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JAN‑Monthly Webcast Series‑(Adobe 4.1)

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Live Captioner standing by...

>> Hello everyone and welcome to the Job Accommodation Network, accommodation compliance audio and web training series. I am Beth Loy and what I would like to say first off is welcome to our webcast today. We hope everyone's having a really good day. We have some great info for you we are going to be presenting thanks to Tracie DeFreitas. We just call her Tracie, our ADA specialist. Before I begin the program, we'll go over a few housekeeping items. If you experience technical difficulties please call. For TTY call (877)781‑9403. Second, we plan to answer as many of of your questions as we can during the presentation. Please send in questions at any time during the webcast. You can do this by using our question‑and‑answer pod located at the bottom of your screen. To use the pod type your question and submit the questions. Tracie has volunteered for questions if there's questions we don't get to. At the bottom of your screen, there's a file share pod you can download. You also find additional information on the slides throughout this presentation so feel free to go ahead and download those files. If you have problems, we'll send you them after. And finally I want to remind you at the end of your webcast an evaluation form will automatically pop up on your screen in another window. We really appreciate your feedback so please stay logged on to fill out the evaluation form. So Tracie DeFreitas, welcome.

>> Thank you!

>> Let's go ahead and start today's program.

>> I would like to open our training today with a nod to the Americans with Disabilities Act. To 20 is a remarkable year for the ADA, we're celebrating 30 years since the passage of this important civil rights statute signed into law by George H.W. Bush in July of 1990. The ADA is a comprehensive piece of civil rights legislation that prohibits disability‑based ‑‑ right to have the same opportunities as everywhere else to participate in the mainstream American life. Of course, the law is divided into five titles that relate to different areas of life including state and local government services, transportation and of most importance to the JAN organization employment. With the issue of workplace ‑‑ provisions of the ADA the JAN service found its place in the history of implementation of this law by becoming the country's premier go to resource on job accommodations and the ADA. Today's webcast series focuses on disability‑related inquiries in ‑‑ reasonable accommodation decisions as part of the interactive process. We have a lot to cover so let's go ahead and get started. The theme of our training today centers around the "Bring Me a Rock" concept, that game where someone has an idea what they need or want but maybe they fail to provide the level of specificity needed for anyone to be successful in complying with that person's request. This can happen in the workplace when employers try to gather information to engage in the interactive process to provide reasonable accommodations. Under the ADA employers may seek reasonable disability‑related documentation after receiving a request for accommodation but there are no standard forms and there is no required procedure for gathering this information. This can lead to that bring me a rock kind of game because sometimes it's not apparent what disability‑related information is needed to comply with the ADA. To illustrate furthered, whether you are an individual with a disability trying to obtain it or house care provider trying to provide it, many of you can relate to these situations. For example an employer says bring me a note from your health care provider but doesn't specify what exact information is needed. Or maybe human resources requests that an employee have their health care provider complete generic ADA forms that are given to all employees who request accommodation, but the requests or forms aren't customized to obtain the information that will be useful in a specific situation. An employer says the information provided by the individuals' impairment isn't sufficient but maybe they fail to indicate how to cure the insufficiencies. Maybe the employee needs light duty or flexible schedule. In this case the ‑‑ frequency of the need for a flexible schedule isn't shared or maybe the employer is given no idea when the employee may return to work. These kinds of situations lead to the uncertainty and lack of efficiency and obtaining disability‑related information needed for ADA purposes. Today our goal is to offer you some practical strategies to enable you, whoever you are in the interactive process, to win this bring me a rock kind of game.

