JAN

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>> LINDA BATISTE: Hello, everyone and welcome to the Job Accommodation Network's Monthly Webcast Series. I'm Linda Batiste and today's webcast is our annual ADA update.

We had hoped to focus on the ADA's 30th anniversary, which is this month. But current events kind of derailed that plan somewhat so instead we're going to be focusing on "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.” Our featured speaker is Jeanne Goldberg from the Equal Employment Opportunity Commission. But before we turn it over to Jeanne, I want to go over just a few housekeeping items.

First, if any of you experience technical difficulties during the webcast, please use the pod located at the bottom of your screen to send a chat message or you can send an email to [question@askJAN.org](mailto:question@askJAN.org). Second you may submit questions during this presentation using the question and answer pod at the bottom of the screen to use that pod type in your question and submit to the question queue. Time permitting, questions received via the chat pod will be answered at the end of the presentation.

On the bottom of your screen you'll notice a FileShare pod. If you have difficulty viewing the slides or you would just like to download them, click on the button that says download file.

And finally, at the end of the webcast, an evaluation form will automatically pop up on your screen in another window, if you don't have your popups blocked. We really appreciate your feedback. So please stay logged on to fill out that evaluation form. And now I want to introduce Jeanne Goldberg. Jeanne is a Senior Attorney Advisor in the Office of Legal Counsel at the EEOC headquarters in Washington D.C. and served as Acting Assistant Legal Counsel from November 1999 to July 2020. She advises the Commission on the interpretation of the ADA, the Rehabilitation Act of 1973, the Genetic Information Nondiscrimination Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Equal Pay Act, and she assists in drafting regulations and policy guidance.

Jeanne has delivered hundreds of training presentations throughout the country for private and public sector attorneys, managers, employees and human resource staff on a wide range of EEO issues and is a frequent speaker at national conferences. She's also a past Public Co-Chair of the National Programs Committee of the American Bar Association’s Section of Labor and Employment Law and a past government fellow on the Section's Equal Employment Opportunity Committee. Prior to joining the EEOC, she was in private law practice from 1990 to 1999 specializing in civil rights litigation and argued EEO cases before the Courts of Appeals for the Fourth and DC Circuits. She also served as an adjunct law professor at the College of William and Mary from 1996 to 1998, and before entering private practice she worked as a staff attorney for the U.S. Court of Appeals for the Third Circuit from 1988 to 1990. She received a BA from Northwestern University and her JD from George Washington University. We are very privileged to have Jeanne here today talking with us about this very important topic. Jeanne thank you for being here and I'll turn it over to you.

>> JEANNE GOLDBERG: Thanks so much, Linda.

As Linda noted, we were expecting as we usually do in this annual July update to discuss the most recent cases and developments at the EEOC with respect to the ADA, especially given that this month is the 30th anniversary of the ADA. We hope you'll go to the newsroom on EEOC.gov to catch up on some of our latest ADA activities, but Linda and I decided that today it was most important to address some of the many questions that both EEOC and JAN are receiving about COVID-19. So that will be our topic today.

We are going to begin with a quick overview of what resources the EEOC has available on this topic.

On Slide 2 you'll see the links to these publications. They are all collected at www.EEOC.gov/Coronavirus. Included on that webpage you'll find the first item, which is a video and a transcript of a March 27th “Ask the EEOC” free recorded webinar that we did for our stakeholders. That was early in the pandemic. And we actually took questions from members of the public by email. We received hundreds of questions and distilled them into the major topics that our stakeholders were asking about. And those are reflected in the 22 questions and answers in that webinar.

The second document is called "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and the Other EEO Laws.” This is called our -- this is our central COVID technical assistance publication and it is updated periodically, most recently on June 17th of this year. You should check it regularly. It has the last updated date on the top left, and each question is dated as well so you can know when it was added.

The third document is technical assistance called Pandemic Preparedness in the Workplace and the ADA. This was actually written in 2009 for the H1N1 influenza pandemic we had at that time so it's mostly about flu pandemics, but we updated it in March 2020 to add a discussion of the COVID-19 pandemic throughout the document where examples were relevant. So it has some good background information about the basic legal principles at play under the ADA and the Rehabilitation Act with respect to both planning for pandemics in advance and what employers may do once a pandemic is declared by the World Health Organization.

In the following slides in the PowerPoint, you will see after every point a citation to one of these three documents, either the webinar transcript, the what you should know publication or the pandemic preparedness publication. So I've given you the citation to particular questions in those publications if you want to go and read more afterwards about any particular topic we address today.

Turning to Slide 3 there's a quick list here of all of the topics we'll discuss today just to give you a preview and including -- they are not just limited to the ADA but also some other Frequently Asked Questions involving COVID-19 and the other EEO laws including the Pregnancy Discrimination Act as it amends Title VII, other parts of Title VII and the Age Discrimination in Employment Act. Turning to Slide 4, furlough and layoff, I want to begin by mentioning furloughs and layoffs because unfortunately there have been a lot of them due to the contraction of the economy that has resulted from the precautions taken for the pandemic.

