# ADA and Beyond Compliance Considerations: Medical Documentation

## [Introduction]

**TRACIE DeFREITAS:**

Welcome, everyone. We're pleased to have you join us for this Job Accommodation Network training titled "ADA and Beyond Compliance Considerations: Medical Documentation." I'm Tracie DeFreitas. I am a JAN program leader and the Director of Training and Outreach. Joining me in presenting today is my colleague, Lisa Mathess. Lisa is a JAN Principal Consultant and ADA Specialist. Big thank you to Lisa for teaming up with me for this training.

This JAN training includes a high-level overview of the Americans with Disabilities Act, title I, medical inquiry rules. We'll focus on common scenarios when employers request medical documentation, and we'll share some beyond-compliance strategies for employers to consider when navigating the ADA accommodation process. The training will be 60 minutes in duration. For additional information on this topic, please contact JAN directly for free consultation. You can visit AskJAN.org.

Let's quickly cover housekeeping.

To address technical difficulties, please either use the Q&A feature to connect with our webcast tech team, access the Live Chat at AskJAN.org, or email training@AskJAN.org.

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A link to download the PowerPoint slides is included in the webcast registration email you received today and also in the chat.

Questions for presenters may be submitted using the Q&A option and will be answered, if time permits. But we encourage contacting the JAN service directly for assistance with your ADA and accommodation questions, so, again, visit that AskJAN.org site for contact options.

One HR CEU is available to attendees of the live webcast. The webcast evaluation must be completed to receive the CEU. We'll offer more on that at the end of the webcast. Now let's get started with the training.

We do have a lot to talk about today. Our agenda includes discussing medical documentation requests and ADA and then sharing medical documentation scenarios and accommodation process strategies. Of course, time permitting, we'll field a few questions.

Please note that JAN is not a legal service and does not provide legal advice. The information provided today is based on ADA title I enforcement guidance provided by the Equal Employment Opportunity Commission, EEOC.

Now, based on our experience at JAN, we know that there can be a lot of uncertainty surrounding medical documentation within the scope of the ADA. Employers may be uncertain about what medical inquiries are permissible and their timing, employees may question the extent of medical information that they need to share to receive an accommodation, and even healthcare and other professionals may be unsure about the type of documentation to provide to support a patient's or a client's request for accommodation. Many employers do require medical documentation as a prerequisite to providing accommodations.

Today, Lisa and I will talk about what is technically allowable, but we'll also ask attendees to consider whether requests for reasonable accommodation in the workplace must be supported by medical documentation. Current EEOC guidance allows employers to request documentation if the disability or need for accommodation is not known, but it is possible to have an accommodation process that accepts an individual's assessment of their own disability and defers to their accommodation preferences when it's reasonable and not a hardship.

When medical information is deemed necessary by an employer, offering flexibility in the process by accepting alternative forms of medical information and focusing on functional limitations to support accommodation requests really can help bridge the gap between what's technically allowable under the ADA and meeting the accommodation needs of employees with disabilities.

So, with that, let's cover what the ADA says about employee medical inquiries. Lisa, will you please help us understand the ADA medical inquiry rules?

## [ADA Medical Inquiry Rules]

**LISA MATHESS:**

Absolutely. You can see on slide six there is a foundation on the ADA about when it's appropriate to make a medical — require a medical exam or medical inquiry. And really, in the most simplest terms, it's broken down by three stages.

So stage one is typically those job applicants. This is before a job offer is offered to an applicant. The general rule here is employers cannot be asking medical questions or requiring medical exams before an offer is made. So, EEOC is very clearcut that during that interview and application stage, we shouldn't be asking people about their medical history or anything.

And then, stage two, the job offer is made, but a person hasn't started working yet. The general rule, employers can ask medical questions or require any medical exams they choose, as long as all entering employees in that same job category are subjected to the same questions or exams, regardless of disability, and the medical information they do collect does need to maintain confidentiality. EEOC is very strict with medical records and related information being kept under confidential records. But it's basically a free-for-all post-offer but before they start working. It doesn't have to be job-related, consistent with business necessity.

And then, the last stage, the employment stage, the general rule there is that disability-related inquiries and examination of employees, those do have to be job-related and consistent with business necessity.

The next two slides, I'm going to get into the nitty-gritty of what that truly means. But to help you guys navigate these stages, like I said, EEOC does have very clear formal guidance on pre-employment inquiries, and also, of course, JAN has a slew of resources for these medical exams and inquiries linked on the website and on the slide.

### [Job-Related and Consistent with Business Necessity]

What does job-related and consistent with business necessity really mean? Typically, an employer, with reasonable belief based on objective evidence, they can make an inquiry, if they have that reasonable belief and objective evidence that an employee's ability to perform those essential functions are going to be impaired by a medical condition. Another time it could be job-related and consistent with business necessity is if an employer has that reasonable belief, based on objective evidence, that an employee will pose a direct threat due to a medical condition. Again, EEOC has lots of formal guidance on those employment-based inquiries, and that's linked here on the slide.

So when else might an inquiry or exam be job-related and consistent with business necessity? Typically we see this most often when an employee asks for a reasonable accommodation and that employee's disability or need for accommodation is not already known or it's not obvious. Then we could ask for limited medical, if we choose to. Like Tracie said, it's an entitlement, not a requirement. You can accommodate without gathering medical.