So let's get to the objective. Employers have no mandate under the ADA to request disability‑related information for ADA purposes but they do have the right to do so under appropriate circumstances. Before seeking disability‑related information whether through medical inquiry or examination, you must be clear on your objective for obtaining the information. The objective for obtaining disability‑related information should be well designed and most importantly, it should be purposeful. Employers usually obtain ADA related documentation primarily to establish rights and responsibilities under the law on a case‑by‑case basis. The process of gathering information is generally meant to establish that the individual has an impairment affecting a major life activity or to understand what limitations impact the ability to perform functions or meet standards to support the requests for accommodation or to learn details surrounding an individual's ability to return to work, maybe their fit Fitness‑for‑Duty or to analyze whether there's a legitimate safety concern on the basis of a known disability‑related issue. As part of the objective for obtaining ADA documentation you have to know what your rock looks like so to speak. Are you seeking the pinkish heart shaped rock or speckled rock and you must know the purpose you expect the rock to serve, the documentation in this case, to serve in the interactive process. So quick side note, as we move through the training, you'll notice links at the bottom of many slides. There are so many resources you can tap into on the topic of disability‑related information. I've included information from JAN, equal employment opportunity, starting on this slide with the link to AskJAN.org website A to Z by topic on medical inquiries and exam. As part of the process under the ADA when the accommodation are not known or obvious, employers are permitted to request reasonable disability‑related information for ADA purposes. The important thing for employers to remember is not to ‑‑ is to ask for information at the right time and not to ask for more information than is necessary. The ADA places restrictions on disability‑related inquiries during three stages of employment. I'm only going to mention these in brief. The pre‑offer stage of employment is the most restrictive. This is the hiring period, application, interview, testing, but when no job offer has been made. Generally no job ‑‑ or exams may be asked or required of applicants until after a conditional job offer is made. Next is the post offer stage which is the least restrictive. During post offer disability‑related inquiries may be asked and exams required if required of all candidates entering into this job category. After the candidate becomes employed, we're back to restricted stage. Our training today focuses predominantly on the employee to stage where information is requested as part of the interactive process to provide accommodations to employees. When you're gathering information from current employee to engage in the interactive process you have to know your inquiries are job related and consistent with business necessity.

When will it be true that disability‑related inquiries are job related and consistent with business necessity?

When the employer has a reasonable belief that the performance of job functions is or will be impaired by a medical impairment or known limitation or direct threat due to known medical impairment. This reasonable belief has to be based on ‑‑ can't just be assumed.

Now usually the standard is met after an accommodation request is received from an employee whose disability and/or need for accommodation are not known or obvious. This is typically when an employee will be asked to provide disability‑related information from a health care provider. Sometimes positions that affect public safety ‑‑ and this can meet that standard. Also we know that generally the obligation to request reasonable accommodation falls on an individual with a disability and then that typically triggers the interactive process and a disability‑related inquiry but it is possible for employer to initiate the interactive process without being asked by an individual if it's known that the employee has a disability and there's reason to know that the employee is experiencing workplace problems because of the known disability. Now as mentioned earlier, employers are not mandated to obtain documentation to provide accommodations, but employers have the right to request debilitated information to confirm that the individual has legitimate be reason for requesting accommodation. Remember the main objective for requesting documentation is to establish ADA rights and responsibility. When it's determined that documentation is needed, situations can turn into that bring me a rock kind of game due to the lack of specificity for how this process should go under the ADA. What I mean is there's no required process for requesting documentation, no required ADA form or method for obtaining sufficient documentation, and there's no specified time frame for an employee to respond to a request to provide that documentation. That lack of specificity provides little legal framework for employers to follow to obtain documentation for ADA purposes.

Now, because employers often seek information to establish disability under the ADA I would like to offer practical guidance. The ADA act provides three prongs for establishing disability to determine who's covered under the law. We know making decisions about ADA can seem medical in nature. When you're establishing coverage under the ADA employers are encouraged to process accommodation requests without placing too much emphasis on determining disability. So basically don't get too stuck in the process of determining disability for ADA purposes, meaning don't make it hard to decide who has a disability. The definition of disability is to be interpreted broadly, meaning it should require little analysis. You may only need to know if ‑‑ substantially limiting, yes or no. It doesn't have to get complicated. You don't have to have a lot of information. It can be that simple. Think about what's known about the impairment and limitations, the impact on performing job duties and the need for accommodation. This information will help determine the next steps in exploring and providing reasonable accommodation. You want to turn your focus to analyzing requests for accommodation to decide if a reasonable accommodation can be provided. In this situation where you're not sure where to go with it or how much information is needed, consider this.

Going through the process of gathering disability‑related documentation you want to be prepared to ask purposeful questions. If you're going to go that route, be prepared. For example, what is the nature of the impairment and what are the limitations or restrictions or how long is the impairment expected to last and what's the expected duration of those limitations or restrictions?

This is important because duration can impact the reasonableness of accommodations. Knowing if the impairment and limitations are permanent or temporary can affect the duration of accommodations. Also what is the impact of impairment or limitations on performing job duties or meeting standards and will accommodation enable the individual to overcome these work‑related barriers. Remember how I mentioned there's no standard ADA form?

JAN offers sample debilitated forms that employers can customize and we encourage customization. You can use the forms to ask purposeful questions and obtain the information needed for ADA purposes. These forms are linked here and at the end of the PowerPoint. If you're wondering what types of questions might be purposeful, this is a good guide for that. There are two related to medical inquiries in general and another more directly related to requests for leave as an accommodation.

