# ADA and Accommodation Lessons Learned: Stay at Work/Return to Work Edition

## [Introduction]

**TRACIE DEFREITAS:**

Welcome everyone, and thanks for attending this JAN Accommodation and Compliance webcast titled "ADA and Accommodation Lessons Learned: Stay at Work/Return to Work Edition." My name is Tracie DeFreitas, and I'm a JAN principal consultant. I'm joined today by my colleague, copresenter, and fellow ADA specialist Lead Consultant Lisa Mathess.

Before we begin, let's cover some housekeeping items on the next slide. First, if you experience any technical difficulties during the webcast, please use the question-and-answer option located at the bottom of your screen to submit a question. You may also contact JAN at 800-526-7234 or use the live chat at AskJAN.org. That's A-S-K J-A-N dot O-R-G. We also offer an FAQ that may answer some of your questions. See the email you received with the event log-in information for the FAQ link. You can also find it on the webcast registration page.

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All right. Well, Lisa and I have a lot to cover today, starting with the purpose and benefits of stay-at-work and return-to-work programs. These initiatives are designed to retain valued employees and enhance productivity and can include temporary or permanent job accommodations like modified scheduling, job restructuring, transitional work, and reassignment. And we're going to discuss these types of accommodations. We'll also offer a high-level overview of the various employment laws that can interplay when navigating stay-at-work and return-to-work situations including workers' compensation; the Americans with Disabilities Act, as amended; the Family and Medical Leave Act; and others. This interplay can make it challenging for employers to figure out compliance and best business practices, but -- \*clears throat\* excuse me -- Lisa and I are here to help you, hopefully make things a little bit easier in terms of compliance by talking mainly about taking an ADA path to provide accommodations when it's reasonable. And finally we'll offer some stay-at-work, return-to-work accommodation lessons learned that will include practical ADA guidance and some situations and solutions.

Okay, Lisa, get us on track and take the lead with the purpose and benefits of stay-at-work and return-to-work programs.

## [Purpose/Benefits of Stay-at-Work and Return-to-Work Programs]

**LISA MATHESS:**

Thanks, Tracie. So just to make sure all the attendees, we're all on the same page today, we're going to refer to SAW as stay-at-work initiatives versus RTW, which is a return-to-work initiative. So stay-at-work is just that: We're trying to keeping -- keep an otherwise-impaired individual on the job, if medically feasible, to reduce that need for leave. Whereas return-to-work is someone is out on leave, but we don't want to leave them there unnecessarily if there are modifications that can bring them back to work in a safe environment. And we'll get into the nitty-gritty details on that later.

So stay-at-work and return-to-work programs, those programs really help supervisors manage employee injury, illness, and disabilities, ensure that employees are able to return to the workplace as quickly and safely as possible. And programs that allow employees to resume working, in an appropriate and timely manner, with or without work restrictions, those are essential for minimizing health-related absences and optimizing that work productivity.

One of the important take-aways of our presentation today is going to be early intervention through the participation in these initiatives can be key in preventing a long-term or permanent disability. In many cases like I said, these employees are left out on leave unnecessarily. So retaining these employees through stay-at-work/return-to-work initiatives, sometimes with accommodations, that can be done at little to no expense. The JAN study has shown consistently that those accommodations are often no cost, and if there happens to be a cost it's a one-time cost of less than $500. And you'll see later in this presentation that another key purpose of these initiatives is for an employer to remain in compliance with disability-related legislation, including the ADA.

Next slide.

So what are the benefits to stay-at-work initiatives? There can be numerous benefits for both the employer and the employee. But just to look at some highlights, these programs can reduce the number of lost workdays taken after an employee sustains an injury or acquires an illness or disability on or off the job. The median number of lost work days is eight. And certainly, if accommodations could be put into place for an employee who might otherwise be out of work for over a week, the number of reportable lost workdays could be decreased. These programs can help maintain workforce productivity.

From a practical perspective, if you even have one employee off for one day, there could be an impact on productivity. When we start to extend the number of lost workdays for an employee, the impact on productivity starts to become substantial, there develops a need to hire temporary workers, which can draw up costs. These programs can help lower the risk of a condition being long-term, becoming long-term or permanent.

The general standard, lots of research has kind of shown once an employee is out for over six months, the chance of them coming back to their role is down to 50%. So being and remaining on these long-term leaves could have a major impact on the in-person -- the person's well-being and how they view themselves, and stay-at-work and return-to-work programs have the potential to bring these employees back to work from those leave of absences before that condition evolves into long-term, permanent disability.

And, of course, these programs can help reduce costs, not only workers' comp -- compensation costs incurred by the company but other disability-related costs that could be incurred by a business.

Next slide.

And then these are return-to-work program benefits. Very similar, you'll see return-to-work programs are often to retain a current employee. Again, that JAN study shows that over 80% of the inquiries JAN deals with, they're from employers who are trying to retain the person already on staff. They know the job the best. We want to keep them, perhaps with accommodations. They're valuable assets to that organization. Return-to-work programs, much like stay-at-work, increase productivity. So while they're recuperating from their illness, they could be performing some job tasks, protecting their earning power and boosting that company's output.

