help manage anxiety in the workplace. Maybe it is putting pictures of the animal on the wall or taking -- restructuring their breaks to have more stress management. So, you know, there's not a whole lot of information here if the animal will enable them to do their job, but I always like taking that a step forward. If their doctors and medical providers are willing to support that their mental health is improved and the employer sees this in their work performance, then taking away that factor could have a negative impact, and that could end up being detrimental to work efficiency. So again, kind of looking at yes, everybody else is going into the office, but this unique situation of, can we meet this individual's needs?

Next question? Next slide.

**MELANIE WHETZEL:**

Okay. In this example, we have an employee that has PTSD and asks to bring an emotional support animal to work. The employer denies the request because the employee did not need the accommodation before the pandemic.

Well, I think the general ADA rule here would be that accommodations, it's an ongoing process. Some people don't need accommodations because -- let's say until a disability changes, something about the job changes, they may not need an accommodation, and just like James was saying that people with a mental health condition may have been impacted by the pandemic more than the rest of us -- and let's just face it, all of us are stressed in ways and uncertain. There's a lot of changes that go on. Things change, mandates change from day to day, it's hard to keep up with everything, and just because an employee didn't need an accommodation in the past -- 18 months ago or two months ago or yesterday -- doesn't mean they don't need one now, and we would recommend that an employer look at the need for an accommodation as just a need for an accommodation, whether it's pandemic-related or not. Just look at that need for the accommodation, you know, process that, get the information they need. Is it going to be effective for the employee? Is the dog going to be trained? Is it going to be able to behave in the workplace? And just go through it like a normal accommodation and try to make the best-faith effort they can to accommodate this employee.

All right. Next slide there.Questions?

### [Q&A]

**LINDA BATISTE:**

All right. First one. We have an employee with bipolar disorder who asks to telework because her service animal is not trained to social distance during the pandemic. We have denied the request, because it's about the service animal's limitations, not hers. The employee keeps submitting this request and refuses to come into the office. What do we do?

**JAMES POTTS:**

I'll take that one, Melanie. I think you need to probe more about the situation and potentially get some more information. Really what issues are there with the animal being around others? I would also caution the logic behind this being about the service animal's limitations. The service animal is an extension or tool of the individual, and if that tool is having issues, the employer is not going to be relieved of its obligations to provide an effective accommodation in that situation.

So as for an accommodation in the workplace, a common accommodation idea here, let's think about private work areas. Let's think about staggering schedules, so the individual and their animal does not have to be around others as much. And then specifically for this one, is the employee comfortable with the employer posting information just reminding employees to socially distance themselves around the dog? Everybody should be six feet. And taking that even a step further in general, typically a service animal is going to be providing assistance to its handler, and that is usually within at least what we're considering now socially acceptable distance, you know, the six feet. So I really think I would need to poke at both sides a bit in this one and maybe just come to a solution, kind of get both parties to see maybe a little bit from the opposite perspective and then seeing what they both would agree to.

**LINDA BATISTE:**

That's a really interesting one. Another one before we move on to the last section. We've got a request from a home health nurse with anxiety asking to have her dog with her all day while working. We're not sure how to approach this request, because she has to go into patients' homes. Can we deny it on that basis?

**JAMES POTTS:**

I'll take that one, too, Melanie, if you don't mind.

**MELANIE WHETZEL:**

Don't mind. Go right ahead.

**JAMES POTTS:**

So probably not a good idea to deny just on that reasoning alone. What I think or what we think could be potentially appropriate is talking to the employee and maybe seeing about reaching out to these clients that they see, just to see the willingness. Do they mind having animals in their homes? The employer certainly couldn't force a client or patient like, "Hey, you have to let my employee's dog on your premises," but facilitating that conversation could be helpful. Because, you know, if you call ten people or ten clients and all ten of them say, "I love dogs, I don't mind at all," then is there really a valid business reason to deny that request at the end of the day? And again, I think the main thing is investigating that feasibility. You know, if 9 out of 10 people said they won't allow dogs in their house, then that's pointing a different direction. But just not jumping straight to a denial.