Next let's talk about knowing whether to ask for disability‑related information or not. EEOC has stated that documentations should only be necessary when the disability and need for accommodation are not known or obvious. Therefore, requesting information will depend on what information is already known about the impairment, what you know about the functional limitations and the need for accommodation.

What can help employers decide when to gather disability‑related information?

When the impairment and/or the need for accommodation are known or obvious, disability‑related documentation may not be necessary. For example, if an employee uses a wheelchair and requests an automatic door opener to enter the building, the impairment and need for accommodation is obvious. What documentation is not needed but information about the accommodation may be. Focus on gathering information on the documentation. Next we have something calls the Hoops Theory. This is where the individual requests workplace adjustments, access to benefits to employees without disabilities but for a disability related reason. For example, if employees are permitted to work a flexible schedule for work to telework without a specific reason for doing so, then employees with disabilities should not be required to jump through extra hoops to provide disability‑related information just because they're asking for a adaptibility‑based reason. If the person asks for something that goes beyond, then an employer may request documentation to establish ADA rights and responsibilities.

So taking this example a little further, if employees can telework one day a week as a general access privilege, but an individual with a disability requests to telework three full days a work for a disability‑related reason, this request may warrant documentation to support the need for accommodation.

Now in situations where the individuals' impairment and/or need for accommodation is not obvious, employers may request that documentation to verify the existence of an impairment. Let's say someone has a learning disability, seizure disorder, mental health impairment, back injury, these are just examples. Also, you need to know a little bit about the impairment and how it affects a major life activity in a significant way. For example, when an employee shares that she's having difficulty meeting the employer's attendance policy because of the side effects of medication but she's never disclosed the disability before, it's possible to gather information about the impairment and limitation while the ability to meet the attendance ‑‑ treatment to for the impairment and what accommodation is needed. When the impairment and the need for accommodations are not known or obvious, it suggests that the employer begin by asking the individual for more information about their impairment. If the employee can't provide the information necessary, then ADA documentation may be requested.

Again, keep your objective in focus. Keeping with our theme, you want to establish the shape, size, color of the rock or that the individual has an ADA impairment and limitations affecting a major life activity and that accommodations are needed.

Now I want to touch on a topic that comes up a lot in my day‑to‑day employer. The employer has reason to believe that accommodation is needed due to a suspected but maybe a not confirmed impairment. In this situation, the employee hasn't formally disclosed the disability or requested anything at work and the employer is trying to decide if they can request disability‑related information or ask about the possible need for accommodation, but it's not absolutely known that the individual has a disability. So the ADA risk for the employer is not knowing if the disability‑related inquiry is job related and consistent with business necessity but it can offer a strategy for consideration. Ask how can I help. Instead of asking the employee to provide information about whether they have a disability or need accommodation, it can be explained what issue has been observed, what the employer's expectations are and any consequences of not meeting the expectations and ask how you can help. Asking this question is a strategic way of creating a safe space for disability disclosure and there are limitations for performing job duties. Or the need for accommodation, and extending this kind of support often leads to disability disclosure and ultimately engagement in the interactive process which will typically lead to a request for disability‑related documentation.

now let's dive a little deeper into what ADA documentation may be required of an employee who requests accommodation. An employer may require documentation that is reasonable and sufficient. So in the simplest of terms, sufficient documentation establishes that the individual has or had an impairment, whether the impairment affects or affected a major life activity, whether the impairment substantially limits or limited the major life activity, and that accommodation is needed. That's keeping it pretty simple. When reviewing documentation for efficiency it's important to remember what's the purpose. So the information should help the employer make the determination that the individual meets the ADA definition of disability and make the accommodation. EEOC offers a guide on disability‑related inquiries and medical exam inquiries under the ADA and this is something you can access for more information.

Now, I suspect that many of you would like to learn more about what is insufficient documentation. Documentation may be insufficient for example, if it doesn't specify the existence of impairment, functional limitations due to the impairment or the need for reasonable accommodation. If the health care provider doesn't have the expertise to give an opinion about the individual's impairment that might mean it's insufficient. So for example a cardiologist providing information on an orthopedic issue. Or if the information is not from a credible source or is fraudulent. Maybe the documentation is not on appropriate letterhead and appears to be made up. When insufficient medical documentation is received in response to an employer's initial request, the employer should notify the individual, preferentially in writing, explain why the documentation is insufficient and allow the individual an opportunity to provide the missing information in a timely manner.