Return-to-work programs that's keeping those experienced workers on the job often cost less than the onboarding, the application stages, the hiring new people that you then have to turn around and train to do that job. So keeping the current employees often costs less than that onboarding process. And, again, these type of programs could help reduce workers' compensation costs and reduce the cost by minimizing the impact of an employee's injury.

Okay. So next slide.

## [Key Protections]

On slide 8, you'll see there's three main key protections that we're going to look at today. So you may have one single layer of consideration, perhaps two of the three -- or in some circumstance you might be looking at an application of ADA, FMLA, and a workers' comp. So you're going to have to do an individualized assessment to see what protections an employee has. So whenever you have any type of leave of absence you want to think, "Does this leave relate to an injury?" You also want to be exploring reasonable accommodations for both stay-at-work and return-to-work programs. And really, I think, the key point today is to do an individualized assessment for each and every request. So I'm going to pass it back to Tracie to get into more detail for each of these applications.

**TRACIE DEFREITAS:**

Thanks, Lisa. So let's break these laws down just a little further so everyone has a basic understanding and also to acknowledge some of the key differences, starting with the ADA.

The ADA is, of course, a federal law that applies to private employers of 15 or more employees and state and local governments. To have ADA protection the individual must have an ADA disability and be able to perform the essential functions of the job with or without reasonable accommodation. Of course, reasonable accommodation is a key statutory requirement of the ADA, and as we'll discuss it's a strategy for keeping employees with medical limitations working instead of being out on leave. An employee can have an injury or an illness that is work-related and be a person with an ADA disability too.

I'll share some more details around this momentarily, but I want to note that, because we're discussing SAW and RTW situations, we must acknowledge the leave and reinstatement differences with these relevant laws also. Unpaid leave is a form of accommodation under the ADA. Whether leave is reasonable and for what duration must be determined on a case-by-case basis and with, of course, undue hardship in mind. Leave granted as an ADA accommodation must be job-protected leave, and the employee's position should be held unless it will create an undue hardship for the employer. A small side note: Federal government executive agencies do follow Section 501 of the Rehab Act, which has the same statutory requirements as the ADA with regard to accommodation and nondiscrimination. When we talk about ADA, if you're in a federal employment situation think Rehab Act but know the reasonable accommodation and nondiscrimination rules are the same as the ADA. So just kind of keep that in mind.

Next let's look at the FMLA. Covered entities have 50 or more employees within a 75-mile radius, and individuals have protection when they meet very specific requirements. So they must have worked for the employer for one year and for 1,250 hours in the year preceding the need for leave. Remember the FMLA is a leave law, not an accommodation law, and is available to those who have an FMLA serious health condition. FMLA leave can be accessed for reasons related to an injury or illness that's work-related and also that is an ADA disability when it's applicable. There's up to 12 weeks of unpaid leave, job-protected leave available under FMLA. And it can be applied intermittently if that's needed. Accommodations provided under ADA can enable employees to return to work or stay at work and use less FMLA leave time, so that's just something we want to keep in mind.

Looking at workers' compensation: It's a state-mandated program that applies to employers of any size, even small employers, and, depending on -- the requirements depend on state-specific rules that are in place. The federal government does offer its own workers' compensation insurance for federal employees as well. Only those with injuries or illnesses arising out of or in the course of employment will qualify for workers' compensation benefits. Benefits can include anything from wage replacement, medical treatment, retraining, things of that nature. Workers' comp benefits do preclude an employee from suing their employer for injuries covered, so that -- that's something to keep in mind. For those who must be on workers' comp leave, this leave is based on the nature of the injury or the illness and the medical opinion resulting from the workers' compensation examination process. Workers' comp leave, it can be lengthy in some cases, but it really is, in the best interest of employers to return employees to work in some capacity as soon as possible, and this, again, is where reasonable accommodation can be beneficial.

And to further complicate compliance other protections like state civil rights laws that are similar to the ADA, state disability benefits programs, and also wage-and-hour laws like the Fair Labor Standards Act can sort of interplay when you're dealing with a stay-at-work or return-to-work situation, so so much to think about! Lots of compliance to keep in mind.

So, one final slide on the overview of the key protections, and we'll get to the fun stuff. When assessing the key protections that apply, a key factor is eligibility based on the medical condition. And that's whether the person has a work-related injury or illness, an ADA disability, and/or an FMLA serious health condition.

Workers' compensation covers only work-related injuries and illnesses, and eligibility, again, is going to be based on those state-specific workers' comp criteria. An employee on workers' comp will at some point be classified under a certain disability status. So they might be totally disabled, permanently disabled, or perhaps classified as having reached maximum medical improvement.

We look at the ADA as amended, it requires that an individual meet the definition of disability. And that is they have or had a physical or mental impairment that substantially limits or limited a major life activity such as walking, lifting, standing, breathing. It does not require that the disability be permanent in order to receive an accommodation, because even temporary accommodations -- I'm sorry -- temporary conditions may be covered if not temporary and minor and as long as sufficiently severe. The ADA does not specifically list all medical impairments that are considered a disability. ADA protection does require, of course, a case-by-case analysis.

The FMLA definition of serious health condition is an illness or injury or impairment, physical or mental condition, that involves either inpatient care in a hospital, hospice, or residential medical care facility or continuing treatment by a healthcare provider, and this can also include pregnancy.

