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**JAN**

**THE MOST FREQUENTLY ASKED QUESTIONS ABOUT ACCOMMODATING MENTAL HEALTH IMPAIRMENTS**

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 >> BETH LOY: Hello, everyone, and welcome to the Job Accommodation Network's accommodation and compliance audio and Web Training Series I'm Beth Loy and I'll be the moderator for today's program called JAN FAQs: Mental health impairments in the workplace featuring Melanie Whetzel, Lead Consultant for the mental health team and Sarah Small, a consultant on the same team.

 So now before we start the program I want to go over a few housekeeping items

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 So now let's start today's program.

 Melanie, kick us off.

 >> MELANIE WHETZEL: All right, thank you for attending. When did our webcast last year on mental health we got so many questions that we thought it was a good idea to kind of do the same thing again, let employers see the questions that we get most commonly to let you know you're not alone out there with those same types of questions. So first of all, we're going to talk about common mental health impairments. Just a brief list here of things that impairments that we talk the most about, we get the most calls about at JAN those would be diction, anxiety, bipolar disorder, major depression, obsessive compulsive disorder or OCD, panic disorder, Post Traumatic Stress Disorder or PTSD and seasonal affective disorder or SAD and just a few of the limitations as we go through these examples and talk about the questions, the most common limitations associated with mental health impairments are concentration and memory, organization, time management, handling stress and emotions. Panic. Sleep disturbances, attendance, co-worker interaction and working effectively.

 Okay. So now we get to our first example here. And this one concerns disclosure.

 The question was we have an employee who didn't disclose during his interview now 6 months later he is finding it difficult to work the night shift he was hired for and is requesting for accommodations and the employers say do we have to accommodate? Yes. Maybe. That's the best answer is maybe.

 You would certainly want to go through the accommodation process with the employee. But there is no limitation on the timeframe of asking for an accommodation. Because an employee really doesn't have to disclose and ask for an accommodation until he faces a workplace barrier. Maybe unable to do some of the functions of his job and he may not know that when he starts the job. He may have had a bad experience in a previous job and he doesn't want to disclose. Maybe he doesn't really know what the tasks are going to be in the new job so doesn't really know if he's going to need help maybe he doesn't even know what his ADA rights are so we would say yes you would need to go through the accommodation process. Get more information from the employee to determine if a disability or medical condition is involved And start the Interactive Process. The next step would be to get the medical information and consider accommodations that may be effective.

 Now let's turn over to Sarah

 >> SARAH SMALL: Thanks, Melanie so the next topic is medical documentation and here there was a question regarding a state agency employee who part of the job was for him to answer consumer questions by phone. And he had stated that he can no longer work the phones even for the two hours a day that he was he have required. And the reason was because of stress.

 So the question posed was that we have documentation of stress from the Urgent Care doctor who saw the employee last night. Can we request more information, from a more appropriate source? And when it comes to medical documentation EEOC talks about any time a condition is not known or obvious the employer being entitled to have established that ADA coverage and to support the need for what is being asked for so in a case like this I think it would come down to the employer looking at the documentation they have. Seeing what they have. I think likely in this case they would be able to seek some clarification.

 I think the Urgent Care piece of it kind of throws people off sometimes and I think it's important to remember people go to Urgent Care for all kinds of reasons. I think to me an example that pops up in a situation like this could be if someone is experiencing a panic attack for the first time, something like that, sometimes those symptoms can really mirror a heart attack or something that maybe some would go to Urgent Care for.

 So I think in this case, looking at what they have and starting the conversation I think from a practical standpoint, this would likely be enough to start that dialogue. And then based on that conversation, it likely is something that they could then move forth and ask for some additional information, if needed, to engage in that process.

 So here, one of the big things we talk about when it comes to stress is looking at triggers. So in this case, JAN suggested looking at what it is about the phone calls in particular that was triggering that stress. So what is the reasoning the employee is asking to not have to be on the phone.

 Some ideas we have seen are some additional training or mentoring, sometimes there might be visual or even written resources that could help or be there to refer to. Sometimes those could be color coded or some sort of system that might help the employee to easily identify the information they need.

 Sometimes listening to music, having more frequent breaks. Sometimes the opposite of the music someone might need to not have background noise because that's something triggering stress. So again I think by initiating that conversation and starting to look at some of these things might help them to then figure out how to proceed.

 >> BETH LOY: So let's take a few questions We're starting to take questions in so we'll try to pound through these as best we can. First question is, what is the difference between a medical condition and a disability?

 >> SARAH SMALL: I think medical condition and disability can sometimes go hand in hand. I think when we talk about disability in relation to the Americans With Disabilities Act, we're referring to that definition of disabilities that they have set, which is any physical or mental condition that substantially limits one or more major life activities. So I think when we're talking about medical condition if we're saying medical condition, we're saying disability, I think it's really going to come down to how it's affecting that person and in regards to the ADA does it rise to that disability definition.

 >> MELANIE WHETZEL: Right and I'll just say here, too, that you can have a disability that may not be a medical condition Perhaps someone has a learning disability, intellectual disability, it's not really a medical condition. And the documentation for that is going to be a little bit different and we have some information on that. So I think that might be one of the differences between a medical condition and a disability.