For more information about insufficient documentation again you can go to the EEOC guide on disability related inquiries. It's actually question 11. We'll fix that on the slides posted later on on our website. Next slide.

Next let's talk about what I'm referring to as disability‑related information request failures. These are actions taken by employers that are not best practices or are noted to be unacceptable by EEOC. The first is asking for information that is already available to the employer either because it's obvious, apparent or because the employee's already provided it. When disability is already apparent or established, employers can be held liable for asking for information for which they are not entitled. For example, asking for new medical information when an employee requests a second accommodation for the same exact impairment. If the disability is already established, new medical information will generally not be needed. Information about the need for accommodation, yes, but not updated medical information about the impairment that you already have information on.

Next, not asking purposeful questions. Revisit your objectives. Are your inquiries purposeful?

Will the information support the interactive process?

For example, asking a health care provider to simply review a job description and provide a medical opinion when what really needs to be known is if the employee can perform a specific function. The specific questions are more useful so consider that. Sending a job description is one of my pet peeves because I hear that a lot because the employer is not getting the information they need. Next, requiring need for medical records or requesting too much information. In most instances the employer cannot ask for the employee's complete medical records because it will likely contain information not related to the accommodation.

Another, requiring information to come from a medical doctor, MD. This is something we frequently hear about. Know that the ADA does not specifically require that disability‑related information come from a licensed medical doctor to establish the existence of ADA qualified disability. This is an issue I'll talk more about later. Another, requiring ADA ‑‑ to avoid violating the ADA's disability inquiry rules, the employer has to be aware of what is known about the ‑‑ before engaging in the process of requesting updated medical information, whether annually, monthly or otherwise. I'm going to expand on this a little bit further in just a little bit as well. Finally, requesting an IME, independent medical examination or fit Fitness‑for‑Duty examination that is not job related and consistent with business necessity. There are situations when a medical examination can be requested but you have to know that the exam is job related and consistent with business necessity. You have got to meet that standard before making such a request. You have to be clear in knowing when you're asking and whether or not you've met that threshold before requiring a medical examination.

So let's expand on the no MD required issue related to who can provide disability‑related information for ADA purposes. The information necessary to determine coverage under the ADA may be provided by an appropriate health care or rehabilitation professional familiar with the individual's impairment and functional limitations. EEOC actually spells this out. According to the EEOC, the ADA does not specifically require that the medical information be provided by an MD, but the appropriate professional could be somebody who has expertise in the person's disability that's involved or direct knowledge of the individual with the disability. Medical information of course should come from a credible and reliable source. But appropriate professionals can be a variety of individuals. They can provide disability‑related information that could speak to the person's impairment and their need for accommodation. Appropriate professionals can include but are not limited to a doctor, physician assistant, nurse practitioner, psychiatrist, psychologist, counselors, even a vocational rehabilitation specialist, job coach, occupational or physical therapist, social worker. You can see there are a lot of individuals who might have the expertise needed to speak to somebody's impairments, limitations and possible need for accommodations. This is not an exhaustive list. Information can come from what may be considered a non‑traditional health care provider like a chair pract or reflexologist.

You can look to question 6 for all of this information.

When employers seek medical information, sometimes there's a bit of an overreach for too much information. For example, when an employer requires an employee to sign a release of complete medical records. According to EEOC in most situations under the ADA an employer cannot request a person's complete medical records. This is because the records are likely to contain information unrelated to the disability and need for accommodation. Employers should not use a medical release or form that constitutes a general release for all medical records. Instead, it's suggested that employers allow the opportunity for an individual to obtain the needed information directly from their health care provider. In this case, a separate release will not be necessary. If the employer has to communicate directly with the provider for some clarification on a specific issue, then either the employee may sign the consent provided by their health care provider or the employer may ask the employee to sign a limited release that specifies the information to be requested. Employers may use a customizable ADA form letter to request information from a health care provider or appropriate professional. Sometimes we call these ADA paperwork or ADA forms. JAN offers sample forms to be used for this purpose but we encourage customization of these forms because each request for information will be unique based on what is already known. You have to be careful. You don't want to use a form that asks the same questions when you already have certain information. So you want to make sure you review those forms.