The first point is that the laws enforced by the EEOC prohibit covered employers from selecting people for furlough or layoff because of a protected characteristic such as the individual's race, color, religion, national origin, sex, age, disability or protected genetic information.

So, an employer can't make furlough decisions based on one of those protected EEO characteristics and the “What You Should Know” publication expressly gives the example of pregnancy.

Second, also remember that special rules apply for furloughs and layoffs if an employer is offering a severance package to the employee that includes a general release from all discrimination complaints against the employer, and the “What You Should Know” publication links you to the EEOC's question and answer publication on Understanding Waivers of Discrimination Claims in Employee Severance Agreements. And that lays out these rules for releases, so take a look at that if you're dealing with this situation.

Turning to Slide 5, direct threat.

EEOC has said that as of March 2020, at this time, if an employee is physically entering the workplace, the ADA allows employers to screen for and exclude those with COVID-19 or symptoms of COVID-19, because of the direct threat posed to the health of others. And I want to unpack that a bit because we do get a number of questions about the legal reasoning here, so I want to walk you through it.

As background, direct threat under the ADA is significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.

Direct threat is determined based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence.

The recommendations of the Centers for Disease Control (CDC), and state and local public health authorities are examples of such evidence.

CDC recommends that due to the serious health risks to others that anyone with COVID or symptoms of COVID should not be in the workplace. So, based on that CDC recommendation, EEOC has, therefore, said that the ADA direct threat standard permits employers at this time to exclude individuals with COVID or symptoms of COVID from the workplace.

As far as screening, under the ADA, you'll remember the legal standard for medical exams of current employees or disability-related inquiries -- questions, and medical exams is those exams or questions have to be job related and consistent with business necessity. And EEOC has said that at this time because an individual with COVID-19 in the workplace will pose a direct threat to the health of others, therefore, that business necessity standard is met to allow employers to take steps to determine if an employee who is physically entering the workplace has COVID-19 or symptoms of the disease.

Obviously, employees who are teleworking are not physically interacting with co-workers and they cannot pose a direct threat. So, the employer generally would not be permitted to apply this screening to employees who are merely teleworking. We're talking here about screening that EEOC has addressed as permissible under the ADA for those who are physically entering the workplace.

Now, that's the first point on Slide 5. The second point I would like to make is a very important distinguishing point, which is that we have just been talking about screening for and excluding people with COVID or symptoms of COVID because such an individual would pose a direct threat to the health of others in the workplace, but it's really important to separate out that standard from people who obviously don't have COVID but may have underlying health conditions that the CDC has identified as placing people at higher risk of severe illness if they do contract the virus.

As you may know, CDC has issued such a list that includes things like diabetes, heart disease, folks who are immunocompromised, and a range of other conditions.

Now, being on this list of so-called high-risk conditions does not mean -- does not mean -- that people who have these underlying conditions are more likely to get COVID-19. They are not more likely to get COVID-19. What it means, CDC has said, is that if they contract the virus, they are more likely to get sicker than other people. To get a more severe case.

So, employees with these underlying medical conditions, who do not have COVID or symptoms of COVID are not currently contagious, and they do not pose a direct threat to others.

So, a number of employers have asked us about this, because they thought if they could legally exclude people with COVID from the workplace, that they could also legally justify excluding from the workplace people who have one of these underlying disabilities. But where somebody with one of these underlying conditions wants to report to the work site, the employer cannot simply exclude them because they are at higher risk of more severe illness if they do contract the virus.

The employer has to do an individualized assessment that would show that this particular person poses a direct threat to herself by being in the workplace. In other words, the employer would have to show that the person poses a significant risk of substantial harm to herself. And that’s the -- either the risk to her of contracting the virus in that particular workplace and -- or the risk of more severe illness. And it would depend on, as I said, individualized facts about the workplace, and about that particular person's medical condition.

And even if the direct threat to self does exist, an employer must still consider if there's a reasonable accommodation in the workplace that could eliminate that risk or reduce the risk to an acceptable level.

So, to recap, the ADA does not allow employers to simply involuntarily exclude an employee who does not have COVID or symptoms of COVID solely because of an underlying disability. Such as diabetes, heart disease, or one of the other CDC underlying disability conditions.

An employer would have to analyze and show that the employee poses a direct threat to self, which is a very high standard to meet. And even then, exclusion from the workplace of such individuals would only be allowed if there was no accommodation that was possible.

So that's a standard that arises if the employee with one of those underlying conditions wants to report to the workplace but the -- workplace but the employer is seeking to exclude them. So, you can see how that plays out very different than someone who the employer can indeed exclude at this time if they have COVID or symptoms of COVID.