 >> SARAH SMALL: Right

 >> BETH LOY: So the next question is related to the Interactive Process. Does the Interactive Process have to be done a certain way? Can it be done by phone, webconference, or face-to-face? And I've seen it done in a variety of ways. Any comments on that?

 >> MELANIE WHETZEL: No, I think whatever works best between the employer and the employee. I think it needs to be done quickly and it needs to be done thoroughly. But I think whatever works best. We talk to people who work remotely. And they do that process with someone in a totally different state. So it is done by phone and sometimes done by email.

 >> BETH LOY: I would say this is another situation where the employee would need to have accommodations to be able to engage in the Interactive Process so if one of the accommodations is not working face-to-face, then you would probably want to pick another way to do the Interactive Process.

 >> MELANIE WHETZEL: Right.

 >> SARAH SMALL: Yeah I think it can be helpful maybe to be a little flexible about it and initially figure out, okay, with this employee what's going to be the best way to effectively communicate.

 >> BETH LOY: Next question. Do you have an interaction form that we can use to guide through the process? And we sort of have that.

 >> SARAH SMALL: Yeah on the JAN Web site we do have a six-step sample Interactive Process. I think the way that I typically find that is by utilizing the A to Z link and going by topic. And while there's no set formal process that's universal, it does provide a lot of information and steps to follow based on the experiences here at JAN.

 >> MELANIE WHETZEL: And it gives some good tips, too, on what to do and what not to do.

 >> BETH LOY: Okay. Next question. What is the best advice for employers who suspect a mental health impairment may be causing problems but an employee hasn't admitted or disclosed anything

 >> MELANIE WHETZEL: Well, probably the best thing is to look at if there are performance issues, conduct issues, that they strictly go by that. They meet with the employee. They talk about the performance or the conduct. And the employer doesn't mention anything about a disability, mental health disability, anything like that, they can certainly say, we would like to help you. But they can hold the employee to the same performance or conduct standards they hold everyone else to so that's a really good place to start and then by having that conversation it brings to the employee's attention oh gosh maybe I'm having problems I didn't realize I was having or maybe they are worse than they thought so it gives the employee a good time to disclose at that time if you want to say how do we accommodate you do the same as you would with a person without a disability like we want to help you, we want you to get to where you need to be. Tell us what that is.

 >> BETH LOY: Okay. One more question about disclosure. So I think oftentimes when it comes to disclosure employees hesitate to disclose until there is a problem. What are some of your best practice tips for employers to be able to let employees know and be comfortable with disclosing?

 >> SARAH SMALL: I think with that, Beth, I think really just keeping that door open I think being an employer who really strives to communicate well and tries to interact with the employees. I think letting them know from the start about the different laws or about the ability to ask for accommodations when needed, not in a way that you're making any sort of assumptions but just making sure that they have that information and just trying to establish that rapport that hopefully they will feel comfortable coming to you if they are facing difficulties.

 >> MELANIE WHETZEL: And employees do talk about seeing how the employer has handled other issues so they are aware of that and if the employer handles things in a good way then they feel a lot more comfortable doing that themselves

 >> BETH LOY: Let's go ahead and move on to medical documentation. We have a few more questions that came in and we'll address those later in the presentation.

 Let's go ahead and talk about this interesting topic of service animals. Sarah.

 >> SARAH SMALL: Yes. Service animals is definitely a hot topic. And this particular example there was an employee who actually brought his service animal to work without giving the employer any notice. And so when he showed up, and was asked about the dog being with us, he told the employer that they can only ask two questions and cannot require medical documentation. So the question posed is what kind of documentation can employers ask for related to a service animal. And this is a tough topic. There's common confusion I think with those two questions that he mentioned. And with sort of that automatic access that comes with public situations. It's something that when we talk about service animals, everything that's formally written in regulation at this point in time does pertain to Title III of the ADA regarding public. So when it comes to employment, what that means is that the ability to bring the service animal is going to default to being a request for reasonable accommodation. So in this case, we had mentioned medical documentation. It's something that if that condition is not known or obvious, that employer is going to be able to ask for documentation the same that they would for any reasonable accommodation request.

 So in this case, it's something that the employer explained to the employee under the ADA that they are able to request some documentation. Especially when the need is not obvious And also it opens up the ability to talk a little bit more about what that looks like. Is the animal appropriately trained to be in the workplace? So here they were actually able to provide the JAN publication we have based on informal guidance we have received for service animals in the workplace. They also suggested that maybe the employee could call JAN and talk about it themselves, as well

 >> BETH LOY: Okay

 >> SARAH SMALL: So another service animal situation is documentation to show that and that can be a big one the question here can we require service and support animals in the workplace to be behavior or training certified. And again I think it comes back to the fact that really there's nothing set in stone. I think it's absolutely something to ask about Some situations maybe there is some sort of certificate of training, especially if the dog went through some sort of program. But I think in a case like this, I think the sole reason for denial should not be simply because they don't have a certificate. I think it's something that there are other options, as well. And with service dogs we talk a lot about demonstrating the behavior or doing a trial period to bring in the dog. Sort of assure that there's not going to be a disruption. Because that expectation is there that the dog is going to behave appropriately. But I don't know that it would be enough to justify a straight denial solely based on there not being a certificate.

 So in this case, you'll see the employer did allow the employee to bring in the service animal on that trial basis. And that way they are able to assess is the animal effective, well-behaved and not posing any sort of undue hardship or disruption.