Now, moving on to another topic here. The waiting place. In his beloved book oh the places you go, the waiting place is an imaginary place in life where everybody is waiting for something. In my experience employers feel stuck in this place when disability‑related information is requested and it's not received or insufficient. There are ways to detour the waiting place. First, when requesting information be clear about what's needed and why. You want to establish impairment and provide reasonable accommodation. You want to ask specific job related questions about the accommodation, impact on job performance and need for accommodation. Don't just send a general job description. Next request that documentation be provided within a reasonable time frame. So for example, up to 15 calendar days. The ADA does not regulate the duration of time employees may take to respond to request for provide disability‑related information. So it's important to provide a deadline and remind the employee in writing when the deadline is approaching. That deadline is up to your discretion because the ADA doesn't give you a deadline, however, you want it to be reasonable. Sometimes it can take some time for people to get in to see a specialist. So keep a reasonable time frame in mind. We typically suggest up to 15 calendar days because that is consistent with the requirements under the Family and Medical Leave Act.

Continuing with the waiting place, the employer might issue a notice that explains that sufficient information was not received by the original date. Maybe extend the deadline, let the employee know what will happen if the information is not provided. If documentation was provided by the individual but it is insufficient, explain why. What additional information is needed?

Allow some time to cure that insufficiency. You may need clarification in the documentation. So if it is insufficient and you want to understand a few things, do that in the most productive and officiate way. For example, explain what is exactly needed to proceed so the employee can obtain it and get the information on their own or ask for ‑‑ been given authorization to speak with you as well. That can be a little bit more officiate if it's a simple question that you need clarification on. If the individual doesn't provide sufficient information and the employer may request the individual go to the health care professional of the employer's choice but the employee should have the choice to cure the insufficiency first. If this happens, the employee has ‑‑ ultimately if the individual fails to provide sufficient documentation and the impairment and the need for accommodation are not obvious, they will be entitled to receive accommodation under the ADA. So the employer should document the effort to obtain the information and the next steps in the interactive process and move on.

now, sometimes the perfect circumstances don't exist for obtaining or providing disability‑related information. Unlike the perfect smooth round rock on this slide the process of requesting disability‑related information can be imperfect and messy. Employers are encouraged to consider the individual's effort to obtain the documentation and the reasons for that failure. It may be necessary to be flexible but it's okay to do what's needed to obtain sufficient information to provide accommodation. The situations we sometimes hear about include wherein a health care provider refuses to complete ADA paperwork or the individual doesn't have health insurance at the time of the accommodation. Consider what's specifically known and needed in the situations. Maybe it's possible for the individual to provide a simple note from an appropriate professional or can obtain medical records and can share relevant parts of those records if they can have access to that information. Maybe it's just about getting the information from the individual and working with that information, not necessarily having documented information from the health care provider. There can also be situations where the medical information is dated or the individual was diagnosed before 18 years of age and doesn't have current information. Certain medical conditions change and limitations may fluctuate over time. Current or relatively recently documentations can be required in some situations but in the case of learning and intellectual disabilities, these types of impairments are lifelong and static so current diagnosis shouldn't be needed if the individual was tested and diagnosed at an early age. We have information on the website on that as well. Another topic we hear about is the subject of recertifying the ongoing need for accommodation. For example, when recertification every six months or annually was requested. Nothing was in the federal ADA's places rules around and restrictions on the accommodations provided. When reasonable sufficient ‑‑ previously provided by an employee for purposes of receiving accommodation, an employer won't likely have a reason job related to request new medical information on an annual or periodic basis simply because the employer wants to do this as a practice. Under the ADA, updated medical information can only be requested under certain circumstances. Remember, when it's job related and requested with business necessity. Of course there can be ‑‑ accommodation may meet this standard. On a case‑by‑case basis, of course. For example, when the original medical documentation or request for accommodation indicates that the employee's impairment and limitations or the need for accommodation may change. So maybe an employee has multiple sclerosis and the medical documentation indicates that the medications and need for accommodations can change due to the nature of that impairment. Or when no duration for the need for accommodation was originally provided in the original documentation. That might be a reason to request updated information. Maybe when the duration for the need for accommodation was provided in the original documentation but it's nearing expiration or it's apparent that the accommodation is still needed. When there's a change in an employee's medical impairment or limitations or the employer's ability to accommodate. Sometimes an accommodation might not be reasonable any longer or pose an undo hardship. The employer needs to engage and figure out what other accommodations can be provided. There can be reasons why to do this but be careful about simply doing this on an annual or periodic basis just by virtue of the fact that you want to have a practice of doing that.