The second instance here that could be job-related, consistent with business necessity, there's limited circumstances for those employees that work in public safety like airline pilots and police officers and firefighters. Periodic exams and inquiries could be appropriate because that line of work is so safety-sensitive.

And then last here, an employer must have objective evidence suggesting that a medical reason is a likely cause of a performance problem to justify seeking medical information or ordering a medical examination. So, in those limited circumstances, the nature of an employee's performance problem or unacceptable conduct could provide that objective evidence that leads an employer to that reasonable belief that a medical condition is likely the cause. So, there's very limited reasoning for an employer to be asking for medical documentation, and those are kind of the foundation under the ADA of what's considered job-related, consistent with business necessity.

### [How Can I Help? Approach]

Okay, so, like I said, we went over what's job-related, consistent with business necessity. There's a lot to think about, a lot to consider. So what about an alternative approach so you really don't have to worry if you have that reasonable belief, if you have that objective evidence, if you meet that threshold: Is this truly job-related and consistent with business necessity?

Here at JAN, us consultants often — every day, I would say — suggest this "How can I help?" approach. Asking an employee, "How can I help?" This opens up the door for a safe space, for an open dialogue, without leading with medical conditions or disabilities. It's simply asking an employee who may not be meeting performance goals or metrics or asking someone who is having a hard time at work, "What can you, as the employer, do to help this employee succeed in the workplace?"

So, this "How can I help?" strategy, it can be a good way of creating that safe space for a disability disclosure at work, it can be a way of demonstrating a good faith effort, again, opening that door to discuss reasonable accommodations that could enable these employees with disabilities to improve performance or complete those essential job tasks. So this "How can I help?" approach really helps employers avoid asking disability-related questions or appearing that they're making assumptions based on disability or medical conditions, and it can be an effective business strategy for building trust that can be applied to everyone, not solely employees who are suspected to have a disability.

This "How can I help?" resource, I push it out every day. It's linked on the site. And then another helpful resource is that "Mother May I?, Must I?, Should I?", and it really talks about if you should ask an employee medical questions. All right. I think I'm going to pass it back to Tracie to talk about some key considerations.

**TRACIE DeFREITAS:**

Absolutely. That "How can I help?" strategy, it's certainly a best practice. We use it all the time, like you said.

### [Key Considerations]

Now what are some key considerations related to medical inquiries and this "job-related and consistent with business necessity" standard? Well first I think mind the medical inquiry rules of other federal and state laws. This training, of course, is focused on the ADA, but sometimes other federal or state laws offer broader protection to individuals. For example, federal laws like the Family and Medical Leave Act, the new Pregnant Workers Fairness Act, or state laws like the Fair Employment and Housing Act in California have different and/or more restrictive medical inquiry rules. These rules will prevail over the ADA when they offer broader protection to the individual, so be mindful of that.

Next, treat all medical information as a confidential record, regardless of the reason it was obtained. Medical information should only be shared with those on a need-to-know basis. Generally, this means that people leaders, like managers, supervisors, they should not have direct access to the specific medical information of their employees. So designate an HR professional or someone responsible for processing accommodation requests in order to obtain that medical information, when it's necessary.

Regarding fitness for duty and/or independent medical examinations, any medical examination conducted by or at the request of the employer or conducted by their healthcare professional must be job-related and consistent with business necessity. So when an employee provides sufficient evidence of the existence of a disability and the need for reasonable accommodation, an individual may not be required to submit to a medical examination that is not job-related and consistent with business necessity. For more information on that, we say see EEOC's enforcement guidance on disability-related inquiries and medical exams of employees under the ADA, and that link is included at the end of the PowerPoint in the resources.

Now what about return-to-work releases? Employers may have a policy or practice that requires employees to provide a return-to-work release to confirm their ability to return to work after a medical absence so long as the policy is applied uniformly and consistently. For example, requiring a note to return to work after an absence, a medical absence, of five consecutive days. It's not uncommon.

Lastly, I'm mentioning FMLA here because of the common interplay with the ADA. When applicable, an FMLA fitness-for-duty certification showing that the employee is able to resume work may be requested when the employee is notified in advance and in accordance with the employer's policy. We do recommend looking at the FMLA regulations for more information on that.

## [Requesting Documentation]

The most common reason employers request medical documentation is to establish an employee's right to receive an ADA accommodation by determining whether they have a disability. When it's job-related and consistent with business necessity, employers may request reasonable documentation from an appropriate healthcare or rehabilitation professional. That information is to establish an ADA disability and that need for accommodation. This is clearly established in EEOC's ADA enforcement guidance on reasonable accommodation and undue hardship under the ADA. You can see question six.

But must a reasonable accommodation request in the workplace be supported by medical documentation? Well, this is a question to consider; right? We say no. The ADA does not require employers to request medical documentation to accommodate. So knowing that there's no required process, no ADA forms or timeframes related to medical documentation, might lead us to wonder whether requesting this information is necessary. In fact, some scholars have argued that the original intent of the ADA was to move away from that medical model of disability, to not require proof of disability, and rather to emphasize that — the idea that an employee's preferences, knowledge, their experience should drive the accommodation process. That's the social model of disability.