Workers' comp and ADA include the requirement to consider adjustments or accommodations, and FMLA requires leave. But one common path to take with all key protections is the goal of less time out of work and more productivity through accommodations.

Okay. Now, let's talk about the fun stuff. If you're an ADA nerd like me and Lisa, you know, you'll hopefully be interested in what we have to say, moving forward, kind of taking this ADA path. But first, we want to explain the training strategy for today. We're going to discuss various SAW/RTW topics with a focus on following a path, a road, a journey -- you'll kind of catch on with me. This leads to positive employment outcomes. So with these topics we'll note some SAW/RTW wrong turns. These are practices that may not lead to the best outcome, and then we'll share some lessons and practical ADA guidance to enable return-to-work or stay-at-work through these reasonable accommodation strategies.

## [Engaging in the Interactive Process]

So let's get started with the topic of engaging in the interactive process on the next slide. Remember a key benefit of these programs is to help employers comply with disability-related legislation, including the ADA. So under the ADA when employees with disabilities prefer work rather than stay on leave, employers do have a duty to consider providing accommodations. Therefore, it's important to engage in the interactive process to determine whether the ADA applies; to provide reasonable accommodations when it's possible to keep someone with a medical condition, injury, or illness working; and as long as undue hardship doesn't result.

A common wrong turn here is simply failing to just recognize the need to engage in that interactive process. This could be because it's a work-related injury, and maybe only workers' comp is being considered. Or because of failure to recognize a worker's potential need for accommodation, you know, it may just be they just don't understand or they're not thinking about the fact that accommodation could come into play. Or they may not even recognize the benefit of providing accommodations, so there's just that failure to recognize and engage.

Another wrong turn is dismissing temporary injuries or impairments, meaning there's no decision made to engage in the interactive process or invoke ADA, to provide accommodations, because maybe the employee's impairment or limitations are temporary.

And finally, applying a 100% healed policy will certainly lead an employer down the wrong path, so not one that keeps an employee working or returns to them to work in a timely manner.

So Lisa is going to go ahead and lead us down the ADA path with some lessons to help us avoid these interactive process wrong turns. Lisa?

**LISA MATHESS:**

Okay. So the first wrong turn that we're trying to avoid is failing to engage in the interactive process. So lesson one is going to be follow the ADA process to address these SAW/RTW issues. So, when an individual makes it known that adjustment or change is needed at work due to a medical reason, this is going to be that request for a reasonable accommodation under the ADA. There is a nexus between that medical impairment or limitation and work-related issue. The approach that we like here at JAN, if you're unsure, is ask the employee, "How can we help?" So you're not getting into ADA disability inquiry, medical inquiry territory, you're just offering, "I want you to succeed. How can I help?" And we really like that sentence if you're unsure if the person's requesting or not and you're kind of nervous about next steps.

So oftentimes whenever an employer asks, "How can we help?" an employee will kind of continue the conversation and make that request for accommodation. So once you realize that, you don't want to split hairs over the definition of a disability. Ever since the Amendments Act, it's very broad. So we say, you know, kind of assume coverage, and focus more your time and energy on is this request reasonable? And can I provide it without posing a hardship?

So, you also want to know that employers are not required to grant that requested accommodation. Employers are entitled to choose among effective options. But, I think practically speaking, we do want to give employees their preference if that's feasible. If you're not wanting to approve exactly what was requested, engage in that interactive process, open up that conversation, to kind of get the buy-in from the individual. Let them know what you're thinking and why you're hesitant to certain accommodation decisions. And this is where you might be having conversations with HR, legal counsel for certain applications, and kind of getting your accommodation team to engage in that interactive process.

This is also when you're going to request limited medical support, if necessary. Not all accommodation requests need this whole extensive medical documentation process. But sometimes we're not sure how to accommodate someone, so that medical info could help bridge those information gaps. So employers must engage in the interactive process by working with that individual to determine how a particular accommodation could assist them performing those essential functions or enjoying equal benefits of their employment.

So moving on to step 2, lesson 2. We want to get out of practice of dismissing temporary injuries and illnesses. So, the lesson is going to be consider accommodating these temporary injuries and illnesses. Like Tracie said, ADA doesn't have a set time frame that someone has to be impaired to rise to the level of an ADA disability. Employees with temporary impairments could be eligible to receive accommodations in some case. The key is going to be whether that temporary illness or injury is sufficiently severe. And oftentimes this is where you're looking at workers' comp for these short-duration injuries, so you don't want to ignore or not give those injuries the attention they deserve. And if it's a temporary injury, then often it's a temporary accommodation, which makes sense for keeping productivity levels up, keeping employees working. It works out for both parties. It makes business sense to let the employees, like I mentioned, the ones that already know the ins and outs of that job to continue performing, even if it's in a modified aspect. Especially if that duration is a short one.

So here to illustrate this we have the situation -- in this case it is a pregnancy example. It's common to have that 20- or 30-pound lifting restriction due to pregnancy. In high-risk situations, the restrictions may or may not be higher. The employer moved to the employee to a non patient-care role, which didn't pose a hardship. And then, after recovering from childbirth and once that employee was released to return to work, she could be expected to return to her original duties of lifting.