Something I would like to hopefully provide some calculator on is the health care provider's role in providing disability‑related information for ADA purposes. Health care providers can play a key role in the success of workplace accommodations by providing sufficient medical documentation in support of a patient's accommodation requests, but contrary to what is often believed, it is not a health care provider's place to make ADA decisions affecting individuals in the workplace. So employers are to make ADA decisions using information provided by appropriate or health care professionals. The role of the health care provider is to provide information about the individual's diagnosed impairment or to provide a general statement about the medical condition, to offer information about the major life activity or activity the impairment limits, what limitations are causing the patient's work‑related problems and what those problems are, but it's not to prescribe, recommend or say that an accommodation is medically necessary or to lock the patient into one specific accommodation.

There are no specific requirements regarding what exact information must be provided by a health care provider to support an individual's request for accommodation under the ADA. But information shared by a health care provider can make the Nexus between the individual's impairment and limitations and how their requested accommodation will address the work‑related barrier. Health care providers can certainly support an individual's request for specific type of accommodation by offering insight regarding how it's believed the accommodation may benefit the individual in light of the individual's limitations and work‑related barriers. Jan offers a resource that may be useful to health care providers in supporting a patient's request for accommodations so I would encourage you to look for the practical guidance for medical professionals on providing sufficient medical documentation in support of a patient's accommodation request so this can be a useful resource for practitioners.

The next topic, requesting a diagnosis for ADA purposes. While the ADA does not restrict employers from asking for detailed information about an individual's impairment when needed, some state statutes similar to the ADA do restrict requesting a diagnosis or detailed medical information. For example, California's probably the best example we have. Under the state Fair Employment and Housing Act employers may ask for verification that the employee has a disability but not the diagnosis. They may ask for a description of how the limitations impair the individual's ability to perform the duties of the job, an indication of whether these limitations are temporary or permanent and the expected duration for the limitation.

The take away here is that if a state law is more restrictive with respect to requesting disability‑related information, employers cannot ask for more detailed information under the federal ADA. You need to follow the law that provides greater protection for the individual. So to learn if there are restrictions related to obtaining disability‑related information in your state, you want to contact the state fair employment practices agency in the state the employee is employed. Keep that in mind when you start seeking documentation.

We've already touched on so much information today and as you can tell, there are many issues to address when it comes to ADA documentation. I've drawn our attention to some of the most relevant topics but there's so much more we could talk about. What I would like to do at this point is finish up the training today by covering some special topics. So these are topics that have come to mind that you might be interested in. Again, there's so much we could talk about. We can't cover everything in a one hour training but hopefully we've hit a lot of the issues that you have questions about. So let's start beginning with the inner play of relevant federal laws. First the HIPAA, Health Insurance Portability and Accountability Act. When the employee would like to communicate directly to the employee's provider, authorization will be required from the individual for their health care provider to communicate directly with the employer. This is not an ADA requirement, but rather a HIPAA requirement that actually provides to the health care provider, not the employer. HIPAA doesn't affect an employee ‑‑ but expressed consent must be provided to the health care provider to directly share information with an employer. We do it lots of times hear people say the individual won't provide information because of the HIPAA rights. And that's not exactly how that applies in this situation. Next the Genetic Informaiton Non‑Discrimination Act or GINA. GINA prohibits employers from requesting or requiring information from ‑‑ to comply with this law, the employers must ask that the health care provider when obtaining documentation, not include any genetic information when responding to requests for medical information. And finally, the Family and Medical Leave Act, employers may require a certification from a health care provider to support an employee's leave for FMLA leave for their own serious health condition and to care for a family member. Under FMLA an eligible employee can be asked to provide a ‑‑ serious health condition within 15 calendar days and the Department of Labor offers a standard form that employers may use to obtain the information although they are not required. Employers should note that FMLA documentation and ADA documentation serve different purposes. A lot of times we hear that employers are using FMLA forms to obtain ADA documentations. There's nothing that prohibits this but the questions asked for FMLA are different than ADA purposes. This is where you need to keep your objectives in mind. FMLA is made to determine eligibility under FMLA on the basis of serious health condition. ADA documentation establishes coverage based on the ADA's definition of disability. Also, sometimes the information obtained for FMLA purposes includes information to be used for ADA purposes. This is where you have to be aware of what information you already have before requesting additional or too much information for ADA purposes. So be aware of the differences between FMLA certification and ADA documentation and the purpose they serve and making sure that you're following both laws when you're obtaining that kind of documentation.