We have heard that some employers are moving away from requiring medical documentation and sort of integrating disability-inclusive practices like flexible work arrangements, for example, into policies and programs so that there's no need to go through a formal accommodation process. It's something to consider. It won't be right for everyone, but there is some movement in that direction.

Of course, EEOC enforcement guidance does state that employers may request the information necessary to establish an ADA disability. We must consider focusing on gathering information about the functional limitations to support the accommodation request rather than requiring detailed medical information about the health condition. This enables us to keep our objectives related to asking for medical information in focus.

So, let's think about that for just a second. We know that requesting medical documentation shouldn't be sort of a what I'd call "Find me a rock" kind of situation. Have an objective and be clear about why and what information is necessary when it's necessary.

Some common objectives for requesting documentation include to establish the health condition, the impairment, and the limitations; to understand the impact on the employee and their ability to perform the job duties. Documentation may support the employee's need for accommodation, might help determine whether someone is able to stay at or return to work with accommodations, and may also help us evaluate fitness for duty or analyze whether a direct threat exists, when it's job-related and consistent with business necessity.

Now, it is possible to keep it simple and still get the information necessary to make reasonable accommodations. I mentioned avoiding that "Bring me a rock" game by sort of being clear and direct, but sometimes the documentation received doesn't help us meet our objectives. Maybe it's not sufficient documentation. So, Lisa, what does that mean?

### [Insufficient Documentation]

**LISA MATHESS:**

I think this is a common problem for employers. They ask for documentation, people don't know what to bring back, so they just kind of bring back some sort of documentation, and then it ends up being insufficient.

So what does that mean under the ADA lens? You don't have the disability and the nexus for the requested accommodation, meaning you don't have those limitations outlined. What is the person having trouble doing at the worksite? Or what is that work-related barrier that they're having a problem doing based on limitation. We don't know those functional limitations. You'll see throughout the presentation, Tracie and I are always honing in on what are the functional limitations? What is the issue that someone's having a hard time performing? So, insufficient documentation, we don't have that disability and those functional limitations outlined.

Also it could be considered insufficient if the provider doesn't have expertise to weigh in on the specific impairment and limitation. I'm going to get into that in a little moment, but if that provider doesn't have the expertise or education to weigh in on the specific condition that we're talking about, then maybe that's insufficient documentation. Also, in conjunction with that, if that information or documentation doesn't seem credible or it seems fraudulent, that could be considered insufficient for ADA purposes. The EEOC does have more information, specifically question eleven in their formal medical exams of employees guidance, which is linked on that slide. That could be what's considered insufficient.

### [Role of the Healthcare Provider]

So, speaking of insufficient documentation, what is the healthcare provider's role? I think sometimes there's this disconnect where employers assume that it's the healthcare provider's role to come up with all these great accommodation ideas, but the healthcare provider is like, "No, that's not my area of expertise, "that's your area of expertise to come up with workplace accommodations." So then there's this disconnect.

Ultimately, what is the healthcare provider's role? A healthcare provider is there to document the employee or patient's underlying medical condition and what major life activity is substantially limited and, again, those associated functional limitations. This part of the medical documentation letter, it should include what limitations are causing the patient's work-related problems and what those problems are. The goal here is to help the employer understand the problem and start exploring solutions.

But what the healthcare provider's role is not, it is not there to recommend or say that an accommodation is medically required. The documentation shouldn't be locking this patient, employee, into one set accommodation forever. Employers are responsible for coming up with and providing effective accommodation solutions. We shouldn't be relying on the medical provider to do that. Sometimes we understand that employers don't always know what accommodations might work, so it could be helpful to brainstorm or weigh in if the medical provider does have an accommodation solution they think would work for their patient. Of course, you can document that, but an employer should not be completely relying on that healthcare provider to make those accommodation decisions.

So, JAN does have a really helpful resource. Sometimes because healthcare providers, they're not in this world of ADA, they don't know what to document. They don't want to document too much or too little. JAN has developed this "Practical Guidance for Medical Professionals," and it really lays out what you want to try to document to support your employee or patient's accommodation request.

So, Tracie and I have tried to lay the groundwork for medical documentation under ADA. What is job-related and consistent with business necessity? What is considered sufficient? What is the objective of having all this medical documentation? What's the provider's role? We wanted to take some time and look into real-life, simple scenarios that we often see here at JAN when it comes to medical documentation, and let's try to apply what we just learned to some of these simple scenarios. Tracie?

## [Common Missteps]

**TRACIE DeFREITAS:**

All right. Thanks, Lisa. This is the fun part of the training; right? We get to talk about some common ADA medical documentation missteps and offer that beyond-compliance guidance that we still like to share with JAN users. So let's get right into it.

Some common medical documentation missteps include asking for unnecessary information or information that is known or using a standard form for all medical inquiries. Employers are prohibited from asking for medical information they already have. So if you're using standard forms, sometimes those can include medical questions beyond what's allowed for any given situation. For example, employers are not supposed to ask for proof of disability when the disability's obvious or has already been documented.

Requiring documentation from a medical doctor, an MD. The ADA doesn't require this, why would employers? We'll cover that in a few minutes.