 >> BETH LOY: Okay. So let's dive into the questions that we have about service animals. You guys ready?

 >> SARAH SMALL: Sure

 >> BETH LOY: Okay. First question, what if the organization's lease does not allow for animals.

 >> SARAH SMALL: Gosh that's always a tough one.

 >> BETH LOY: Better work it out.

(Chuckles).

 >> SARAH SMALL: I think there's going to be an obligation to go to the owner of the building and have a conversation. I don't know 100% what that's going to look like or how it will work out. But I think the employer will likely want to do something and a conversation is a good first step.

 >> BETH LOY: Good first step and it would probably be grounds for breaking your lease.

 >> SARAH SMALL: Yeah, I think it could be.

 >> BETH LOY: If they are inhibiting your ability to provide accommodations under Federal law.

 >> SARAH SMALL: Yeah and I think looking at that building, as well, are we talking about you're just leasing that office building where it's just literally you and your employees or is it something you're leasing a part of the building that's also tied somehow to a public access situation. I think there's a lot of stuff that could come into play there. Better work it out though.

 >> BETH LOY: That's the bottom line you can't use it as an excuse not to accommodate.

 >> SARAH SMALL: Right I think you're still going to have to engage in that process.

 >> BETH LOY: Next question how can an employer determine a difference between a service animal and an emotional support animal? I'm not sure you do need to do that.

 >> SARAH SMALL: Yeah I think for Title I there's really no true definition that distinguishes the two. You're going to want to look at both of them as a reasonable accommodation. But I think if we're just talking in general, I think the biggest difference that I know of is that service animals typically have specific tasks that they are trained to do. And then emotional support are still well behaved and trained dogs but they are pretty much there for that emotional support So that's kind of my understanding. But as Beth said, when it comes to employment, really I don't think there's going to be much that matters in really distinguishing between the two.

 >> BETH LOY: We had multiple questions that wanted to confirm that there is a difference in the accommodation process when looking at allowing a service animal into the workplace versus a companion animal. And in particular this individual wants us to reassure them that the companion animal isn't covered. And we absolutely cannot do that. Because just as you said, Sarah, in the employment setting.

 >> SARAH SMALL: In the employment setting there is no distinction. So when we're talking about emotional support or if you're using companion animal as the terminology, those definitions and where you might see that that's not covered is all falling within that Title III and public access component so really with employment, I think you're going to need to look at either.

 >> BETH LOY: Okay. Next question, with service animals does the individual need to show that the animal has been trained as a service animal as proof or not?

 >> SARAH SMALL: I think with training like I said there's that expectation that the animal is going to be well behaved. I think you can certainly ask, does the dog have any sort of documentation for the training? Sometimes they very well may. And that can be something useful and that can be something the employer can ask for but again I think in the event that they don't we're seeing more and more we're seeing sometimes people are training their animals they are training their animals with the help of somebody and maybe don't have an official document so I think that's where that demonstration or trial can come into play because you're still able to assess that the dog is going to be well behaved in that environment and I think you would probably want to take that step or at least consider it as opposed to just denying if they don't have a piece of paper.

 >> BETH LOY: So the bottom line to this question is does the individual need to show that the animal has been trained as a service animal and the answer to that is no

 >> SARAH SMALL: Right.

 >> BETH LOY: And we have multiple questions related to animals not being well behaved. I think it's pretty similar to if you have an employee who is not well behaved

(Chuckles).

 >> SARAH SMALL: I think -- Melanie and I talk a lot about the fact that you do not have to tolerate an animal that is causing disruption. And I'm talking about disruption not just morale or something like that. If someone doesn't like that there's a dog in the building. But I'm talking about a dog having accidents or running around offleash and you know jumping on people. Things that are clearly not appropriate for the workplace. Those are things that would not have to be allowed.

 So even if the employer allows the person to bring in their dog, let's say on that trial period, if something like that is occurring, they are able to address that. They wouldn't just have to let it slide because they allowed the dog in the door.

 >> BETH LOY: Okay. Let's see. Next question is one we get quite frequently about having -- balancing the difference between having an animal in the workplace and the employee having an allergy and we actually have publications on this.

 >> SARAH SMALL: I think one of the biggest things that comes into play there is trying to figure out how you can best accommodate those employees. I think -- I know at least some of the calls I've gotten it's been that the dog is allowed to come in as an accommodation and that's when it brings up the allergy for the other person. So I would encourage not jumping straight to okay you can no longer bring your dog necessarily but instead looking at how maybe could they accommodate that person with the allergies. Would there be a way to keep them separated? Could they be on different shifts? Not being in the same areas. And it's dependent of course on the situation. I'm sure it's dependent on maybe the severity of the allergy, things like that could come into play. But I think it's important to really look at those employees there and see how you might best be able to help those.

 >> And we can find articles on that under service animals.

 >> Yeah, absolutely. So by topic under the A through Z that's kind of always my go-to and there is a link there for service animals as well and that's where you'll find all of the resources we have in regards to those situations.

 >> BETH LOY: We do have a question about what if an employee didn't bring the animal to the initial interview, does it matter?

