# ADA Update 2023

## [Introduction]

**TRACIE DeFREITAS:**

Hello, everyone. Happy Disability Pride Month, and welcome to this JAN Accommodation and Compliance Series webcast titled "ADA Update 2023: Practical Strategies for Handling ADA Accommodation Challenges."

My name is Tracie DeFreitas, and I'm the Director of Training, Services, and Outreach for JAN. As has been the tradition in July for quite some time, Jeanne Goldberg, Attorney Advisor to the Deputy General Counsel at the US Equal Employment Opportunity Commission (EEOC), will join us today to share some insight on the ADA and the accommodation process.

Jeanne, thank you for joining me today. It's always a pleasure collaborating with you, so we're happy to have you here today.

**JEANNE GOLDBERG:**

Happy to be here.

**TRACIE DeFREITAS:**

Okay. We have a lot to talk about today, so let's start with those necessary housekeeping items, and then we'll get right to it.

If you experience any difficulty accessing the webcast, please use the question-and-answer option located at the bottom of your screen. If you have questions concerning technical difficulties, please do that. That Q&A is at the bottom of your screen, so you can use that to connect with our webcast team. You can also use the live chat at AskJAN.org or call 800-526-7234.

You may also check our webcast FAQ for some answers to your technical questions. The link is included in the login email that you received today or go to the webcast series page at AskJAN.org.

Questions for presenters should be submitted using the Q&A option. All questions will be gathered into a queue and answered, time permitting. Just a reminder, today's webcast is 90 minutes, a little bit longer than our usual 60-minute JAN webcasts. So we will leave some time for questions, so you can either hang on to those until the end, or you can go ahead and submit them at any time during the webcast, so whatever works best for you.

You may download the PowerPoint slides using the direct link found in the login email that you received today. The link is also posted in the chat now, or you can go to this webcast event from the training page at AskJAN.org.

To access live captioning, use the closed caption option at the bottom of the webcast window or view captions in a separate browser using the link shared in the webcast chat.

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

And finally, at the end of the webcast, please complete the evaluation. If you're seeking an HR CEU, the HRCI approval code will be provided after the webcast evaluation is completed. We hope you'll do that so we can get your feedback.

Now let's get started with our discussion points on the next slide.

In July, the anniversary of the passing of the Americans with Disabilities Act, ADA, we're reminded of the progress that this landmark legislation has made to ensure equal opportunities and protections for individuals with disabilities. But there of course are still some various challenges that both employers and employees face when it comes to providing and receiving accommodations.

Today, we will explore some ADA accommodation challenges. While we're doing that, we will delve into some key legal points surrounding ADA accommodations, highlight some common accommodation process scenarios, and offer perspectives on potential solutions for addressing these challenges, and these will include beyond-compliance approaches. Jeanne and I will focus on four ADA accommodation topics: request for medical information, selection of accommodation, modifying workplace policies, and handling leave and attendance issues. Jeanne will also offer an ADA case law roundup and brief us on a new law effective last month, the Pregnant Workers Fairness Act.

## [Requests for Medical Information]

Our first topic is request for medical information on the next slide. Give me just one moment here. Okay, here we go.

To help determine effective accommodations, we know that the EEOC recommends that employers use an interactive process, which simply means that employers and employees with disabilities who request accommodations work together to come up with accommodation solutions. This process often begins when an employee requests an adjustment or change needed for a reason related to a health condition, a disability. For example, when an employee says they need to flex their schedule to attend therapy appointments or maybe they're having some difficulty performing a specific job duty because of a medical restriction. These are situations that may be treated as a request for accommodation. Once a request is recognized by the employer, the interactive process can begin.

This process, it commonly includes requesting medical documentation or information when it's permissible and necessary. Jeanne will address the key legal points related to ADA medical inquiries and employees, but let's consider some common challenging situations on the next slide.

So some common medical request scenarios that we hear about at JAN can include things like when an employee balks at an employer's request for medical information, maybe refuses to cooperate in the process of providing information about their health condition. This might be because the employee believes the employer doesn't have a right to ask about their personal health-related information. Maybe because they misunderstand the HIPAA privacy rules and are not informed about the employer's right to request personal health information or disability-related information under the ADA, or it could be that it's believed that the employer doesn't have a need for the requested medical details and the individual prefers to limit the information. Maybe not sharing information about their diagnosis or very specific details, for example, or they just might feel like the employer doesn't need that in order to move forward in the process.

Another challenge is when the employee doesn't provide information in a timely manner. Receiving medical information in a timely manner — It's really important for an effective interactive process. There might be no response or action on the employee's part to provide the requested information, or maybe the healthcare provider refuses to communicate with the employer, they don't respond to emails or messages or calls, and so those details or clarification maybe hasn't been provided.

We also hear about situations where the employee says their healthcare provider requires a medical appointment before they will complete that documentation, but maybe the employee isn't able to get an appointment for months, or the healthcare provider takes a long time to prepare the documentation and send it in to the employer.

We're sure that a lot of these scenarios are pretty common, and many of you have probably experienced some of these similar challenges. Jeanne, I'm going to turn it over to you on slide seven to share some key legal points related to the ADA and requesting medical information.

### [Key Legal Points]

**JEANNE GOLDBERG:**

Okay. So, of course, an employer can decide that it does not need any supporting medical information or want any supporting medical information and it's just prepared to go ahead and grant the requested accommodation. But if an employer does decide it wants to verify that the individual is legally entitled to this accommodation, what are the legal guardrails for getting medical information in support of an accommodation request?

An employer cannot just ask for medical information automatically on every request. The ADA rule is that an employer can ask for supporting medical information if it's not obvious or already known that the requester has a disability for ADA purposes, and we know that's a physical or mental impairment that substantially limits a major bodily function or other major life activity or a history of a substantially limiting impairment. And in addition to having a disability for ADA purposes, that the requester has a current disability-related need for the accommodation that they're asking for. So, if either of those, the disability or the medical need, are not obvious or already known, the employer can ask for supporting medical information.

Now what if the information received from the employee's doctor is unclear or incomplete? The employer is free under the ADA to then request supplemental information. So, there's no barrier to reaching out to have a dialogue to clarify and understand what's been said in the medical information submitted.

You want to read a narrative about what we've just discussed, turn to the EEOC's Enforcement Guidance on Reasonable Accommodation, questions five through nine walks you through this process.

Next slide, eight. Continuing with request for medical information, key legal points.

So, as a practical matter, how does the employer ask for this supporting medical information? The employer can either ask the employee to bring in the information from their healthcare provider, so tell the employee what's needed and ask them to bring it in from their doctor, or the employer could ask the employee to sign a limited release that would allow the employer to contact the healthcare provider directly.

It's important when doing this for the employer to explain what information is being asked for. You know, "I need supporting medical information to verify the type of impairment, what the limitations are, how the requested accommodation would help this employee, what the accommodations are that are needed for how long," that kind of specificity, as opposed to just, "Bring me a doctor's note." If you say just “bring me a doctor's note," there may be endless rounds of back and forth until you actually get the information that you need as an employer.

If it's relevant to the accommodation request, it could also be helpful to describe for the healthcare provider what the job duties are. That can increase the likelihood of getting accurate and complete information. But remember, as to how much medical information in these subject areas the employer can ask for, it's limited to only what is reasonably necessary to determine that the individual has a disability and needs the accommodation requested.

Tracie?

### [Takeaways]

**TRACIE DeFREITAS:**

All right. Thank you, Jeanne.