Moving on to the next lesson. So here, applying 100% healed policies. These 100% healed policies, or restriction-free policies as they're often called, they could be problematic under the ADA, as they ignore that ADA requirement to do a case-by-case assessment to see if accommodations could enable someone to meet the job tasks even if they have that restriction. So employees who wish to either stay at work or return to work, perhaps with those restrictions, they could potentially still do that job task with the accommodations. These type of policies can be viewed as blanket exclusions.

According to the EEOC, generalized blanket exclusions of an entire group of people with a certain disability could be used unnecessarily to screen out people. These classified exclusions that don't reflect up-to-date medical knowledge or technology, that are based on fears about future medical bills or workers' compensation costs, they're unlikely to survive a legal challenge under the ADA. So we do caution employers against having these 100% healed or restriction-free policies, for this reason and because ADA does require that case-by-case analysis of accommodation requests. Each request is different and should be addressed through that interactive process.

So here our example is a security guard is ready to return to work with a 50-pound lifting restriction. The employer said, "No, we are a restriction-free company." The employee was denied his return to work and had -- unless he had no restrictions and could lift that 50 pounds. So this employee called JAN, learned his rights under the ADA, and requested an accommodation. And in this situation, he cited the ADA and requested a policy modification. Showing, "I never had to lift 50 pounds before I went out on leave. That is not part of my essential duties. This is just -- a job task that is not realistic in my day-to-day functions." And even if it -- even if he did have to lift 50 pounds, an employer needs to consider, "Can I provide a compact lifting device? Can he have a colleague help him to lift the 50 pounds?" There needs to be some consideration before refusing to return employees back to work.

I'm going to hand it back to Tracie for our next wrong turns.

## [Exploring Accommodations]

**TRACIE DEFREITAS:**

All right. Thanks, Lisa. So the next wrong turns and lessons are related to exploring accommodations and these programs. Here we're talking about using inaccurate or outdated job descriptions to identify essential job duties, as part of that exploration process or only offering modified light duty to workers with occupational injuries, when it's possible to consider this as an ADA accommodation. We're also going to address issues around removing essential job duties as an accommodation, neglecting to consider temporary or trial accommodations as a stay-at-work or return-to-work method for retention, and finally, undervaluing transitional work arrangements or returning employees to work.

So let's learn the lessons around these topics. Lesson 1: Use the job description as a navigational tool. We know that job descriptions, they're not required, but it sure is a good practice to have them. A thoughtful job description is a navigational tool in the accommodation process, because it can help identify the marginal and essential duties of the job. Now, however, we all know that when job descriptions are available, they are often neglected. They're not updated when content or the nature and functions of the job change. So it's really important to update them periodically and to use the most accurate information from the employee and maybe their manager, supervisors who know about the duties of the job and what the job actually entails on a daily basis.

Also job analysis can be a useful process for updating job descriptions periodically, so, just something to keep in mind every now and then. Job analysis is a process of studying a job to determine which activities and responsibilities it includes. And that can yield some information that can be helpful as part of that exploration process when you're thinking about accommodations.

So here's a situation/solution example to kind of illustrate the usefulness of a job description when exploring accommodations. A food service manager with a back impairment was preparing to return to work after surgery. The employer provided a detailed job description that included the requirements and the environment. This information was used to request temporary modified duty, which enabled the employee to return to work earlier than anticipated.

Just one note here, I think it's important, when we are providing information to a healthcare provider to kind of assess what the person can and cannot do, don't just provide the job description. You know, it's important to offer some additional details, some questions specific to the job-related functions that you might have. You're more than likely to get the information you need the first time than if you just send the job description along, because we know our healthcare providers don't have a lot of time to sort through all the details of a job description. So, again, job descriptions are useful, but also remember that you may have to take it a step further when you're trying to accommodate someone. For general information about job descriptions you can see the JAN resource at AskJAN.org, through our A to Z section by topic, job description that's also linked here.

Next, Lisa, tell us about choosing the modified light duty path.

**LISA MATHESS:**

Yeah, so modified and light duty is a path. So, I'll probably say "light duty" a lot. That has a lot of different meanings. There's not a true definition of light duty needs. Generally most people are referring to temporary or permanent work that is physically or mentally less demanding than normal job duties. Some employers use the term "light duty" to simply mean excusing an employee for performing those job functions that they can't do because of an impairment. Like I said, light duty and modified duty are kind of one and the same.

Light duty, it's often a buzzword in the workers' comp industry. So, we often hear it associated with workers' comp. So sometimes we hear employers ignoring the obligation to consider light duty because they're like, "This isn't workers' comp." Well, if you start getting more into the weeds with it, you could see that perhaps a medical provider simply means modified duty even though it isn't a workers' comp thing. So kind of being open-minded and really kind of looking at the information presented I think could be important.

So how does light duty apply under the ADA? Well, under the ADA, an employer is not required to completely create a light duty position for an employee with a disability as an accommodation, because we know under ADA, it never requires creation of job roles. But an employer must provide other forms of accommodation that might mirror what a light duty role would consist of. So perhaps that's restructuring the job by stripping down those multiple tasks, because that is considered a form of an accommodation under ADA. A modified schedule could include part-time work or reassignment of a dis -- an employee with a disability to an equivalent, existing vacant position could also be considered. So if you have a pool of light duty jobs that otherwise are reserved for workers' comp, for ADA purposes, we might need to consider those as a reassignment for someone with an ADA disability.