Also, making a vague medical request or not following up and ending up in what we call "that waiting place," this comes back to, one, knowing your objective and being clear about what information is necessary and, two, always leading with a solution-oriented approach that aims to resolve the accommodation situation by staying engaged. We'll discuss that one a little bit, here in a moment, as well.

Not requiring a release for complete medical records. We all know this is a no-no; right? But it does sometimes happen. And you do want to check those standard forms, make sure you're not asking for a full release of medical information.

Some other things to consider here: requiring regular or frequent recertification — monthly, annually. This is an issue we frequently address at JAN. And Lisa's going to break that down for us here shortly, too.

Finally, requesting an independent medical examination or fitness for duty that's not job-related and consistent with business necessity is a misstep.

Okay, Lisa, are you ready to talk about some scenarios and beyond-compliance considerations?

**LISA MATHESS:**

Of course. Let's get into it.

## [Scenarios]

### [Unnecessary Request for Documentation]

**TRACIE DeFREITAS:**

Let's do it. All right. These first scenarios are about unnecessary requests for documentation. So, here we have Clarice, who requests a different workstation because her wheelchair doesn't fit under the current workstation. Yea or nay on whether documentation is needed? What do you think?

**LISA MATHESS:**

Well, being on the motor team, we deal with wheelchair users, and the need and the disability is pretty obvious. this shouldn't be additional hoops to jump through with medical documentation. Keep it simple. Work smarter, not harder. We see someone's in a wheelchair. The company-provided desk is too short; she can't put the wheelchair legs under it. It makes sense to get risers; there's do-it-yourself options. We should not be getting all this documentation to support the need for it. We clearly see that it's a necessary accommodation in the workplace; right?

**TRACIE DeFREITAS:**

Totally makes sense. [laughter] All right.

How about Keaton? Keaton requests a flexible schedule to attend physical therapy twice weekly. All employees in Keaton's department have the option to work a flexible schedule. I'd say, before requesting medical here, my first thought is, "Does a current policy already cover this request?" What do you think?

**LISA MATHESS:**

Absolutely. Before even making this an ADA issue — not just this, but anything — look at current policy. Do we allow the flexibility for employees, disability or not — again, don't make more work for yourself. Don't make it ADA. If current policy covers it — and we see that with the modified schedule in this example. We see it with telework. We see it with different types of equipment that's already furnished. Don't make it an ADA issue if customarily that's practice to provide that flexibility; right?

**TRACIE DeFREITAS:**

Absolutely. And you could find yourself in a pickle if you're requesting documentation when it's — in this case probably not job-related and consistent with business necessity. Because the policy covers it, you wouldn't ask this of anyone else, so why are we treating someone with a disability differently than we would anyone else under the policy?

All right. Last example. Jack requests a modification to a previously approved telework accommodation to allow an additional day. Lisa, what's the important fact in this example? What can you pick out here?

**LISA MATHESS:**

Yeah, I think this one's probably our hardest example on the slide. It was a previously approved telework accommodation. So we already must know that Jack needs this for a disability-related reason. The type of accommodation we know is necessary. If the need for accommodation is understood, the type of accommodation is clear — telework in this situation — and it can easily be implemented, what's more medical going to gain? If it's not going to change anything, I don't think always going back to the doctor is worth our while. It could just be a simple conversation with Jack of, "Hey, you know, would an additional day of telework help you be more successful in your role, minimize symptoms?" And we could just implement it by having a conversation with Jack. Again, it's an entitlement to get medical in certain situations. It's not a requirement.

**TRACIE DeFREITAS:**

And here, if it was previously approved, there's probably some documentation already. Are you asking for information you already have? Kind of come back to that. These situations, they really kind of illustrate the importance of considering what's known before requesting medical information. As we work through these scenarios, I just want to point out, of course, you'll notice that we've included some JAN resources that address the various topics. These are also included at the very end of the PowerPoint to make it easy to access them later. Think about what's known before making a request for medical information. You really kind of want to consider things like whether the request is covered under the current policy, like we said. The medical condition or need for accommodation, is it known? Is it obvious? Is it already documented in some way? Whether it's known how the limitations will affect the employee's ability to perform job duties, and for what duration. Consider what you know about it, how will it impact the job? How long will it impact the job? It's also possible to consider whether it's possible to provide that effective accommodation without documentation. So, it's always an option to go there. We know that the process of requesting medical is generally about deciding whether the individual has an ADA disability, so of course we've linked a resource here to help with this process. It's a simple process of looking at the definition of disability and understanding what are some of the facts you might need to know in order to make that determination when it's necessary. Requesting complete medical records is an unnecessary request for information too. Lisa, will you tell us about this misstep?

**LISA MATHESS:**

Absolutely. Is it appropriate to request a release of complete medical records? Tracie said this at the very beginning. Entire medical records is probably a no-no. There's hardly ever going to be a case that an employer should have access to someone's complete medical records. EEOC has been very clear about this. In most situations, under ADA, an employer cannot request a person's complete medical records. Those records are most likely going to contain irrelevant information, unrelated to the disability and need for accommodation they're requesting.