So, now, let's talk a little bit about some takeaways based on this — those key legal points that Jeanne mentioned. So as a practical matter, when the health condition and the need for accommodation are known or obvious, really consider focusing on gathering detailed information about the requested accommodation rather than asking for unnecessary medical information. So if you can shift your focus to that in those situations, that's what we would suggest.

When medical information is necessary, it's helpful to explain to the employee that the ADA permits the employer to request medical information when it's job-related and consistent with business necessity. So, inform them of the ADA rules. Maybe explain why the information is needed, that it will be kept confidential, how it will be used to support the accommodation process.

I really think that communication is key here, because sometimes there's just a misunderstanding of why the information's being requested and how it's going to be used, and there may be some concerns about privacy. So really, make sure you're communicating and you're ensuring that that information's going to be kept confidential.

Also give the employee a reasonable timeframe for an actual deadline to provide the information. So, for example, maybe 15 calendar days. So even though there might not be a timeframe under the ADA, it's a good idea to work with some form of timeframe. Some, you know, a few days so that that individual knows what they're working with in terms of the expectation to get that information back to the employer.

Also, tailor the information sought to the accommodation request. So determine what medical information is necessary to provide the accommodation. So information about the health condition, the related limitations, the job duties affected, and how the accommodation will help.

And don't ask for the employee's entire medical record, of course, or for records from unrelated providers. Asking for all medical records will rarely, if ever, meet the test and can violate the ADA. So you don't want to ask for more information than is necessary or, you know, all of those records.

Providing the employee with a list of job-related questions will make it easier. Like Jeanne mentioned, it's important to kind of be specific. Explain what it is you need, what the job duties are, ask specific questions to kind of make it easier to get the information that's necessary to move forward. For example, would Jess be able to return to work on a reduced work schedule of six hours a day for a temporary period? And if so, for what duration? So try to be specific so that you're going to get the information you really need to move forward in that accommodation process.

Also, sometimes the information received is incomplete or is unclear. Don't just end the process there. Explain to the employee what additional information or clarification is needed and allow them an opportunity to provide it or to follow up with their healthcare professional directly. Also it is possible to see about contacting the provider as well. So if you get that authorization from the employee to do so, sometimes it's a little bit faster to get the information you need and move forward that way. So as long as there's authorization to do that.

In some cases, additional time might be needed to gather that documentation. So consider extending the deadline, maybe five more days or an appropriate number of days given the specific circumstances. If you're an employee, also give the employer a compelling reason to extend the deadline. We know that sometimes appointments can't be scheduled within maybe the timeframe that the employer has given. So it's important to kind of, again, communicate with the employer and the same thing for the employer back to the employee. Explain that you're willing to go ahead and extend that deadline, but ultimately, that documentation might be necessary to move forward. Both employers and employees, they'll be best served by documenting things like dates, their communications, all of their efforts to obtain information, and any — also any interim accommodations that maybe were provided while awaiting documentation, which is a good "beyond compliance" approach, I would say. So providing temporary accommodations until the documentation is received in order to enable the employee to work effectively in the interim is a good practice.

Also, another "beyond compliance" approach is to consider forgoing medical documentation altogether. When a reasonable accommodation can be provided without that documentation, consider moving forward. Know that medical documentation is not required under the ADA for employers to choose to provide accommodations It is possible to move forward without it, and in some instances it makes sense to do that. Just keep those things in mind.

### [Resources]

There are some EEOC and JAN resources available on the topic of requests for medical information and the ADA offering guidance regarding the medical inquiry rules. This is a small selection on this slide of resources that are linked from the PowerPoint and in the webcast chat as well. So you certainly want to look into these. JAN has created a lot of different resources, EEOC has great enforcement guidance resources, so we do encourage you to take a look at all of these and use them to help you through the accommodation process.

So EEOC's "Enforcement Guidance on Disability-Related Inquiries and Medical Exams of Employees under the ADA" is a great tool. JAN has a general landing page related to medical exams and inquiries that links to the EEOC guidance resources as well as our own resources created on this topic. We also — just to mention another — we have a training video that touches on the information around medical information and the interactive process. So that's another good resource to tap into. So there's a lot of information out there to access.

This can be a complex topic, but know that you're not alone in processing requests and gathering information. There are a lot of tools to help.

## [Selection of Accommodation]

All right. Let's move to our next section related to the selection of accommodations. Once an employer understands an employee's health condition, the limitations causing a problem, and has identified what the work-related barriers are, then the next steps in the accommodation process include exploring, choosing, and implementing accommodations. During these steps, employers should be open to new ways of doing things, and this is the time to really brainstorm and consider what accommodations will be effective and reasonable.

Let's explore some common scenarios related to selecting accommodations on the next slide.

These scenarios involve things like a lack of engagement or communication, could be a failure to lead the way and explore accommodations when the employee hasn't proposed a particular solution or where the employer neglects to consult with outside resources like JAN for help seeking accommodation solutions. Worse, maybe they end the interactive process without even providing an accommodation if no solutions were offered at the time. Or the employer's considering or offering a different accommodation than what was requested but fails to communicate with the employee about why they've taken that path. Maybe there's no discussion about why an alternative was selected. For example, whether it's not reasonable or it poses a hardship. Or maybe the accommodation that the employer chooses is less burdensome but might still be an effective solution. We also hear about situations where the employee refused a reasonable and effective accommodation offered by their employer because they want their preferred accommodation. So there are lots of different common scenarios or challenges that can come in during this stage of the process.

Jeanne, moving to slide 14 now, we talk about some key legal points related to selecting accommodations?

### [Key Legal Points]

**JEANNE GOLDBERG:**

Sure. So sometimes the requester is only able to tell the employer what their disability-related need is, but they don't have a particular solution or accommodation to propose. In that situation, the employer nevertheless does have an obligation under ADA to provide a reasonable accommodation if there's one that's available without an undue hardship. So it's the employer who is going to have to search for a solution. The employee has to cooperate, but the employer has the obligation to search for a solution using resources such as the information from the employee and their feedback, what JAN has available, EEOC, and elsewhere.

Sometimes it's not that the individual has no particular accommodation they propose but sort of the opposite. The employee requests a very specific accommodation, but the employer has decided they're not going to provide it. It's not feasible, or it would pose an undue hardship, or it involves eliminating an essential function of the job, or it involves lowering performance or production standards, and we know legally an employer never has to grant an accommodation that does those things.

So what do you do if the employee asks for one of those things? Well, don't stop there. In that situation, even where the employee has asked for something that legally, under ADA, the employer is not required to provide, the employer is still obligated to provide an alternative reasonable accommodation — to search for and provide an alternative, if one is available without an undue hardship.

Now, Tracie mentioned, what if the employee refuses an accommodation that is offered to them by the employer? There's two different ways that happens. One is, as Tracie suggested, the employee may not be aware that the employer has the discretion to choose among effective alternatives, and so the employee might mistakenly think that they are entitled to their preferred accommodation. Then the employer would explain that the ADA gives the employer discretion to choose how to accommodate, as long as it's an effective solution.

But beware of the situation where the employee is, instead, refusing the accommodation because the employee is telling the employer, "This conflicts with my medical restrictions." There you do need to go back to the drawing board at least enough to check whether the accommodation you've offered is consistent with the medical restrictions or not.