 >> SARAH SMALL: Yeah, I think it's the same with, you know, the ability to ask for accommodations at any point and just when they are needed I know a lot of times we'll talk to people the fear is similar with other disclosure situations I think if they bring the dog, what happens, there's that fear of not getting the job because they brought the dog So I think for some people, depending on the disability or condition involved, if they are able to make it through an interview or let's say it's a phone interview, you know, if they are able to do something like that or show up and do the interview without having to have the dog there, sometimes I think they will do that. And that's okay. That is their choice to be able to do that

 >> BETH LOY: And questions about what type of animals are allowed. There's not a list.

 >> SARAH SMALL: Yeah there's no list of course we always most commonly hear of dogs but there's really no exact list just like there's really no set in stone anything in regards to employment when it comes to service animals that is.

 >> BETH LOY: So let's go ahead and move on from the service animal issues. If we get some more questions in related to that we'll try to address those later so we're moving into reassignment.

 >> MELANIE WHETZEL: All right so here we have an employee who found it very difficult to talk to sometimes irate customers on the phone who asked for a reassignment to an administrative position that required only internal phone contacts. She was asked to interview before a panel of evaluators. So we get this question a lot that we require employees who are interested in other positions to interview for them. Are we required to forego that for people with disabilities? Is that fair? And we would say, yes, you are to forego those for people with disabilities. That takes the accommodation piece out of it if you allow someone with a disability to go through the same means, the same procedures for getting a transfer as you do other people but that's not to say that you don't look to see if the someone is qualified.

 A person does not have to be the most qualified for the person. But they do need to be qualified for that position. It would also work in an employment situation where job transfers aren't normally what the employer would do but they would need to look at modifying a policy to allow the reassignment.

 Okay so after consulting with JAN the supervisor better understood how reassignment worked as an accommodation and with the help of the HR department determined if the employee was qualified for the admin position or not

 >> SARAH SMALL: All right. Performance and conduct standards. Here an employee is written up after several verbal warnings for inappropriate conduct. She is placed on a 30 day plan of improvement and warned that if the behavior doesn't stop within that timeframe, she will be let go. The employee decides to disclose her ability and ask for accommodations to assist her in responding more appropriately to co-workers.

 So this is a common question, how do we manage a performance improvement plan when in a counseling session the employee relates the performance issues to a disability?

 And in this case I think what we advise is kind of putting that on hold. I think that EEOC has some language that they talk about where you're not necessarily removing or excusing that performance improvement plan or excusing the behavior in any way. But you're simply saying, okay, let's put this on hold. And see what kind of accommodations might help to improve this situation.

 So in this case, that's what they did. They put it on hold. Until they could receive some documentation to help support the need. And then that way they could put accommodations in place. They didn't rescind it they didn't remove it, but at that point once the accommodations were in place, they were able to resume that performance improvement plan. And that way they are able to see if the accommodations will be effective in helping to improve that behavior.

 >> BETH LOY: Okay. So we already have a few questions that fall into this category First off, let's see here. What if the employee is exhibiting paranoid tendencies or strange behavior without performance issues?

 >> SARAH SMALL: I think with that, you know, it's probably going to depend on what it is. If it's not something that's affecting their ability to work or something that is posing any sort of real threat or anything, I don't know that you would want to do anything. I think what's popping into my mind is there was an example of an employee who I think had obsessive compulsive disorder. And they were coming to work early in order to check to make sure their car was locked. So they were doing this multiple times before they would go in the building they would circle their car and that was I guess making some people uncomfortable but really that had nothing to do with their job performance or anything like that. So really that wasn't something to address from any sort of employment standpoint

 >> BETH LOY: Okay here is one for you, Melanie, what types of accommodations would you give to inappropriate conduct?

 >> MELANIE WHETZEL: Oh, okay. That's a good question. That could be a large number of different accommodations. And I would say you would want to look at exactly what that conduct is and have that conversation with the individual because you don't have to accept inappropriate conduct. You can have the same conduct standard for anybody with a disability that you do for all employees. And you can say, you can't do this. We can't have this kind of conduct in the workplace. How do we help you not to do that?

 So if it's an example that comes to my mind was an employee who says he couldn't control what he said. So he should have the ability to just say whatever he needs to because of his related disability. No, that's not the case. So let's look at, where is he in those situations? Is he in a meeting? Is he talking with clients, you can't say those things. So let's have not a list of things you can't say but let's talk about things you can't say and things you can say and maybe having an advanced organizer with some topics that you can discuss would be a good way to look at that. And I think that's one of those case-by-case bases and it would really depend on the inappropriate conduct some types of inappropriate conduct there might not be accommodations for and that might be something that you would just not be able to keep that employee on the job if they can't control certain types of behavior The EEOC has a list of behavior that is considered unacceptable in any situation So you would want to look at that, as well.

 >> BETH LOY: Melanie what if the employer does end up with medical documentation but that documentation didn't indicate any accommodations were needed?

 >> MELANIE WHETZEL: Well, it's really up to the doctor to determine the disability and what those limitations are.

 And we say the limitations are way more important than the actual diagnosis. Because several people with the same diagnosis could have different types of limitations that go with that disability. So it's not the doctor's place to necessarily list accommodations. They can do that. But they don't have to.

 And so really once the employer knows what those limitations are, then they meet with the employee and they talk about that. Okay. So if you have limitations in concentration and you're in a busy office setting, how do we do that? How do we help you to be able to concentrate better in this situation? Does that mean headphones? Does it mean earbuds? Does it mean moving to a more private place? Does it mean putting up a couple of walls to help with that? So that would go from situation to situation, as well.