So, because it's a no-no for us to ask for full medical records, employers should not use these generic medical releases that constitutes a general release for all medical records. It's suggested that an employer allow the individual the opportunity to obtain information directly from their own healthcare provider. In that case, a separate release will not even be necessary. You're having a form, you're giving it to your employee saying, "Hey, go get this filled out for me and bring it back within a reasonable timeframe." You're not even communicating with that healthcare provider's office.

Whenever we use these sample templates — and I understand that JAN has hundreds of sample templates — but you're going to need to tailor and customize the forms based on what you already have or what you already know or what's been previously documented. So what that means for an employer, you might be highlighting sections you want the healthcare provider to complete, you might be completely removing sections before sending the form to the healthcare provider, or you might be pulling out specific questions that you want answered and sending those separate questions in a customized letter you've put together for the healthcare provider based on what you've already gathered in previous accommodation requests or something like that. If you already have that documentation, we shouldn't be re-requesting that documentation. We love a sample form, it makes all our jobs easier, but for each request you might be tailoring it and customizing those forms.

Okay, so, I'm going to loop Tracie back in here to talk about some simple scenarios about requiring documentation from a medical doctor.

### [Requiring Documentation from an MD]

So now we have Cindy. They provided documentation from a mental health counselor. She was getting anxiety from angry customers on the telephone, so she did ask for reassignment as an accommodation. And whenever she asked for that reassignment, she provided some supporting medical from her mental health counselor. The employer refused to accept it because, "Hey, this mental health counselor is not a medical doctor." How would you respond to that, Tracie?

**TRACIE DeFREITAS:**

Well, I come back to that whole idea that the documentation doesn't need to come from an MD; right? So certainly there are going to be other professionals that are providing care to individuals that are able to speak to their functional limitations and provide some documentation regarding the actual underlying impairment. In this instance, a licensed mental health counselor is probably someone who's qualified to provide information in this situation.

**LISA MATHESS:**

I think so too. As long as it makes sense — If they're documenting functional limitations in their area of expertise, that can make sense.

This next one, we have Buddy's chiropractor recommended periodic breaks for stretching and to rest, because Buddy has a chronic back condition. Buddy's employer says, "Chiropractor? "They're not qualified to provide ADA documentation."

**TRACIE DeFREITAS:**

Lisa, I feel like you get this a lot leading JAN's motor team.

**LISA MATHESS:**

[laughter] Absolutely. So as I tell an employer, a chiropractor, they could have the education and experience to weigh in on a chronic back condition. That's probably a specialist for this employee, realistically. So they probably know more about this condition than anybody on their health team. So, as long as you're looking at the specifics — it's fact-specific — and some cases, that mental health counselor is going to be an appropriate provider. In some cases, it might not. Should a chiropractor be weighing in on anxiety and mental health issues? Maybe not. But could they weigh in on the chronic back condition? I think that could make sense for ADA purposes.

To get more into it of who can provide information for ADA purposes. We mentioned that medical documentation does not necessarily have to come from a medical doctor. So the information — So here, for ADA purposes, the information necessary to determine coverage under ADA may be provided by an appropriate healthcare or rehabilitation professional that's familiar with the individual's impairment and, again, those functional limitations. So, specifically, EEOC says ADA doesn't specifically require medical doc come from an MD, but as long as that appropriate professional could be somebody who has expertise in that person's disability, that's involved, has direct knowledge of the individual with a disability.

So, of course, we know medical information should come from a credible and reliable source, but appropriate professionals could be a variety of professionals. So lots of what can be deemed appropriate professional listed here on the slide. That could be the PA, nurse practitioner, psychiatrist, psychologist, could also include VR counselors, a job coach, occupational or physical therapists, social workers. And then we are seeing more and more requests that come through those nontraditional providers, so that's where the chiropractor comes in, the acupuncturists. All these people could be appropriate healthcare providers, depending what they're documenting and what — the functional limitations that we're trying to accommodate.

**TRACIE DeFREITAS:**

We do get that question quite a bit, so hopefully that clears it up. And there's some good information on that. All right, ready to move to the next scenario?

**LISA MATHESS:**

Of course.

### [Documentation Delay]

**TRACIE DeFREITAS:**

All right. The next scenarios are about documentation delays leading to missteps in the accommodation process.

Ralphie's employer required ADA forms to be completed by a healthcare provider. No deadline was provided for returning the forms, and after two weeks the employer closed the accommodation request stating Ralphie failed to provide the required information. I think there could be a misstep here. The employer could have followed up. They could have asked why the documentation wasn't provided, maybe offered an extension. I don't think closing the request seems to be helpful to anyone in this situation. What do you think, Lisa?

**LISA MATHESS:**

Absolutely. We know under ADA there's not a set timeframe that documentation has to be brought back. I think practical guidance, we do kind of say in the JAN literature give a reasonable timeframe for these employees to bring back that documentation. We see anywhere from ten to fifteen days, but be flexible with that deadline, like you said, and give an extension. If Ralphie can't get into the doctor, perhaps he can get in on day 16, and we should still be considering that accommodation and not just shutting down the interactive process.

**TRACIE DeFREITAS:**

Absolutely.

All right, number two here. Lucy was unable to get a timely appointment with a specialist to obtain documentation to support a modified break schedule needed to manage diabetes. She requested additional time to provide the documentation. This is a common reason documentation is delayed. Individuals may have difficulty getting in to see a specialist, and so it takes some time to make that happen. And in this case, yeah, maybe the employer could, again, choose to be flexible here, maybe provide a temporary accommodation and extend the deadline or really consider whether the information is absolutely necessary to provide this simple accommodation of a modified break schedule. What do you think, Lisa? Anything to add?