So sometimes, in fact, an accommodation that both employee and employer in good faith thought would meet the medical needs, the employee informs you, once it's implemented, "No, this is still problematic given my disability-related needs," and then you know you need to go back to square one or evaluate what they're telling you to see if the employer concludes that's true. Going through this process will ensure that you can sort out that situation if it does arise and know at what point you've reached the point at which the employer has fulfilled its accommodation obligation.

Now beware: Three months, six months, a year later, the employee might come back at that point due to different needs, worsening of symptoms, a new disability restriction and ask for a different accommodation — And there's no limit on how many accommodation requests can be made. So each time the employee raises the issue with the employer, it's important to go back and evaluate whether current needs are being met and the employer's fulfilling its obligation to provide something effective, if that can be done without an undue hardship.

Next slide. Slide 15.

We know — as I mentioned, there's a basic principle that the employer does not have to eliminate an essential function, a main duty of a job, as an accommodation. So what is the employer supposed to do if that is actually what the employee asks for? “Eliminate this duty.” If the employee asks to remove a duty that is, in fact, an essential function, the employer does not have to grant that. But it's still an accommodation request, so the employer needs to determine if there's an alternative accommodation that would enable the employee to perform the essential function.

If there is a reasonable accommodation that could allow performance of the current job, then — if there is a reasonable accommodation that could allow the employee to perform the essential functions of the current job, you're going to provide that if it wouldn't be an undue hardship. But if there's no way to accommodate in the current job, then you're going to look at the last resort — reassignment to a vacant position if there's a lateral move that can be provided, the employee's qualified for the vacancy, or if not something at the lateral level, the next — a lower position, for which the employee is qualified, if there's a vacancy.

Now, what about all the medical information you collected through this process? ADA requires an employer to keep medical information confidential with very limited exceptions. It's important to remember that this does not apply just to diagnoses and treatment. EEOC takes the position that confidential medical information includes the fact that an employee has requested or is receiving an accommodation. So this means that confidentiality includes keeping all that medical information and accommodation information out of personnel files. It can be in a separate medical file or accommodation file. And also not disclosing it, even verbally, to coworkers. Essentially only the people actually involved in deciding the accommodation request will know this information, and each of those individuals will only know what they needed to know to do their part in the accommodation process.

Next slide. 16.

So it's important to unpack an accommodation request when you receive it. An example is suppose an employee communicates that their disability impedes commuting to work. Don't fall into the trap of concluding that just because there's no responsibility to transport an employee to work or because commuting itself, it's not a major life activity, that you can just deny the request. Instead look at what the request is actually about. Unpack it. Is this a limitation or restriction as to standing or sitting for a certain amount of time or a vision impairment or some other barrier. And determine if there is a disability-related need for a reasonable accommodation that can be provided without undue hardship. Might be a schedule change, telework, or something else.

Even if the employee has requested an accommodation that's feasible and would not pose an undue hardship, under the ADA, as we've said a couple times now, the employer always has that discretion to choose among effective accommodations. In other words, if there's more than one effective solution, the employer can choose the one it wants. Now the employer may not know if the alternative accommodation it has in mind would be effective to meet the disability-related needs and limitations that the employee's come forward with. And if that's the case, the employer can ask the employee or the employee's healthcare provider whether the alternative accommodation would meet the employee's needs and have that dialogue.

Tracie?

### [Takeaways]

**TRACIE DeFREITAS:**

All right. Thanks, Jeanne. So, some takeaways related to the selection of accommodations. I'll say the first is don't be a quitter. Be a leader and be solution-focused. Search for an accommodation solution, even if the employee doesn't have a proposed accommodation. So, like Jeanne said, it doesn't just stop there.

Remember the interactive accommodation process, it's collaborative, so work together. Come back to the table. Keep working together. I know Jeanne talked about the employer having the discretion to choose among effective accommodations, but consider the employee's preference, if it's reasonable. The employee might have experience with the accommodation and already know it will be effective. So I think there's some — it's important to kind of value the insight that the individual's offering and honoring that request when it's feasible to do so.

If an employee's proposed accommodation is ruled out, maybe explain why. Maybe it's not possible, it poses a hardship, there's maybe a less-burdensome accommodation to consider.

And then, of course, search for an alternative accommodation, as Jeanne mentioned, if one's available and absent undue hardship. So really just kind of stay in it, continue to look for options.

And again, I come back to that idea of keeping that communication going. I think sometimes there's sort of a breakdown when one party on either side doesn't communicate fully with the other, and I think oftentimes individuals do appreciate having further information about why the employer made the decision they made. So certainly try to communicate that.

Also, employers will sometimes choose to go beyond what the ADA requires when they're selecting accommodations such as by eliminating an essential function. And Jeanne just talked about that. It's an example of a modification that is maybe not reasonable or required under the ADA. But going beyond compliance, this can be an effective solution for maintaining a valued employee with a disability when an employer is open to it. So those who choose to go beyond the ADA are advised to document this decision by explaining why you chose to take that step. Why did you choose to go beyond maybe what the ADA required of you? It's important for both the employer's and the individual's sake.

It's also helpful to communicate any timeframe if you're providing it as a temporary solution, which is not uncommon.

And also to manage expectations for how the work will be completed. Monitor the situation and be sure it's working for both parties. Going back to one of those common scenarios that I mentioned earlier, if an employee refuses an offered accommodation, find out why. If the employee contends that it wouldn't meet their disability-related needs, then maybe return to that accommodation process to determine if offering an alternative accommodation is warranted. It might be. The employer will need to know why the alternative accommodation won't overcome the employee's limitations to enable them to perform those job functions.

So, again, that's where that communication comes in. That information will help the employer better understand the situation and know why that accommodation was one that they refused. When it's necessary to deny an accommodation based on undue hardship, for example, which is infrequent, the denial must take into consideration the employer's overall resources. The lesson in this is of course — is to rarely look at cost as a legitimate undue hardship factor. So it's something you're going to do rarely, but you're really going to have to look at all overall resources to do that.

Lastly, document everything, including when accommodations offered are ultimately refused by the employee. You want to keep a record of everything, keep a record of that process and all of the decisions that are made along the way. This is helpful to, again, everyone involved in the process.

Jeanne, I'm going to kick it back to you to talk about some challenging ADA accommodation issues on slide 19.

## [Challenging Accommodation Issues]

### [100% Healed Rules]

**JEANNE GOLDBERG:**

Okay. So starting on slide 19. 100% healed rules.

A common scenario is where an employer instructs an employee not to return to work after an illness or injury until they have no restrictions. Until they're 100% healed. "Wait until after your leg is better." "Wait until after your chemotherapy treatment is completed." "Don't come back part-time or with restrictions any sooner."

The key legal point is it violates the ADA to make an employee take leave until they're 100% healed if they are able to perform the essential functions of the job, even with an accommodation if needed, and they're seeking to work. The ADA allows employers to insist that an employee be qualified to remain in a position, but qualified means able to perform the essential functions and with accommodation, if needed. It does not mean 100% healed. So this is an important issue to keep in mind, because as I said, it can be a common employer practice that we encounter that violates the ADA.

So takeaways to ask yourself when confronting this situation: Are there reasonable accommodations that would allow performing the essential functions consistent with any medical restrictions that the employee has? They may have none, but if they have any, are there ways to accommodate them? And if so, does the accommodation pose an undue hardship? So make sure to consider reasonable accommodation, any reasonable accommodations that would enable continued work or return to work before placing someone on involuntary leave due to their medical restrictions.

### [Parking]

Next slide, 20.