 But it would be looking at those limitations and how they directly affect the person on the job and then looking for solutions

 >> BETH LOY: So we do have one attendee who is asking for that list of behaviors and it can be found under the conduct section of our A to Z. Those are the behaviors that EEOC considers to be performance problems. Conduct problems.

 >> MELANIE WHETZEL: I don't know that I would say it's under the performance and conduct

 >> BETH LOY: Yeah I believe which is under conduct.

 >> SARAH SMALL: Yeah if you go to the A to Z disabilities, again, going by topic to conduct and you'll find within there that there's going to be a link to that ADA apply performance and conduct standards which comes directly from EEOC and you'll find in there there are some different things learning disability out that they say do not have to be tolerated.

 >> MELANIE WHETZEL: Right there's a section on performance and then there's a second section on conduct.

 >> BETH LOY: Okay. Good information there.

 All right. Next question related to performance and conduct referring to reassignment, as well, do we have to reassign an employee as an accommodation if they have interpersonal conflicts with an individual co-worker?

 >> MELANIE WHETZEL: Maybe not. I think you would want to look at how severe that is, how much they have to interact with that person and can accommodations be put into place? You don't have to change a supervisor. You can look at a modified supervisory method so I would say you would kind of want to look at the same thing a modified interpersonal relationship with the individuals. There's nothing that says an employer couldn't reassign a person that's having interpersonal conflict. But I do remember a call where the employee -- the employer had said they had done that six times and they were beginning to understand that the problems were with the individual and not with the other people around. And so that would be something to look at.

 How do we solve this issue without moving the person. And maybe there is no way to solve that. But there might be ways to look at let's contact with that person. Counseling and EAP program, anything like that that might be able to help.

 >> SARAH SMALL: Yeah and to just throw it out there Melanie and I have recently talked about a situation that came up and I think going back to looking at the specifics, what is it about that person, what is it about that interaction? Because I think if it's something that's maybe related to a PTSD trigger there can be a difference there if it's someone who maybe resembles somebody that was involved in a situation. I think there can be situations where maybe that would be something to go ahead and consider. But I think most of the time you can look at those other types of accommodations to see how they might be able to interact together.

 >> BETH LOY: So Sarah, this person is referring to your situation where you discussed performance and conduct issues in the PIP. So how much time should pass after accommodations are in place before the PIP is potentially rediscussed?

 >> SARAH SMALL: You know Beth I don't think that there's any designated amount of time per se. I think it's something that they could look at and sort of determine what might be reasonable in a situation. I think definitely looking at and making sure there's enough time to get accommodations in place and enough time to assess that they are being effective.

 I don't think you would want to put it on hold and take a week or so to get things in place and then only give them a week. I think you want to take into account trying to adjust and to make sure that the accommodations are working so you don't have to let it go forever. But I think just trying to determine what might be reasonable in terms of assessing whatever it is.

 >> BETH LOY: Given the situation, the type of job, what the accommodation is, how long it takes to implement it, who else has to be involved or notified of the accommodation, those types of things.

 >> SARAH SMALL: Yeah I think at the end of the day it's one of those things that is very individualized.

 >> BETH LOY: Okay. Let's go ahead and move on here. So let's talk about direct threat.

 >> MELANIE WHETZEL: All right the situation we have here is an employer said we recently hired an employee that he has PTSD. This happens frequently and the employer says what do we do now well the first thing you don't want to do is make assumptions you don't want to assume that people with PTSD pose a direct threat to themselves or others because that is not necessarily true. Lots of employees, individuals, can control their conditions through medication or therapy or both. And they probably pose no current risk. And even if a person did become a risk, the employer would need to consider reducing or eliminating that threat by implementing reasonable accommodations.

 So what constitutes a direct threat? We get this question a lot. We get it in reference to conduct. Sometimes there was a question about what if it's just a conduct issue and not performance.

 Direct threat is a really relatively high threshold to meet. So a health or safety risk can only be considered a direct threat if it's a significant risk of substantial harm. And employers cannot deny employment opportunities merely because of a slightly increased risk.

 And it must be based on valid medical analysis or other objective evidence, not on speculation, not on the fact that, hey, the person has PTSD, we're not sure what's going to happen so we're hesitant here to hire them or move forward with it.

 So let's talk about the points are with the direct threat, what does constitute a direct threat? And the employer must be prepared to show that there's a significant risk of substantial harm. The specific risk must be identified. It can't just be a general feeling like oh we're just not sure It needs to be identified. It must be a current risk, not one that is speculative or remote.

 And the assessment of the risk must be based on objective medical or other factual evidence regarding a particular individual. Again it can't be based on stereotypes that we see or that we think of or an uncle that we had that had the same kind of condition and this is what happens to him. Nothing that's based in the news or anything like that. It's very individualized. And you look at that individual

 And the factual evidence that we're talking about here may include an employee's violent, aggressive, destructive or threatening behavior. That could provide such evidence. It may not require medical evidence if you actually see things in the workplace that have happened and that's what the factual evidence would be not just that you're saying well, what if this happens? Because if you're going to go down that road with what if that -- that could be a lot of things with a lot of different disabilities. So you'll want to follow these guidelines.