The reason -- here's an example to explain modified light duty as an accommodation. We have a maintenance worker who had a 10-pound lifting restriction and worked in a physically demanding position. The employer contacted JAN looking for guidance on generating light duty positions. JAN provided information on light duty definitions and accommodations solutions for light duty roles. Luckily, in this case, the employer did have a vacant delivery driver role. So they ended up sliding the maintenance worker into that driver role for a short duration while he medically recovered.

Moving on to the next lesson. Lesson 3: getting around the bump with job restructuring. So I kind of alluded to this with the light duty/modified duty. Job restructuring is another type of accommodation that may be necessary for an employee who was looking to remain on the job or return from a leave of absence. It's a form of accommodation under the ADA that can involve either removing job functions, which are typically the marginal tasks the secondary duties of a job role, or job restructuring can refer to changing how or when the job is performed. So when the employer removes a marginal function, they may choose to give the employee with a disability a different marginal function that they're able to perform in exchange for the one they stripped from their job role.

You'll see the third bullet there, looking at removing essential functions. If an employee can't perform an essential function of a job and requests an accommodation that requires some research, the employer could consider temporarily removing them from those essential functions until a permanent solution could be made. If an employer chooses to do this, the employer should make clear to the employee that this is a short-duration accommodation and it is in fact temporary and for how long that accommodation is going to be feasible. Because under the ADA, essential functions are not required to be removed permanently. So if you're going to be taking away essential functions, really you are going above and beyond the ADA, so I would document those efforts. Job restructuring might also include another type of accommodation in order for it to be an effective solution, such as purchasing a piece of equipment to enable an employee to perform, or you may be looking at modifying that schedule, even though you've already restructured the job role.

So to illustrate this, we have an example of a teacher with seasonal affective disorder. Lots of fatigue because it's now winter and he was changing his medication. The accommodation here was that the employer was willing to remove some marginal tasks during those winter months. He wasn't required to do the early and late bus runs so he could put all his time and energy into his essential teaching tasks.

Okay, looking at lesson 4. Providing temporary accommodations can be yet another best business practice that helps to ensure that employers are compliant with the ADA as well as stay-at-work, return-to-work initiatives. There's no definitive answer to the question of whether or not an employer's obligated to provide an accommodation on a temporary basis, but from a practical standpoint, doing so shows a good-faith effort. A good-faith effort is being made to keep that employee working. So temporary accommodations may be needed while you're looking for a more permanent accommodation determination while you're researching various accommodation requests. Perhaps when there's a temporary workplace barrier or environmental issue that's having an impact on the employee with a disability. We went over that we're seeing these temporary accommodations for those temporary injuries and illnesses.

And then we're seeing this a lot. A temporary accommodation, we know, cannot be long-term. We're seeing this with requests for telework. Right now it's feasible and we can continue teleworking, but we might not be able to lock that in, indefinitely. So just those considerations for the temporary accommodations are important. So in some cases, like I said, failure to provide a temporary accommodation, it could be a violation of the ADA, if not granted. And in any case, where an employer is able to grant an accommodation on a temporary basis, the employer should make clear that this is, in fact, temporary. We do have a link here on the slide to the JAN resource on providing temporary or trial accommodations, and it does include a sample form for documenting that that accommodation is, in fact, temporary in nature.

And then looking at the situation and solution -- we have an employee with a new diagnosis of hypersomnia, which is a sleep disorder. So now they're on a new set of medications, struggling to make their shift on time. Luckily the employer granted a temporary flex schedule to give her time to adjust to the new medications, so with it, she can come in a little later, perhaps stay a little later to make up that missed time. She and the employer did look at other options to help her stay alert during the day.

Okay, last lesson: merging with transitional work arrangements. So these transitional work plans, which can refer to modified duties or tailored accommodations or even reassignment to another position, all of which can minimize the transition period from partial disability to full duty. These plans are often temporary setups. They're typically designed to provide work for the employee to eventually transition and return to their original job thus enabling them to perform the essential functions with or without accommodation.

Transitional work arrangements are not necessarily required under the ADA, as the law doesn't require you to create positions, but, again, practically speaking, it may make sense to create a position consisting of tasks that already need to be completed anyways, all in order to get an injured worker back to work sooner. These arrangements may entail returning an injured worker back to their same position just at a reduced schedule and capacity or even part-time. There's sometimes some ADA complications when changing full-time to part-time, but for a temporary accommodation, it makes good business sense to do that in a return-to-work program. These transitional work plans are shown that they could benefit the employee from a medical standpoint, but, again, can benefit the employer with increased productivity.

Here we have a situation/solution to illustrate these transitional work arrangements. We have a custodian with Long COVID. He was able to work, just not at full capacity. He asked to return part time and gradually increase his hours each week back to full time. So the employer did agree to a transitional work arrangement. It would last four weeks with the expectation that they would be able to work full time at the end of those four weeks. So you'll see that even though the ADA might not require changing full time down to part time, four weeks with this employee that already knows the job is going to be more productive than a new hire going through training. Four weeks will have already passed by the time you've hired someone else, so it just makes sense to keep that original employee in their original role.