What if the employee requests a reserved parking spot? One closer to the entrance or a special, larger, accessible parking spot as an accommodation? The common scenarios confronted here are where the employer-provided parking lot has no reserved regular spaces or has a limited number of those larger accessible spaces or a landlord, a third party, controls the parking lot rather than the employer.

The key legal point here is that accommodation may, nevertheless, be required to meet the needs of a particular employee.

So the takeaways, things to ask yourself when confronting this situation: Can a parking space be reserved? Maybe there aren't reserved spaces there now, but if an individual needs a reserved space closer to the entrance — let's say due to mobility limitation — can a sign be put up? A temporary one overnight, for the longer term one ordered?

Can a space be reserved for an individual with a disability? Can — If it's a question of accessible parking spots, Can the number of accessible spots be increased if that's necessary to provide accommodation because you need more for all the people who need them? If not, is there a different type of accommodation that's available? Maybe someone has to telework due to their mobility limitations or other alternative accommodations that the parties can together determine might be effective.

And if you are in that situation where a third party, such as a landlord, controls the parking lot, discuss the situation with them and memorialize your efforts, that documentation that Tracie was discussing. Remember that some of these entities will themselves be covered as public accommodations under title III of the ADA, so they may have their own independent obligation to make modifications to accommodate members of the public who are using their lots. So that is an additional incentive they may have to work with the employer on finding a solution. We've got a link on the bottom of that slide to JAN's parking publications.

### [Requesting a New Supervisor]

Next slide, 21.

What if the employee requests a new supervisor as an accommodation? The key legal points here are that there is no ADA obligation to assign someone to a different supervisor as a reasonable accommodation. But just as we were talking about before when someone asked to eliminate an essential function of their job or have their performance standards lowered, don't simply deny the accommodation in the face of such a request. Even though you don't have to grant what was asked for, you do have to see if there is an alternative accommodation that's available that could be provided.

Here, for example, that could be changing supervisory methods based on the disability-related needs, such as having the supervisor give or confirm instructions in writing instead of only verbally or giving assignments in chunks instead of all at once and so on.

So, as a takeaway, of course, always feel free to go above and beyond what ADA requires. Assigning a new supervisor is not required, but it's also, of course, not prohibited, but the employer — So the employer can choose to grant it as an accommodation if it wants to, but it need not, but consider the alternatives that could be provided. Fulfill that obligation to provide some alternative accommodation before ending the interactive process. Make sure you've considered everything that you might be able to do rather than switch the person's supervisor, if you decided not to voluntarily do that.

Tracie?

**TRACIE DeFREITAS:**

Okay. So those are some tricky, I think, accommodation situations that we certainly hear a lot about, so, thanks for going over those, Jeanne.

## [Modifying Workplace Policies]

Our next topic is related to modifying a workplace policy as accommodation. The ADA doesn't interfere with an employer's right to have workplace policies. Employers are of course allowed to develop and enforce policies that apply to all employees, including employees with disabilities. However it can be a reasonable accommodation to modify a workplace policy when it's needed because of an employee's disability-related limitations, absent undue hardship, of course.

Sometimes when creating or modifying a policy as an accommodation, the accommodation may be apparent to or affect others, so this can create some challenges. So let's consider some of those.

So, sometimes decisionmakers, they might rely on an employer's policy, not realizing the ADA may require an exception as an accommodation for one or some individuals based on disability-related need. It's not acceptable to lean back on the idea, "This is the policy, and it applies to all. No exceptions." Or maybe management might be opposed to making any exceptions to uniformly applied policies, because they're afraid of setting a precedent or that coworkers will request similar types of exceptions.

Jeanne, what are some legal points about modifying policies as an ADA accommodation?

**JEANNE GOLDBERG:**

Okay. Starting on slide 24.

The ADA can require making an exception to a policy for an individual with a disability as a reasonable accommodation if it's not an undue hardship. Now when an employer does this, however, it is still permitted to maintain and apply its policy as to everyone else. A super simple example: An employer could still require everyone else to stand while performing a retail sales job, even if, as an accommodation, it allows an individual with a disability to sit on a stool. We've given you a link here on the bottom of slide 24 to the section in EEOC's reasonable accommodation guidance on this topic, "Modified Workplace Policies."

### [Telework]

The next slide, 25, let's look at telework policies in particular as an example.

Some common scenarios that come up when someone seeks — has an accommodation to have an exception to a telework policy. The employee might need more telework as an accommodation than the policy allows ordinarily for employees. You may encounter a situation where a manager is resistant to giving any exceptions to the telework policy because they fear other employees will complain or will want the same thing or they fear that they won't be able to ensure that work is being completed if the individual is teleworking. Or the employer may be concerned about allowing telework for a poor performer.

Turning next to slide 26, continuing with exceptions to telework policies.

The key legal points here are that the ADA may require telework as an accommodation, absent undue hardship, even if other employees are not allowed to telework at all under the employer's policy or even if other employees are only allowed fewer telework days than this individual seeks as a reasonable accommodation.

The employer may be required to allow telework as well as a reasonable accommodation even if the individual has poor performance or it's contrary to their ordinary policy that requires you be at a certain performance level in order to be eligible for telework. But there will be some situations where the performance issue will make telework not feasible or an undue hardship. For example, where, due to the nature of the work and the performance concern, the employer actually needs the individual on-site for working together on certain work that can't — where that kind of coordination or oversight or supervision can't be done remotely. And I've given you a link on the bottom of slide 26 to the EEOC's telework technical assistance publication.

Slide 27, continuing on this topic.

It's a really, really fact-specific determination that courts make, based on the particulars of the position and the workplace. when they have to decide if telework would be a reasonable accommodation that did not pose an undue hardship that the employer should have provided as an accommodation. Courts have shown a real willingness to look quite granularly at the particulars of a job and the workplace.

Key, potentially relevant facts they may scrutinize: the employer's ability to supervise the employee adequately, whether any duties require use of certain equipment or tools that cannot be replicated at home or there may be duties that can only be performed on-site. You're doing the filing; you're performing functions with customers who come in person on-site. Those kinds of facts would be highly relevant to whether telework was feasible at all.

Whether there's a need for face-to-face interaction and coordination of work with other employees, again, that cannot be done through technology if the individual's working remotely. Whether in-person interaction with outside colleagues, with clients or customers is necessary. And this may be because they're coming on-site; this may be because it can't be done through technology; it may be because the timing is unscheduled and the individual has to be available in an on-site location for this to work. Looking, again, at the details.

Finally, whether the position requires the employee to have immediate access to documents or information that's located only in the workplace, or it has to be shared with other individuals, so it can't be removed, because everyone needs to be working on it simultaneously.

Tracie?

**TRACIE DeFREITAS:**

Okay. So, lots of takeaways, I think, here that we want to keep in mind. We want to make sure that managers and supervisors know to accommodate, that they may have to make an exception to a usual practice or policy or rule. Basically, the first response to a request around this type of modification shouldn't just be "No." Certainly come back, take a look at the situation, and figure out if you can make an exception for an individual on the basis of their disability.

Of course, the employer has discretion to choose alternative, effective reasonable accommodations if available. For example, would it be possible to accommodate to work on-site instead? So, in those telework scenarios where you might have somebody who could potentially be accommodated in another way on-site, it's okay to look at those other options, as long as they're going to be effective and reasonable. So you can come back to that interactive process and take a look at some other alternatives.