I'm going to turn now to Slide 6. A lot of employers ask how long will it go on that it is permissible under the ADA to continue to screen employees for COVID if they are entering the workplace. It will depend entirely on how long public health officials view the virus as so prevalent and serious that those who may have it pose a significant risk of substantial harm because they may transmit it to others, so they pose a direct threat in the workplace. EEOC has said that the ADA allows screening of all employees for COVID as long as it's consistent with the best available objective medical evidence -- those recommendations of CDC or public health authorities.

So, if you are following those recommendations, you are likely complying with the ADA. And you just simply need to be aware if and when at some point those recommendations of the CDC or public health authorities change.

You should be aware that in some instances, employees might make a request for an alternative method of screening. That could be due to disability or due to religious beliefs. And if you receive such an accommodation request, it should be handled in the usual way. Determining if, for example with respect to disability, if the person is an individual with a disability, if accommodation is feasible, if it would pose an undue hardship, and so on.

Now, we've also been asked, what happens if an employee refuses to answer our questions when we are screening at the door. And because an employer is justified in knowing whether an employee has COVID-19, an employer is allowed to bar an employee from the workplace if she refuses to answer questions, or to have her temperature taken, or to submit to a COVID viral test if the employer is administering testing, and we'll talk about that more in a moment.

But the practical point here I think is if there is an employee who declines, to gain the cooperation of employees, employers can certainly ask the reason for an employee's refusal. And the employer may be able to provide information or reassurances that changes the employee's mind, that the employer is taking these measures to ensure the safety of everyone in the workplace, that the employer is going to maintain confidentiality and so on.

And finally, on Slide 6, an important point that an employer should not engage in any disparate treatment on a protected basis in determining who will be subjected to screening.

Turning to Slide 7. What are some examples of employer work site screening for COVID-19 that ADA does allow at this time. Some examples that EEOC has provided:

Employers can certainly ask all employees who are physically entering the workplace if they have COVID-19, if they have been tested for COVID-19.f they have symptoms associated with COVID-19.

In addition to asking those questions, employers can ask employees if they have been exposed to anyone who has been diagnosed with COVID-19 or who has symptoms associated with the disease.

It's important to note, however, that employers may not ask whether any of an employee's family members has COVID or its symptoms. Because that would violate the Genetic Information Non-Discrimination Act, GINA. And when you think about it, as a practical matter, that question is too narrow to provide the employer with the type of information that it seeks about whether someone has had prolonged or significant exposure to someone with COVID. It would be -- provide better information for the employer to ask whether the employee has had exposure to anyone.

So what happens if somebody calls in sick or feels ill at work; can the employer ask them questions then? Certainly the employer can ask if the person has COVID or symptoms of COVID as the reason why they are sick, and the employer can tell someone with COVID to stay home.

The CDC advises that anyone who knows they have COVID-19 or thinks they may or has symptoms should stay home.

The employer can also tell an employee who comes to work and then starts evidencing symptoms, starts coughing, has a sore throat, fever, chills, shortness of breath, et cetera, to go home. Because CDC says employees who become ill with symptoms of COVID should leave the workplace right away.

So that's all permissible.

Now, in addition to asking questions of employees about illness, which is the examples we've just been talking about here on Slide 7, employers may also administer -- well, take the temperature of employees who are physically entering the workplace or administer a COVID viral test.

Now, the EEOC “What You Should Know” publication addresses two different kinds of tests. The first is what I just mentioned, a viral test to detect the active case of the virus, and those are addressed in Question A.6. As explained in this question and answer, as CDC has said that viral tests can properly be used in a range of circumstances in order to screen from the workplace people who might have an active case of the virus, it's permissible under the ADA for employers to administer a COVID-19 viral test.

It does say in the “What You Should Know” publication to comply with the ADA employers should take into account the accuracy and reliability of the test if they are selecting one to use. And there's a link to the Food and Drug Administration page in Question A.6. They have issued guidance about what may or may not be considered an appropriate test.

And as recently as July 3rd, CDC issued a new publication on testing strategies. And that is linked also in Question A.6.

By contrast, there's a second kind of test, which is antibody tests. An antibody test is different than a viral test. A viral test is, as I said, to detect current active infection. An antibody test, by contrast, detects past infection or virus immunity. And that is addressed separately in Question A.7.

The CDC has said that these antibody tests have some limitations. Including the potential for false positives. And that there is a lack of data at this time about whether the presence of antibodies means that a person is immune to COVID-19 and for what period of time, if so.

For these reasons, at this time, the CDC has specifically stated that unlike viral test results, antibody test results quote should not be used to make decisions about returning persons to the workplace unquote.