Back to you, Tracie.

[No audio]

## [Medical Inquiries and Examinations]

**TRACIE DEFREITAS:**

Sorry, I was on mute.

Okay, we're learning some great and clever lessons today. Let's keep moving forward with some wrong turns related to medical information including issues related to medical inquiries and examinations.

First, broad-reaching or inappropriate requests for functional capacity evaluations -- or fitness-for-duty exams -- these requests can go too far sometimes. Or insisting on an independent medical examination, an IME, when an employee has provided sufficient medical information to return to work. And finally, making stay-at-work/return-to-work decisions based on unsubstantiated safety and direct threat concerns.

So the first lesson on the next slide is covering too much ground may go too far. So what does this mean? When exploring ways to return to work, it's important to know whether the medical information needed is already available before you request additional examinations or evaluations. And often a release to return to work, it will include sufficient information about the employee's limitations, their medical restrictions, and their ability to perform job duties. This information can be used to explore accommodations.

We've heard about situations where the medical documentation clearly stated the employee's restrictions as they relate to performing the essential duties of the job, but the employer still wants a full functional capacity evaluation. So we kind of have to ask why in a situation like that. It's important to focus on the employee's present ability to perform the essential functions, based on the information that is known. So it's possible that an FCE will identify other limitations that are not of current concern and so I think you want to keep that in mind. Is it really necessary to go down that road? Probably not. It may be in some cases, but really, you want to evaluate what you already know and whether you have the information you need to explore return-to-work accommodations without reaching too far with further evaluations or examinations.

Another issue is unnecessary fitness-for-duty exams. I'm not saying they're always unnecessary. They can absolutely be necessary and helpful in some situations, but you just want to make sure that you're aware of and you're following the rules related to when fitness-for-duty can be required. In a stay-at-work or return-to-work type situation, so for example be mindful of the FMLA rules and whether the employee was notified in advance of fitness-for-duty requirement before returning to work. Also be sure that a fitness-for-duty request meets the ADA "job-related and consistent with business necessity" standard when it comes to requiring examinations of employees.

The next lesson is related to medical information. Lesson 2: pay attention to this the signals. This means pay attention to the information that's right in front of you as you move forward with that interactive process. Recognize what's already known and whether the information is sufficient. Know those ADA medical inquiry rules related to requesting information. Sufficient information can be required to make accommodation decisions. That's information that specifies the existence of an ADA disability, the limitations involved, and the need for accommodation.

Sometimes employers will request an IME when an accommodation is needed. For ADA purposes, an IME may not be required to provide accommodation unless the information supplied by the employee's own healthcare provider or appropriate professional is insufficient. So really kind of take a look at what information is there? Does it meet the needs that you have for the information to move forward in that interactive process? So is it sufficient or not?

And when it is insufficient, let's say that you have made that determination, that you don't have all of the pieces necessary to move forward, we do suggest requesting clarification or additional information before going straight to that IME request, maybe give the employee a list of specific questions, ask to contact the healthcare provider directly to get the answers to your questions. Maybe extend the deadline to get that sufficient information and just sort of be clear about what it is exactly that's needed in order to move forward to get that person back to work or to keep them at work. So you can, you know, think about all of that. Also, remember an IME that's requested by the employer, it's going to be at the employer's expense, so if you're -- if you're taking that direction, that's something that's going to fall on the employer in that type of situation.

Lastly don't forget that interplay and pay attention to other IME rules under maybe FMLA and workers' comp, so you always want to pay attention to that -- the other laws that could come into play, and it might change the approach that you take based on those rules.

Here's another situation to illustrate. A forklift operator wanted to request accommodations to alleviate the pain they experienced while sitting for long periods of time. And the employee provided their supervisor with a medical note from their provider, simply stating that the employee needed to take breaks or have a different seat. There's not a whole lot of information in a note like that necessarily. Once the -- once HR received the medical note, they explained to the employee how the note didn't have enough information to show the disability, the functional limitations, and it lacked information to support the accommodation requested by the individual. So HR gave the employee additional 15 days to go ahead and provide sufficient information. Just a note there, of course under ADA there's no specified time frame for an individual to return documentation. An employer can dictate that time frame. We typically say up to 15 days, it's consistent with FMLA rules, so that's usually pretty good time frame to follow. But sometimes you might also need to look at providing an extension when it's necessary.

All right, lesson 3, related to medical information, is know before you go. Identify the safety risks. This lesson is about knowing the facts before you go down the road of making an unsubstantiated determination of direct threat without having the proper medical information. So are you keeping people on leave because you're worried about additional injuries or risks to others?

Employers may require as a qualification standard that employees not pose a direct threat to the health or safety of themselves or others. But very specific and stringent requirements have to be met under the ADA to establish that a direct threat exists. It's defined as a significant risk of substantial harm to the employee or others which cannot be eliminated or reduced by reasonable accommodation. That specific risk, it must be identified, it must be current, it can't be speculative or remote. And remember: That direct threat analysis, it doesn't include assumptions. It must be based on objective, factual evidence related to the individual's present ability to safely perform the essential functions of a job. And it cannot be based on unfounded assumptions or fears or stereotypes, so you have to keep all that in mind. It does rely on the most current medical knowledge and/or the best available objective evidence. So you really want to pay attention to those facts before you're going to decide not to return someone because you're worried about what's going to happen.