If it's uncertain whether essential functions can be performed remotely, maybe consider it helpful to implement a trial accommodation or a temporary accommodation at first to see whether or not that could work. So it certainly might be feasible to go ahead and give it a try and see. And come back and re-evaluate. You may have to make adjustments along the way, but it might be possible to do that.

Something else to keep in mind is you do want to hold all of those teleworking for any reason to the same performance and production standards as everyone else. We have heard of employers who were trying to hold individuals who've asked to telework to different or higher standards than employees who might be working on-site. So just be careful you're not treating people disparately because they've chosen to request this as an accommodation and work in a different location. The expectations should be the same for the work they do that would be performed on-site as well, so just be careful how you're doing that.

Of course, JAN offers a lot of resources around telework. One of those is our "Telework Accommodation Request Flowchart," and this is a nice little tool to use when you're receiving those telework accommodation requests to kind of process that, to make sure that you're treating it either under your current policies or looking at it as a form of accommodation. So that's a real good resource to take advantage of.

Jeanne, what about applying a "no animals" policy in the workplace when access for service or emotional support animals is requested as an accommodation?

### [“No Animals” Policies]

**JEANNE GOLDBERG:**

Sure On slide 29, we've got some of the common scenarios we see where a supervisor might reflexively deny an accommodation request because. let's say. the employer has a "no animals" rule. Or the supervisor's concerned about disruption to the workplace, or they're concerned about the allergies of others, or they're concerned that if they say, "Yes," this will mean that other employees can insist on bringing in animals.

The key legal point to keep in mind, rather than a reflexive denial of the accommodation request, is that a "no animals allowed" policy is just like any other workplace policy. The employer may need to modify the rule for an individual that needs the animal, due to disability, absent undue hardship.

Tracie, I think you've got some resources that JAN has on this that are super helpful on the next slide.

**TRACIE DeFREITAS:**

We absolutely do. It's a tricky topic, and we do get a lot of questions around this topic. Certainly take a look at these resources. We have one related to service animals in the workplace, another related to emotional support animals in the workplace. Also one around animals and allergies in the workplace, which is a typical concern, where employers might be worried about how that accommodation affects other people. So those are just a couple of those that we do offer.

But it's something that you want to explore the accommodation solutions to address individual needs and circumstances. So gather information, figure out whether this is something that's feasible. Is it reasonable? Is it possible to have the animal on-site? Is it possible that the animal can behave appropriately in the work environment? Understand what the animal's temperament is and what environment it needs to be in. It's one where you may need to ask a few questions to go ahead and implement this type of accommodation, but it certainly is one that can be effective for a lot of people. We do encourage you to consider that. JAN helps employers navigate this type of accommodation situation by offering practical guidance on how to proceed with the interactive process. So we can certainly help with that.

## [Leave and Attendance]

All right, so, let's move to another topic, leave and attendance. What are some common scenarios around leave and attendance issues? As you all probably know, we could probably talk about leave and attendance for many hours, but we have a short period of time.

Here are some examples. Maybe an employee requests leave, but they're not eligible for FMLA, or they've used up all available FMLA and accrued leave, and they still need to be out. This might be where we cue the ADA; right? Or an employee's disability-related absences are frequent or unplanned and unpredictable, possibly causing some undue hardship for the employer. We also hear about long-term, a long-term need for leave, needed for things like recuperation or treatment and the struggle of deciding what duration of leave is reasonable as an ADA accommodation. What about those indefinite leave requests where a healthcare provider maybe can't say whether or when an employee is able to return to work. Or maybe an estimated return date is offered, and we still aren't really sure.

So, Jeanne, we could talk about leave and attendance for days, of course, but what are some key legal points that you'd like to note today?

### [Key Legal Points]

**JEANNE GOLDBERG:**

Sure. So on slide 33, a few key legal points. First, that the employee may be entitled to leave as an ADA accommodation — and that's unpaid leave when it's an ADA accommodation — if it's not an undue hardship, even if they already used FMLA leave or even if their employer is not covered by FMLA or they are not covered by FMLA. In other words, the employer has to have at least 50 employees or the employee has to have worked a certain number of hours, so FMLA might not apply if — to the employer or the employee, depending on the circumstances, or it might apply and the employee has already used it up.

In any of those situations, ADA leave as an accommodation could then come into play where the individual needs more leave. But in deciding if leave as an ADA accommodation would pose an undue hardship, that significant difficulty or expense for the employer, the employer is allowed to consider the impact of FMLA or any other kind of leave that's already been taken. And the employer has to allow the employee to use their accrued paid leave before having to use ADA unpaid leave as an accommodation.

And for ADA leave, the employer also has to allow the employee to return to their same position if the employee's still qualified for it and if, after the leave, holding the position open during that period of ADA leave is not an undue hardship. If it is an undue hardship to hold it open, then the employer's looking at if they could reassign them to the next closest thing. But the obligation, if it's not an undue hardship, is to put the individual back in their same position after the leave. So some employers look at whether they can put someone temporarily in that position, as a way to fill it or otherwise, accommodate the absence.

Next slide. 34.

What kinds of factors are relevant in deciding if leave requested as an ADA accommodation would pose an undue hardship? I think this is a question that both JAN and EEOC get with great frequency. The key things that — to look at, to decide if the leave requested is an undue hardship is first of all, the length of the leave, the frequency of the leave, if it's intermittent, or the unpredictability of the leave if it's intermittent. Is that such that it poses a significant difficulty or expense on the business? The length, the frequency, or the unpredictability of the leave?

Next, the impact of the employee's absence on coworkers. Does it affect the ability to perform work in a timely and appropriate manner such that it really poses that significant difficulty or expense on the employer's business.

And another key fact, the impact on business operations overall and the employer's ability to provide timely and effective customer service or otherwise accomplish work objectives, if that impact is such that it poses a significant difficulty or expense on the business.

And on the bottom of slide 34 here, we've got a link to EEOC's key technical assistance publication on leave and the ADA called "Employer-Provided Leave and the ADA." It has a lot of examples involving when a period of leave might or might not pose an undue hardship on the employer, so I commend that to your attention if you have this issue.

Tracie?

### [Takeaways]

**TRACIE DeFREITAS:**

That EEOC guidance is excellent. We use it all the time, so glad we're sharing that today. Very helpful.

So certainly lots of leave and attendance takeaways to consider, but really I'd say — one thing from a JAN perspective, we often will say, "Make sure you've looked at all the other avenues for leave first." So again, you're looking at employer policies; we're looking at state and other federal laws like the FMLA, for example, that might come into play. Before we're looking to ADA, remember ADA's not a leave law. Leave's a form of accommodation. So we really try to encourage employers to kind of look at other avenues first but then of course look to ADA.

So when that request doesn't fall into those other areas, now we're looking to provide an accommodation. Even if it's a situation where FMLA was exhausted or other forms of leave were exhausted, that person might need to take additional time. And maybe it's only a few weeks, maybe it's a few months, but you really want to kind of look at that and figure out what's going to work in that situation. And certainly consider that leave, even the leave that's already been taken, as Jeanne mentioned, can be considered when you're evaluating what's reasonable and what poses an undue hardship.

I think it's important to ask questions, find out as much information as you can. With a request to extend leave, you might need to reinitiate that interactive process, so one perspective we have is that it might be possible for the person to return to work sooner than anticipated by going back to that interactive process. It's possible they might not be thinking of accommodations of some other sort could work to get them back to work or keep them at work. We would say that it might be a good idea to do that.