**LINDA BATISTE:**

All right, great. Let's move to the next slide and our last section for the day, which is Long COVID.

## [Long COVID]

**MELANIE WHETZEL:**

Okay. And here we have a link here from the Department of Justice Health and Human Services guidance there on Long COVID. You know, how we determine whether a condition is a disability or not is based on whether it substantially limits one or more major life activities, and it would be the same for COVID. Some people have had COVID and have had no symptoms. Some people have had COVID and are fine afterwards. They have no lingering symptoms. And some people have recovered and then have setbacks and setbacks, and some people have not recovered, and it's taking a long time. And so this is a really good example of needing to look at something on a case-by-case basis and look at can we provide an accommodation that person needs in this case for Long COVID? You know, if we're not sure it really rates as a disability, we go back to that definition, and we can look around, and we can see how people we know -- coworkers, family members, people in our community -- have been affected by it. So it's no surprise that somebody who gets COVID is going to have some issues afterwards.

Next slide.

So here we have an example, an employee returning to work after having COVID-19 and asked for periodic rest breaks to help her deal with ongoing fatigue and stress intolerance. The employer denied the request after deciding that COVID-19 is not a disability.

Well, I'm going to say, you know, you really want to look at that and not analyze it too much. That's where you're going to get in trouble. But you want to move past that and look at can we accommodate the employee? That's the important thing. So if you say no, we can't -- we're going to deny the request and the employee doesn't get the periodic breaks, she can't come back to work, then there's the employer without an employee, where if she could come back with the breaks, they've got somebody who's going to productive.

Now, part of the thing I would say you would want to go through that interactive process where you have a thorough conversation with the employee if it's not spelled out in medical documentation. what does that mean, periodic rest breaks? That could mean about anything. We see a lot of breathing issues. We see a lot of people with ongoing fatigue, some of it very severe, people having difficulty just walking and standing. And so when you say a periodic rest break, what does that mean? So find out if that means 10 minutes every hour or 15 minutes twice a day. Or does it just "When I feel really tired I need to get up and walk around a little bit, go to a different setting so I can lie down?" So the employer really needs to find out more about that, but I would say that you wouldn't want to just deny it just because you don't think COVID-19 is a disability and then deny somebody the ability to work when they could with some breaks, because that way you have an employee that's working, and you're getting your job done.

All right, next slide, please. Okay. We're going to give that one to James.

**JAMES POTTS:**

Okay. And I think that's a really good point about, you know, determining or letting the employer know what that break or what periodic breaks means, because a lot of times, employers -- if they don't know what to wrap their heads around, then it's going to be hard for them to make an informed decision. If you need five-minute -- If you need ten minutes every hour, that's a lot different than an additional ten-minute break every four hours. So something an employer could plan around.

But I have Jules, and she's a customer service agent, finding it difficult to keep up with the constant barrage of phone calls and also difficulty remembering information to relay to her customers. She asked as an accommodation to be removed from taking phone calls and offered to complete more chats to help offset her numbers. She also requested time off between chats to gather her thoughts. Her employer denied both due to the universally applied performance standards and because the accommodation would remove the essential function of helping customers via phone.

So on one hand, an employer is right that they don't have to remove or lower performance or production standards. The next step further is the obligation to provide accommodations that would enable them to meet those standards. So again, first idea, ask the employee what she needs. What do they need to be successful? They identified breaks. Well, a break after every caller could be lowering numbers. But what about taking the breaks that they're already entitled to? If you have two 15-minute breaks and one 30-minute lunch, that's 60 minutes of breaks a shift. Maybe you take five minutes after a difficult call or ten minutes after an incredibly difficult caller, and that would help manage your needs versus every single one to where you're not getting your numbers.