So since that is CDC's current assessment of antibody tests that they should not be used to make decisions about returning individuals to the workplace, EEOC has said that at this time an antibody test would not be considered job related and consistent with business necessity.

Now, that could change if CDC revises its recommendations. But this is based on the current recommendations.

Now, of course I've reviewed all of these examples. But I want you to bear in mind, the ADA does not require employers to do virus screening of employees entering the work site. It simply allows employers to do so if they choose consistent with the ADA rules we just talked about. Some employers may forego it altogether, some employers may have employees take their own temperature at home or before work and report the results. And still other employers may, themselves, administer a screening as employees enter the workplace or even take temperatures or administer viral tests as I've described. So ADA does not require this screening. But permits it consistent with the standards and examples we just talked about.

Turning to Slide 8.

If an employer wants to screen only a particular employee as opposed to everyone who is entering, the ADA requires that they have a reasonable belief based on objective evidence that this person might have the disease, in other words symptoms or other reason that this individual might pose a direct threat.

So all the prior examples we were talking about involve the employer not singling out individuals but rather testing or screening all those who enter.

An example of how this standard might be met as to an individual only is if somebody -- an employer may for example not be doing screening but then notices that an employee who has already reported to work has a persistent hacking cough which is a symptom of COVID-19 and the employer could ask about the cough, whether the employee has been to a doctor, whether the employee knows if she or she might have COVID-19. In other words, those questions would be permissible because there's a reason based on the symptoms that this individual has displayed to engage in the questioning.

Turning to Slide 9.

There are other instances when an employer can ask questions of a particular employee. But that is because these questions -- and I'm about to give you some examples here on Slide 9 -- are not disability-related inquiries.

For example, where an employee has been absent from work without explanation.

Whether they have been physically absent from the workplace or maybe they are supposed to be teleworking but they have not been reporting as expected and there's no explanation, the supervisor can ask the reason for the absence. Again, this is not a disability-related question. It's simply because an employer is entitled to know the reason why an employee has not been at work and to ask why there's an unexplained absence or failure to report. That is permissible. It's not a disability-related question. It's a question about the reason for the absence.

An employer may also question an employee returning from travel whether from work or -- for work or personal reasons if she traveled to a location where CDC recommends quarantining upon return. This line of questioning again is not considered disability-related. And consistent with CDC guidelines, an employer might refuse to allow an employee to return to the workplace after they have traveled to areas where COVID-19 are spreading until the CDC-recommended period of self-quarantine has ended.

It's also permissible to require an employee who is returning after having been out with COVID-19 to provide a doctor's note or some other documentation that certifies fitness for duty when the employee is ready to return to the workplace.

Employers could also require a similar note if employees have been self-quarantining because of possible COVID-19 exposure or because they had symptoms associated with the disease. Even if they were not diagnosed with COVID-19.

Now, because an employee as a practical matter might be unable to have a doctor or healthcare professional be available to provide a timely note in the current circumstances of the pandemic, to show they are fit for duty and to return, CDC and EEOC have both said that employers should consider being flexible in terms of the form that that return-to-work documentation takes. It might be sufficient to rely on a form from a local clinic or stamp or email to certify that the individual does not currently have COVID-19 and is fit to return to work, therefore.

Finally, I want to make a point about applicants. Obviously, you know the general rule is that you can't ask -- before you have made a conditional offer of employment, you can't ask applicants any disability-related inquiries or perform medical exams. You can do that post-offer for all applicants entering the same job, but not pre-offer. Some employers have asked, what if a job applicant is coming to our workplace, to our work site, for the interview process or some other pre-offer requirements?

In that instance, the employer if it's doing screening at the work site entrance would not be engaging in some kind of unlawful pre-offer disability-related inquiry if it subjected the applicant to the screening along with everybody else who entered. Because there you're interacting with the applicant in their capacity as a visitor, not as an applicant.

Okay. Turning to Slide 10, confidentiality of medical information. All of this medical information that we are talking about that employers may end up gathering either because of screening at the work site or because of medical documentation an employee has submitted, either for accommodation or for return to work, is medical documentation that is subject to -- medical information that is subject to the ADA's confidentiality requirements.

The fact of a COVID diagnosis, a test result, result of fever checks, that's all subject to confidentiality. The documents or notes about it therefore have to be placed in the employee medical file, not in the regular personnel file. Just like any other medical information is handled under the ADA. Now you don't need a separate COVID file, it can just go in the existing medical information file. The key is it should not be placed in the personnel file.

Confidentiality also applies where someone in the workplace is diagnosed with COVID-19 and it -- and it affects who may learn about the name of the person who has been diagnosed. A manager who learns this may only share the name with other managers who have a need to know, not all other managers.

And if the employer is informing the whole workforce or a portion of the workforce or that office that they have been potentially exposed, the employer cannot disclose the name of the employee who has been diagnosed. The employer could say for example someone on the fourth floor. Someone in this building. Something generic like that. And that would of course be sufficient to advise individuals that they have potentially been exposed and should take appropriate precautions but you cannot share the name of the individual who has been diagnosed with the workforce.