Sometimes the healthcare provider also doesn't really have any idea about accommodations, and so they're not really thinking about other ways to help that person get back to work sooner or to stay at work, so you might need to return to that process. This could also be if someone exhausts their leave, and they might be ready to return but with some restrictions. So remember you might need to come back and reinitiate that interactive process once the person's completed the leave and is able to return to work.

And of course don't penalize an employee for using leave as a reasonable accommodation. It might be necessary to do something like prorating an end-of-year productivity measure if in some way that leave comes into play and affects productivity. So you don't want to use that time against the individual, of course.

Also, provide training. So make sure that those handling leave requests know when employees with disabilities may have a right to ADA leave absent undue hardship. So make sure they're not just saying, "No, we can't give you any leave right away," and they're familiar with the other requirements that could come into play and looking at ADA and figuring out what's possible.

In those situations where the healthcare provider offers a revised return-to-work date, maybe they've extended it and they give a different date, you still need to look at that. It's not the case that you just decide, "No, we can't continue to provide leave anymore," you might need to consider that extended date. Again, you might want to come back to that accommodation process, ask whether or not the person could return sooner with some other type of accommodation that could be provided at work, so it's possible to do that.

And then finally, of course, you do want to make sure you're analyzing all accommodation requests for leave on a case-by-case basis. Each circumstance or each situation should be looked at objectively, make sure that you are considering the impact of that leave, like Jeanne mentioned. She gave you all of that good undue hardship factor-related information to really consider. So do take a look at all of that on a case-by-case basis.

That wraps up our ADA accommodation topics, but now, Jeanne, we're going to move to the ADA reasonable accommodation recent case law round-up, which I think is a real exciting part of this particular training. So I'm going to turn it back to you.

## [Recent Caw Law Round-up]

**JEANNE GOLDBERG:**

So we're going to look at some cases from the past year that may help illustrate some of the principles we've been discussing.

The first on slide 38 is EEOC v. Wal-Mart Stores from the 7th Circuit. We know that in accommodation cases there's often a question of whether the employee's qualified, in other words whether they can perform all the essential functions of their job with the accommodation that they're asking for, if it's relevant.

In this case, the appellate court held the jury reasonably found a customer service staff member's duties were not — I'm sorry — that customer service duties were not essential functions of a shopping cart attendant position even though the shopping cart attendant's position description, the job description, did list customer service duties. The court held that, even though all of the company's job descriptions included the same boilerplate sort of customer service elements, this included tasks that a cart attendant, a shopping cart attendant, never had to do: assisting with purchasing decisions, locating merchandise for customers, resolving customer issues, and promoting products and services to customers. They were in the job description, but they weren't anything that the shopping cart attendant ever had to do.

This case reminds us that a written job description is one relevant fact in determining what the essential functions of the job are, but it's not dispositive. Courts will look not just at what it says on paper, in the job description, but also at the reality of what the job actually entails in deciding what the essential functions are for purposes of deciding, "Is this individual qualified for their position under the ADA?"

Next slide, 39. Brigham v. Frontier Airlines. In this case, a flight attendant alleged she was unlawfully denied accommodation for her alcoholism, but she was not able to show in her EEO case that there was a reasonable accommodation that could have been provided. The accommodations she sought, like, include bypassing the bidding system that was required by the collective bargaining agreement, those were not reasonable accommodations, and the court held, as all courts and EEOC have, that just failing to engage in the interactive process is not, in and of itself, an independent violation of the ADA. The employee has to show that there was an available reasonable accommodation that could have been provided. Often that failure to engage in the interactive process is relevant to determining the outcome of the case, because if a court says, "Hey, there was this available reasonable accommodation; it was not provided; we have to figure out why it wasn't provided." Was it the fault of the employee because they did not cooperate in the interactive process? Or was it the fault of the employer because they did not pursue determining, through the interactive process, what options were available and failed to find this reasonable accommodation and offer it.

So, interactive process — so important, so relevant often to driving what the outcome is, if there's a challenge after-the-fact that a denial of accommodation was unlawful, but in and of itself, not engaging in the interactive process is not a violation. The employee always must show there was an available reasonable accommodation that the employer could have provided.

Next slide? 40. Norwood versus UPS. In this case, the employee requested to tape-record meetings as an accommodation. Instead, UPS wanted to explore the alternative of a notetaker for selected meetings, and they repeatedly asked the employee to clarify what meetings would require a notetaker or another idea they were considering, a written agenda. And the employee never provided the requested information about these alternative accommodation ideas the employer was exploring in terms of a notetaker or an agenda. Instead, the employee just kept insisting on the need to tape-record as an accommodation.

The court — she challenged the denial of accommodation — and the employer — the court held that the employer did not act in bad faith. In having this dialogue, the employer was just trying to learn if its proposed alternative accommodation would be effective. And HR manager communicated that a notetaker was a possible accommodation subject to a better understanding of when it'd be needed and they made repeated efforts to find out from the employee, "If we went with a notetaker instead or an agenda, what kinds of meetings would you need that at?"

The court held the employee wasn't entitled to the accommodation of her choice, as we know, the tape recorder, if another reasonable accommodation met her needs. And her failure to cooperate in the employer's discussion of alternatives made the breakdown in the interactive process her fault, not the employer's.

Next slide, 41, Swain v. Wormuth. Here the court had to apply the accepted rule that an unreasonable delay in providing an accommodation can be tantamount to a denial of accommodation and violate the ADA. But on the facts here, the court held that there was a delay, but it was not unreasonable. They look at the totality of the circumstances, including things like the employer's good faith in attempting to find accommodation, the length of the delay, the reasons for the delay, what was happening during that delay? Was the accommodation request just sitting, rotting on a supervisor's desk, long forgotten? Or was the employer taking steps to see what accommodation could be provided, and if so, to implement it. So, they look at the nature and complexity as well of the accommodation requested, and that might factor into how long it takes. And whether an employer offered alternative accommodations.

In this case, the court said, "Well, we'll look at those kinds of facts." Here the employee's paperwork had to be reviewed. They had requested a complicated accommodation of automatic doors for a certain entryway. The doors needed to be inspected, parts needed to be ordered, installation needed to be scheduled, and importantly, the court said, very importantly in a case where undue delay is alleged, they said the employer, once it had decided to provide the accommodation but needed more time to implement it, provided interim accommodations while they were awaiting that installation after the request was approved. So, even though each step did, in fact, take a few months, the court concluded the employer was not ignoring the request or failing to act at a reasonable pace.

Slide 42. LeBlanc v. McDonough, the 8th Circuit. In this case it was held that the employer did engage in a good faith interactive process on the employee's request to work a constant day shift. In other words, the employee wanted to be accommodated by being exempt from the otherwise-required rotating shifts as an accommodation for their dizziness and blurred vision that was caused by a vestibular dysfunction. And the employee alleged that the employer should have made better efforts to find some accommodation other than reassignment. They challenged that they should have been entitled to work a constant day shift or have some other accommodation, not be reassigned to a different position altogether.

But the court held the employer's efforts to determine whether the person could be accommodated in their current position were sufficient. So it was okay to resort, make that — go to that last-resort accommodation of reassignment. In fact, the court said it was significant that the employer provided interim accommodation while it was considering the request, because the interactive process was taking a while. They sent the employee numerous emails explaining the accommodation process, they had a reconsideration process after they denied the request to be assigned just to day shifts, and ultimately they did identify a vacancy to which they could reassign the employee as that accommodation of last resort. So the court held that was a sufficient effort to accommodate.