 And then, like I said before, even if a genuine significant risk of substantial harm exists, the employer must consider whether the risk can be eliminated or reduced below the level of a direct threat by reasonable accommodations. And that would depend on the situation as to what those accommodations might be.

 So for the solution here, once the employee disclosed that he has PTSD, the employer starts the Interactive Process and asks him what accommodation he needs to help him in the workplace and if he needs nothing, which we find out that a lot of times people will disclose a disability so the employer knows but they don't need accommodations at the time. Then the employer should document that they followed through on the process. The employee didn't need any accommodations. And then move on.

 And you don't want to eagle eye or try to micromanage the employee, either, as a result of the disclosure.

 >> BETH LOY: So Melanie here is our first question, can you explain the difference between what we may consider a conduct direct threat issue and what is probably more of a performance one?

 >> MELANIE WHETZEL: Yeah, sure. We had a question there before about -- and this comes up a lot. We have this question a lot. Where someone may have a conduct issue in the workplace. It's not really related to performance. Sometimes it is. Here is an example. An employee thought that the employer was spying on her through her computer so she refused to work that's a performance issue there was nothing dangerous about that it really didn't come to a direct threat. It was the fact that she wasn't doing her work.

 Now, in some cases the employer goes that route and says, hey, unless you have a complete psychological evaluation and bring us proof that everything is okay, you can't come back to work. But that type of situation is better addressed as you're refusing to, who, we're going to handle this the same as we would with anyone else with performance issues that is refusing to work this is what we need you to do can we move you to another computer can we move you to another setting in another part of the building something like that to accommodate that person. And then just go down the performance route, if it's not a direct threat.

 We had another example of a person who worked in a emergency situation where he was taking calls. And then alerting emergency professionals. And he started having panic attacks and when he had a panic attack he needed to go outside and walk around well the panic attacks were becoming more and more frequent which you consider is that a direct threat because if he's outside trying to calm himself down then he's not able to do his job tasks and some calls may go unanswered or is it a performance issue because you need to be at your seat working. How do we help you do that? How do we reduce the stress that's causing the panic for you so you can remain in your seat and actually do the work?

 >> BETH LOY: Excellent. Okay.

 What if an employee makes a direct threat of bodily harm or death against another employee, do we have to keep the employee making the threat in the workplace?

 >> MELANIE WHETZEL: No, I would say that's one of those situations where you can have a zero tolerance. And this is our policy. And even some of those things, you may not have a direct policy that someone can't make a death threat but that would be one of those situations where you have a zero tolerance for that people need to feel safe in the workplace and need to be able to work effectively.

 >> BETH LOY: Okay. So we have several questions about liability and we can't really answer those related to the ADA and accommodations, liability is usually one of those issues you have to address in many other situations outside of whether there's a service animal in the workplace or whether someone is making threats or all kinds of liability issues that employers have you should check your state laws relative to liabilities and talk to your state insurance provider as far as what goes for liability.

 A couple of questions about reassignment. What would you suggest an employer do if an employee requests reassignment to another supervisor?

 >> MELANIE WHETZEL: Well, under the ADA you're not required to change a supervisor. What you would look at is modifying a supervisory method. Does the person not want to have this supervisor in their face? Then let's look at how can they -- can they communicate more by email or memos or something like that. Some people -- maybe somebody with reading difficulties, I've had this example, they find big emails really hard and they would rather have the manager, supervisor, come and talk to them and give them direction. So you would look at that. And as Sarah mentioned earlier, we have had an example where the person was assaulted by a person who the supervisor looked like

 So it was a direct correlation. And trigger for that person And I think in that case, you would really want to look at, yes, doing that. Although there's nothing in the ADA that would keep you from reassigning a person to another supervisor. I think that would be a good thing to evaluate. You know, is there a way for the person to work with this supervisor or not? And like I said, we had an example of a person who couldn't get along with co-workers We've had that example, too, where they have asked for reassignment to various different supervisors. And they haven't been able to make that work effectively. And so you look at what is it we can do in this -- instead of moving you, how can we make this work? And look at accommodations for each individual situation.

 >> BETH LOY: Okay. Next topic.

 >> SARAH SMALL: Modified schedule and leave. Here an employee was originally accommodated with a 12-week leave for depression and they asked for an 8-week extension, which the employer did provide. Now that it was time for the employee to return the employer receives an additional doctor's note stating that the employee was not ready to return and on this new note, there was no date provided in which the employee would be able to return.

 So here a question was, how much leave is too much for an employee who needs extended leave for mental health issues? And what constitutes a hardship?

 And I think with something like this, with it being ADA, leave can certainly be a reasonable accommodation. And it really comes down to the employer assessing how much leave can be provided absent hardship. So looking at the current situation, looking at -- getting probably some clarification in this case, going back and asking, is there an approximate return to work date. And that approximation, even if it's not exact, it's going to help that employer look and see okay at this point can that additional extension be provided without creating some sort of hardship? And when we talk about hardship, you know, it could be a variety of things I think in leave situations we're looking at not having sufficient staff. Looking at the work not being done or some sort of disruption. I know EEOC again -- and I believe that performance and conduct document has a list of some different factors that can contribute to an undue hardship and leave situation.