Turning to Slide 11. Can you tell co-workers that someone is out on leave or that they are teleworking? Yes, you can. But you cannot reveal that the reason is medical, if it is. So that means that you cannot reveal if someone is out because of COVID-19 diagnosis or symptoms, you cannot tell co-workers that that is why the individual is out or is teleworking.

You simply tell them that the individual is teleworking or is on leave but you can't reveal the reason is COVID-19 or its symptoms.

Managers and supervisors also have to keep information confidential, even while they are teleworking, while they themselves are teleworking.

So you may have a situation where a manager is taking notes from a phone call with an employee or has electronic documents and they need to either follow the employer's existing confidentiality protocols as best they can while working remotely or take steps if they can't to keep that information confidential while in their telework location. And then at the soonest time to store it in accordance with the employer's protocols.

So that's an important notification and training point for managers and supervisors who may be working remotely during this time.

Turning to Slide 12, hiring and onboarding. As I said earlier, a lot of employers have asked about the interplay of these rules for disability-related inquiries, medical exams, and what they might do for screening people for COVID-19 when someone is an applicant. So I said if they are coming in for a job interview and you happen to screen everybody who is a visitor, they can be screened in their visitor capacity. That wouldn't be interacting with them in their applicant capacity, and that employer would not get that information about them as an applicant. Similarly, post-offer, you could screen all applicants post-offer who are entering the same job for COVID-19 or symptoms if the employer sought to do so, just like it could do any other medical exams or inquiries post-offer, as long as it does it for everybody entering the same job.

Employers have also asked about whether they could delay the start date for a job that involves physically coming to the work site if it turns out that the applicant has COVID-19 or symptoms. And the answer is yes, the employer could delay the start date in that instance because the individual is not physically able to come in, but the employer could only withdraw the offer -- or we have asked -- been asked this question, could the employer withdraw the offer because the applicant has COVID-19 or its symptoms? And we've said the employer could do that where the employee -- employer needs an immediate start date. So that would be a unique circumstance.

Also with respect to hiring and onboarding, I wanted to mention the Age Discrimination in Employment Act, the ADEA, and Title VII as amended to the Pregnancy Discrimination Act, the PDA. Pursuant to these, an employer cannot unilaterally postpone a start date or withdraw a job offer based on the individual's older age or pregnancy even if the applicant is at higher risk of severe illness if they contract COVID-19. So the Age Act and the Pregnancy Discrimination Act do not have that direct threat to self or others defense that we find in the ADA, and while individuals who have COVID can be excluded because of the direct threat to others, an individual cannot be excluded from the workplace simply because of the employer fears that their older age or their pregnancy could cause them to have a more severe risk of illness if they do contract the virus. So employers have initially been asking us a lot in particular about these groups because CDC has said older individuals -- first they said individuals 65 and older, in June they modified it to just older age generally -- because those folks are at higher risk of serious illness if they do contract the virus. And while there isn't set evidence yet that pregnancy puts people at higher risk, there's some evidence CDC says that pregnant women are at higher risk of developing respiratory viruses. So for these reasons, we've been getting these questions from employers about what to do if they've got pregnant or older age applicants and what we have been telling them is yes employers can discuss and explore possible flexibilities, if that's what the individual wants like teleworking if that's feasible for the job or a postponed start date if that works for the applicant and that's what they seek. You can certainly discuss those ideas with the applicant, but employers would certainly violate these statutes if the applicant wanted to begin work in the work site, have been hired to do so, and the employer unilaterally postponed the start date or withdrew the job offer simply because of the individual's older age or pregnancy. That would violate these laws.

Turning to Slide 14. Some important points about reasonable accommodation under the ADA.

Now employees may be entitled to accommodation for a pre-existing disability that puts them at a higher risk of severe illness from COVID. We talked earlier about heart disease, diabetes, some other things on the CDC list of high-risk illnesses. Could also include in this situation accommodation requests an employer might receive from those with anxiety disorders or OCD or PTSD. Conditions for which the employee now seeks an accommodation due to circumstances either created by or exacerbated by the pandemic situation. And if an employer receives one of those requests, they should be handled in exactly the same manner as any other accommodation request.

To determine if the individual is an individual with a disability under the ADA definition, you're permitted to do that -- to determine through the interactive process if an accommodation is feasible that would not pose an undue hardship, if it's an accommodation -- and determine -- if you have determined that it is an accommodation that the individual medically needs due to their disability.

We've gotten a lot of questions about a term that has been used a lot – “critical infrastructure workers”, or also sometimes you see it as “essential critical workers,” folks who have been called back to particular industries or to work during a time when others were subject to lockdown orders.