In the context of staying at work and returning to work, this means making sure you're not preventing an employee from working, keeping them on leave, or failing to accommodate them based on an assumption that there is a risk or a direct threat. For more information about direct threat analysis, the old standby still is the ADA Technical Assistance Manual. So chapter 4, 4.5 standards necessary for health and safety of a direct threat.

## [The Final Journey]

All right, our last topic is about the final journey, so we're getting ready to round out this presentation today. What we mean here is that point where you reach where it may be the employee's been out on a lengthy leave of absence and you think you've reached that point of no return, but have you? Maybe the journey isn't fully over yet. So don't stop.

Some wrong turns to think about or to avoid here. Neglecting to explore reassignment to enable stay-at-work/return-to-work. Don't forget about reassignment as a strategy for return to work. Another is exploring reassignment but not following the rules, whether they be workers' comp or ADA. Also providing indefinite leave, never-ending leave that means you'll -- you'll never reach that positive employment outcome goal that we're hoping for. Or purposefully keeping an employee on leave to avoid providing a reasonable accommodation. So let's hit the road with these.

Lisa, talk to us about reassignment.

**LISA MATHESS:**

Yeah, so under the ADA, reassignment to a vacant position could be an accommodation as long as that employee is qualified for that new position and it does not pose a hardship. In terms of stay at work/return to work, reassignment, it could be a temporary accommodation, or it may be more of a permanent solution. Temporary reassignment could be useful when the interactive process is taking place and you're exploring those accommodation options for that original role. So instead of forcing someone out on leave while engaging in that interactive process, we're going to find them a vacant role that they can perform while we're still focusing on accommodating that original role.

So as far as ADA goes, a -- reassignment is typically an accommodation of last resort. But sometimes reassignment could be the best option. If the employee and the employer are in agreement that reassignment to that vacant role would be the best solution, they can move forward with that as opposed to exhausting all other options to keep the employee in their current position.

So to give you an example: Now we have a mail clerk in a corporate office. They were not able to lift items heavier than 15 pounds. Most packages weighed more than 15 pounds, and there were only a few clerks that this could be reallocated to. The solution here is the employer reassigned the employee to a filing clerk position that was vacant while another employee was on medical leave. So this was a temporary arrangement, allowed that employee to continue working and eliminated costs associated with hiring a temporary employee for that filing clerk position.

Keeping on track of reassignment, here on the next slide you will see lesson two. You want to follow the reassignment rules. So when we're looking for jobs to reassign to, you want to consider the laws at play and what gives the employee the greatest protections. ADA says that that job needs to be vacant or soon to be vacant, but workers' comp could have different entitlements. So check those in your state. FMLA has parameters on reassignment when people taking are intermittent or reduced-schedule leave, so you just want to be mindful of what applications an employee is utilizing.

Under the ADA reassignment is a noncompetitive transfer. So we should not have these folks going through that whole competitive process with outside applicants. The search for a vacant position should include those that are equivalent to the employee's original position, in terms of pay and status and benefits, and doesn't have to be limited to positions within the employee's original department or location. When an equivalent vacant position is not available, an individual may be reassigned to a vacant, lower-level position. In this situation there is no duty to carry over that original rate of pay unless you do that for other transfers in a similar situation. And then generally employers are in the best position to know about potential vacancies, but the interactive process should be collaborative so both parties can take their part in that job search. We do have a JAN resource linked that goes even more in-depth on reassignment linked on Slide 29.

Back to Tracie to take us through our leave situations.

**TRACIE DEFREITAS:**

All right. We're ready for our final two lessons now. Lesson 3: Leave should lead back to work. In stay-at-work/return-to-work situations there's always a leave scenario, either because someone has been out intermittently or has had a short absence or maybe a lengthier absence. Leave may be required under workers' comp or FMLA or provided as an accommodation under the ADA. There can also be state laws and programs to follow so, of course, one point here is to pay attention to the various leave requirements and benefits and their interplay. We do know, of course, there are a lot of state laws around leave, paid leave and such, too, so there's just -- there's a lot to pay attention to in the leave landscape for sure. The objective of providing leave is to ultimately lead the employee back to work. I know it can be confusing, but you want to follow that yellow brick road through recovery, through treatment, for your wellness, and then get back to work, so that's really what we're hoping for here.

Leave provided through ADA and FMLA, it must be job-protected time off. Of course, FMLA mandates this, and under ADA if you don't hold the employee's position during leave, you're not accommodating them.

Of course, indefinite leave is not required, nor is it a best practice. FMLA does cap the time at 12 weeks. The ADA has no required duration, but employers can expect employees to return to work within a reasonable period of time. So before the leave is a hardship for the employer. This is going to be different on a case-by-case basis, so it's really important to consider the impact of that leave and -- and how it affects the operation of the business, how people perform their job duties, how the work gets completed. So there's a lot to consider when we're looking at leave-related situations. And looking at indefinite leave, it's different from a leave request that gives an approximate date of return. But we do know that repeated extensions of leave can become a request for indefinite leave, so you really kind of want to analyze what do you know about the situation? Is there an anticipated date of return? Is it something where the healthcare provider can continually offer you some additional information about the individual's progress and when they're expected to be able to get back to work, and maybe it's through a transitional period. So remember to keep that in mind.