 And so another question that came up here is do employers have to grant indefinite leave as a reasonable accommodation to employees with disabilities? And here, although there might be that need to grant an extended medical leave as an accommodation, there's going to be no obligation under the ADA to provide an indefinite leave.

 So granting an indefinite leave such as frequent unpredictable requests for leave could maybe cause some concern. It's also a request for leave that has no fixed return or approximate date, you know, again it might not be an exact science but there needs to be an approximation there. It's not something that you just have to grant leave without knowing because the idea of leave is that that person is going to be able to return.

 So with hardship, here is sort of that list that I mentioned that I believe comes from that performance and conduct. And it talks about chronic, frequent, unpredictable nature. It talks about inability to ensure a sufficient number of employees. Failure to meet work goals. A need to shift work to other employees, thus preventing them from doing their own work or imposing some sort of additional hardship on them. The thing that it's important to point out there it's not really a morale issue but it's more of a disruption in their ability to actually do their job and sometimes there can be additional costs associated if you're having to pay people for overtime and things like that.

 So here the employer did request information from the doctor about some sort of return date. And when none can be given, the employer determined that at this point they could no longer provide the leave and keep that position open because they had no verification that there would be a return date or how long it might be.

 >> BETH LOY: Okay. Questions related to this area. Let's see what we have here. How many times can we extend an ADA leave?

 >> SARAH SMALL: With that it's truly going to come down to looking at that employer's business needs and how much leave they can extend without imposing a hardship. Sometimes I think depending on the job, maybe there is the ability to allow someone to be out for a significant amount of time. But in other cases, there might not be that ability. So I think really just assessing. There's not going to be a set number in regards to extensions. It's all about determining what can be done absent hardship.

 >> MELANIE WHETZEL: Right and let me just say here that we get a lot of questions about that exactly. And if -- it depends, too, on the area or the department the person works in. If somebody works in a large area where more people can pick up that work and it wouldn't be a hardship that may be different than somebody who works in a small area maybe two or three people and when they are out for an extended amount of time there's a large amount of work that isn't getting done and also like seasonal employees. You know, if you are working in retail in the summer, that person may be able to have a longer amount of leave time than somebody who needs it during the busiest time of the year. And employers can look at that based on from one situation to the next. They don't have to always do the exact same thing.

 >> BETH LOY: And we have some guidance related to leave, as well on our A to Z page.

 >> SARAH SMALL: We do, yes.

 >> MELANIE WHETZEL: We do.

 >> SARAH SMALL: And I think that could be really helpful.

 >> BETH LOY: If you go under topic and select leave there's a good bit of information there.

 Okay. Telework, Melanie?

 >> MELANIE WHETZEL: Okay. An employee with acute anxiety asks to work from home as often as possible. The commute to work has become very difficult. So the employer question is we don't have to accommodate employees because of their issues getting to work, do we? And the answer to that is, yes, you would really need to look at that.

 Alternate work assignments, including telework, can really help employees work based on their limitations that affect commuting to work or providing job tasks at a traditional site. So yes, the Equal Employment Opportunity Commission says that telework may be a reasonable accommodation under ADA because changing a location where work is performed may be a form of modifying a workplace policy. Because it is the employer who controls schedules and work locations. And when a schedule or location becomes a barrier, then the employer must consider reasonable accommodations to overcome that barrier.

 And even if there's -- if no one in the department teleworks, they still need to look at that, can this person do their job from home? And it can be a wide variety of number of days or amount of time somebody can work from home. Some people can work from home all the time. You know there are people who telework and go to the office once a quarter there are people who may be able to telework one day a week because their work needs to be done in the office or things they need to be doing in the office but yes an employer needs to consider that as an accommodation. And even if they have no formal telework policy, they still need to look at that, can we allow this person to do that in the situation they are in? Are they able to do their job -- are they able to do their job from home?

 So in this situation the employer worked through the Interactive Process and determined that the employee was having panic attacks when caught in rush hour traffic. A compromise was offered that allowed the employee to work from home at times but was also offered a flexible schedule so she didn't travel in peak traffic And another good idea for telework is to do that on a trial basis or temporary basis. The employer can even put that in writing, if they feel that's appropriate and say, hey, you know what we think we can do this for a couple of days a week, let's try it and see how it works. Somebody needs to work five days a week from home and they can actually do their job from home, then the employer can say, okay, let's do this for a couple of weeks, six weeks, you know, you want to give the employee a long enough time for them to show that they can effectively work from home and studies show that people can work up to 27% more effectively when they are working from home and isn't that the issue is getting the work done? Maybe not as much where they get that work done from.

 >> BETH LOY: Excellent point, Melanie. Next topic modified policy.

 >> SARAH SMALL: Modified policy. An employer refuses to engage in the accommodation process that involves a request from an employee with epilepsy for a change in the attendance policy. The employer says that everyone wants more flexibility and this employee is no different we aren't in the business of giving employees special treatment So in this case how do we explain to employees who work the regular schedule why we have to allow an employee with a disability to have a flexible one. And I think in a case like this you might not really have to explain. I know there might be questions that come in. I think that idea of fairness or morale is not likely enough on its own to justify a hardship. So I think in a couple of slides we have some pieces from EEOC that talk a little bit about some ideas for if you do receive those questions from other employees but I think up front you really don't have to say anything. So in this case the employee provided information that they had gained from utilizing JAN to show about modified workplace policies and the employer in this case was able to call JAN and talk to somebody himself to find out a little bit more about the type of accommodations. And here is that list. This is something that comes from EEOC and it has some insight I believe in regards to if you do receive those types of questions about why someone is getting special treatment or receiving something different than everyone else It tries to give some practical tips on things you can say. And with confidentiality, you know, you really want to uphold that. But it is something that they point out that as long as there's no sort of influence from the employer, an employee with a disability can voluntarily choose to share that with their co-workers.