Some employers were under the misimpression that because these individuals were summoned to work and deemed to be within the special category of critical infrastructure or essential workers, that they did not have rights under the ADA. And that is not correct. They have the same accommodation rights as other employees. So again, requests for accommodation from them would be handled in the usual manner.

Now, the next point on Slide 14 is one we have gotten many, many questions about, which is what if an employee seeks accommodation because of their association with someone with a disability? In other words they for example live with someone who has one of those CDC identified conditions that would result possibly in a more severe case of COVID, if someone does contract the virus? And for that reason, the employee seeks accommodation, whether it's telework or some other accommodation.

The ADA does not require accommodation of an employee who themselves does not have a disability. In other words, the ADA does not require an employer to accommodate someone based on their association with an individual with a disability.

Now an employer could choose to offer this flexibility to its employees. But the ADA does not require it.

That association discrimination provision in the ADA only prohibits disparate treatment and harassment. It does not provide for accommodation of an employee based on that association with someone with a disability.

Finally, a very important point on the bottom of Slide 14. The EEOC has not addressed yet whether someone with COVID-19 is an individual with a disability under any of the three prongs of the definition of disability in the ADA. This was explained at the outset in the March 27th webinar. You can read more about it there. But because the medical information is becoming new every day, new documentation of a very novel medical condition, EEOC has not yet spoken to this question.

Turning to Slide 15, a lot of employers have asked us about practical approaches for planning for a return to work where they have had employees on mandatory telework or reduced staffing due to mandatory telework and they want to plan for the reconstitution of the workplace, they want to know, who in our workforce is going to be requesting accommodation. We have advised as a best practice, if you will, some ideas for possible approaches for inviting employees, if they want to, to request accommodation or other flexibilities that the employer might be offering in advance.

If you look at Question G.6 in the “What You Should Know” publication, we give a few examples of an employer could disseminate information to everyone in the workforce explaining that disability accommodation, if needed for return to work, can be requested in advance should the employee return to do so -- choose to do so. And the interactive process thereby could begin earlier. And the employer could provide information about who to contact.

And in that way the employer may learn sooner and more specifically about some of these requests that might be coming. Another option that EEOC discusses in Question G.6 is for the employer to more broadly invite people who need any kind of flexibility, or the particular kinds of flexibilities that the employer is choosing voluntarily to offer, to contact particular people who are designated. It's important to make sure as the employer that if you're doing this, the requests are going to people who know how to handle them. Whether it's religious accommodation, disability accommodation, pregnancy accommodation issues, you want to make sure that whoever is designated to receive these requests knows the standards to apply or who to contact to find out. But there are some good ideas here to take a look at if you are in that situation where you're trying to figure out some advanced planning.

We have also said, second point here on Slide 15, that an employee is still required to request accommodation during this time, so the usual rule in other words, that an employer does not have to guess that an employee needs accommodation. And the employer is entitled to be placed on notice from some sort of request from the employee that they need some sort of a change due to a medical condition. And then the employer may still conduct that usual interactive process, including asking for reasonable medical documentation, if the disability or need for accommodation is not obvious or already known, in determining if the employee has a disability and needs accommodation and what's feasible, and having that interaction with the employee and/or their healthcare provider. The employer retains that discretion to choose among effective accommodations if there's more than one that the healthcare provider says would meet the individual's needs and so on, and considering undue hardship. So all of the usual same standards apply as they would if someone was requesting accommodation before the pandemic.

Now, some things, however, about the pandemic have presented unique circumstances. That affect the ADA process. And one, which is the fourth bullet here on Slide 15 is that the circumstances surrounding the pandemic might delay the usual processing of accommodation requests, depending upon the employer's staffing, the availability of a prompt response from a healthcare provider, whatever information gathering might be needed. It's possible that could happen.

It's also possible that the circumstances of the pandemic and the workplace shutdown could figure into undue hardship. It's possible that there could be an accommodation that would not have been an undue hardship for an employer to provide back in January of 2020 that would be an undue hardship to provide now, whether it's due to cost or whether it's due to the difficulty related to staffing needs, or other changes in the workforce and the workplace operation that have arisen because of the pandemic.

So, while it's not necessarily the case at all that the answer would be different for undue hardship for some employers between January and now, it may be that for a particular employer, the facts of the pandemic do relate to their assessment of undue hardship. And they would consider that.

Now we have of course, turning to Slide 16, talked a lot in our publications about telework, leave and reassignment. That might be reasonable accommodations for people whose disabilities require that they stay out of the workplace in order to be accommodated due to their risks to their health, or other issues that necessitate an accommodation. We have also given examples, though, of accommodations that would allow individuals with disabilities to be in the workplace.