And finally slide 43, the Dansie v. Union Pacific Railroad case. In this case the employee sought intermittent time off. That intermittent leave for their disabilities, which were HIV and testicular cancer, that intermittent leave they needed for symptoms or treatment would take them beyond the maximum six absences per 90-day period that the employer's policy allowed for. And they challenged the denial of accommodation, the denial of this intermittent time off, and the court held that the employer cannot end the interactive process prematurely in a way that keeps the parties from being able to work together to find a reasonable accommodation.

In this case, the employee and the doctor provided the information the employer had requested of them, but the employee and their doctor asked the employer for clarifications about the reasonable accommodation form and about the scheduling policy, and they said if they could get these clarifications, it would enable them to give a better estimate of exactly how much leave, intermittent leave, was expected to be needed. The company refused to reply. They did not reply. They said the doctor's information that was submitted with an estimate of how much leave would be needed was insufficient, and they denied the request.

And the court held that a reasonable jury could find the employer was responsible for the breakdown in the interactive process here, because it made no effort to learn what the employee's limitations were or explore other possible reasonable accommodations or to get back to the doctor with the answer to his questions. All of that — responding to questions from the employee, from their healthcare provider, to clarify the employer's policy, to clarify the employer’s forms, to clarify what information the employer is asking for — is part of the interactive process. So the employer can't simply fail to respond to those inquiries and deny the request out of hand as happened here, or they could be responsible for denial of accommodation because they were responsible for the breakdown in the interactive process if indeed, the employee shows there may be have been available reasonable accommodation they could and should have been provided.

## [Pregnant Workers Fairness Act (PWFA)]

Turning now to slide 44, we're going to pivot for a moment before we turn to Q&A, because we want to make sure to highlight, for anyone who isn't aware or may have only read about it in passing, that there is a brand-new employment civil rights law that EEOC is charged with enforcing that took effect just recently on June 27th, 2023, and that's the Pregnant Workers Fairness Act, the PWFA, which Congress enacted in late December.

We're all familiar with the fact that, under the ADA, pregnancy itself is not a disability, but pregnant workers may have medical conditions related to their pregnancy that are disabilities, so they may have ADA accommodation rights there. What the PWFA adds that is different is a requirement that employers provide reasonable accommodation, absent undue hardship, for a known limitation related to pregnancy, childbirth, or related medical conditions. In other words, accommodations for pregnancy or childbirth or related medical conditions, period. Need not be a disability. Could even be a healthy pregnancy for which the employee needs accommodation. The new law adopts the ADA's definitions of reasonable accommodation and undue hardship.

This term "pregnancy, childbirth or related medical conditions" is actually part of the definition of sex in title VII, the sex discrimination statute that EEOC also enforces. For example, it's long been the case under title VII that lactation has been held to be a pregnancy-related medical condition. So we will see now an obligation for employers to provide reasonable accommodation, absent undue hardship, for pregnancy, childbirth or related medical conditions under the PWFA.

The law defines "qualified" as being able to perform the essential functions with or without accommodation but says the individual is also qualified if any inability to perform an essential function is for a temporary period, the essential function could be performed in the near future, and it can be reasonably — it can be reasonably accommodated.

So this new obligation will be added to the rights that already exist, and we'll turn to the next slide.

There are existing sex discrimination claims involving pregnancy that are available under title VII, which was amended back in 1978 by the Pregnancy Discrimination Act to say that pregnancy discrimination is sex discrimination under title VII. So existing title VII claims are still available, and existing ADA disability discrimination claims and accommodation claims are still available for pregnancy-related disabilities, but as I said, not for pregnancy itself. Now there'll be this third law, the PWFA, that provides for reasonable accommodation, absent undue hardship, for pregnancy, childbirth or related medical conditions.

EEOC has a landing page on pregnancy discrimination where you can read about all three statutes as their rights and responsibilities relate to pregnancy, and we've given you the link to that here on slide 45. The statute requires that EEOC promulgate final regulations interpreting the Pregnant Workers Fairness Act by December 29th, 2023. The Commission has voted to approve proposed regulations, and those are currently awaiting clearance by the Office of Management and Budget to be published for public comment. So look out for those. There'll be a notice on EEOC.gov when those proposed regulations are published, and anyone, any member of the public, can read the proposals and comment, submit public comments through a website called Regulations.gov, and then EEOC will issue those final regulations after considering the public input.

There's one other new law. It's not enforced by EEOC, but it's also in this space so I wanted to make sure to mention it. It's called the PUMP Act. It's actually enforced by the U.S. Department of Labor, and it took effect in late April. That is a new law, federal law, that requires employers to provide, under a variety of circumstances, space — private space that's not a bathroom for employees who pump. And I've given you the link here at the bottom of slide 45, so you can go to the DOL page on the PUMP Act and read all about these new requirements.

Tracie?

## [Q&A]

**TRACIE DeFREITAS:**

Such great information. Thanks, Jeanne. I'm not going through the resource slides, because they're simply here for everyone's benefit, so certainly do go ahead and download the PowerPoint so you can get the links to all of these resources. I'd like to skip right to the Q&A, because that's the best part. So we do have a whole bunch of questions coming in. So I'm going to pull those up and get started with that, if that's okay with you. Let's see here. Okay.

I do want to clarify a couple things. We had some comments, one related to the Rehab Act for federal settings and where they might be different from ADA. I just want to mention — and, Jeanne, hop in here too — that everything we talk about related to the ADA, as it relates to accommodation and also nondiscrimination, the rules are the same as they would be ADA to Rehab Act Section 501 So kind of keep that in mind. I know we often don't say the Rehab Act, but we tend to oftentimes hear those terms, ADA and Rehab Act, being used interchangeably.

**JEANNE GOLDBERG:**

I'll just add one thing to that. Yes, exactly what you said for nondiscrimination and accommodation purposes, the standards under title I of the ADA apply under section 501 of the Rehab Act, which is the section that — the equivalent statute for federal government employment, and title I of ADA applies to state and local government employees and private sector employees. The only difference is that that rule is about nondiscrimination and accommodation, and there are some additional obligations that federal government agencies have under the Rehab Act as a matter of affirmative action for people with disabilities and their obligation to be model employers for people with disabilities.

For example, there's a regulatory requirement that federal agencies provide personal assistance services for severely — individuals with severe disabilities, something that's not required under title I of the ADA as an accommodation but is required of federal government agencies absent undue hardship as a matter of affirmative action. And you can read about personal assistance services and other requirements of that sort on EEOC.gov or contact me if you need to find them.

**TRACIE DeFREITAS:**

Okay. Great So, I'm going to hop in quickly with a PWFA-related question since we've just finished up that topic.

So the question is can an employer ask for reasonable medical information related to a pregnancy-related condition?

**JEANNE GOLDBERG:**

The statute does not specifically address that, so we'll see what the proposed regulations from the EEOC say and what courts say in that regard.

**TRACIE DeFREITAS:**

Okay. And then, let's see. So we have a lot of different medical inquiry-related questions. Here's one.

When you have thousands of employees, can you allow one employee to not submit medical documentation because their condition is known yet require another employee to submit medical documentation when their condition is not known? This seems like employees are not being treated the same with regard to requests. Can you maybe talk about that a little bit, Jeanne?

**JEANNE GOLDBERG:**

Sure. I think it's okay to treat those two employees differently, because they are not similarly situated. they fall differently under the rule. The rule is that if an employee's — the fact that the employee has a disability or medically needs the accommodation they've requested is not obvious or already known, the employer's allowed to ask for medical documentation. So if it is known, the employer's not allowed to ask for that documentation. If it is — if it is not known, then the employer can ask for the documentation. So I think there are two different situations, and the rule permits the employer taking a different path.