The next topic, sometimes we receive questions about return‑to‑work releases and fit Fitness‑for‑Duty certificates and fit Fitness‑for‑Duty examinations. Generally return to work releases may be requested as a matter of policy, for example, after an absence of three or five days someone needs to bring in a note to return to work. It's okay to have that as long as the employer requires this ‑‑ fit Fitness‑for‑Duty certificates are generally requested for FMLA purposes so when an employee's returning from leave after their own serious health condition. A fit Fitness‑for‑Duty certify is a signed statement from a health care provider indicating an employee is fit and able to return to work. The employer ‑‑ at the time of leave designation. This is something the individual needs to be aware of before they go out on leave. Fit Fitness‑for‑Duty examination must be job related and consistent with business necessity under the ADA. Because a Fitness‑for‑Duty could reveal information about an employee's disability these exams are allowed only in limited circumstances under the ADA. Generally the standard is met if the employer reasonably beliefs that the employee's impairment will prevent the individual from performing the essential functions of the job or the individual pose a direct threat. You have to be careful on the requests for information and make sure that you're using them in the right way.

So another topic we discuss on a frequent basis is requesting documentation related to allowing access for a service or emotional support animal as a workplace accommodation. In this situation employers have the right to request reasonable documentation about the employee's disability and functional limitations, which typically comes from a health care provider. So of course the person is still establishing that they have a disability and they may need accommodation. But what about the documentation related to the animal?

In some cases a health care provider was not involved in the acquisition of the animal and cannot provide documentation specifically about the animal. In that case, documentation about the animal, for example, what it does or how it behaves may need to come from some other source. For example, if a service animal, then maybe whoever trained the animal. The goal of an employer is to understand in this case why the animal is needed and what it does for the person. The employer also has the right to require that the animal be trained to be in a workplace and capable of functioning appropriately in the work environment and may need some sort of documentation or demonstration that speaks to its ability to be there and not be a disruption and to be able to behave appropriately. So again, that could come from somebody who provided training for the animal or again, demonstration as well. Might not necessarily be documentation. It could be the individual having the animal demonstrate that it can behave appropriately in the work environment. We have a good deal of information on service and emotional supported animals in the workplace. Take a look at that. Almost there. So we can't talk about disability‑related information without reminding everyone that the ADA requires employers to maintain the confidentiality of all medical information collected as a result of either medical inquiries, exams, and the interactive accommodation process. So all documentation must be kept in a medical file in a separate locked cabinet apart from the location of personnel files with only certain individuals having limited access to that information. Also supervisors and managers may be informed about necessary restrictions on the work or duties of an employee and necessary accommodations, but employers are reminded to restrict their access to specific medical information. So I think you want to be real careful about how you go about requesting documentation when someone asks for an accommodation. Usually you don't want managers and supervisors being the party who's requesting the medical documentation or who has access to the medical documentation because you want to restrict their access to that information. So if a request comes in, hopefully you have a process in place where maybe someone in human resources is going about obtaining that documentation, but hopefully there's a system of bypassing supervisors and managers in terms of having access to that specific medical or disability related information.

So of course we have to end this training by talking a little bit about the public health topic on everyone's mind today. COVID 19 or Coronavirus. It's developing on a daily basis. Employers should really avoid making decisions based on fear and panic and misinformation and rely instead on the centers for disease control, the CDC, World Health Organization and other public authorities to guide their actions and reactions. I only have time to hit some high‑level issues on this topic today but we will be offering new information on this on the JAN website very soon in the coming days. Is it ready?

That's exciting!

It's available.

>> It's on the A to Z by topic and the home page.

>> Cool. It's there. Take a look at some information. We'll be building upon that. It will be fluid and as more information develops and more accommodation and ADA issues develop on this topic, we will be updating that information. You can look for that as a resource. From an ADA perspective and with respect to the topic we are talking about today, EEOC notes that the ADA and the Rehabilitation Act rules apply but they don't interfere with or provide employers following the guidelines and suggestions made by the CDC about steps employers should take regarding the Coronavirus. This means that the employers that have concerns about employees being exposed to or diagnosed with Coronavirus. Medical questions asked in a situation where the likelihood of exposure to the Coronavirus is high are meant to analyze health and safety risk or direct threat and may be job related and consistent with business necessity. You would consider that and do it on a case‑by‑case basis. You want to make sure you have objective information before making those decisions to ask those questions. Of course, requiring all employees to answer questions about whether they have symptoms associated with the disease, that would fail this test. You're indiscriminately asking a group of employees medical questions with no objective basis to believe any or all might be posing a direct threat due to the Coronavirus. You don't want to start asking employees whether or not they have the Coronavirus. You want to be careful. Employers may ask questions about possible exposure during travel as such questions are not disability‑related specifically. Employers may encourage employees to telework as an infection control strategy. In addition, EEOC says that employees with disabilities that put them at high risk for complications of pandemic influenza or Coronavirus in this case may request telework as a reasonable accommodation to reduce their chances of infection. So you do want to think about that. Obviously a lot of employers are trying to figure out how to create protocols around this specific public health issue and what to do next. You want to be purposeful. You want to make sure that your decisions are made based on facts and you're asking questions based on objective information. Also employers may request documentation related to fitness to return to work from employers who have been away from the workplace during a situation where we have flu going on. While the Coronavirus is not at this moment considered a pandemic, the Equal Employment Opportunity Commission does have a resource on pandemic preparedness in the workplace in the ADA which offers useful information for employers who may need a framework for how to approach issues and concerns surrounding the Coronavirus. We are starting to get questions about asking medical inquiries, what kinds of accommodations to consider, how to address telework in the workplace when it comes to this issue. Just keep in mind it's a developing issue. It's one that obviously we are going to start receiving a lot of questions about, but we'll be here as a resource for you and can provide information as it develops.