And I know JAN has also provided a lot of information about this. And if you look at Questions D.1 and in particular G.5 of the “What You Should Know” publication, a lot of examples about physical modifications to the workplace or modifications to someone's schedule or other work arrangements that may allow them to work in the workplace while accommodating their disability during this time.

So a lot of good factual suggestions to pair with the information and advice that of course Job Accommodation Network can provide.

Finally, I want to spend a moment talking about a question that we have gotten very frequently about, as an employer recalls employees to work, reconstitutes the workplace, we're in a situation where for some employers they have had employees on mandatory telework. And they might have had some employees who are doing their usual jobs, no problem doing them remotely. But other employees for whom in order to facilitate, make possible, mandatory telework during lockdowns and shutdowns and the rest, the employer has relieved the employee, has chosen to relieve an employee, of certain essential functions of the job.

And we've gotten the question from employers, what happens now as we call folks back to work.

Now what we have explained is that --from the outset is that the employer can restore the essential functions if they were temporarily removed to allow mandatory telework.

The employer has not bound itself to permanently relieve the employee of performing those functions simply because the employer allowed the employee to telework during this time and conformed their duties to enable that to happen.

So the employer when they call people back can reimpose the ordinary functions.

Now, the next question that we have gotten, though, is what if the employee asks to continue to telework. Well, the employer will have to assess whether those essential functions that the employer is now requiring or requiring again can be performed remotely, assuming the person has a disability and medically needs to telework as an accommodation, is it feasible for them to perform these essential functions remotely and would it pose an undue hardship?

What we are hearing from employees and employers is that the assumptions that were made before shutdowns due to the pandemic about which jobs, which tasks, could feasibly be performed remotely were not always correct. Employers are discovering that some tasks, which they thought could be performed remotely cannot be performed remotely or it can't be done well enough. Also, on the other hand, discovering that some tasks that they never thought at all could be performed remotely it turns out have been successfully performed while teleworking. And that experience, both where it's been effective and where it hasn't, is relevant to the decision that an employer now makes if it receives a request to continue telework as a disability accommodation. Once it is ending its mandatory telework and calling employees back to the office and receives a request from an individual employee that due to a disability they are requesting to continue the telework arrangement now as a disability accommodation, that experience during this period of mandatory telework for good or for ill is relevant to the employer's assessment of whether it's feasible and whether it would pose an undue hardship.

Turning now to a few last points about infection control, protective personal gear, vaccine requirements.

What happens if, as employers call folks back to the workplace, employers decide to adopt rules, workplace rules, that require employees to do frequent hand washing, to wear masks, gloves, or other protection at the work site, even to take a COVID-19 vaccine if one is developed in the future? For any of these kinds of infection control requirements, if an employee makes a reasonable accommodation request, based on disability or based on a sincerely held religious belief asking to be excused from the requirement altogether or to have an alternative version of something provided by the employer, the usual ADA and Title VII accommodations standards apply. In other words, if the requirements are met, the employer has to allow accommodation. If there's no undue hardship, as that term is interpreted under the two different statutes. ADA versus Title VII.

In the disability area, accommodation might include clear masks for employees who communicate at work with an individual who lip reads. Or with respect to religious beliefs, an accommodation might be telework sought by an employee whose religious beliefs preclude getting a vaccination if her job could be performed remotely.

In addition to accommodation, it goes without saying that if an employer is imposing any kind of infection control requirements at work, it cannot engage in disparate treatment. For example, it cannot require only Asian Americans to wear protective gear, or require vaccination only for older employees or only for employees with underlying disabilities.

I would like to say a few words now turning to Slide 18 about age discrimination. We've gotten so many questions about this. As you know, the ADEA prohibits employee discrimination based on older age and it applies to applicants and employees who are age 40 and older.

Now, even though the CDC originally said that people age 65 and older are at higher risk for severe illness if they contract the virus -- and as I said since June they have amended that to older age generally -- it would still violate the ADEA to involuntarily exclude an employee from the workplace based on age. So, if an older employee who does not have COVID or symptoms of COVID and wants to work at the work site, they can't be excluded due to their age. Even if the employer is motivated by concern for their health.

Now, employers can of course choose to voluntarily offer flexibilities to older employees due to COVID risks. And that does not violate the ADEA. Even if it means that people who are between say ages 40 and 64 who are also covered by the Age Act are treated less favorably based on their younger age than people age 65 and older who the employer decides to voluntarily offer some flexibilities to. The Age Act does not prohibit a younger worker from being treated less favorably based on age. In other words, the ADEA allows preferable treatment of older workers based on age. That does not violate the statute.

Turning to Slide 19, a couple other points that have come up a lot in the questions we have received about age discrimination. What if an older employee wants to telework or get some other accommodation based on the COVID related risks due to their age? The employer is not, is not, required to grant it. Because unlike disability under the ADA, there's no right to reasonable accommodation based on age under the ADEA. Although remember some older workers may also have a disability for which they need accommodation, and they could be entitled to accommodation if they request it on that basis, under the ADA.