**LISA MATHESS:**

I have nothing to add. You hit all my talking points: the temporary accommodation consideration, is more medical going to change anything? Are we just readjusting Lucy's breaks? Are we breaking up her 30-minute into smaller increments so she can eat or take medicine? What's more medical really going do at the end of the day?

**TRACIE DeFREITAS:**

Yeah. Absolutely I think it's important to consider when someone's able to give you a reasonable excuse for not getting the documentation to you in a timely manner, really consider that. Consider their effort in trying to get that documentation.

Okay, so, we know that employers sometimes sort of feel stuck in the waiting place. You have these documentation delays, and, again, you're just kind of stuck. This can occur for various reasons that may or may not be in both party's control. but there are some strategies for kind of detouring this waiting place, I would say.

You can start by having a reasonable accommodation policy that serves as a step-by-step guide for that interactive process and includes timeframes for each step. Timeframes that apply to both the employer and the employee. Keeps everybody engaged, moves things along, and we know where we stand. B

e clear about why medical information is necessary and ask very clear and specific job-related questions about the impact of those functional limitations on performing job duties and the need for accommodation. What I'm saying is don't just send the job description alone and expect the healthcare provider to know what information is needed. You might have to be a bit more clear about what's necessary to move forward.

Also, request that documentation be provided within that reasonable timeframe. Provide an actual deadline. Maybe it's that 15 calendar days that works in most situations, but maybe you need to remind the individual when that deadline's approaching. And if it can't be met due to reasons beyond the employee's control, maybe consider that extension. We do offer a fun resource related to sort of addressing this waiting place — or avoiding it, I should say. See that "Avoiding 'The Waiting Place' After Requesting Medical Information." Lisa, what if the ADA information is ultimately not received or is insufficient? What do you think?

**LISA MATHESS:**

In those situations — and it happens — you do want to consider that employee's effort and be flexible, but you want to do what's necessary to obtain sufficient information. Like I said, can you give that employee a reasonable deadline, remind them in writing that it's approaching, but ultimately, still consider extensions. If they're trying to get the doctor's appointment, we all know we're on the doctor's schedule, we're not on our own. If the specialist couldn't get them in until end of month, I'd tell an individual, "Communicate that with your employer. Don't just miss the deadline and not say anything." So, both parties should be engaging in that process and communicating, "Here's the deadline; here's why I can't meet it. I'll get it in. My appointment's the end of January" or whatever. And just kind of keep that line of communication open so everyone is still an active participant and trying to do the right thing.

Also, you want to accept alternative forms of medical information. This could be a brief note from a provider, information from a past medical appointment, or, with the proper authorization, you may be able to contact that provider directly. This may be a faster approach for that provider and for you to get the information you're seeking. Last, accept information from an alternative healthcare, rehab, or other qualified professional who is knowledgeable about the health condition and need for accommodation. This might be where those physician assistants, primary care, or social worker could weigh in, and that might fast-track it, instead of that specialist that this employee might be waiting on.

So I think Tracie's going to talk about some key considerations whenever we're talking about this medical documentation. Being flexible; right?

**TRACIE DeFREITAS:**

Yep. Thanks, Lisa. So just to summarize ways to manage documentation delays. Here are some key considerations related to some flexible approaches to ADA medical documentation. Maybe allow medical documentation extensions when feasible. What those look like depends on the situation. We can't say five days is the best approach. It really just depends on the circumstances. So consider the individual's effort; consider are they telling you they can't get in to see a specialist for a month? That means that that extension might need to be longer than five days. Really look at that on a case-by-case basis.

Consider relying on information from the employee and providing temporary accommodations while you're waiting for medical documentation. Lisa and I talk about temporary accommodations all the time, because it's a great way to ensure that the individual's needs can be met while you're waiting for the documentation, if you've decided that it's necessary. So you might consider that while you're waiting.

And like Lisa said, partner with the employee to explore some solutions like accepting alternative forms of medical information that helps you meet your objective. So, you know, what are you looking for, and is there some other way to get it through other types of information or from an alternative provider that can help you ultimately get to the end goal, which is to hopefully provide a reasonable accommodation. And of course, we can choose to forego that medical documentation altogether, if that's the path you'd like to choose.

[Requiring Regular and/or Frequent Recertification]

These last couple scenarios are related to requiring regular and/or frequent recertification. Jovie was approved to wear earbuds as an accommodation to help her reduce distractions and improve focus and productivity. Medical documentation shows Jovie's health condition is ongoing and accommodation need is indefinite, but the employer requires a new medical note every six months. I don't know. I don't think that's the best practice, Lisa. What do you think?

**LISA MATHESS:**

Why are they making more work for themselves? We've already established this. The condition is ongoing. The need for this accommodation is indefinite. What is new medical every six months — What's it going to show? What's it going to change? Your ability to accommodate? That she needs it? We've already established all those things. So nothing new's going to be presented. There's really not a purposeful reason to requesting documentation for this Jovie case. And so, at the end of the day, I really don't think this would be job-related and consistent with business necessity. We might not have that reasonable belief that we need more medical or new medical documentation every six months. It could be problematic to ask for documentation that we already have or we already know.