**TRACIE DeFREITAS:**

That leads me to another question around using forms.

So if a request for information or documentation needs to be specific, does that mean that employers should not use a standard reasonable accommodation form?

So I do want to comment on that, because at JAN, we do provide sample forms that employers may customize to gather information about somebody's disability and their need for accommodation. They're a starting point, and sometimes it makes sense to use a form, and sometimes it doesn't.

I think it's really important with what Jeanne just mentioned too. You know, even — we can go about requesting information when the ADA allows for it. There'll be times when, if you're using a form, you want to look at that form to make sure you're not asking for information you already know. So if you're using a standard form, you might kind of fall into that trouble if you're not paying attention to what's on that form. I think you want to be careful, really take a look at the questions, make sure you don't already have the information, cross out questions you don't want answered. Be explicit about the type of information you need in order to move forward. So just kind of be careful about how you're using forms like that. And we do have some specific information about the use of forms on the AskJAN.org website under the medical inquiry A to Z that might be helpful.

Jeanne, do you have anything to add to that?

**JEANNE GOLDBERG:**

Nope.

**TRACIE DeFREITAS:**

All right. Here's another question.

How does a request for medical information interact with state accommodation laws that are more restrictive? I'll throw this to you, Jeanne. I'm thinking of California?

**JEANNE GOLDBERG:**

Well, an employer would be in violation of a state law that was more employee-protective even if what it did allowed — was allowed under the federal law. So it's always important to be aware of any state or local laws that require you as an employer to do something more employee-protective. That might be when we're talking about reasonable accommodation. It might be at a different definition of undue hardship that's harder for the employer to meet. It might be a different definition of disability that's easier for the employee to meet. It might be a different rule about when medical information can be requested that's more restrictive for the employer. So anything that is more protective of the employee in a state or local law, you need to make sure to be aware of and follow, because if you don't, you could be in violation of that state or local law.

**TRACIE DeFREITAS:**

Okay. Absolutely. I'll throw one more medical inquiry-related question out there, and then we'll hit a different topic.

In an instance where a medical provider does not include an end date or a duration for a particular accommodation that's requested, can an employer come back, let's say, every six months and request new information, new medical information, because there wasn't an end date?

**JEANNE GOLDBERG:**

I think we always say that, you know, whether you can request updates about whether the accommodation is still needed in part depends on what the original documentation said. If the original documentation had no date, that might be because you know, it was permanent, the individual's now blind, they're going to need various accommodations for a vision impairment, there would be no reason to update that. On the other hand, if it was a condition that might not — would not be permanent, the employer could check in about whether the accommodation is still needed when you're coming to the end of the period that was noted in the original documentation.

I think the question said, "What if there's no date?" In my experience, it's unusual that an employer would not find out how long the accommodation is needed for, but that would certainly be the employer's prerogative. If they didn't do that, then they could presumably, in due course, determine that. It seems important at the outset to check it, to know about that, how long the accommodation is expected to be needed for, whether it's permanent or for a shorter period of time, both to manage employee expectations and so that the employer can know exactly what the course of the accommodation is going to be.

Tracie, have you run into this?

**TRACIE DeFREITAS:**

Yeah, absolutely. I would say we have. It comes up quite a lot, actually. We get lots of questions around recertifying the need for accommodation, and we do actually offer a resource that touches on the topic. So you want to be careful how you're going about doing that in terms of getting new information.

**JEANNE GOLDBERG:**

I mean, yeah. I think the key is going to — whether you can check back, or if so at what point, is going to depend on what the information was that was represented by the healthcare provider, the employee, about the condition and the limitations at the time you granted the accommodation. Was it expected — Was it represented — Or was it the kind of condition that was understood would be permanent or not? And that will dictate whether or when you would follow up.

**TRACIE DeFREITAS:**

Absolutely. Okay. We only have about one minute left, but I'll do one final question, and then I'll wrap things up with our housekeeping.

If someone — if an employer chooses to go beyond compliance, would that be setting a precedent in some way?

**JEANNE GOLDBERG:**

Well, I think an employer is always free to go above and beyond what ADA requires, but it is important to avoid disparate treatment on another protected basis, so — or the perception of that. So you — an employer would not want to invite a situation where coworkers perceive that there was differential treatment on the basis of race or sex or national origin or some other characteristic, because there was this difference in how the accommodation requests were handled. That's just one example of how this could go awry. So, it's — an employer's totally free to go above and beyond what ADA requires. It's often in the employer's interest to do so, to be able to keep an employee working with an accommodation. But it is important, two things in that situation to keep in mind.

First, that the, the employer should memorialize to the employee, to manage that employee's expectations, that the employer is choosing to offer this accommodation, not because it's required by the ADA, but because the employer's choosing to do it, and.if something more or different is needed later, the employer will revisit it, retains the right to request supporting medical information or determine whether this accommodation — if this is an accommodation arrangement it chooses to continue. That kind of — you could do that anyway, but saying that to the employee manages their expectations that they will understand the employer's choosing to grant this out of — based on its own willingness to do so, not because it's determined an ADA requirement applies. And if and when circumstances change, the employer may reconsider its willingness to provide that accommodation, and there could be a new interactive process at that point.

The other thing is, as to these coworkers, I think that it is important if you're going to give supervisors and managers the discretion to go above and beyond what ADA might require, to give them some guideposts, some criteria to work with so that you minimize the chance that you have these very widely disparate decisions on seemingly identical situations.

I'll give you one example. Ergonomic chairs, easy enough to provide. You don't want a situation where one employer says, "Sure," and — one supervisor says, "Sure," and another says, "No," and the situations were really the same where neither employee met the disability-related need under ADA for getting the ergonomic chair. Far better for an employer to have a policy or an instruction for its supervisors, you know, that anyone who needs an ergonomic chair, not through — not because of an ADA disability, we'll still provide it in these situations. That way, you have reduced any chance of having these very widely — wildly disparate or unstandardized decisions where outside of the ADA accommodation process, some people are getting one thing and other people are not, and it's better — if you're going to go above and beyond, it's great, but to standardize it some way by giving instructions and guardrails to supervisors and managers for how to do that.

**TRACIE DeFREITAS:**

All right. That's some great advice. I am going to stop here and just finish up with housekeeping. Jeanne, before we finish, thank you so much. we really appreciate you sharing your time and expertise with us today. We absolutely appreciate you.

**JEANNE GOLDBERG:**

Thanks for having me.

## [Conclusion]

**TRACIE DeFREITAS:**

All right, everyone. Thank you so much for attending today. We appreciate that you joined us for another ADA update. Don't forget to register for the next JAN webcast, "AT Update 2023," Thursday, August 10th, at 2:00. If the registration is full, you can certainly catch that after we release the archive.

If you're seeking a continuing education unit for today's training, we do offer one HR CEU. You do want to complete the webcast evaluation. You can do that when the webcast ends. A new window will open, or you can simply go ahead and scan this QR code to make it a whole lot easier to get that evaluation. Once that eval is completed, you can view your certificate and access the code for that CEU.

All right. Lastly, thank you to Alternative Communication Services — we really kept you busy today — for providing that sign language interpreting and captioning for today's webcast. Enjoy the rest of your day today, everyone. We hope this information was very helpful.

This concludes today's webcast.