The flip side is of course there cannot be disparate treatment against older workers that treats them less favorably based on age. So, for example, an employer can't engage in disparate treatment by providing telework or other flexibilities to comparable workers but then refusing that same flexibility to an older worker just because of his age.

Turning to Slide 20, pregnancy: just like with older workers under the ADEA, it would violate the Pregnancy Discrimination Act, the PDA, to involuntarily exclude a woman from the workplace based on her pregnancy, even if she's at potential greater risk if she contracts COVID. But unlike with older workers, an employer may have legal obligations to provide accommodation to a pregnant employee. And that's for two reasons. First under the ADA, even though pregnancy is not a disability, ADA accommodation could be available for a pregnancy-related medical condition that is a disability. And second, under the disparate treatment prohibition of the Pregnancy Discrimination Act, an employer may have to give an accommodation or flexibility that's requested due to pregnancy where the employer gives that same accommodation to many other workers who are considered similar in their ability or inability to work. So, two different ways that pregnant workers might be entitled to accommodation, under the ADA or the PDA.

Finally, a point on Slide 21 about caregivers and family responsibilities. A lot of employers may be choosing during the pandemic as more employees return to work but schools are still closed to offer flexibilities for employees with family responsibilities. They may be offering telework, modified schedules or other flexible arrangements. If they do that, they have to remember not to engage in disparate treatment based on a protected EEO characteristic. So, for example giving female employees more preferable benefits than males because of a sex-based assumption about who in the workforce has caregiver responsibilities could be sex discrimination in violation of Title VII.

And finally, turning to Slides 22 and 23, some important questions that we have been receiving about harassment. The EEOC's “What You Should Know” publication addresses specifically pandemic-related harassment that implicates the EEO laws. You may have seen that in the early days of the pandemic EEOC Chair Janet Dhillon issued a statement warning employers and employees to guard against national origin and race discrimination against Asian Americans in particular related to COVID-19. You can find the statement on the EEOC.gov/Coronavirus page that I mentioned. And it might be useful to distribute it in your own organization as part of your anti-harassment efforts.

What you should -- the “What You Should Know” publication spells out that harassment related to COVID-19 based on national origin, race, or any other protected characteristic is prohibited, and it specifically emphasizes that managers should be alert at this time to harassment that's directed against employees who are or are perceived to be of Chinese or other Asian national origin, including harassment that's related to the coronavirus or its origins.

The publication also reminds employers that workplace harassment sometimes won't be by co-workers or supervisors. But by contractors, customers and/or clients. And the employer still has an obligation to stop it to the extent that those individuals are within their control.

And turning to Slide 23. Some additional points about harassment. The “What You Should Know” publication explains that harassment, especially these days, might also take place by electronic communication. It can occur whether employees are physically in the workplace or when teleworking or on leave. And it might occur by email or phone calls or on video or chat communication platforms like Teams or Skype. And the publication links to EEOC anti-harassment resources and tools that I think employers could make good use of as workplaces reopen. It specifically suggests educating managers about pandemic-related EEO harassment and their role in recognizing and responding to it. It suggests that employers may issue reminders to the whole workforce that pandemic-related harassment on an EEO basis is prohibited, and to remind employees of the potential discrimination consequences of any harassment up to and including termination.

On the second to last slide I've provided here information about the EEOC Office of Legal Counsel's Attorney of the Day phone line, including the TTY and ASL videophone, and links to information for private sector and Federal sector EEO processes. And then on the final slide my own contact information directly and you can feel free to reach out to me. As Linda said at the outset of the presentation today, we decided to focus on COVID-19 because both JAN and EEOC have received so many questions about that topic as of late. But I would be happy to hear from you individually by email or phone if you have questions either about topics we covered in the presentation today, or about the other ADA issues that you might be confronting. As you may know, attorneys in the Office of Legal Counsel take calls from employers and employees every day. We cannot bind the EEOC as to a particular case, but we're more than happy to talk through the issue with you that you have, to try to answer questions that you may have about the law, to direct you to relevant portions of the EEOC publications, and talk through as a practical matter how other employers have handled similar issues. With that, Linda, I'll turn it back to you.

>> LINDA BATISTE: Thanks Jeanne, thanks so much for that presentation it was great, it was very informative. And it answers a lot of the questions that we've been getting every day from our callers. That is all the time we have. I want to also thank Alternative Communication Services for providing the net captioning today. If you need additional information about anything Jeanne talked about today you have her contact information. If you want to talk about accommodations, you can contact us any time get on askJAN.org you can find all of our contact information. As mentioned earlier an evaluation form is going to pop up in on a screen in another window as soon as we're done again we really appreciate your feedback so we hope you take a minute to complete the form again thanks so much for attending.