But the employer wouldn't be able to force them to do so.

 >> BETH LOY: Okay. Questions related to this. We have quite a few questions related to telework. Several of them resolve around telework being approved. And then it being revoked because the employee wasn't getting things done. Any comments on that?

 >> MELANIE WHETZEL: Well, I think you want to be careful about revoking that Because the employee wasn't getting things done. I think that can be addressed as performance issues and you go down that route the same as you would if the employee were in the office just because they are working from home doesn't mean that they might not need some other type of accommodation to help so you want to go through that process, as well. We do have examples of people who wanted to work from home and once they got to work from home it was a disaster. Because they were too distracted at home. Too many things going on. And they weren't able to do that. But that's not the case with everyone. And so I think you want to evaluate that, are there other accommodations that need to be put in place does that person understand exactly what they should be doing while they are at home and bring to the attention that that's not what they are doing, they are not getting work done.

 >> SARAH SMALL: Yeah I think with something like that it comes down to the Interactive Process being ongoing for that reason if there is a change like Melanie said in that one example it ended up really not working out for the person. But I think from a practical standpoint, having that conversation before you would just completely revoke the telework to see, could there be something additional that would help, I think you would definitely want to try to avoid doing something like that that would come off as like a punishment or something like that in regards to the accommodation piece.

 >> BETH LOY: Okay. So say there isn't a formal telework policy or there is a formal telework policy but the accommodation goes above and beyond that policy, where does that leave us Melanie?

 >> MELANIE WHETZEL: Well, if you mean by that sometimes we hear from employees that the employer has a telework policy where they can work one day a week from home and no more that would be one of those modified policies you would need to look at because a person with a disability may need to work from home more than one day a week and look is that possible in the job they are in so accommodations would go above and beyond what your policy would be. So you want to look at that and make sure that you're not sticking to that policy very rigidly and not looking at someone with a disability being able to work from home more than one day. And then it would go back to that question, too, about confidentiality and what do other employees say because they may say well if Sarah is getting to work three days a week from home I want to too so you might need to be prepared to address that but that would not be a reason to deny an accommodation if someone was working at home more frequently because you're afraid people are going to have questions.

 >> BETH LOY: I'm going to squeeze this last question in kind of a little bit offtopic related to the highlights of the presentation but I still think it's important. Would you speak about your definition of a job coach or a mentor? And I know that having a mentor when you transition into a new position can be very helpful for people who have disabilities and people who don't.

 >> MELANIE WHETZEL: Right.

 >> BETH LOY: So Melanie could you speak to that just a little bit.

 >> MELANIE WHETZEL: Sure, absolutely. A mentor would be -- a job coach could be somebody who comes from the outside. A mentor is somebody who is there in the inside It could be available for not necessarily formal training but to help that person know what to do. When situations come up. To know the ropes. You know, just to know what to do in situations. If they are in a new job. We get questions a lot about people who become -- come back to work with very severe difficulties, sometimes with brain injuries, sometimes with mental health issues when they have been off. Sometimes with dementia and those types of cognitive issues and so a mentor can help reorient them to the workplace. Help them make decisions. But one thing -- if a position requires independent thinking that you may not have to supply somebody with a mentor for that. A mentor or a job coach is not somebody who is going to be doing analytical thinking, synthesizing doing those types of things in a job and helping somebody make decisions. They can help somebody set up their office in order to have less clutter and understand how to make decisions But wouldn't be making those decisions for them.

 >> BETH LOY: Excellent. So we do have some resources learning disability here. What I would suggest is that you go to askJAN.org and find the topic that you are interested in under that topic hopefully we have the resources to answer your question. If we do not, then certainly find a way to contact us. We're open 9 to 6 Eastern Time.

 Also, you'll find it helpful under our A to Z for different types of impairments and types of accommodations for those conditions.

 Any final comments, Sarah or Melanie? We had a good crowd today.

 >> MELANIE WHETZEL: Okay, great, thank you for joining us and as like Beth said if you have questions give us a call. Because the situations are so individualized that it's sometimes hard for us to answer questions that would apply to everyone. But hopefully what we did say was helpful.

(Chuckles).

 >> SARAH SMALL: Right and there's so much gray area so we're always happy to try and help talk through different types of situations

 >> BETH LOY: Definitely if you can't find what you're looking for go ahead and open up the chat and see if we can help you find what you need. In response to everything that we have discussed today, please let us know if you have any additional questions. That is all of the time that we have. If you need additional information or you want to discuss an accommodation or ADA issue, please feel free to contact us.

 We thank you for attending and also thank you to Alternative Communication Services for providing the net captioning. We hope the program was useful. As mentioned earlier, an evaluation form will automatically pop up on your screen in another window as soon as we're finished. We appreciate your feedback.

 So we hope you'll take a minute to complete the form. Thanks for being a great audience and this concludes today's webcast

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