And then we're thinking about accommodation ideas. Maybe retraining. But specifically you need to find areas of the issue and work on new ways of handling those problem areas. Typically, just providing the training twice is not effective. It didn't work the first time. What's going to work -- Why is it going to work the next time? So we're talking about alternative training materials. Maybe a notebook and color-coded sections to help ease finding information, or templates or to-do lists. Flow charts. But again, it's going to be important to organize this all to the employee's way of thinking. Even a script to help with wording. So if you have how to deal with a difficult caller, maybe appropriate hand-off procedures to a supervisor or mentor. But even taking that a step further. After the mentor takes that call, having that interaction and working through, "Hey, this is how you can do it better in the future," I think could be helpful in that situation.

All right, next slide. I think we're to the questions.

### [Q&A]

**LINDA BATISTE:**

Yes. Let's hit this one first. One of our employees has had Long COVID for almost a year and hasn't been able to fully perform his job since. His job is a high-level job. We've provided him with all the accommodations he asked for, but they haven't helped very much. How long do we have to keep doing this? It's a great question.

**MELANIE WHETZEL:**

I will take that one. That is a great question, and, you know, we get a lot of questions like that because on our team, because we deal with a lot of people that have cognitive limitations, and here's one point I want to make is people with cognitive limitations may not always know what they need. They may not realize that they're not getting the whole scope of their job done or their tasks aren't completed. There might be a whole little section they've don't even know they're supposed to be doing or they've forgotten that or they're not aware of that and so the interactive process can be really important to the employee and the employer as well, but James has mentioned several times about holding employees to performance standards, and when the employer does that and talks to the employee, then it helps that employee understand, "I'm not where I need to be, maybe I need more."

So just because they haven't -- the accommodations that this employee suggested haven't worked doesn't mean they've thoroughly accommodated him. And, you know, if accommodations don't work, we say maybe they need to be tweaked a little bit, maybe they kind of need to start over, and a high-level job can be very difficult to accommodate because of high-level thinking skills, independent thinking, problem-solving. Those can be really difficult things to accommodate. We do have a publication on executive functioning and high-level employees that might be helpful in this case, but I think calling JAN can also be helpful.

If you think you've done enough to accommodate somebody, and you're saying, "How long do we have to do this?" That's a good time to call JAN if you haven't, because we might be able to help with some different ideas and talk about that time frame. If you do get to a point where you've done every possible accommodation, and it's not been successful, then you can look at is there an open position that we could provide to move this employee into as a reassignment? And I want to caution there, you want to be careful. You know, you want to try to get – EEOC says you want to try to get a reassignment for a person to as close of status as possible, and that's like their status and their pay. But for someone with cognitive disabilities that's not able to do the job they're in, they may not be able to have a job in that level, so it may be a lower-level job, and you can look at those, what's open, and you want to evaluate the employee's skill level and match it with the skill level of the job.

**LINDA BATISTE:**

All right, great.

## [Wrap-up]

Unfortunately, we're just about out of time here. I'm going to thank James and Melanie for an excellent presentation. And I really appreciate everybody who sent questions in. I know we weren't able to get to all of them. We have some excellent questions. So I want to encourage anybody whose question didn't get answered to please feel free to contact us so we can have a one-on-one conversation with you about your question. And with that I'm going to turn it back over to Tracie to wrap up the presentation for the day.

**TRACIE DeFREITAS:**

Thanks so much, Linda, and thanks again to Melanie and James. You guys did an amazing job.

For additional information on the topics we discussed today, please do contact JAN. Go to AskJAN.org to contact us by phone, live chat, or email. Please also consider following JAN on Facebook and Twitter.

As mentioned earlier, please complete the webcast evaluation. Keep the JAN webcast window open when the webcast ends, and that evaluation will pop up right in another window. We do really appreciate your feedback, and we hope that you'll share it with us. Also, if you're seeking a CEU for this event, the CEU approval code will be available after the evaluation is completed.

Thank you to Alternative Communication Services for providing captioning for this webcast.

Finally, please do join us again next month for "Accommodation Solutions for Autoimmune Disorders."

Thanks for attending this JAN Accommodation and Compliance Webcast Series event, and this concludes today's training.