To illustrate, here's an example. An employee, originally accommodated with a 12-week leave for depression, asked for an 8-week extension, which the employer provided. At the end of the extension, the employer received a note stating the employee was not ready to return, and there was no anticipated date of return provided. This kind of situation can make it difficult for employers to figure out, "What do we do next? Do we continue to allow the leave?" One thing to consider, I think, it's always important to reach out and say, "Is there any belief that the individual could return to work with accommodations?" So, sometimes the provider is not really thinking about that, necessarily. In this case, the employer requested information from the employee's mental health provider about a firm date of return. Unfortunately, no date could be given, and so the employer had to determine that they couldn't extend the leave again or hold the employee's position.

So, unfortunately, you do run into some of those situations where it may not be possible to continue to extend the leave if there's just no end in sight. So, that does happen.

All right, finally, let's finish up with Lesson 4: Leave should not be a detour or shortcut. So let's revisit some of those stay-at-work/return-to-work benefits that Lisa shared with us earlier: reducing the lost number of workdays, enhancing workforce productivity, reducing costs, retaining valued employees saving on recruiting and training costs. These benefits should lead to the stay-at-work/return-to-work objective of keeping qualified workers on the job instead of out on leave.

So employers can't detour the ADA or take a shortcut by forcing employees to go out on leave instead of providing reasonable accommodations when accommodations will be effective for enabling them to stay at work. In this instance, really looking at leave being an ineffective accommodation. According to the Equal Employment Opportunity Commission, forcing an employee to accept a less-effective form of accommodation, like leave, it deprives that individual of their job and the ability to earn an income, so that's really not the best course. Don't detour that way.

Of course, on the flip side of that, when a healthcare provider does state that an employee has a serious health condition and leave is necessary, an employer can't force an employee to stay at work if they are FMLA-eligible.

So, again, remember that interplay and pay attention to other laws that can come into play. Lastly, employees can't be forced to take leave until the ADA interactive process is complete. In most situations -- we hear about this more often than you might expect. And in most situations, you know, you really want to consider an -- if an employee is able to continue working, they should be permitted to do so, during that interactive process. Perhaps with those temporary accommodations in place, until that process is complete.

However, of course, there may be circumstances where it's not possible -- maybe there's a direct threat, maybe the employee can't safely perform their job functions, or the employee can't perform the essential functions until an accommodation is provided, or it could be while you're waiting for necessary medical information about whether an employee can continue to perform job functions safely. So there are some situations where, you know, an individual may need to be out during that process. But I would say that they're going to be quite limited. So, you know, really pay attention. Is it possible to keep that person at work as you're going through that process? You don't want them out on leave if you don't need to have them out on leave.

Of course, JAN offers many resources related to leave issues. One is "Leave as an Ineffective Accommodation," so we've pointed that one out here, since it's related to the wrong turn to avoid. And that is, of course, linked on the slide and on the JAN website.

## [Conclusion]

All right. So we have covered a lot of ground today. In conclusion: Of course, stay-at-work and return-to-work initiatives are designed to retain valued employees and enhance productivity. To keep accommodations in mind, of course, when you need to be able to meet those objectives, so accommodations can help you do that. And, of course, in keeping with our theme today, you want to follow that path that leads to positive stay-at-work and return-to-work outcomes. We couldn't help but include this cute little buggy with a heart on top to kind of illustrate that we're on the same road together. So we hope you've enjoyed this information.

Lisa Mathess and I thank you for attending JAN's "ADA and Accommodations Lessons Learned: Stay-at-work/Return-to-work Edition." We do encourage you to register for the next JAN Accommodation and Compliance Series Webcasts, or all of them for that matter. The complete 2022 series is now posted, so you can register for all of them. The next event is "Accommodation Solutions for Executive Functioning Deficits," and that will be hosted on Thursday, March 17th. For more information go to AskJAN.org and click on "Training."

We do know that some questions were submitted. We don't have time for those today. However, we might be able to answer a few of them through our social media channels, So maybe pay attention to that so we can get some information out there related to those questions.

There's so many issues that, of course, we can address, but unfortunately that is all the time we have. We hope the information has been interesting and helpful. Lisa, thanks for joining me for this webcast. I do appreciate you and your expertise.

For additional information on the topics discussed today, please do contact JAN. Go to AskJAN.org to contact us. You can use the site or contact us by phone, live chat, or email. Please also follow us on Facebook and Twitter for timely ADA and accommodation information and resources.

And, finally, before you leave us today, we hope you'll share your feedback by completing the webcast evaluation. Just keep the JAN webcast window open when the webcast ends, and the evaluation will pop up in a new window. Again, if you're seeking a CEU for this event, the CEU approval code will be available after you complete the evaluation.

Thank you to Alternative Communication Services for providing captioning for this webcast today. Finally, thanks to everyone for attending this JAN Accommodation and Compliance Webcast Series event. This concludes today's training.