**TRACIE DeFREITAS:**

Absolutely. We go back to that "What is known?" Ask yourself that question. "What do I know?" before choosing to get that recertification.

**LISA MATHESS:**

And not all recertification is bad. If the doctor or medical provider indicated that the condition or limitations might evolve and change, or we don't have a duration for that accommodation, those could be appropriate times that we ask for that recertification. Having this blanket policy that everyone with an accommodation is going to recert every six months, eh, that's probably not best practice under ADA.

**TRACIE DeFREITAS:**

Right. Absolutely. All right.

Greenway Press is trying to reduce telework and get employees back to the workplace. To do so, it's implementing routine updates of medical documentation to recertify the ongoing need for previously approved telework accommodations. This is a hot topic; right? [laughter] You know, we're hearing this a lot, of course. Again, we have a situation where we may have known facts here; right? Recertifying the ongoing need for previously approved accommodations. So what's the point of requesting new medical?

**LISA MATHESS:**

Right. Exactly. Look at what you already have, and if you have people teleworking, that they did have an expiration to the need of telework, or their condition was set to improve, perhaps we could revisit those specific employees, but, again, that blanket policy of recertification probably isn't ideal under ADA. You don't want to go just pulling telework as an accommodation out from everyone, because there's still going to be duty to accommodate under ADA. Removing telework, you're still on the hook to consider other effective accommodations for these individuals.

**TRACIE DeFREITAS:**

Absolutely. We do have a good resource on this topic, "Recertifying the Ongoing Need for Accommodation," so if you need more information on that, certainly check that out.

Lisa, what practical guidance do we offer to avoid this misstep?

**LISA MATHESS:**

Is this a pop quiz? [laughter] Flexible work arrangements. Having telework as a benefit of employment, not making it an ADA medical disability issue. So, just having telework as a flexible work arrangement could be inclusive and good business strategy.

**TRACIE DeFREITAS:**

And we want to pause on the recertification; right?

**LISA MATHESS:**

Absolutely. I've already said I don't love a blanket policy, asking for recertification every six months. So some key considerations, looking at this recertification policy, you don't want to require employees to recertify as a way to monitor whether the accommodation is effective and working. Instead, better business practice is encourage employees who have been accommodated to communicate any changes or problems with those accommodations with the appropriate personnel. Open up that line of communication.

This process should be about evaluating the effectiveness of the accommodation as opposed to asking for new medical documentation every six months. So have that open dialogue with that employee. Only ask for updated medical when it's truly needed. Look at what you already have, what is already known. And then I did mention this, you don't want to remove those accommodations out from under people without adequate warning to those employees And without considering that alternative accommodations that we might have to implement.

Okay, so we have said a lot, Tracie. Do you have any, you know, home run, key takeaways you want to go over? [laughter]

## [Key Takeaways]

**TRACIE DeFREITAS:**

With this information, I imagine some attendees may sort of be rethinking some of their current policies and procedures, maybe. We sort of have reached that end where we can give you some hopefully good takeaways.

 We know, of course, that a lot of employers do require that medical documentation as a prerequisite for providing accommodations. Whether requests for reasonable accommodation in the workplace absolutely need to be supported, it's a question to consider. We're really kind of just saying, "Think about it." But we do offer some strategies or some key takeaways here that you can kind of keep in mind when you're really debating what to do in these types of situations.

So upon receiving a request for accommodation for a medical reason, first determine whether that request is covered under current policy. We've said this; we hopefully have made it real clear. You want to consider your current policies and procedures that apply to everyone and ensure you're not treating people with disabilities who ask for the same access to benefits, privileges, workplace flexibility. Make sure you're not treating them differently. Don't require an accommodation process when it's unnecessary.

Also, assess what is already known and documented about the medical condition and need for accommodation before requesting medical information. So, employers are not supposed to ask for proof of disability when the disability is obvious and has already been documented. So again, "What do I know?" Think about that.

 Now, when choosing to request documentation, specify what type of information is necessary regarding the disability. But consider focusing on information about those functional limitations and the need for accommodation. At the end of the day, the goal is to try to figure out how is it that this person, perhaps, could perform the job duties in a different way. So, kind of get focused on how do limitations affect job performance and how can we resolve that through accommodation?

And finally, as an alternative to requesting medical documentation, consider discussing with the employee the nature of their disability, their functional limitations, and maybe accept their assessment of their health condition and limitations and defer to their accommodation preferences, when it's reasonable and possible to do that.

So, I think there's a lot to consider when we are asking the questions about somebody's disability and their need for accommodation, but we certainly do hope that we have offered you some pretty good guidance, pretty good practical takeaways, I would say. And so, certainly, if you need more information, you can definitely reach out to the JAN service. You can go to AskJAN.org to find the contact information. It's also included in the slides. But that's where we can certainly provide you that direct one-on-one consultation to kind of answer these tough questions, I would say, around medical inquiries and documentation. Now, we do — it looks like we have just a few minutes that we could probably field a few questions, Lisa, if you're up for it?

**LISA MATHESS:**

Sounds good.