So that was a lot of information. The take away before seeking disability‑related information, whether through medical inquiry or examination, is that you have to be clear on your objective for obtaining the information. So it's to be well designed and most importantly purposeful. Again, know what your rock looks like. Be able to provide the level of specificity needed for everyone to be successful in getting the information you need. Know what the purpose is for the information that you're requesting and what you expect to do with the documentation and how it's going to serve the interactive process in some way. Hopefully we've provided you with some tools and information that will help you take a look at your ADA request for information documentation in a little bit of a different way. And obviously we are here as a resource. The JAN service is here for you as a resource when you have questions on these types of topics. It looks like we do have a little bit of time. Beth, do you want to throw some questions at me?

>> Sure. We have several. We can get to a few of them. First question. I have an employee requesting a sit stand desk. The employee's disability isn't obvious. Can I request ADA documentation?

>> This is a pretty common question that we receive at JAN. Of course, when sit stand desks were becoming popular and coming up in the workplace everyone wanted one. Of course employers started getting requests. There are some workplaces that don't provide that type of equipment through an ergonomic program or otherwise and it may be something provided only when somebody has a disability‑related need for it. If that's the case, if somebody's impairment and limitations is not obvious and they're asking for equipment not available for everyone in the work environment and they need it to perform their job duties, the employer can go about requesting information or documentation to substantiate that they do in fact have an impairment and limitations and need the accommodation. What I would encourage you to do is take a look at whether or not first of all is this something that anyone can ask for and be provided in the work environment, and if so, don't make the person jump through extra hoops to get it. If on the other hand, if it is not something that someone can access through the ergonomics program you can go through the process and request information to make sure you established ADA rights and responsibilities.

>> The next one, if an accommodation is provided and a manager asks questions about that accommodation, can the manager tell coworkers that the individual is receiving an accommodation under the ADA.

>> That's a good question. Of course, it's not directly related so much to requesting information or documentation but it is important to come back to confidentiality and making sure that information about disability, impairment, limitation, accommodation, that's information, remember, that has to be kept confidential in the work environment. So employers need to be careful not to share information about a person's disability or their need for accommodation with other individuals. That means not telling coworkers about someone's disability or their need for accommodation. There can be strategies around dealing with these types of questions and JAN offers some information through a blog related to the manager's dilemma that can be helpful. EEOC offers in their EEOC enforcement guidance in reasonable accommodation, question 42, that addresses whether or not an employer can tell other employees that someone is receiving an accommodation. They offer practical guidance how to address the situation. I think it's important to ensure that everyone is aware of ADA and how to request accommodations in the work environment, so it wards off questions about why someone is receiving something at work. Of course a manager could also respond by explaining that the employer has a policy of any employee who encounters problems in the workplace and many issues are personal and that in these circumstances it's the employer's policy to respect that person's privacy and not share information about what's been provided.

So maybe not specifically related to documentation requests, but I think it's relevant because we're looking at the confidentiality of information.

>> Great.

>> What else, Beth?

>> Well, it's time to wrap it up.

>> Oh, I was excited!

>> It was an exciting topic today. Thank you for that information and all of your preparation and the work in putting that together for us. That is all the time we have today. 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 thank you all also to ACS for providing the captioning. We hope the program was useful. An evaluation form will pop up on your screen in another window as soon as it's finished. We appreciate your feedback so we hope you take a minute to complete the form. That's all for today's webcast.