## [Q&A]

**TRACIE DeFREITAS:**

Let me see what we have here. Bear with me, everyone.

Here's a question. They're evaluating an ADA request for 100% telework for an employee. It looks like they're being evaluated for long COVID, but they don't have the official diagnosis yet. We know there's a health-related condition, it looks like, and they don't have the diagnosed condition yet. So, in this case, can the employer just accept that? Where do we go from there when you don't have anything specific?

**LISA MATHESS:**

Whenever I get similar calls to JAN about the diagnosis, "Do we have to accommodate? They don't have a diagnosis," I always start the conversation that, ever since the Amendments Act, that definition of disability under ADA is so, so very broad. It includes bodily functions. It's a lot easier for someone to get coverage under ADA. So, again, I think the important pieces of documentation are "What are the limitations of this person we think has long COVID? What limitations do they have, and how is it impacting their work tasks or their ability to work?" I don't even think there's a test or anything to specifically diagnose long COVID. I think it's all just based on symptoms. So are they ever going get a concrete diagnosis? Which can make it difficult for providers to really diagnose that condition.

So, again, consider those temporary accommodations. Focus on the functional limitations and how you can help someone overcome those work-related barriers. So, you could do the temporary accommodations while you're waiting for more concrete medical or just accommodate based off the limitations and having a conversation with the employee about what they're experiencing in the workplace and what they're having a hard time doing.

**TRACIE DeFREITAS:**

Ultimately the goal is to provide an accommodation. If we know that someone's having difficulty doing the job and we can make simple adjustments to ensure they can perform their job duties, why wouldn't we do that without getting too bogged down in the medical?

**LISA MATHESS:**

Exactly.

**TRACIE DeFREITAS:**

Ok. It looks like there's another question here. It's kind of related, so I think I'm going to throw this one out here. Are employers allowed to ask for a diagnosis to be included in the medical documentation? I'll take this one.

So, in absence of the ADA actually prohibiting an employer from requesting a diagnosis, yes, it seems employers may ask about a diagnosis. However, certainly consider whether the information is necessary to provide reasonable accommodations. So, how will knowing the diagnosis impact the decision to provide accommodations? Maybe, again, we keep coming back to maybe focus, instead, on the functional limitations to support the accommodation request. Also, remember, we mentioned earlier, it's important to be aware of those restrictive state laws. So, for example, the FEHA in California doesn't allow employers to ask for a diagnosis. Even though the ADA doesn't prohibit it, you might be barred from asking based on more restrictive state law. Okay, let's see if — I think we could probably slide in one more.

**LISA MATHESS:**

[laughter] Of course.

**TRACIE DeFREITAS:**

Everyone, of course, is thinking about the Pregnant Workers Fairness Act. We've been getting a lot of questions about that. I know our training today is focused on ADA, but why not field this one here.

Regarding the PWFA, is it permitted to have an employee provide a healthcare provider statement regarding the requested accommodations? And this person is saying they haven't seen anything about this.

So, the PWFA still-proposed regulations do indicate that employers are more limited in requesting documentation to provide accommodations requested due to pregnancy and related medical conditions. So, I think the key difference — It's sort of a key difference, honestly, between the PWFA and the ADA. Employers, they'll sometimes be permitted to ask for medical documentation to support an accommodation request, but only when it's reasonable under the circumstances for the employer to determine whether to grant the accommodation. So, you really do want to take a look at those PWFA proposed regulations, kind of evaluate them yourself. There are several sections that refer to documentation. We have yet to see the final regulations. We're hoping that they are available very soon. We do encourage folks to contact the EEOC directly for guidance on the PWFA, and then you can go to EEOC.gov for some information and to get their contact information as well. So, I would say yeah, a few questions about that. It's a good idea to check out the regulations and contact EEOC. We're doing our best to answer those questions, but we don't have the final regs yet.

## [Wrap-up]

Okay, looks like we just have a few minutes left for us to wrap up, so I'm going to do that.

Lisa, thanks so much for joining me. That was fun. Lots of good information. We did set out to provide a high-level overview of the ADA medical inquiry rules, and we shared some beyond-compliance strategies to consider when you're navigating that ADA accommodation process.

Of course, attendees, if you have questions regarding this topic and other ADA and accommodation issues, you can certainly contact JAN for that free consultation that I mentioned. You might also consider attending our "Ask JAN! Q&A" series of webcasts, the first of which will be hosted by JAN's sensory team on March 14th at 2:00 Eastern. That team will field questions related to sensory impairments like deafness, hearing aid use, blindness and low vision, and immunological and respiratory conditions like allergies and asthma. You can visit the training page at AskJAN.org to register for that webcast and all of the webcasts in our series for 2024.

And remember, again, you can ask us for help. Ask JAN! We can help. We do, of course, make it very accessible to contact us, to get those services, so you can use the website, AskJAN.org, you can use the live chat, you can call, or you can email us at JAN@AskJAN.org. If you're not already following us on social media, we do offer a lot of great resources and information via our social media, so please do that. You can find the Job Accommodation Network on Facebook, LinkedIn, and YouTube, and at JANatJAN on X or Twitter. Thank you for choosing JAN to meet your training needs.

Enjoy the rest of your day, everyone. This concludes today's training.